Foreword

Every semester, hundreds of Melbourne Law Masters students produce outstanding legal research essays. However, until now, there has been no forum internal to the Law School for students to share their work. One of the aims of the Melbourne Law Masters Student Association is to facilitate knowledge of developments in law and legal thinking; therefore the Association has created Melismata.

Congratulations to the authors for your successful submission and your contribution to Melismata. The research essays contained within the inaugural issue have been selected because they demonstrate exceptional critical analysis, original research, academic legal writing or are highly relevant to a current development in law. To inspire and challenge the reader, the Editors have selected six essays which explore both classical legal concepts and specialist areas of law.

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President

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WRONGFUL LIFE: AN ANALYSIS OF CROSS-JURISDICTIONAL APPROACHES TO THE DAMAGE QUESTION

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ABSTRACT

There are two distinguishable judicial applications of the damage test in wrongful life cases across the United States (US), the United Kingdom (UK), Israel and Australia. The first is restrictive and premised on logic - that is, whether the plaintiff can prove that the negligent act or omission resulted in legally cognisable detriment (Australia, the UK and some US jurisdictions). This test requires the plaintiff to prove that nonexistence is preferable to existence with disabilities; a task that has since proved insurmountable. The alternative approach refuses to view life, however unpleasant, as damage (US and Israel). This same approach, however, allows limited recovery as an expression of compassion to the visibly suffering plaintiff and as a measure of deterrence for future transgressors. This article examines the two approaches in detail. By its conclusion, the article suggests that given the diverse objectives of the law of torts, the latter approach appears more fulfilling.

I INTRODUCTION

Wrongful life claims have been framed as actions in negligence, a tort that requires the demonstration of a duty of care and a breach that results in legally acceptable damage. From the outset, this framework appears unyielding to the typical wrongful life litigant leading some to question its appropriateness.¹

The question of whether one born with a congenital disability as a result of a doctor’s negligence in advising the mother can sustain a cause of action elicits varying opinions from judges, legal scholars, theologians and philosophers. Often, the variation in opinion stems

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from what the law should accept as damage. While some insist on running the claim through the traditional negligence inquiry such that one has to provide the impossible proof of detriment, others assert that the focus ought to be on the defendant’s negligent conduct.

This article tracks these differing views. The article begins by tracing the genesis of wrongful life claims and how they fit into the law of negligence. Subsequently, the jurisprudence around these claims in the United States, the United Kingdom (UK), Israel and Australia is analysed with the objective of pinning down jurisdiction-specific perceptions of damage critical to any useful comparison.

Two major approaches are identified. One is premised on logic; and would require a plaintiff to prove that non-existence would be preferable to existence with disabilities. It is this perception that is favoured by Australia and the majority of the United States. The alternative approach places primacy on the sanctity of life, yet allows the plaintiff to recover against the defendant for extra-ordinary expenses occasioned by the disability. Courts, in the United States, that have preferred this view have reasoned that although life should not be characterised as damage, injury to the plaintiff is unquestionably apparent in wrongful life cases. With careful consideration of the purpose and objectives of the law of torts, it is concluded that the latter approach to damage is more coherent with the existing body of law.

II  WRONGFUL LIFE

A ‘wrongful life’ claim is one brought for or on behalf of a usually extremely disabled plaintiff who claims recompense on the basis that but for the defendant’s negligence, they would not have existed at all. The argument extends to include the allegation that the defendant’s negligence caused the plaintiff to endure an unhappy existence and suffering occasioned by the deformity. It is critical to note that the plaintiffs in these cases do not contend that the defendant caused the deformity; rather that they reneged on their duty to

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inform or advise the parent who might have decided either not to conceive at all, or lawfully terminated the pregnancy.\(^4\)

These claims must be distinguished from the so called ‘wrongful birth’ claims; in which parents may bring an action in negligence against a practitioner seeking damages in lieu of costs incurred in raising a child born out of the doctor’s negligent conduct.\(^5\)

The common law as seen through the Australian High Court’s decision in *Cattanach v Melchior*\(^6\) has generally endorsed ‘wrongful birth’ actions. Similar recognition for ‘wrongful life’ claims remains elusive.

Animosity towards these claims has not only come from courts, but also from legal scholars; some of whom have suggested that the inability to prove actionable injury relegates these actions to misfits within the conventional negligence framework.\(^7\) Yet some have insisted that their mere being labelled ‘wrongful life’ is what evokes an inherent repugnance.\(^8\) In *Harriton v Stevens*\(^9\), for example, Kirby J opines extensively on this ‘danger of labels’.\(^10\) Mislabelled or not, whether these claims fit the traditional negligence mould is a legitimate question.

### A Is There a Place for Wrongful Life in Negligence Law?

In 1932, Lord Atkins, in the seminal English decision of *Donoghue v Stevenson*\(^11\) defined a neighbour in law as someone ‘so closely and directly affected by my act that I ought reasonably to have them in contemplation.’\(^12\) Much as this definition refined the principle of

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\(^6\) *Cattanach v Melchior* (2003) 215 CLR 1 (‘*Cattanach*’).


\(^10\) Ibid 393.

\(^11\) *Donoghue v Stevenson* [1932] AC 562.

\(^12\) Ibid 580.
negligence, it also broadened the scope of torts law. Since then, situations that may invite the finding of tortious liability have increased considerably.\footnote{Peter Handford, ‘Intentional Negligence: A Contradiction in Terms?’ (2010) 32 Sydney Law Review 29, 29.}

Initially, negligence was more concerned with the wilful offender, giving little or no attention to inadvertent harm.\footnote{John G Fleming, The Law of Torts (LBC Information Services, 9th ed, 1998) 113.} The cause of action was more focused on the nature of the plaintiff’s injury than on the quality of the defendant’s conduct.\footnote{Ibid.} However, through a process spanning decades, negligence has now overcome these confines such that it now encompasses intentional wrongs.\footnote{Handford, above n 13.} In many aspects, the outstretch has been additionally fuelled by economic, social and technological advances which have inspired new duties and extended the reach of those already existing.\footnote{Maurice A Millner, Negligence in Modern Law (Butterworths, 1967) [1].}

Nowhere has this expansion been more apparent than in the medical sphere. Advances in medical technology have made it possible for medical professionals to achieve greater control over the circumstances leading to birth.\footnote{Teff, above n 8, 423.} With remarkable precision, advanced techniques such as genetic screening and ultrasonography enable prospective parents to have prior knowledge of the likelihood of congenital disease and disability afflicting their offspring.\footnote{E Haavi Morreim, ‘The Concept of Harm Reconceived: A Different Look at Wrongful Life’ (1988) 7(1) Law and Philosophy 3, 3.} The result has been a build-up of anticipation for legal intervention into injuries that only a few years ago would have been written off as the work of fate’s cruel hand.\footnote{Teff, above n 8, 423.} Previously the preserve of divinity and philosophy, the law is now being compelled to consider questions of existence and nonexistence;\footnote{Maxine A Sonnenburg, ‘A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice’ (1981-1982) 55 Southern California Law Review 477, 477.} a task it appears reluctant to embrace.

Initially, parents who commenced compensatory action for wrongful birth against their doctors were met with hostility by courts. Some judges reasoned that as it is with eating and breathing, an unwanted pregnancy was to be treated as a normal physiological function of the female form.\footnote{David Hirsch, ‘Rights and Wrongs: A Post-mortem on Birth Torts’ (2006) 75 Precedent 35, 35.} However, a number of factors, including the women’s movements of the 60s
and 70s, conspired to relegate this view to obscurity.\textsuperscript{23} Wrongful life actions are now acknowledged to be the latest development in negligence jurisprudence;\textsuperscript{24} the foetus, a worthy ‘neighbour’ to the doctor.

At first blush, wrongful life claims appear to fit within the medical malpractice realm and therefore a concern of professional regulatory authorities.\textsuperscript{25} Closer scrutiny however reveals that it is justified to frame these actions within the exclusive domain of tort law.\textsuperscript{26} For one reason, the claims typically involve a doctor who fails to conform to a professional standard of care resulting in pain, suffering and unforeseen costs to the one subsequently born.\textsuperscript{27}

More specifically, the elements of wrongful life as a tort have been identified as: the finding of a duty to take care in advising or performing diagnostic tests on an expectant mother; a breach of the said duty resulting in the mother lacking awareness of real or reasonably suspected foetal defects; the mother’s reliance on the negligent act or omission by not aborting or by conceiving; and the eventual birth of an impaired offspring.\textsuperscript{28} The usual contention is that the life with disabilities is what ought to be compensable. From the outset, difficult questions begin to emerge.

The existence of a duty to the unborn has been contested. Those against have advanced that it appears strange for a duty to disclose medical information to be owed to the unborn who is in no position to act on it.\textsuperscript{29} These suggestions have however been rebuffed by some courts which have had no difficulty in finding the existence of an independent duty to the unborn to advise the mother of the possibility of being born disabled.\textsuperscript{30} Australian Courts, on the other hand, have stressed that even though a duty of the kind in question is apparent, it is one to which they cannot give effect as it fails to engage legally acceptable damage.\textsuperscript{31}

\begin{thebibliography}{9}
\bibitem{23} Ibid.
\bibitem{25} Perry, above n 1, 335.
\bibitem{26} Ibid.
\bibitem{27} Ibid.
\bibitem{28} Pace, above n 7, 146.
\bibitem{29} Alan J Belsky, ‘Injury as a Matter of Law: Is this the Answer to the Wrongful Life Dilemma?’ (1993) 22 \textit{University of Baltimore Law Review} 185, 205.
\bibitem{30} Ibid.
\bibitem{31} Harriton (2006) 226 ALR 391, 407 [68].
\end{thebibliography}
The second question, one that has proved unassailable, is conceptual. Can it be said that one born with disabilities is ‘harmed’? How can an affirmative answer be reconciled with the fact that no other existence was ever possible for the claimant? These questions coupled with the moral and public policy implications of whichever answer one contemplates have had courts struggle to find a clear position.

While these questions indeed provoke an extensive discussion, this article elects to concern itself with a narrower variant; that of ascertaining how different jurisdictions have answered or avoided the question of whether a life with disabilities can constitute legally cognisable damage. If this objective is to be meaningfully achieved, it becomes necessary to delve into how these claims so evolved as to concern the law.

III HISTORICAL AND JURISPRUDENTIAL REVIEW OF WRONGFUL LIFE CLAIMS

In negligence law, wrongful birth actions preceded those of wrongful life. Suffice to note, courts in many jurisdictions have since allowed recovery for wrongful birth claims. On the other hand, though achieving limited success in a few jurisdictions, the common law remains largely belligerent to the potential wrongful life litigant.

A The United States

Termed as the ‘prenatal torts’34, these actions trace their origin to the United States; where the earliest claim was arguably the 1934 wrongful birth case of Christensen v Thornby.35 The plaintiff in this matter commenced an action for damages against the defendant, a surgeon, for the failure of a sterilisation procedure that led to the unexpected pregnancy of his wife.36 Court held that since the intention of the operation was to protect the plaintiff’s wife from possible death in the event of a pregnancy, damages could not be justified when the mother had gone through the pregnancy unscathed and delivered a healthy baby. While dismissing the claim, the plaintiff was encouraged to embrace fatherhood with Court asserting that

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33 Burns, above n 24, 812.
34 Ibid 809.
35 Christensen v Thornby, 255 NW 620 (Minn, 1934).
36 Ibid 621.
‘[i]nstead of losing his wife, the plaintiff has been blessed with the fatherhood of another child.’

Perhaps surprisingly, the first wrongful life claims in the US were brought by perfectly healthy children. In 1963, the first of these was decided in the Appellate Court of Illinois in Zepeda v Zepeda. A healthy illegitimate child initiated action against his father seeking damages in lieu of his illegitimate status. Court rejected the claim with Dempsey J stating that ‘[r]ecognition of the plaintiff's claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering.’

A similar action, Williams v State of New York, involved an infant plaintiff suing the State of New York for alleged negligent failure to appropriately care for her mentally incompetent mother that led to a sexual assault which resulted in her birth. Citing the reasoning in Zepeda, the claim failed with court emphasizing the lack of a legitimate cause of action as the basis for the said failure.

It was thus not until 1967 that the first genuine wrongful life claim was considered in Gleitman v Cosgrove; a matter in which both wrongful life and wrongful birth were at issue. The defendants, specialists in obstetrics and gynaecology, were sued by the Gleitman family for negligent conduct. The family’s contention was that while the mother informed the specialists of her recent history of German measles at her first antenatal visit, she was ill-advised that it would have no effect on her unborn. The infant, Jeffrey Gleitman, commenced an action for damages for his birth defects; as did the mother, who sought damages for emotional distress occasioned by the son’s condition; and the father, who intended to recover for the extra costs involved in caring for a disabled child.

37 Ibid 622.
38 Zepeda v Zepeda, 190 NE 2d 849 (Ill App, 1963) (‘Zepeda’).
39 Ibid 858.
40 Williams v State of New York, 18 NY 2d 481 (Ct App, 1966).
41 Ibid 484.
42 Gleitman v Cosgrove, 1967 49 NJ 22 (1967) (‘Gleitman’).
43 Ibid 24.
44 Ibid.
45 Ibid.
The claim was defeated with court noting that ‘the defendants did not violate any legal duty which would make them liable in damages to her or her husband or their child, even if they failed to advise her of the possibility that her child might be defective...’\textsuperscript{46} This decision underscored the fact that American Courts were not prepared to embrace wrongful life claims until much later; in \textit{Curlender v Bio-Science Laboratories}.\textsuperscript{47}

In \textit{Curlender}, the plaintiff was an infant born with a genetic illness who commenced an action against a genetic testing laboratory alleging that their negligent failure to inform the prospective parents of the genetic condition led to her being born with Tay-Sachs disease. Court found for the plaintiff and awarded damages, including punitive damages. In justifying this award, Jefferson J stated that there was ‘no reason in public policy or legal analysis for exempting from liability for punitive damages a defendant who is sued for committing a "wrongful-life" tort.’\textsuperscript{48}

In part reversal of the decision in \textit{Curlender}, damages recoverable for wrongful life were constrained in \textit{Turpin v Sortini}.\textsuperscript{49} \textit{Turpin} was a general damages claim based on hereditary deafness allegedly occasioned by the defendant’s negligence in failing to diagnose the condition in the plaintiff’s elder sibling. Although general damages were denied due to the impossibility of their assessment, Kaus J (with whom Newman J agreed, Mosk J dissenting) awarded ‘special damages’ as recompense for the ‘extraordinary expenses’ that the plaintiff was likely to incur during her lifetime.\textsuperscript{50}

\textit{Curlender, Turpin} and decisions which soon followed in \textit{Procanik v Cillo}\textsuperscript{51} and \textit{Harbeson v Parke-Davis Inc}\textsuperscript{52} suggested that American courts had started to embrace wrongful life claims; a matter on which more will be written in subsequent parts of this article.

\begin{footnotes}
\item[46] Ibid 48.
\item[48] Ibid 832.
\item[49] \textit{Turpin v Sortini}, 643 P 2d 954 (Cal, 1982) (‘\textit{Turpin’}).
\item[50] Ibid 966.
\item[51] \textit{Procanik v Cillo}, 478 A 2d 755 (NJ, 1984) (‘\textit{Procanik’}).
\item[52] \textit{Harbeson v Parke-Davis Inc}, 656 P 2d 483 (Wash, 1983) (‘\textit{Harbeson’}).
\end{footnotes}
Until 2012, Israel’s courts had embraced wrongful life litigation in their courts, routinely allowing recovery. In fact, before the Supreme Court of Israel decision in *Hamer v Amit*[^53], Israel stood out as the only common law jurisdiction[^54] to permit recovery of both general and special damages for wrongful life claims[^55]. Israel reconnected with the majority of the common law fold in *Hamer*, where it was declared that wrongful life claims were no longer welcome to Israeli courts[^56].

The first, and arguably most influential[^57], Israeli decision so far handed down was that of *Zeitsov v Katz*[^58] in 1986. The Zeitsovs were a family with a history of Hunter syndrome and were thus resolute in not having a child that carried the responsible gene. As such, they carried out the necessary tests upon which they were assured by their physician that the expected child was free from the defective gene. The child, however, wound up with the gene and subsequently developed Hunter disease, a severely debilitating genetic syndrome. The Supreme Court found for the plaintiff and awarded damages[^59]. A number of successful wrongful life actions followed *Zeitsov*[^60] cementing Israel’s erstwhile position as the most liberal jurisdiction to wrongful life actions in the world.

A public committee constituted by Israel’s Ministry of Justice to review wrongful life claims only recently reported[^61]. In its March 2012 report, the committee recommended statute barring of the claims[^62]. The legislature is yet to respond[^63].

[^53]: *Hamer v Amit* [2012] CA 1326/07 (Supreme Court of Israel) (‘*Hamer*’).
[^54]: Perry, above n 1, 340 n 109.
[^55]: Ibid 340.
[^57]: Sagit Mor, ‘The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique’ (Draft Paper, Faculty of Law, University of Haifa) 16.<http://weblaw.haifa.ac.il/he/Faculty/Mor/Publications/Sagit%20Mor%20-%20The%20Dialectics%20of%20WL%20and%20WB%20-%20final%20for%20web.pdf>.
[^58]: *Zeitsov v Katz* [1986] CA 512/81 40 (2) PD 85 (Supreme Court of Israel) (‘*Zeitsov*’).
[^59]: Perry, above n 1, 340.
[^60]: See, eg, *Ploni v The State of Israel* CC 259/02; *Siddi v Clalit Health Services* CA4960/04; *Ben-David v Dr Antebi* CA 9936/07.
[^61]: Karako-Eyal, above n 56, 291-2.
[^63]: Ibid.
C United Kingdom

By comparison, the UK has not been as liberal in its reception of wrongful life claims. The matter was the subject of a Law Reform Commission which reported in 1974 cementing the opinion that there was to be no cause of action for wrongful life in the UK.64 This recommendation received legislative approval leading to the enactment of the *Congenital Disabilities (Civil Liability) Act 1976* (UK), which effectively barred any wrongful life claims arising out of births occurring after its passing.66

As such, only a few wrongful life claims have surfaced in the UK with the principal one being *McKay v Essex Area Health Authority*.67 As in *Gleitman*, the plaintiff in *McKay* was an infant born disabled as a result of the mother’s rubella infection who hoped to recover damages in negligence. It was contended that but for the negligence of the doctor and the local health authority, the rubella could have been detected thus enabling the mother to have an abortion under the provisions of the *Abortion Act 1967* (UK).

The claim was struck out at first instance with subsequent appeals facing a similar fate. In the House of Lords, it was held that the doctor was under no obligation to either ‘cause the death’ or ‘prevent the birth’ of the foetus.68 The claim was dismissed as novel and unsupported by English authority.69 Moreover, the passing of the *Congenital Disabilities Act* guaranteed that the case would have no influence on wrongful life jurisprudence in the UK.70

D Australia

While Australia, unlike the UK, has not legislated on wrongful life71, a handful of judicial decisions shape the common law on the matter. In each of these decisions, the plaintiff failed, thus putting the Australian position beyond doubt.

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64 *McKay v Essex Area Health Authority* [1982] QB 1166, 1169 (‘McKay’).
68 Ibid 1188.
69 Ibid 1184 [G].
70 Ibid 1169 [H]; see also, Liu, above n 3, 70.
71 Harriton (2006) 226 ALR 391, 393[7].
Bannerman v Mills relies on similar facts as those in Gleitman and McKay: of an infant born with severe disabilities as a result of an in utero infection with rubella. As with the previous cases, the mother sought the professional advice of the defendants who were negligent in advising her. Based on English and American precedent, the claim was dismissed by the Supreme Court of New South Wales on the grounds that it was legally unsustainable as no cause of action could be established at law.

Bannerman was followed by Hayne v Nyst, where a mother commenced proceedings on behalf of her child. Still at issue was the negligent failure to advise one who had a rubella infection about its potential effects to the foetus. However, the matter failed when an application for stay of proceedings beyond the limitation period was denied.

Then came Edwards v Blomeley, where a failed vasectomy led to the unexpected birth of a severely disabled child. In the New South Wales Supreme Court, it was argued that the defendant not only negligently performed the operation but also negligently advised Mr Edwards that the operation had been successful. A child afflicted by cri du chat syndrome, a condition that causes severe physical and intellectual disabilities, was subsequently fathered. For lack of a demonstrable duty of care, the failure to establish causation, the impossibility of damage assessment and for public policy considerations; Studdert J disallowed the child’s claim.

Heard and equally defeated at the same instance as Edwards, was Harriton No 1 as well as Waller v James. Unlike Edwards, however, the plaintiffs in both Harriton No 1 and Waller appealed Studdert J’s decision in the High Court of Australia. An opportunity thus presented for Australia’s highest court to determine the status of wrongful life claims within Australian Law. In this regard, Harriton is to receive more detailed attention in subsequent parts of this article.

Bannerman v Mills (1991) Aust Torts Reports 81-079 (‘Bannerman’).
Edwards v Blomeley [2002] NSWSC 460 (‘Edwards’).
Harriton v Stephens (2004) 59 NSWLR 694 (‘Harriton No 1’).
Waller v James [2002] NSWSC 462 (‘Waller’).
Waller, however, involved a plaintiff that was born as a result of an In Vitro Fertilisation (IVF) procedure by the defendant. A paternal genetic anomaly, which ought to have been identified and brought to the notice of the parents prior to the IVF procedure, caused the plaintiff severe disability. In this respect, negligence was argued. Among other reasons, both appeals failed in the High Court on account of the plaintiffs’ failure to prove actionable damage.

Although a number of the above discussed cases failed at the duty stage, the majority succumbed to court’s failure to establish compensable damage. Heavily weighing on court’s conscience was the question of whether life, in any form, should be recognised as damage at law. The public policy, ethical, legal and moral implications of such an assertion need not be over emphasised, with various judgements having comprehensively articulated them.

However, the fact that some jurisdictions have allowed recovery for wrongful life claims suggests that there are differing perceptions as to what constitutes recoverable damage within the principles of tort law. How damage fits into the negligence inquiry and how different jurisdictions have approached the damage question such that compensation has been permitted in some jurisdictions while denied in others now becomes the focus of this article.

IV DAMAGE IN THE LAW OF NEGLIGENCE

A The Negligence Inquiry

Unlike other torts, negligence is not actionable per se; and must rely on the existence of legally recognised damage. Further, although the concepts underlying the law of negligence have been refined and modified over centuries; three core elements persist in defining the negligence tort in most common law jurisdictions. A plaintiff must satisfy these three elements in order for an action in negligence to be successful.

Theoretically, it must be demonstrated that a duty of care was owed by the defendant, that the said duty was breached, and that compensable loss or damage was suffered as a result of the

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breach.  

As was noted by Mason P, however, the three elements are not as distinct in practice. His Honor contended that while some authorities may perceive an issue in light of a duty of care, closer scrutiny reveals that this duty is often denied due to ‘fundamental problems in assessing damages and/or problems in describing the nature of the injury inflicted.’ This argument suggests that each element cannot be realistically addressed independent of the others; a fact not lost to Kirby J. His Honor asserted that the duty question in a wrongful life claim should not be treated in isolation, but rather in harmony with other components of the integrated negligence inquiry, to which it is intimately bound and which will assist in its final discharge.  

As such, one may conclude that the existence of a duty without concomitant proof of actionable damage arising out of its breach means that the duty cannot be cognisable at law. An appreciation of this concept is critical to understanding why wrongful life claims continue to fail in Australian courts.

As Anthony Jackson observed; there is indeed no doubt that the act from which a wrongful life claim arises is a negligent one; usually involving a doctor who ill-advises a mother. Further, the relationship between the doctor and the unborn is proximal with injury to the potential plaintiff foreseeable; as the doctor’s role in this scenario is to offer professional advice which should assist the mother to make an informed choice. It therefore follows that the birth of a child with deformities that could have been detected in utero can in fact be linked to the negligence of the doctor in advising the mother.

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84 Jackson, above n 4, 551.  
85 Ibid.  
86 Ibid.
Jackson further contends that if Lord Atkins’ ‘neighbour principle’ is to be applied to such a scenario, it appears that an unborn child ought to be within the contemplation of a reasonable doctor.\textsuperscript{87} This, he surmises, means that some courts’ assumptions that a wrongful life claim cannot exist as no duty is owed by the doctor to the unborn child must be taken with a pinch of salt.\textsuperscript{88}

However, it has been asserted that in the present law, the duty concept is often modified so as to deny a duty not because of a lack of foreseeability but for policy reasons.\textsuperscript{89} Indeed, policy considerations appear to lace judicial decisions to deny a duty of a care in wrongful life claims Australia.\textsuperscript{90}

Donal Nolan has asserted that a negligence cause of action is incomplete without proof of actionable injury.\textsuperscript{91} This opinion is supported by Jane Stapleton who stresses that the existence of a duty of care without consequent damage is not sufficient to see a negligence claim through.\textsuperscript{92} She further contends that damage is the ‘gist’ of a claim in negligence without which there can be no cause of action.\textsuperscript{93} This line of thinking finds further expression in Kiefel J’s emphasis in \textit{Tabet v Gett}\textsuperscript{94} in which she contends that ‘damage is an essential ingredient in an action for negligence; it is the gist of the action.’\textsuperscript{95}

\textbf{B The Damage Question}

Most judgements on wrongful life cases have emphasized that the primary objective of an award of damages in tort law is that of restoring the plaintiff to the position they would have been but for the legal wrong.\textsuperscript{96} It follows that in determining whether the minimum requirement for damage has been met, courts typically seek to resolve the issue of whether

\begin{enumerate}
\item[Ibid.]
\item[Ibid.]
\item[William V H Rogers, \textit{Winfield and Jolowicz On Tort} (Sweet and Maxwell, 13th ed, 1989) 73.]
\item[\textit{Harriton} (2006) 226 ALR 391, 417 [113].]
\item[Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70(1) \textit{Modern Law Review} 59, 59.]
\item[Ibid.]
\item[\textit{Tabet v Gett} (2010) 265 ALR 227.]
\item[Ibid 254.]
\item[See, eg, \textit{Berman v Allan} 80 NJ 421(1979) (‘Berman’).]
\end{enumerate}
the plaintiff would have been better off had the defendant’s negligence not occurred.\textsuperscript{97} A resolution of this question in favour of the plaintiff then leads to the calculation of how much it would require to achieve restorative justice. Therein lays an important distinction between damage and damages.

\textit{C Damage in Wrongful Life Claims}

Damage has been defined as loss, harm or injury that may be suffered by a plaintiff as a consequence of the defendant’s negligence.\textsuperscript{98} As an element of the negligence inquiry, it is discernible from ‘damages’, which refers to the monetary indemnification that may be awarded by a Court of Law to a successful plaintiff in an action for damages.\textsuperscript{99}

When alluding to the component of the negligence action, however, the damage question is not as simplistic and as such not limited to just identifying some form of loss suffered by a plaintiff.\textsuperscript{100} It necessitates the determination of whether the loss suffered is a kind recognised at law; whether the said loss was the result of the defendant’s breach; and whether it is fitting to hold the defendant culpable for the said loss.\textsuperscript{101}

It also appears from Crennan J’s judgement in \textit{Harriton} that even if the above qualities are satisfied, it still cannot constitute damage until it is comprehensible and can thus be evaluated by court; an aspect that has proved to be the Achilles’ heel in the quest for recovery in wrongful life claims. Her Honor stated:

\begin{quote}
\ldots a plaintiff needs to prove actual damage or loss and a court must be able to apprehend and evaluate the damage\ldots in cases of this kind, to find damage which gives rise to a right to compensation it must be established that non-existence is preferable to life with disabilities. A right capable of being protected by the law of tort, to not exist\ldots A comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible. Judges in a number of cases have recognised the impossibility of the comparison and in doing so references have been
\end{quote}

\textsuperscript{97} Pace, above n 7, 146.
\textsuperscript{98} Harold Luntz et al, \textit{Torts Cases and Commentary} (LexisNexis Butterworths, 6\textsuperscript{th} ed, 2009) 460.
\textsuperscript{99} Ibid.
\textsuperscript{100} Amanda Stickley, \textit{Australian Torts Law} (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2013) 268.
\textsuperscript{101} Ibid.
made to philosophers and theologians as persons better schooled than courts in apprehending the ideas of non-being, nothingness and the afterlife.\textsuperscript{102}

These sentiments appear not to elicit universal acceptance as evidence suggests that different jurisdictions, and indeed, different judges have interpreted the damage question in dissimilar ways. The article attempts to isolate these differing views.

1 \textit{The Interpretation in Australian Law}

Australia’s legal position on wrongful life is currently guided by the controversial High Court ruling in \textit{Harriton}. At issue in the High Court was whether the severely disabled plaintiff could assert a duty of care in light of a doctor’s failure to appropriately advise her mother of the possible effects of rubella to an unborn foetus. In the event of a finding of a duty, the court was to determine whether a viable cause of action for damages in negligence could be sustained on the facts of the case.

The appellant, Alexia Harriton was born in March of 1981. Prior to her birth, in August 1980, her mother, Mrs Olga Harriton, had a fever coupled with a rash. Suspecting a pregnancy, she visited her general practitioner, Dr Stephens, the father of the respondent. Mrs Harriton informed Dr Stephens of her suspicion that she was pregnant and of her concern that her illness might be rubella. A pathology report confirmed her fears. Upon the death of Dr Stephens, Mrs Harriton consulted his son, Dr Paul Stephens on 22 August 1980 and revealed to him the same medical history as she had to his father. In addition, the respondent had the benefit of the pathology report. The respondent advised the appellant that she was pregnant but that her symptoms were not indicative of a rubella infection. It was commonly agreed that this act together with the respondent’s failure to arrange further confirmatory tests was a negligent one. It was further agreed that, in 1980, a reasonable medical practitioner ought to have been aware of the risks to the foetus inherent within a rubella infection and ought to have accordingly advised the respondent. It was also mutually agreed that had Mrs Harriton received competent medical advice, she would have terminated the pregnancy. Alexia Harriton was thus born with catastrophic disabilities resulting from an in utero exposure to rubella.

\textsuperscript{102} \textit{Harriton} (2006) 226 ALR 391, 449 [251]-[252].
At first instance in the Supreme Court of New South Wales, Alexia claimed damages in negligence for pain and suffering, loss of amenities and medical expenses; a claim that was consequently defeated with Studdert J holding that no cause of action was apparent. An appeal in the New South Wales Court of appeal was similarly defeated with Spigelman CJ finding no relevant duty of care and consequently dismissing the appeal. A final appeal was made to the High Court of Australia.

The decision in the High Court very much revolved around what the common law was ready to recognise as damage. A further complication lay in the compensatory nature of the sought remedy; as the purpose of an award of damages is understood to be that of restoring the plaintiff to the position they would have been sans the legal wrong. At first blush, the Harriton court elaborates two dissimilar approaches to the meaning of legal damage.

The first, preferred by the majority of the bench, ties damage to the duty question. To this end, it was enunciated that the fact that damage formed the core of the negligence cause of action meant that a duty of care could not be stated in respect of damage that could not be proved. In an attempt to define damage, court invoked the comparative paradigm; insisting that although the plaintiff suffered visible injury, it was necessary to show what her life would have been like without the alleged negligence. This comparison, according to Hayne J, was fundamental to the engagement of compensatory damages. Of this comparison, Hayne J elaborated thus:

…damage, of which the defendant’s breach of a duty of care owed to the plaintiff was a cause, requires the making of a comparison. It invites attention to the position in which the plaintiff would have been had the tort not been committed and the position in which the plaintiff is shown now to be. Often that comparison is not easily made.

The plaintiff’s contention that such a comparison could just as well be achieved by comparing her life with that of an ‘ordinary person’ was rejected as unhelpfully

103 Ibid 431 [167]-[168].
104 Ibid 450 [254].
105 Ibid 431 [167]-[168].
106 Ibid.
107 Ibid [167].
hypothetical.\textsuperscript{108} Hayne J asserted that since the appellant had never known any life apart from the disability-afflicted one she had; an award of damages would be in vain as the position to which she was seeking to be restored could not be demonstrated without engaging in legal fiction.\textsuperscript{109}

The decision also hinged on a causation issue with the court opining that even if the doctor had discharged his duty to the mother, it would still be up to her to terminate the pregnancy.\textsuperscript{110} This, it was reasoned, would lead to a protracted causation pathway.\textsuperscript{111}

Although in slightly differing language, Crennan J echoed similar sentiments, declaring that proving that a plaintiff is ‘worse off’ is inherent to the concept of damage capable of being remedied by law.\textsuperscript{112} Her Honor further reasoned that a duty of care could not arise in respect of damage incapable of such recognition.\textsuperscript{113} Most importantly however, the fact that the compensatory principle as articulated in \textit{Skelton v Collins}\textsuperscript{114} could not be engaged due to the plaintiff’s inability to show detriment led the bench to deny the existence of any cause of action. Crennan J stated that ‘if the principle cannot be applied the damage claimed cannot be actionable.’\textsuperscript{115}

The position taken by the majority in \textit{Harriton} appears to be consistent with that taken by Courts in other jurisdictions; that have found it legally unhelpful to engage in a comparison of the existence with disabilities versus nonexistence kind. In \textit{McKay}, for example, Ackner LJ wondered:

\begin{quote}
But how can a court begin to evaluate non-existence, ‘the undiscovered country from whose bourn no traveller returns?’ No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.\textsuperscript{116}
\end{quote}

\\textsuperscript{108} Ibid 432 [171].
\textsuperscript{109} Ibid 434 [181].
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid 449 [251].
\textsuperscript{113} Ibid 443 [225].
\textsuperscript{114} \textit{Skelton v Collins} (1966) 115 CLR 94.
\textsuperscript{115} \textit{Harriton} (2006) 226 ALR 391, 453 [264].
\textsuperscript{116} \textit{McKay} [1982] QB 1166, 1189.
The Gleitman Court was similarly incapable of making the comparison. Proctor J summed up the court’s dilemma as follows:

The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.  

From these observations, it appears that a court incapable of apprehending a plaintiff’s damage in a wrongful life claim is not one where recovery for the same should be expected.

The second approach to legal damage in Harriton manifests as a critique by Kirby J. In dissent, he proposed that rather than perceiving law as an ‘exercise in logic and logical analysis’ it was important for Court to exercise flexibility when dealing with novel claims as this was a core characteristic of the development of the common law. Further, he states that the fact that the plaintiff was alive and visibly suffering and incurring daily costs attributable to the defendant’s negligence was sufficient for a finding of unquestionable damage capable of being remedied at law.

For a number of reasons, Kirby J found fault with the majority’s view that the impossibility of assessing damages militated against the plaintiff’s ability to recover. To advance his reasoning, he pointed out that though it was the purpose of damages to restore one to their pre-tort position, this was impossible to achieve in practice. His Honour also noted that court had, on previous occasions, compensated many injuries that were impossible to

\[\text{Gleitman, 1967 49 NJ 22, 28 (1967).}\]
\[\text{Harriton (2006) 226 ALR 391, 413 [96].}\]
\[\text{Ibid 410-411 [85]-[86], [97], [35].}\]
\[\text{Ibid [85].}\]
\[\text{Ibid 410 [82].}\]
evaluate in monetary terms such as pain and suffering; loss of expectation of life; injury to reputation and deprivation of liberty.\textsuperscript{122}

Moreover, Kirby J argued, though not in the context of damages award, Courts have in previous cases successfully compared existence to nonexistence; as in when courts have to decide whether life support should be withdrawn in the interest of a vegetative patient.\textsuperscript{123} Kirby J concludes by opining that the majority’s denial of an award of damages finds more justification in policy than in law.\textsuperscript{124}

Kirby J’s reasoning appears to command support from a number of commentators. Albert Ruda has submitted that the \textit{Harriton} court’s reasoning is assailable. He contends that while the existence of a handicapped plaintiff is in itself sufficient evidence as to the negligence of the defendant, it is additionally not uncommon for courts to compensate damage that lies \textit{in re ipsa} in torts such as trespass or infringement upon one’s rights.\textsuperscript{125} Further, German and Italian scholars are cited for asserting the notion that in a wrongful life claim, the dignity of life of the plaintiff is what is violated by the doctor’s negligence and it is this that should attract liability.\textsuperscript{126}

A supporting opinion is that the role of the law in a wrongful life claim is not that of determining whether nonexistence is preferable to existence but rather to protect the right of the plaintiff to an informed choice.\textsuperscript{127} Sonnenberg, the author of this opinion, continues to suggest that \textit{Turpin} and \textit{Haberson} might have returned a different outcome for the plaintiffs had they emphasized their right to have their parents make an informed decision as opposed to subjecting court to a philosophical dilemma it was eager to avoid.\textsuperscript{128}

\textsuperscript{122} Ibid [83].
\textsuperscript{123} Ibid 413 [95].
\textsuperscript{124} Ibid 412 [93].
\textsuperscript{125} Albert Ruda, ‘‘I Didn’t Ask to be Born’: Wrongful Life from a Comparative Perspective’ (2010) 1 \textit{Journal of European Tort Law} 204,211.
\textsuperscript{127} Sonnenburg, above n 21, 492.
\textsuperscript{128} Ibid.
2 The Interpretation in American Law

In comparison, the American approach to damage is ambivalent. Only three states have so far permitted recovery for wrongful life claims. The remaining states have treated these claims harshly with nine legislating against them. Maine stands out as the only state where wrongful life has attracted positive legislative attention with recovery of special damages guaranteed by statute. For the states where damages are recoverable, there seem to be four distinct ways in which damage has been perceived.

The first is where courts have considered it to be unquestionably obvious that injury attributable to a defendant’s negligence is apparent by the mere existence of a disabled plaintiff. Courts that have preferred this summary approach find it unnecessary to delve into the existence versus nonexistence debate. This line of thinking is perhaps best exemplified by Jefferson J’s opinion Curlender. His Honor stated that:

The reality of the “wrongful-life” concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all.

This approach has been criticised for obliterating the vital link between injury and causation by suggesting that the defendant, by allowing the birth to happen, led to the injury; a proposition that has been rejected in tort law.

The second approach, similar to the one adopted by Australian courts, is to consider at length whether existence with disabilities can be regarded as preferable to nonexistence. This approach suggests that since it is impossible to compare the state of nonexistence with that of an impaired life, there is no fair and non-arbitrary way to measure damages. Yet although American courts favouring this approach have acknowledged this handicap, it has not been an

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133 Pace, above n 7, 152-4.
impediment to the award of damages. This was certainly the case in *Turpin* where court rationalised that:

…the problem is not…simply the fixing of damages for a conceded injury, but the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all.\textsuperscript{134}

If the final outcome in *Turpin* is anything to go by, it appears that while court was reluctant to declare life with an ailment as damage, it was eager to award some form of pecuniary compensation in harmony with the ‘benefit doctrine’.\textsuperscript{135} The doctrine emphasizes that any benefit that arises from the perceived harm be subtracted from the potential award.\textsuperscript{136} General damages, less the benefit of life, led to the court awarding only special damages. While making a case for this award, court reasoned that:

Realistically, a defendant’s negligence in failing to diagnose a hereditary ailment places a significant medical and financial burden on the whole family unit. Unlike the child’s claim for general damages, the damage here is both certain and readily measurable.\textsuperscript{137}

However, the same argument has been employed to justify the total denial of damages. In *Goldberg v Ruskin*\textsuperscript{138} for example, court found as unacceptable the suggestion that one could infer damage on the basis of a hypothetical comparison to nonexistence. The life claim was dismissed with court asserting that:

The argument that the child was in some meaningful sense harmed by being born and would have been better off not being born suggests that there is a perspective, apart from our life and world, from which one can stand and say that he finds nonexistence preferable to existence. Determining whether an injury has occurred in these circumstances is a matter outside the competence of the legal system…\textsuperscript{139}

\textsuperscript{134} *Turpin*, 643 P 2d 954, 963 (Cal, 1982).
\textsuperscript{135} Pace, above n 7, 151-2.
\textsuperscript{136} Ibid.
\textsuperscript{137} *Turpin*, 643 P 2d 954, 965 (Cal, 1982).
\textsuperscript{138} *Goldberg v Ruskin*, 113 Ill 2d 482 (1986).
\textsuperscript{139} Ibid 489.
An identical opinion was shared by the *Becker v Schwartz*\(^\text{140}\) court which opined that ‘[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.’\(^\text{141}\) A third approach is enlivened in *Azzolino v Dingfelder*\(^\text{142}\); where the North Carolina Court of appeals threw all caution to the wind holding that nonexistence can be better than existence. While court was all too aware of previous holdings that life in any form was preferable to nonexistence, it was not to be persuaded on this occasion. Hill J had this to say:

> While we agree this may be arguably true in some cases, we do not agree it is always or necessarily so. We are unwilling, and indeed, unable to say as a matter of law that life even with the most severe and debilitating of impairments is always preferable to nonexistence. We believe that a child, who is as severely impaired as Michael Azzolino, has suffered a legally cognizable injury; therefore, Michael's action for wrongful life should not be dismissed for lack of actionable injury.\(^\text{143}\)

Citing the problematic nature of their calculation, the same court denied the plaintiff general damages preferring instead to adopt the *Turpin* court’s position of allowing only special damages.\(^\text{144}\) Court’s reasoning in this case suffers the same flaw as that identified in *Curlender*; that of erasing the necessary connection between causation and injury.

A final approach prioritises the equitable notion of fairness to the plaintiff and deterrence of prospective tortfeasors as more noble pursuits compared to the requirement of establishing injury.\(^\text{145}\) Thus although the Supreme Court of New Jersey in *Procanik*, could not pinpoint harm suffered in fact, it premised its decision to award damages on purely equitable and utilitarian tenets.\(^\text{146}\) Court regarded the establishment of harm as an unnecessary exercise stating instead that:

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\(^{141}\) Ibid 812.


\(^{143}\) Ibid 300.

\(^{144}\) Ibid.

\(^{145}\) Pace, above n 7, 152.

\(^{146}\) Ibid 160-1.
…at work is an appraisal of the role of tort law in compensating injured parties, involving as that role does, not only reason, but also fairness, predictability, and even deterrence of future wrongful acts.\textsuperscript{147}

Commentators have however argued that the same notions of fairness and utilitarianism enunciated by the \textit{Procanik} court can still be achieved by expanding the scope of damages recoverable in wrongful birth torts; where harm can be conventionally established.\textsuperscript{148}

3 \textit{The Interpretation in Israeli Law}

Despite what is evidently a problematic characterisation, Israel appears to be treating the existence of harm in wrongful life claims as a matter of course. The Supreme Court of Israel decided that the plight of the disabled child and society’s disapproval of the offending doctor’s negligent conduct were matters too salient to ignore. Barak J in \textit{Zeitsov} suggests another, arguably radical, approach to the definition of harm within the context of wrongful life claims.\textsuperscript{149} He stated:

\begin{quote}
The doctor’s notional duty of care requires him to exercise reasonable care so that the minor’s life will be unimpaired . . . [The minor’s] legally protected interest is not in nonexistence, but in life without impairment. Accordingly, the harm for which the negligent doctor is responsible does not lie in causing life or in preventing nonexistence. The doctor is responsible for causing life with impairment . . . [The] assessment of damages need not take into account the state of nonexistence . . . [The] doctor is responsible for causing a defective life, so the extent of the harm should be determined by comparing impaired life and unimpaired life.\textsuperscript{150}
\end{quote}

A similar contention, although rejected by the High Court of Australia, was made in \textit{Waller v James} and \textit{Waller v Hoolahan}.\textsuperscript{151} This proposal appears, at first glance, to resolve most of the murky issues associated with the finding of damage in wrongful life cases. However, this approach to damage has had its fair share of proponents and critics.

\textsuperscript{148} Pace, above n 7, 166.
\textsuperscript{149} Perry, above n 1, 373.
\textsuperscript{151} \textit{Waller v James} and \textit{Waller v Hoolahan} (2006) 226 ALR 457,465 [39] (‘\textit{Waller and Hoolahan}’).
Those in favour advance that such characterisation would do justice to the plaintiff by allowing recovery from the careless doctor. Secondly, this method sidesteps the philosophical and metaphysical questions that burden the existence versus nonexistence approach. Thirdly, it would make the assessment of damages possible as this can be easily aligned to similar assessment in body injury cases. By not distinguishing between what defects may attract recovery and those that may not, this approach ensures a universal right of action for the differently disabled persons while maintaining liability for all negligent doctors.

Advantageous as this method may seem, potentially more compelling arguments have been made by its critics. The main resistance has stemmed from its incompatibility with the principles of tort law; which define harm as detriment in one’s state occasioned by the tortfeasor’s negligent conduct. The embedded requirement would thus be for the plaintiff to prove that they are worse-off; by demonstrating that nonexistence is superior to a disability afflicted life. This inevitably relegates this method to a legal fiction incapable of withstanding scrutiny.

Secondly, it has been reiterated that except in cases of punitive damages, tort law generally serves not to punish tortfeasors but to compensate those on whom negligent conduct has been visited. Keeton et al clarify that the idea of punishment is more synonymous with the criminal law and is alien to the law of torts.

It would then appear that to oblige a doctor to restore a plaintiff to a position economically akin to a normal life resonates more with punishment than compensation for harm the doctor in question can be said to have caused; the harm itself having been the result of in utero infection or hereditary factors. In this respect, the Zeitsov approach appears to insult the principles of tort law.

These decisions are suggestive of a system that is struggling to uphold the sanctity of life while simultaneously guaranteeing justice by ensuring that there is no ‘perversion of

153 Perry, above n 1, 374.
154 Ibid.
155 Keeton et al, above n 152, 9.
156 Ibid.
157 Perry, above n 1, 374; see also Karako-Eyal, above n 56, 291.
fundamental principles of justice to deny all relief to the injured and thereby relieve the wrongdoer from making any amend for his acts.  

D An Appraisal of the Different Perspectives on Damage in Wrongful Life

While the above discussion reflects the ambivalence prevalent in the common law world, it also highlights the distinctive approaches preferred by the respective jurisdictions.

The American position appears to be that life in any form is sacred and can thus not be treated as damage. This take resonates with the values enshrined in the American constitution. In fact, the bench in *Berman* makes reference to the American Constitution’s characterisation of life as a fundamental right of which none should be deprived without due process of law. Further, the court insisted that to treat a disabled life as less desirable would be to offend the very core principles of American society.

American Courts thus find the comparison between a disabled existence and nonexistence as problematic. It has been acknowledged that the award of damages per se, is not what is burdensome to the American judge. However, the fact that these damages are claimed by asserting a right to nonexistence is what proves insurmountable for the American plaintiff. In *Berman*, Pashman J elaborated that:

> Nonetheless, were the measure of damages our sole concern, it is possible that some judicial remedy could be fashioned which would redress plaintiff, if only in part, for injuries suffered. Difficulty in the measure of damages is not, however, our sole or even primary concern…One of the most deeply held beliefs of our society is that life - - whether experienced with or without a major physical handicap -- is more precious than non-life…The documents which set forth the principles upon which our society is founded are replete with references to the sanctity of life.

Evidence of this paradoxical tendency by American courts to allow recovery while circumventing the problematic damage issue is further seen in the *Turpin* decision. The

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159 Ibid 429.
*Turpin* court was very delicate in its approach; refusing to award general damages yet allowing for special damages in redress of a specific kind of harm; to which it went to great lengths to define. Court stated that:

…the defendant's conduct has conferred a special benefit "to the interest of the plaintiff that was harmed." Here, the harm for which plaintiff seeks recompense is an economic loss, the extraordinary, out-of-pocket expense that she will have to bear because of her hereditary ailment. Unlike the claim for general damages, defendants’ negligence has conferred no incidental, offsetting benefit to this interest of plaintiff. Accordingly, assessment of these special damages should pose no unusual or insoluble problems.\(^{161}\)

The weakness with the American technique has been identified as its tendency to stray too wide from the conventional meaning of damage. It has been contested that despite humanitarian sentiments, merely being born into unfortunate circumstances cannot constitute harm onto which legal recognition can be visited.\(^{162}\)

Conversely, the Australian characterisation of damage appears to be premised on logic. That it is logically impossible to experience or evaluate nonexistence means that proof of damage equally defeats logic.\(^{163}\) This is the fundamental position adopted by the majority in *Harriton*; with the sanctity of life argument, corrective justice and other public policy reservations playing second fiddle.

Alice Grey has contended that by adopting the logical existence versus nonexistence argument, the *Harriton* Court managed to distance itself from the contentious issues associated with the legitimacy of abortion; the inherent value of human life and disabled individuals in society; as well as the sanctity of human life.\(^{164}\) She further contends that although these issues were indeed enunciated in the joint judgement, they were only

\(^{161}\) *Turpin*, 643 P 2d 954, 965-6 (Cal, 1982).

\(^{162}\) Ruda, above n 125, 212.

\(^{163}\) Teff, above n 8, 433.

\(^{164}\) Grey, above n 78, 551.
secondary with far greater emphasis placed on the fact that the Alexia Harriton could not logically prove damage.\footnote{Ibid.}

The Harriton Court, it has been suspected, may also have had the worry that dismissing the claim based on the sanctity of life argument presented the undesired possibility of court being seen as unacceptably interfering with the moral realm of society.\footnote{Ibid.} It then appears that by requiring the plaintiff to compare their present life with that of nonexistence had the negligence not occurred, court engaged an impregnable obstacle against which no wrongful life claim can prevail.\footnote{Ibid 552.} As has already been pointed out, this approach has been criticized by Kirby J who reasoned that to apply logic alone would be to fail the common law in its response to novel claims and hence would be to totally miss the point.\footnote{Harriton (2006) 226 ALR 391, 411[86].}

Despite Kirby J’s misgivings, however, it is arguable that for as long as Harriton stands, the door remains shut to any success of wrongful life claims in Australia. It is also possible to conclude from the above discussion that while the American courts refuse to recognise damage based on the concern for stigmatising life with disabilities secondary to the legal and social construct of human life, their Australian counterparts are comfortable not recognising damage based on the mere logical impossibility of comparing a disabled existence with nonexistence.

E Which Approach to Damage is Preferable?

The preceding discussion highlights a number of noteworthy observations. Australia, by preferring to treat the finding of damage as a matter of logical comparison between life and nonexistence, locks out the potential plaintiff; as this comparison cannot be meaningfully made.

By extension, it would also mean that this approach disregards the purpose of tort law. Richard Abel contends that the function of the law of torts is to hand down moral judgement,
be reactive to the plaintiff’s needs and to foster future compliance and safety. A similar assertion is made by Alice Grey who identifies the main function of tort law as that of providing corrective justice and ensuring compliance to standards of conduct. Grey further reasons that if the core purpose of tort law is to be achieved, it is necessary to overcome the logical and legal obstacles associated with wrongful life claims.

The need for corrective justice is further articulated by Mason P in his dissent in Harriton No 1. His Honor observed that the dilemma for courts lay in the fact that wrongful life plaintiffs ‘exist and suffer due to the assumed negligence of others who had represented professional competence in relation to medical procedures they embarked upon for reward.’ A similar observation was made by Kirby J in the High Court.

Further still, Callinan J, even though eventually dismissing the Harriton claim comes off as only too aware of the unfairness to the plaintiff occasioned by the decision of the Harriton court. In his submission, he concedes that:

The consequence of failing to allow this appellant to recover, is that a person such as she, catastrophically disabled, will recover nothing, whilst, if after the moment of conception, she had suffered negligently caused injury, even of a much lesser kind, she may be able to recover.

Moreover, the need for negligence law to be deterrent and to set clear practice standards was not lost to the Harriton court. It is a need conceded by Callinan J and a concerned Kirby J who states that:

A medical practitioner who has been neglectful and caused damage escapes scot-free. The law countenances this outcome. It does nothing to sanction such carelessness. It offers no sanction to improve proper standards of care in the future.

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170 Grey, above n 78, 557.
171 Ibid.
174 Ibid 438 [205].
175 Ibid.
176 Ibid 414-5 [101].
It is this author’s argument that in not finding actionable damage, the decision in Harriton was consistent with established legal principles. However, it is also suggested that the same decision failed to meet the other objectives of tort law; that of guaranteeing corrective justice, of discouraging careless conduct and of setting clear standards of practice. This article contends that this deficiency can be tied down to the rigid approach preferred by the High Court in addressing the damage question.

Although Israel’s enthusiastic pre-Hamer approach appears, at first glance, to satisfy the moral, reactive and deterrent purposes of tort law as explained above, it also suffers salient doctrinal flaws. The main one is that, like the bench in Curlender, the Zeitsov court attempts to divorce birth from compensable injury. The Zeitsov court’s only requirement of the plaintiff is the demonstration of absolute suffering. It is not necessary, according to this approach, for one to show that injury would not have been suffered had reasonable care been taken.177

Since the allegation in a wrongful life claim is that the defendant caused the birth, not the defect; the elements of damage and causation in the negligence inquiry lose their vital link.178 The result is that liability is imposed for an ‘injury’ not caused by the defendant.179 Apart from being unfair to the defendant, this approach runs counter to the principle that a defendant can only be held liable for injury of which his negligence is the proximate cause.

For a number of reasons, the position adopted by the Supreme Court of California in Turpin finds the greatest favour with this article. The preference for the Turpin approach is driven by two factors. The first is that unlike Israel which opted for a significant departure from the known legal definition of actionable damage, the Turpin court acknowledged the impossibility of such a finding. General damages were hence denied, with court stating that:

…with respect to the child's claim for pain and suffering or other general damages -- recovery should be denied because (1) it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in

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177 Pace, above n 7, 153
178 Ibid.
179 Ibid.
being born impaired rather than not being born, and (2) even if it were possible to
overcome the first hurdle, it would be impossible to assess general damages in any
fair, non-speculative manner.\textsuperscript{180}

Deciding not to award general damages based on a failure by the plaintiff to establish damage
meant that in respect to tort law, the \textit{Turpin} decision appears to be on solid doctrinal ground.
As has been discussed, however, it is also the purpose of tort law to deliver corrective justice
to the plaintiff and to discourage future negligent behaviour. By awarding special damages to
the plaintiff, the \textit{Turpin} court managed to also achieve the second purpose.

Albeit not the factual cause of the plaintiff’s disability, the court emphasized that the doctor
was liable for performing his professional duty carelessly, a fact that contributed to the birth
of the plaintiff into circumstances of special needs; needs that would engage extraordinary
expenses. This point was explained thus:

\begin{quote}
If, as alleged, defendants' negligence was in fact a proximate cause of the child's
present and continuing need for such special, extraordinary medical care and training,
we believe that it is consistent with the basic liability principles…to hold defendants
liable for the cost of such care…\textsuperscript{181}
\end{quote}

This rationale was further buttressed in \textit{Procanik}. The New Jersey Court, on this occasion,
clarified that an award of special damages does not mean that the court endorses the view that
nonexistence is preferable to a disabled existence; rather, it serves as an indication of court’s
awareness of ‘the needs of the living.’\textsuperscript{182}

This view is additionally endorsed by Jillian Stein; who argues that an award of nominal
damages can have the effect of addressing the financial implications of living a disabled life
while serving to frustrate subsequent negligent tendencies.\textsuperscript{183} She further submits that the
award of special damages in wrongful life claims makes good public policy for two reasons.
The first is that it would discourage abortion if the parents’ only reason for seeking it is the

\begin{footnotes}
\item[180] \textit{Turpin}, 643 P 2d 954, 963 (Cal, 1982).
\item[181] \textit{Turpin}, 643 P 2d 954, 965 (Cal, 1982).
\item[183] Stein, above n 131, 1150.
\end{footnotes}
potential financial burden of raising a disabled child; the second being the fairness it occasions on the plaintiff who has to incur unusual costs for a lifetime.\textsuperscript{184}

This article thus argues that by forging a delicate balance between consistency with tort law principles on one hand and moral, corrective and deterrent justice on the other; the \textit{Turpin} approach provides the best possible alternative to addressing the damage question in wrongful life claims. As has been demonstrated, analysing the damage question in any other way stands the risk of either engaging a legal fiction or denying a clearly suffering plaintiff recovery while leaving the doctor’s negligence unchecked.

V Conclusion

It has been asserted that the purpose of tort law is that of distributing losses and awarding compensation for harm suffered as a consequence of another’s conduct.\textsuperscript{185} At the core of this objective is the imposition of liability on one who significantly departs from a reasonable standard of care.\textsuperscript{186} Yet courts are not only concerned with indemnification of the plaintiff, but also with the prevention of future careless conduct and admonition of the tortfeasor.\textsuperscript{187} In a wrongful life claim, although the perceptions of harm differ, it is generally accepted that a doctor who ill-advises an expectant mother is a negligent one; and that the plaintiff both exists and suffers as a result of this negligence. Admittedly, the defendants in these claims are not the essential cause of the harm suffered; and it is never contended to that effect. Rather, the defendant denies the mother an opportunity to make an important choice.

Seen from this perspective, it would appear that the Australian approach of positing existence against nonexistence misses the point, and is inherently incapable of meeting the above stated objectives of tort law. On the contrary, the American approach in \textit{Turpin} seems more rational; compensating the plaintiff while making clear attempts to deter future transgression. This article thus finds as appealing the proposition that in a wrongful life claim, the important

\textsuperscript{184} Ibid 1155.
\textsuperscript{185} Keeton et al, above n 152, 6, citing Wright, Introduction to the Law of Torts, 1944, 8 Camb.L.J 238.
\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid 25.
question ‘is not whether the defendant caused the damage, but whether the defendant should be held responsible for the damage.’

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STATE-FUNDED VICTIM COMPENSATION SCHEMES
IN AN INTERNATIONAL CONTEXT:
RE-IMAGINING AUSTRALIAN POSSIBILITIES

RACHEL GEAR*

ABSTRACT

State-funded victim compensation schemes hold potential to be an alternative form of justice for many who qualify for assistance.¹ Yet the existence of state-funded schemes, much less their purpose and functioning, is not without controversy. Despite significant advances and confronting worldwide attention to the plight of certain victims over the last decade, the potential of state-funded victim compensation schemes in Australia remains largely unrecognised, untapped and often incoherent. This article examines that potential and proposes a plan for movement towards a national system for victims of violence in Australia.

I INTRODUCTION

Organizing is what you do before you do something so that when you do it, it’s not all mixed up.

– Christopher Robin in A.A. Milne’s ‘Winnie the Pooh’.

Increasing global violent events are causing countries throughout the world to re-assess their preparedness and responses toward victims of violence. Events in Norway² highlight yet

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² On July 22, 2011, a Norwegian national detonated a car bomb in the heart of government buildings in the capital, Oslo, and then proceeded to Utoya island, where he embarked on a shooting massacre, intent on killing as many youth as possible who were attending a political camp, see ‘Norway Launches Probe into Massacre
again that terrorism is but one of any number of sources of violence resulting in victims. Moreover, citizens expect their governments to be capable of response.³

Perhaps most notably, the swift creation of the September 11th Victim Compensation Fund of 2001⁴ by the US Government following the unprecedented September 11th terrorism attacks – and the controversy about the scheme that then ensued⁵ – amplified the need for governments to think proactively and implement policies for victims that are pre-emptive, integrated, coherent, and equitable.⁶ Particularly, pre-emptive government actions must be sensitive to the plurality of victims⁷ and able to withstand the heat of glaringly public violent events, along with the insidious and much more frequently occurring acts of violence which take

³ In the week that followed the attacks, Norwegian Prime Minister Jens Stoltenberg announced that an independent inquiry – the special “July 22” commission – “will map out what functioned well and what functioned less well.” He also announced a national commemoration and the government’s intention to make a financial contribution to the families of the deceased, to cover funeral expenses; see ibid. Norway’s current government-funded victim compensation scheme does not distinguish victims of terrorism from other victims of violence, see Hans-Joerg Albrecht and Michael Kilchling, Council of Europe, ‘Victims of Terrorism – Policies and Legislation in Europe: An Overview of Victim-Related Assistance and Support’ Victims-Support and Assistance (September, 2006), 199, 229-30 <http://www.coe.int/t/dghl/standardsetting/victims/6041-6-ID3996-Victims%2020Support%20and%2020assistance.pdf>. How this scheme fares in the wake of July 22, 2011 will undoubtedly be the source of debate and will almost certainly influence the state-funded victim compensation schemes of other countries.


⁶ Ibid.

place outside of the public’s eye.\textsuperscript{8} As prominent US Victimologist Marlene Young asserts, the September 11\textsuperscript{th} Victim Compensation Fund:

\begin{quote}
\textit{… has been perceived by many victims as demeaning and unfair. This perception is shared by some of the victims of the attacks as well as by thousands of victims who were not victims of the attacks but whose loved ones were shot and killed on the streets of same city, or whose daughters were raped, or whose family members were assaulted or murdered—none of whom were able to get [government-funded] compensation at anywhere near the amounts offered to the September 11 victims.}\textsuperscript{9}
\end{quote}

This is by no means intended to diminish the suffering of those affected by these horrific attacks\textsuperscript{10} or the effect of such public attacks on a nation’s psyche. Nor is it to denigrate the unprecedented work of the Fund’s Special Master Kenneth Feinberg in this instance. It is simply to situate \textit{ad hoc} government responses to victims of violence within pre-existing contexts and to highlight that any new system will be compared to the systems and norms currently in use\textsuperscript{11} – for better or worse.\textsuperscript{12}

\textsuperscript{8} For example, recent Australian crime statistics reveal that over one third of assaults occurring in the state of Victoria occur in the family environment. Incidents of rape are also cited as most frequently occurring within the family environment. Crime statistics are widely understood to reveal the tip of the iceberg, see ABC News Online, ‘Figures show alarming rise in domestic violence’, \textit{ABC News Victoria}, 30 August 2011 (Lisa Maksimovic) <http://www.abc.net.au/news/2011-08-30/crime-stats-reveal-alarming-rise-in-domestic-violence/2862124>. In a disturbing meta-analysis of five common law countries, Daly and Bouhours found that conviction rates for all sexual offenses reported to the police have significantly decreased in Australia, Canada, England and Wales, see Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ in Michael Tonry (ed), \textit{Crime and Justice: A Review of Research} Vol. 39 (University of Chicago Press, 2010) 565, 568-9. Victims of sexual violence who report it to the police find that 70 out of every 100 cases are dropped by the police, and a further 10 are dropped by the prosecutor (these figures refer to all sexual offenses in five common law countries [Australia; Canada; England and Wales; the United States; and Scotland]). Australia-specific figures reveal a similar pathway: of 100 reported to the police, the police drop 72, and the prosecution drop 8, see Daly and Bouhours at 608.

\textsuperscript{9} Young, above n 1, 11 (emphasis added). See generally Susan Herman, \textit{Parallel Justice for Victims of Crime} (National Center for Victims of Crime, 2010).

\textsuperscript{10} Indeed, Young, above n 1 asserts previously at 7: ‘Most cultures and communities rally around victims after particularly [public] traumatizing experiences – that was clearly evident in the outpouring of volunteers, resources, money, and other aid in the aftermath of the terrorist attacks of September 11, 2001. Yet as months go by, divisiveness begins to tear apart the supportive context, both among victims and survivors as well as among the helpers. The communities that seemed so resilient in the immediate aftermath of the attack find their own emotional resources depleted and the psychological needs of the victims may come into conflict with other needs. The consequence can mean that victims’ traumatization is extended and compounded.’

\textsuperscript{11} Stephanie Smith and Janet Martinez, ‘An Analytic Framework for Dispute System Design’ (2009) 14 \textit{Harvard Negotiation Law Review} 123, 128. In addition to being compared to the pre-existing state-funded victim compensation scheme, the remedies available via the September 11\textsuperscript{th} Victims Compensation Fund have also
In this article, ‘state-funded victim compensation schemes’ is a broad term referring to the government’s mechanisms for payment of public funds and any other provisions of assistance to victims who qualify. A central feature of state-funded victim compensation schemes is that the funds are public, that is, ‘they come from a source external’ to the wrong-doer (or liable third party) and ‘are awarded on the basis of a particular account of the needs of victims or … [in] the interest of the public good.’ This provision for victims – entirely separated from a particular wrong-doer, a criminal trial or civil proceedings – has been heralded as ‘one of the most significant’ justice developments in recent history. By emphasizing the victim’s recovery, it will be argued that government-funded victim compensation schemes allude to restorative justice, albeit restorative justice that is truly victim-centred and is therefore not contingent upon the outcomes or responses of a particular wrong-doer.

This article focuses attention on victims of violence resulting in personal injury (physical, psychiatric, psychological) irrespective of whether that particular violence has been legally been criticized as lacking when compared to other pre-existing legal and societal norms for dealing with mass injury and destruction, see generally Alexander, above n 5; Young, above n 1, 11. For a general discussion of ‘the role of local social and interpretive structures among actual actors in and between organisations’, see Calvin Morrill, ‘Chapter Seven: Conclusion: Orthodoxy, Change and Identity’ in The Executive Way: Conflict Management in Corporations (University of Chicago Press, 1995) 221, 217-228 (emphasis added).

12 See generally Alexander, above n 5.


deduced *a priori*. The latter is primarily in recognition of the need to be inclusive and flexible in the face of unknown but nonetheless certain future acts of violence. It also attempts to ensure equity and integration of public responses to victims of violence generally. It is proposed that victims of violence resulting in personal injury are a subset of the population for which Federal, State and Territory Governments of Australia can reach towards consensus and robust response.

This article is structured in two parts. Part One commences with a selected history of state-funded victim compensation schemes. Alternatives to state-funded victim compensation schemes are then presented, as the inadequacies of these alternatives provide strong argument for robust state-funded victim compensation schemes. A discussion of contemporary foreign schemes then ensues to highlight how various procedural design metaphors guide the remedies available. Key international and regional advances for victims are then discussed, as these, coupled with international comparisons, present significant opportunities and challenges to Australia’s approach to victims of violence. Part One concludes with an analysis of Australian state-funded victim compensation schemes and some of the consequences of the disarray.

Part Two looks to the future and presents an innovative plan for movement towards a national system for victims of violence in Australia. It is contended that state-funded victim compensation schemes hold potential to become a strong ally of victim-centred restorative justice, and an alternative form of justice for many who qualify for assistance. Key aspects of dispute system design, restorative justice, and trauma literature are incorporated into the proposed plan.

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19 According to Alexander, above n 5 at 689: The timing and exact location of future acts of violence are unknown, however, some aspects are foreseeable. For example, ‘terrorist attacks in the future might involve biological weapons, … “dirty bombs”’ and may ‘come on apartment buildings, bridges, or water supplies, or might take the form of cyber terrorism.’ Government responses to victims (including those involved in rescue and clean-up) can take heed of these known possibilities and should make provision for injuries that might ‘take months or years to manifest.’
PART ONE

II EARY BEGINNINGS: STATE-FUNDED VICTIM COMPENSATION SCHEMES

"Learn from the mistakes of others... you can’t live long enough to make them all yourself.

– Anon.

Very early notions of state-funded victim compensation schemes have been traced to records of The Babylonian Code of Hammurabi of approximately 2250 BC. For example, if a visitor was robbed or murdered in a city and the offender was not captured, the Code made provision for that city to compensate the victim or its heirs. Similarly, under Mosaic Law, if a person was found murdered and the murderer was unknown, the town nearest the location of the body was required to expiate by means of animal sacrifice at that town’s expense (otherwise, in this society, the entire community of Israel would be considered guilty of murder in the eyes of God). Childres, citing Mueller, notes that Hammurabi’s provisions were solely for travellers – situations where locals may not be so eager to extend local law enforcement efforts. Local victims in these very early societies typically sought restitution by the offender, or were guided by the principle of quid pro quo.

In later feudal societies, for example, the early Common Law of Middle England, provision

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21 Childres, above n 20, 444; O’Connell, above n 20, 2-3.

22 Childres, above n 20, 444; O’Connell, above n 20, 2-3. See also Holy Bible, Deuteronomy, Chapter 21, Verses 1-9. It is important to note in verse 9 that such compensation can be interpreted narrowly (ie, animal sacrifice only) or more broadly (ie, animal sacrifice plus any additional acts of generosity deemed appropriate), as indicated by the phrase ‘and doing what is right in the LORD’s sight’ (emphasis added). This latter, more inclusive interpretation is in keeping with the spirit of the law and may be useful in contending for contemporary and flexible expressions of solidarity and generosity to those affected by violence, expressions which go above and beyond the minimum that is stipulated by law.

23 Childres, above n 20, 444. See also O’Connell, above n 20, 3.

24 Albeit those with access to power.

25 Childres, above n 20, 444; O’Connell, above n 20, 3-4. Social relations during this time were ‘familistic, involuntary, primary, sacred, traditional, emotional, and personal’, see Marvin E Wolfgang, ‘Victim Compensation in Crimes of Personal Violence’ (1965) 50 Minnesota Law Review 223, 223. Interestingly, Mosaic law also makes provision for refuge from avengers for those who accidentally kill a person, see Deuteronomy, Chapter 19, Verses 1-10.
for punishment was made by the payment of money by the offender (or kin) to the victim.\textsuperscript{26} Germanic Europe\textsuperscript{27} and the Tokugawa shogunate (Japan)\textsuperscript{28} also emphasized the offender ‘making amends or remuneration for their wrongdoing.’\textsuperscript{29} Little, if any distinction was made between crime and civil tort – it was simply presumed that ‘the victim should be paid back for what he has lost or suffered, because he has experienced injury or wrongdoing.’\textsuperscript{30} In other words, ‘the ancients did not \textit{need} a law of crimes because they often dealt with murder, assault, and theft as private wrongs to be redressed by compensation or more brutal tort substitutes.’\textsuperscript{31}

As societies evolved further, the ‘state’ became increasingly involved in the settlement of disputes as a means of curbing private vigilantism and revenge. Initially, the state imposed a system of fines which effectively functioned as payment for that state’s participation in the dispute.\textsuperscript{32} This later grew into the separation of the criminal justice system from civil proceedings, whereby regarding crime: ‘the state became primarily responsible for imposing punishment based not only on harm done to individual victims but also harm done to the king or feudal lord.’\textsuperscript{33} Crimes were thus gradually ‘differentiated from other social wrongs on the grounds that they were so serious as to offend not only against the victim’s interests but against society as a whole… Now former private wrongs are regarded as wrongs against society.’\textsuperscript{34} Megret succinctly encapsulates the developments that then ensued:

\begin{quote}
With heightened state centralization and the idea that the criminal law could serve to protect the public order, \textit{fines} \dots \textit{began to be paid to the state rather than victims.} 
\end{quote}

\textbf{Criminal justice became a branch of public law, one devoted to the protection of a…}

\begin{footnotes}
\item[27] O’Connell, above n 20, 3-4. See generally Forer, above n 26; Wolfgang, above n 25.
\item[28] O’Connell, above n 20, 4; Wolfgang, above n 25, 223. See generally Forer, above n 26.
\item[29] O’Connell, above n 20, 4.
\item[31] Lindgren, above n 30, 56 (emphasis in original).
\item[32] O’Connell, above n 20, 4.
\item[33] Young, above n 1, 2; See also Clarence Ray Jeffery, ‘The Development of Crime in Early English Society’ (1957) 47 (March-April) Journal of Criminal Law, Criminology and Police Science 647.
\end{footnotes}
certain minimum social order.\textsuperscript{35}

The ramifications of these developments for injured parties were far-reaching, as O’Connell explains: ‘The advent of fining offenders of state law… had a profound effect on the administration of justice, not the least of which was a decline in interest in compensation and or [sic] restitution for victims.'\textsuperscript{36} The injured party was initially ‘assigned a subordinate, and eventually a non-existent, role in the process of trying the offender\textsuperscript{37} as the state developed an intricate and complex infrastructure for dealing with what it deemed to be crimes or torts (specific courts, specialized procedure, professional police force).\textsuperscript{38} Thus, crime gradually transitioned to become a wrong against the state for which the state could exact vindication by fining the offender and pocketing the bounty – all with little practical regard to those actually injured or wronged.\textsuperscript{39}

The injured party might, of course, seek redress through civil remedy – at their own expense, should they have the resources to do so, if they could identify and locate the offender and deem such action viable.\textsuperscript{40} However, civil remedies ‘were often neatly excluded from the criminal trial,’\textsuperscript{41} meaning that, if activated, civil proceedings took place long after the state had received its fine, thus often leaving little prospect for substantial victim recovery.\textsuperscript{42} European continental systems (and some civil law systems in South America) with a tradition of \textit{parties civiles} were the exceptions to these general rules, as they permitted victims to participate as triggering parties in the state’s prosecution case and enabled a compensation claim in the event of a guilty verdict.\textsuperscript{43} The state, though, for the most part, gradually

\textsuperscript{35} Megret, above n 13, 144-145 (emphasis added).
\textsuperscript{36} O’Connell, above n 20, 4.
\textsuperscript{38} Megret, above n 13, 145.
\textsuperscript{40} Schafer, above n 39, 55; Susan Kiss Sarnoff, \textit{Paying for Crime: The Policies and Possibilities of Crime Victim Reimbursement} (Praeger, 1996) 2, 18, 51.
\textsuperscript{41} Megret, above n 13, 144.
\textsuperscript{42} Ibid 145.
\textsuperscript{43} Megret, above n 13, 144; See C Howard, ‘Compensation in French Criminal Procedure’ (1958) 21 \textit{Modern Law Review} 387 (outlining the \textit{partie civile} system in France); Jean Larguier, ‘The Civil Action for Damages in French Criminal Procedure’ (1964-65) 39 \textit{Tulane Law Review} 687 (as per title). But also note that compensation in such circumstances was dependent upon the outcome for the offender. Victims whose offenders were not identifiable, or were not convicted, were usually ineligible for compensation. So, although applauded in theory, these kinds of compensation measures tended to reach only a handful of victims, see
dispossessed the victim of their central role in the criminal process and from any realistic prospect for reparation as a result of the trial. Where historically the victim of crime had ‘almost universally enjoyed the right to repatriations’ the state now ‘confiscated’ that right ‘without due consideration for the victim.’

The absurdity and inherent injustice of the system has been well documented. Jeremy Bentham was perhaps the first to take issue with criminal law and administration’s chronic neglect of the interests of those who suffered from violent crime. Adolphe Prins articulated at the often-cited Paris Prison Congress in 1895:

The guilty man lodged, fed, clothed, warmed, lighted, entertained, at the expense of the State in a model cell, issued from it with a sum of money lawfully earned, has paid his debt to society; he can set his victims at defiance; but the victim has his consolation; he can think that by taxes he pays to the Treasury, he has contributed towards the paternal care, which has guarded the criminal during his stay in prison.

Enrico Ferri, an Italian criminologist of the similar period, and later, Schafer similarly stress the irony of the State collecting its fine without actually providing relief to those victimized. The realisation of the historical injustice of the state interjecting between victim of crime and known offender (and thereby often curtailing victim recovery) provided

Young, above n 1, 9.


45 Wolfgang, above n 25, 240-41. Some would additionally argue that by the process of criminalizing what were traditionally tortious actions, the state is guilty of further distancing the injured from substantial recovery, see Burt Galaway and Leonard Rutman, ‘Victim Compensation: An Analysis of Substantive Issues’ (1974) 48 (1) Social Services Review 60. Although this may be true, much of this argument is predicated on the same assumptions: (1) the offender is identifiable, (2) the injured party has the necessary resources to sue, and (3) the offender is of substantial fiscal means. Each assumption constitutes a very big ‘if’ with respect to the victim receiving substantial recovery.


48 Ferri states: ‘[T]he State cannot prevent crime, cannot repress it, except in a small number of cases, and consequently fails in its duty for the accomplishment of which it receives taxes from its citizens, and then, after all that, it accepts a reward’, see Enrico Ferri, Criminal Sociology (1884) 514 (Joseph I Kelly and John Lisle translation) William W. Smithers ed. (Little, Brown & Co. 1917) quoted in Megret, above n 13,145-46. By ‘reward’, Ferri was referring to the State’s vindication by means of fining the offender.

49 See generally Schafer, above n 47.
damning evidence and required the state to proffer an alternative, as Elias surmises: ‘the case against the government is enhanced when one considers the barriers it creates against the victim’s being restituted by the offender.’

However, it was not until the 1940s and 50s when the activism of English Magistrate Margery Fry spurred broad interest in the plight of victims of crime. She is widely regarded as the impetus for modern victim compensation schemes. Her article in London’s *The Observer* in 1957 called on the public to correct their collective abandonment of victims of crime and to fulfil their responsibility by providing such victims with more effective remedies. In addition to arousing the public’s interest, her work provoked academic debate and stimulated government action throughout the developed countries of the former Empire. In 1963, New Zealand became the first common law country to initiate a state-funded victim of crime compensation scheme, just surpassing that of the United Kingdom.

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50 Elias, above n 37, 24. Elias perhaps simplistically overlooks the changed social conditions of contemporary society. See also Wolfgang, above n 25, 240-41. But see also H. Donnie Brock ‘Student Comment. Victims of Violent Crime: Should they be an Object of Social Affection?’ (1968-69) 40 *Mississippi Law Journal* 92, 100-1 (arguing that the benefits provided to citizens by the state far outweigh this occasional injustice, and thus, the state does not owe aggrieved citizens anything); David Miers, ‘Looking Beyond Great Britain: The Development of Criminal Injuries Compensation’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan, 2007) 337, 339 (arguing that the state’s responsibility to protect its citizens equates to providing a ‘fair share’ of public goods (law enforcement), with no further liability or guarantees). It should be noted, as was mooted earlier, that in some countries the state was not as guilty of intrusion and thus required less reversal, see Megret, above n 13, 145. Additionally, to many indigenous cultures of the world (where the state has not usurped traditional practices), this predilection may appear quite foreign, see Megret, above n 13, 145.

51 Margery Fry, ‘Justice for Victims’ (1959) 8 *Journal of Public Law* 191 (which reprints her article from London’s *The Observer* in 1957). See also Stephen Schafer, ‘Restitution to Victims of Crime – An OldCorrectional Aim Modernized’ (1965-66) 50 *Minnesota Law Review* 243. For an overview of earlier efforts towards compensation schemes – from places and times as diverse as Tuscany (1786), Mexico (1871), Italy (1921), Ireland (1836, 1919-1920) and the Republic of Czechoslovakia (1923) – see O’Connell, above n 20, 5-6.

52 See generally O’Connell, above n 20; Young, above n 1; Megret, above n 13; Schafer, above n 39; Garkawe, above n 44.

53 Fry, above n 51 (This journal article is a reprint of her 1957 article in *The Observer*). See generally Schafer, above n 39.

54 For example, see ‘Compensation for Victims of Criminal Violence: A Round Table’ (1959) 8 *Journal of Public Law* 191-253.

55 In common law countries, precedent in Great Britain was highly influential.

56 *Criminal Injuries Compensation Act 1963* (NZ). This legislation took effect on 1st January 1964. The initial scheme was replaced in 1972 with a general compensation scheme for all injured people, regardless of the cause of the injury. New Zealand’s current scheme is the Accident Compensation Corporation, enacted by legislation *Accident Compensation Act 2001* (Amended 2010), see <http://www.acc.co.nz/about-acc/index.htm>. See also Garkawe, above n 44.
itself in 1964. In the United States, California became the first state and thus the third government entity to instigate a comprehensive scheme in 1965. In 1967, Canada launched a number of provincial schemes. In that same year, New South Wales became the first Australian jurisdiction to initiate a scheme. In the following years and decades, state-funded victims of crime compensation schemes emerged in all US jurisdictions (including Federal), all Australian jurisdictions (excluding Federal), and across provincial Canada. Variations of state-funded victim compensation schemes now exist around the world and can be found in numerous European countries (for example, Switzerland, France, Luxembourg, Norway) and countries further afield such as the United Arab Emirates and Hong Kong.

57 See Joanna Shapland, ‘Victims, The Criminal Justice System and Compensation’ (1984) 24 British Journal of Criminology 131, 137-40; Garkawe, above n 44, 27. The Criminal Injuries Compensation Board was a non-departmental public body established in 1964 to award public funds to victims of violent crimes based on the amount of damages they could have been awarded in a civil claim. The Criminal Injuries Compensation Act 1995 (UK) established the current scheme (Criminal Injuries Compensation Authority [CICA]) in 1996. The CICA uses a tariff-based methodology which ‘approximates’ civil awards and caps claims to a maximum limit (note the different terminology).


59 See Megret, above n 13, 131-132, Elias, above n 37, 26.

60 Criminal Injuries Compensation Act 1967 (NSW). For the state’s contemporary scheme see Victims Support and Rehabilitation Act 1996 (NSW).


63 Galaway and Rutman, above n 45, 60.

64 Albrecht and Kilchling, above n 3, 199-245. This paper examines state-funded schemes for victims of violence in European countries alongside provisions for victims of terrorist attacks.

65 Ibid 241.


68 Ibid 229-30. As was noted earlier at above n 3, Norway’s scheme does not distinguish victims of terrorism from other victims of violence. How this national scheme fares in the wake of the recent July 22, 2011 massacres will undoubtedly be the source of debate and will almost certainly influence the state-funded victim compensation schemes of other countries.

69 O’Connell, above n 20, 7.
and Japan. Interestingly, China now has law that provides state-funded compensation for victims of abuse of power perpetrated by State officials, and it is hoped that state-funded compensation for victims of crime may one day be a possibility.

Given the proliferation of state-funded victim compensation schemes, an exploration of the inadequacies of other existing mechanisms for victims is warranted, since state-funded victim compensation schemes have been proffered in lieu their shortcomings, usually as a last resort. The following section explores these alternatives.

II ALTERNATIVES TO STATE-FUNDED VICTIM COMPENSATION SCHEMES

The ability and appetite of individuals to commit... atrocities generally far outweighs their ability to pay for them

– Frederic Megret, above n 13, 149.

Alternatives to state-funded victim compensation schemes include the victim absorbing their losses, restitution from the offender, reparations as per civil remedies, insurance, the scope for personal revenge, private charity, and social security (welfare). The inadequacies of each in Australia are discussed below.

72 Buck, above n 34, 158-59. See also Garkawe, above n 44, 31; Elias, above n 37, 20-22.
A Absorb the Losses

One option for victims aside from state-funded victim compensation schemes is for victims to simply absorb the losses or go without. Indeed, this is by far the most common option victims of violence in Australia take. 74 Australian author Sam Garkawe recently compared crime statistics with the number of applications for state-funded victim compensation schemes and estimates that up to 90% of eligible crime victims in Australia do not submit a claim for state-funded victim compensation. 75 Not knowing about the scheme and eligibility the typical requirement of reporting to the police plus co-operating ad infinitum with justice systems prior to receiving any benefit – systems well-known for inflicting further injury upon those already injured 76 – are most often cited by eligible victims as reasons why they do not make applications to state-funded victim compensation schemes. 77 Alarmingly, crime statistics are widely known to represent the tip of the iceberg: it can safely be assumed that well-over 90% of those actually eligible for benefits from state-funded schemes in Australia do not apply at all. Notwithstanding that ‘avoiding’ is the most common form of dispute resolution, when coupled with the aforementioned reasons victims give for not applying, these statistics reveal that a pandemic of epic proportions is plaguing victims of violence in Australia – a pandemic to which governments and the general public appear alarmingly silent.

Of those who do apply and successfully qualify for state-funded victim benefits, victims absorbing their losses (or going without) still features widely. From the selected history of state-funded victim compensation schemes presented above, it should be clear that state-funded victim compensation schemes provide ‘a highly politically acceptable means for

74 Garkawe, above n 44, 31.
75 Ibid 38. Note that not all applications are approved, nor are all losses covered within an approved application.
76 Elias, above n 73, 103-4. According to prominent trauma expert Judith Herman, ‘if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a [common law] court of law’, see Herman, above n 7, 574. Herman goes on to state that ‘Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to re-live the experience. Victims often fear direct confrontation with their perpetrators; the court requires face-to-face confrontation’.
77 Garkawe, above n 44, 38.
governments to be seen to be providing “something” to crime victims.’ Inversely, being seen to be doing nothing for victims of violence is not generally deemed to be in the political interests of a government. The fact that that ‘something’ seldom comes anywhere near close to covering all the losses incurred by victims of violence who qualify are details that most members of the population will probably only discover upon their own victimization and necessary involvement with a scheme, unless the publicity of a violent event or some other measure thrusts a scheme into the spotlight and precipitates change. The restrictive criteria, generally low amounts on offer and limited benefits provided by state-based victim compensation typically reveal that most governments still expect victims to play a large role in absorbing their own losses, or to simply go without. Moreover, the limited benefits of these schemes only partially ‘aid a minority of victims who are aware of their right to apply for compensation; have the necessary level of competence to apply or seek assistance to apply; and are actually prepared to go through with the process.’ That violent victimization frequently results in victims feeling alienation from their family, friends and community accentuates the extent to which victims literally absorb the loss or go without: the presumed informal networks of care cannot be relied upon to adequately sustain a person suffering violent victimization.

Thus, victims absorbing their own losses is by far the most often utilized solution to the problem of violent victimization in Australia, even with the operation of state-funded victim compensation schemes fully in play. It is contended that this government solution is unsatisfactory and that urgent action is necessary, if not for victims of violence themselves then at least for reason of the government’s own political self-interest in the wake of dramatic publicity. System design that addresses these factors form foundational pillars of the proposed national framework presented in Part Two.

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78 Garkawe, above n 44, 31 (emphasis added).
79 Elias, above n 73, 103.
81 As was the case with the September 11th Victims Compensation Fund.
82 For example, the release of Australian Productivity Commission’s Inquiry Report (2011), Disability Care and Support, above n 80.
83 Elias, above n 37, 20.
84 Garkawe, above n 44, 31; Young, above n 1, 5-6.
B Restitution from the Offender

The distinction between criminal and civil law differentiated crimes from other personal (civil) wrongs. Crimes are wrongs distinguished on the grounds that they hold a degree of severity requiring recognition by society as a collective whole.86 Crimes are considered ‘public wrongs that violate the community’s essential values’ and thus ‘require a public response.’87 Accordingly, ‘the purpose of criminal liability [is] to declare public disapproval of the offender’s conduct by means of public trial and conviction.’88 Restitution is a remedy for victims typically linked to the criminal trial. It is not intended to fully remedy non-pecuniary losses such as pain, suffering or the emotional damage of victimization.89 Restitution usually ‘involves payments, in either money or service, made by the offender to the victim of the crime’90 as stipulated by a judge as part of sentencing or as an outcome of restorative justice proceedings. Although a favourable authoritative decision by a judge holds potential to be significantly meaningful for some victims,91 as can an apology from an offender,92 the reliance on restitution as an effective remedy to restore victims of violence has been soundly criticised. In the case of court-ordered restitution, it presupposes that an identifiable, non-indigent offender has been caught, charged and found guilty, and that effective collection mechanisms are in place.93 In the case of restorative justice, it presupposes that an identifiable, apprehended offender feels so inclined as to agree to change their behaviour, provide restitution, and that effective enforcement mechanisms are in place.94 Australian restorative justice for victims of violence appears to presume that a ‘uniform’ victim is not so traumatized that they are able to meaningfully participate in the restorative process, confront their perpetrator, and that such ‘mediations’ are both safe and of benefit to

86 Buck, above n 34, 158.
88 Buck, above n 34, 159.
89 Smith, above n 73, 308.
90 Galaway and Rutman, above n 45, 60.
91 Young, above n 1, 4-8. As can a humanizing interaction with a person endowed with authority, such as was the case for some victims in the Dalkon Shield mass tort settlement, see generally Menkel-Meadow, above n 7.
92 Evaluating Victims Experiences, above n 7, 113-4.
93 Sarnoff, above n 40, 2, 18.
94 See generally Daly, above n 15; Cheon and Regehr, above n 18.
all victims. These scenarios contain enough contingencies to make significant victim recovery improbable.

As has been shown, court-ordered restitution and classic restorative justice outcomes do not reach the vast majority of those victimized by violence. Restorative justice advocates acknowledge that the overwhelming majority of those victimized by violence ‘never have their offenders apprehended and processed in the system’, be it restorative or otherwise. Reporting violence to law enforcement personnel does in no way guarantee an investigation, much less an arrest, least still the prospect of successful conviction – all usually pre-requisites for access to court-ordered restitution or typical restorative justice outcomes for victims of violence. Further, Cheon and Regehr (and many others) illuminate numerous, dangerous mismatches between restorative justice assumptions, principles and processes on the one hand (healthy community; ongoing relationship; shaming; apologising) and situations of intimate partner violence on the other (absent community, isolation from community, complicit community; unsafe relationship; absence of empathy trait in many abusers; the potential for restorative justice to collude with perpetrators). Their study warns against the

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95 The International Victimology Institute at Tilburg University (UK) recently took great pains to highlight the many complexities that Australian restorative justice advocates in particular overlook, see generally Evaluating Victims Experiences, above n 7. Australian Kelly Richards, above n 17, is apt to point out that those Australian victims who offer glowing reviews of Australian restorative justice processes do not actually represent the universe of victims, and that restorative justice lessons extrapolated from victims who experienced minor crime by juvenile offenders should not be so readily truncated as being applicable to all victims universally (especially not to those suffering heinous crimes). Others recognise that restorative justice practice is typically characterised by a ‘curvilinear relationship for participation rates for victims and the seriousness of the offence, with participation rates lowest for less serious offences ... and [also lowest] for the most serious’, see Menkel-Meadow, above n 16, 10.14. This curvilinear relationship adds further credence to the argument that those suffering the most severe violent victimizations are not accessing the justice system, be it restorative or otherwise. A face-to-face meeting between offender and victim may offer real benefits for some victims, but it can also pose real risks, depending on the timing of the meeting, the behaviour of the offender and their reason for committing the violence, see Evaluating Victims Experiences, above n 7, 105. This is all the more reason for capitalizing on state-funded victim compensation schemes as forums for victim-centred restorative justice, since the timing can be tailored to the victim’s progress in recovery, and the perpetrator’s motivation and constructive participation in the process is not required.

96 That is, restorative justice practice which hinges upon direct interactions and exchanges between victim and offender.

97 Evaluating Victims Experiences, above n 7, 103.

98 Umbreit, above n 18, 303. See also Herman, above n 9; Herman, above n 18.

starry-eyed application of restorative justice, disconnected from the decades of ‘accumulated knowledge and experience of how perpetrators of violence change and how victims recover.’

The vast majority of victims of violence do not identify themselves to any system of justice for valid reasons, most notably that legal systems are well-known for inflicting further injury to those already harmed. It is also recognised that legal processes are stressful for those supporting the victim. Those few victims of violence who do identify themselves to a system often find that that system presumes them to possess the resilience and resources necessary to sustain their involvement to the end; endings which, as has been shown, too often offer all but an illusive hope of meaningful recovery. This is where state-funded victim compensation schemes that require victims to report to the police and to sustain ongoing cooperation with the justice system ad infinitum can be faulted: the conduct of police and justice personnel (including their political interests), the adequacy of pre-existing resources of the victim, and a victim’s personal reservoirs of capacity following violent victimization are all hardly within the victim’s control. These roadblocks to accessing state-funded victim compensation schemes are addressed in Part Two.

State-funded victim compensation funds are justified in this context in that they provide a means of expressing public disapproval of violent behaviour, and a symbolic statement of

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100 Ibid 389. See also Stubbs, above n 85. See especially Annalise Acorn, Compulsory Compassion: A Critique of Restorative Justice (UBC Press, 2004).
101 Elias, above n 73, 103; Garkawe, above n 44, 38 [13]; Evaluating Victims Experiences, above n 7, 103.
102 Elias, above n 73, 103; Evaluating Victims Experiences, above n 7, 103. See especially Herman, above n 7.
103 Disability Care and Support, above n 80, 15.31. This reference is referring specifically to litigation but the experience of such stress can obviously be generalized to criminal processes as well: both systems are adversarial, and most victim-oriented supporters and professionals are not legally trained.
104 This author is aware of a number of incidents where police point-blank refused to even take a statement from victims of the most horrific acts of violence; a police report is a pre-requisite for applying for state-funded victim compensation in Australia (and elsewhere, such as the UK). Such occurrences are not infrequent and are often experienced as devastating and re-traumatizing by victims. Having been pre-warned that this might be her reception by police, one amazingly resourceful woman recounted how she handled such invalidation and betrayal at the hands of those who are paid to provide protection: in the presence of the belligerent police person, she promptly ‘feigned’ phoning a lawyer and carried on a one-sided conversation into her mobile. The police person eventually acquiesced and took down her statement, albeit begrudgingly and insensitively. They never did investigate and her application for state-funded victim compensation was refused, despite her having sustained medically verified internal injuries. Situations such as these do not only affect victims. This author knows of trauma experts who actively discourage clients from engaging with any branch of the justice system, including state-funded victim compensation. These experts represent victims who categorically should qualify for the highest levels of assistance.
public solidarity with those victimized by violence, all without the requirement of full-scale engagement with the too often fraught processes of the criminal justice system. The unlikely eventuality of convicting or securing restitution from a particular guilty person can also be side-stepped by the provision of state-funded victim compensation.

C Civil Remedies

In contrast to criminal law, civil law addresses wrongs (torts) that are the concern of only the private or individual. It is up to the injured party to consider and then initiate a civil claim ‘without the assistance of any public authority.’ If the wrongdoer is found liable for tortious damages, it is ideally their responsibility to internalize costs and restore the victim to ‘the position they would have occupied but for the wrongful act’ – an individualized remedy. This leads the discussion to the notion of reparations. Reparations include non-pecuniary losses and are ‘owed by a legal subject found liable for harm caused.’ Their ‘amount is based on the gravity of the harm suffered’, as a matter of right, with the aim to restore the victim to the situation they were in prior to that harm occurring. This remedy has been criticised for many of the same reasons as restitution. In addition, civil action requires the victim to bring tortious actions against the offender: launching and sustaining a civil lawsuit is financially and emotionally costly to victims, and often takes years. If successful, and there is no guarantee, damages awarded are seldom sufficient to cover all recovery costs plus legal fees. There is also the problem of collecting costs from the offender: even if found liable, offenders can file for bankruptcy. Thus, when the perpetrator is known, wealthy, well-insured or connected with a wealthy third party and the

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105 See generally Buck, above n 34.
106 Megret, above n 13, 143-52.
107 Ibid.
108 Marshall and Duff, above n 87, 7.
109 Buck, above n 34, 159. That is, without the assistance of professional law enforcement personnel.
110 Alexander, above n 5, 651.
111 Megret, above n 13, 135.
112 Ibid.
113 Sarnoff, above n 40, 51. See also Wolfgang, above n 25; Elias, above n 37.
114 Smith, above n 73, 309: ‘[A] poor victim … may seek lawyers who work on a contingency basis, though they are likely to select only those cases with strong evidence and then take a significant percentage of the winnings.’
115 Sarnoff, above n 40, 51. See also Wolfgang, above n 25; Elias, above n 37.
116 Elias, above n 37.
117 Sarnoff, above n 40, 51.
evidence is strong, civil litigation may be in the victim’s interests.\textsuperscript{118} For the large volume of victims whose circumstances do not meet these criteria, the potential of costs and risks associated with civil litigation frequently render it an implausible remedy.\textsuperscript{119} A suite of reforms commenced by the Australian Government in 2002 significantly curtails the amount of damages available in personal injury cases,\textsuperscript{120} further rendering such civil action unfavourable for victims and victim-related parties.

State-funded victim compensation schemes are justified in this context in that for the vast majority of those victimized by violence, civil remedies are, at best, unlikely to secure adequate relief. Like criminal restitution, pursuing civil remedies can result in further victimization. The time-frames and emotional and financial costs to victims also justify state-funded victim compensation in this context.

D Insurance

In Australia, insurance arrangements which may cover some victims of violence ‘broadly align with the cause of injury.’\textsuperscript{121} Common sources include public liability insurance, fault-based medical indemnity insurance, and workers compensation schemes (across Australia).\textsuperscript{122} Some jurisdictions have mandatory, no-fault third party motor vehicle insurance (for example, Victoria); other jurisdictions have fault-based arrangements for motor vehicle insurance (for example, Western Australia).\textsuperscript{123} Each of the existing insurance schemes varies widely in terms of coverage, accessibility and benefits.\textsuperscript{124} For Australians victimized by

\textsuperscript{118} Smith, above n 73, 309.
\textsuperscript{119} Ibid. See also Sarnoff, above n 40, 51. The September 11th Victim Compensation Fund deliberately mimicked mass tort litigation and settlement with the expressed aim to entice victims of violence away from civil remedies in order ‘to keep the airlines running’ by ‘shielding the airlines from tort liability in excess of their insurance coverage’, see Alexander, above n 5, 635, 672.
\textsuperscript{120} Australian Government 2004, as cited in \textit{Disability Care and Support}, above n 80, 15.7-15.8, 15.36. The ‘Box’ at 15.8 provides a succinct summary of these reforms.
\textsuperscript{121} \textit{Disability Care and Support}, above n 80, 15.2. See generally Chapters 15 and 16.
\textsuperscript{122} Ibid 15.2.
\textsuperscript{123} Ibid. The Australian Productivity Commission recently criticised existing fault-based insurance schemes for many of the reasons associated with law courts outlined above and also because ‘people’s future needs are unpredictable and poorly captured by a once-and-for-all lump sum, compensation is often delayed, and there is a risk that lump sums are mismanaged; adversarial processes and delay may hamper effective recovery and health outcomes; in the presence of insurance … the common law does not provide incentives for prudent behavior’, see \textit{Disability Care and Support}, above n 80, 15.1. See also Chapters 15 and 16.
\textsuperscript{124} See generally \textit{Disability Care and Support}, above n 80, Chapters 15 and 16.
violence, this means that ‘the amount, nature and timeliness of support’ is dependent upon the location of the victimization and its exact circumstances.125

If a victim of violence fails to qualify for coverage from existing insurance schemes, state-funded victim compensation schemes are offered as an avenue of last resort.126 However, with the exception of the Australian Victims of Overseas Terrorism Payment (AVTOP), no state-funded scheme covers violent victimization that occur outside their jurisdiction.127 Also, unlike some of the above insurance arrangements, state-funded victim compensation schemes typically exclude damage to property for pragmatic reasons: property coverage would substantially increase costs to government and citizens are generally expected to have taken out private property insurance.128 Victims of terrorism or mass violence on Australian soil might qualify for the Australian Government Disaster Recovery Payment – a one-off payment of $1,000 per adult and $400 per child administered by Centrelink.129

The Australian Government does not consider it reasonable to expect victims of violence to hold personal injury insurance against violent attack, irrespective of it occurring in Australia or abroad.130 In 2012 – more than a decade after the September 11th attacks131 – the Australian Government enacted its Australian Victims of Terrorism Overseas Payment

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125 Ibid 15.2. The Australian Productivity Commission recently promulgated a National Injury Insurance Scheme (NIIS) to ensure consistent coverage for catastrophically physically injured Australians regardless of who is at fault, see ibid Chapters 15 and 16. See section ‘IV Government-Funded Schemes from Abroad: Metaphors and Examples: B Insurance Metaphor’ and the notes therein for further discussion of the NIIS.

126 Buck, above n 34, 158-59. See also Garkawe, above n 44, 31; Elias, above n 37, 20-22.

127 The Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) provides an Australian Victims of Overseas Terrorism Payment which covers only Australian victims of terrorism attacks overseas. See also Peter Yeend, Social Policy Section, Parliament of Australia, Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 Bills Digest, No 99 of 2010-11, 11 May, 2011, 12.

128 Garkawe, above n 44, 27.


130 Garkawe, above n 44, 27. The Federal Government is relying upon the State and Territory state-funded victim compensation schemes to support victims of terrorist acts occurring on Australian soil. This raises other questions since, unlike the United States, Australia has no Federally funded victim compensation scheme for victims falling within the Federal jurisdiction. Section ‘VI Australia’ delves into these issues in more detail.

The AVTOP differs substantially from other major schemes by countries for victims of terrorism: it does not reflect the right to insure against the risk of being a victim of a terrorist attack, nor is the Payment in the form of formal compensation. Instead, the AVTOP mimics state-funded victim compensation schemes. It provides discretional ‘financial assistance’ up to a capped amount ($75,000) for Australians injured due to an overseas terrorism act (primary victim), and to close family members of Australians who are killed or who die within two years from sustaining injuries from an overseas terrorism act (secondary victim). It is unclear whether the amount is intended to meet the costs victims incur whilst overseas (for example, accommodation, health care, transport, personal support) as per previous ad hoc Government responses, or if it is an additional amount. The intersection between other sources of payments to victims (including private charity) and the AVTOP is also unaddressed, despite the publicity of this intersection with respect to the September 11th Victim Compensation Fund. If, like the September 11th Victim Compensation Fund, it is decided that charitable donations are exempt, then it raises the issue of fairness with respect to victims of terrorism and non-terrorist violence in Australia – especially since the Australian Government has chosen to mimic state-funded victim compensation schemes. If other sources (non-charitable) are also exempt, it begs similar questions. If the AVTOP is an additional amount to the expenses victim of terrorism incur whilst overseas, this raises questions about the level of support similarly situated victims incur whilst overseas.

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132 Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth). See generally Yeend, above n 127.
133 As per the measures in the United States, see Terrorism Risk Insurance Act 2002, Pub L No 107-297, 116 Stat 2322 (codified at 15 USCA § 6701 note) (2002). Following the September 11th attacks, this federally administered terrorism risk insurance scheme aims to guarantee the availability of casualty and property insurance for acts of terrorism, along with protecting the insurance industry from the risks and uncertainties of losses arising therein. Australia has not experienced a strong human rights thrust, unlike the United States and much of Europe, see Garkawe, above n 44, 32-34, 38 [9].
134 In contrast to the arrangements in Israel, see Benefits for Victims of Hostilities Law, 5730 – 1970 (Israel). For details of these benefits in the broader context of the National Insurance Institute of Israel, see Victims of Hostilities <http://www.btl.gov.il/English%20Homepage/Benefits/Benefits%20for%20Victims%20of%20Hostilities/Pages/default.aspx>. See Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) 1061PAH.
135 Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth). See also Yeend, above n 127, 4, 22.
136 Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) 1061PAD(3), 1061PAE(3). See also Yeend, above n 127, 17-21.
137 Yeend, above n 127, 13-16. Yeend discusses the variety of the Australian Government’s ad hoc responses to victims of specific overseas disasters occurring in the last ten years.
138 See generally Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth). See also Yeend, above n 127, 22.
139 See, for example, Alexander, above n 5, 675-80.
terrorism or more broadly violence) in Australia receive, especially in light of the limitations of welfare and the capped maximum benefit available through state-funded schemes. It appears that, one decade on from September 11th, lessons have not been learned and no real thought has been given to procedural design. If anything has been learned from September 11th it is that the time to answer these questions is not in the wake of a tragedy.

Some countries, for example, New Zealand, chose early on to move away from government-funded victim compensation schemes in favour of a national general injury insurance scheme, regardless of the cause of injury. This answered in some way the criticism that state-funded victim compensation is unjustified because it singles out one particular subset of the population to have their harm partly shouldered by the collectivity. However, any scheme may be criticized for whom it includes and whom it does not; herein lies an inherent tension for which any program requires rationale.

E Personal Revenge

Anger is a healthy response following violent victimization, and fantasies of revenge by victims of violence are common. However, victims of violence seldom enact personal

140 Ibid 634.
141 See note at above n 56. New Zealand’s scheme is examined in section ‘IV Government-Funded Schemes From Abroad: Metaphors and Examples’.
142 Megret, above n 13, 143; Miers, above n 73, 6. Other objections to state-funded victim compensation schemes are decidedly more obtuse and will only be mentioned here. For example, it has been asserted that the provision of state-funded victim compensation schemes might result in would-be victims engaging in risky behaviour so as incite victimisation to garner public funds, and that the provision of state-funded compensation may be viewed by wrong-doers as licence to commit offences with peace of mind, knowing that their victims will be provided for, see generally Samuel Cameron, ‘Victim Compensation Does Not Increase the Supply of Crime’ (1989) 16 Journal of Economic Studies 52. This research concludes that there is no statistical evidence to support the claim that victim compensation schemes increase the level of crime. Note also that qualification criteria for state-funded victims compensation schemes typically restricts eligibility to ‘innocent’ crime victims, for example, the United Kingdom’s current Criminal Injuries Compensation Authority, see <http://www.justice.gov.uk/guidance/ compensation-schemes/cica/am-i-eligible/index.htm>. Note also that intentional perpetrators of violent victimization typically lack the personality trait of empathy (see Cheon and Regehr, above n 18, 389), which would be required for the latter obtuse objection to be substantiated.
revenge.\textsuperscript{145} Meting out justice to others is usually illegal, and the rights of the accused are firmly protected by the law.\textsuperscript{146} Further, personal revenge ‘breeds lawlessness and disorder’\textsuperscript{147} and as such, governments can hardly promulgate it as a remedy that victims of violence should rely upon. At an intra-personal level, excessive anger rumination and revenge fantasies are associated with prolonged symptoms of victimization.\textsuperscript{148} Thus, the decision by government to award benefits from its state-funded victim compensation schemes holds potential to symbolise validation for feelings of anger by victims of violence and may contribute to the alleviation of these feelings ‘even if the amount is significantly less than the expense.’\textsuperscript{149} However, if those benefits are delayed, denied or otherwise less than anticipated, state-funded victim compensation schemes can exacerbate victims’ anger and prolong victimization.\textsuperscript{150} Part Two contains provisions for validation.

\textbf{F Private Charity}

Australians are renowned for their generosity in the immediate aftermath of devastating disasters.\textsuperscript{151} However, like most countries, the provision of charitable funds often depends upon the extent to which a particular event is publicized politically.\textsuperscript{152} Donations to charity commonly wane after the initial outpouring.\textsuperscript{153} Charity is thus considered an inequitable and

\textsuperscript{144} Evaluating Victims Experiences, above n 7, 111. See generally Herman, above n 7; James Ptacek, ‘Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work’ in James Ptacek (ed), Restorative Justice and Violence Against Women (Oxford University Press, 2010).

Susan Herman, Parallel Justice for Victims of Crime (National Center for Victims of Crime, 2010).

\textsuperscript{145} Megret, above n 13, 159. The words of Ghandi spring to mind: ‘An eye for an eye and the whole world will go blind.’

\textsuperscript{146} Megret, above n 13, 159. He goes on to state: ‘Domestically … this idea that victim compensation will prevent mob justice is something of a fiction; for many centuries victims did not receive any compensation from the state, yet only in exceptional circumstances did they resort to extreme measures.’

\textsuperscript{147} Elias, above n 37, 21.

\textsuperscript{148} Evaluating Victims Experiences, above n 7, 111.

\textsuperscript{149} Young, above n 1, 6.

\textsuperscript{150} Ibid. Such were the criticisms leveled at the September 11\textsuperscript{th} Victim Compensation Fund, see Young above n 1, 11; see generally Alexander, above n 5.

\textsuperscript{151} Charitable donations to those effected by the 2009 Victorian Bush Fires ($379 million raised, see <http://www.dhs.vic.gov.au/bushfireappeal>), and the 2010-11 Queensland floods (over $290 million raised, see <http://www.qld.gov.au/floods/>), provide examples of local expressions of charity. Donations to those effected by the 2011 earthquake in New Zealand (over $7.9 million raised, see <http://www.redcross.org.au/NZEQ2011.htm>) provide an example of Australian generosity abroad.

\textsuperscript{152} Alexander, above n 5, 653-5.

\textsuperscript{153} Young, above n 1, 7.
unreliable source for victims of violence. Reliance upon private charity (as with public welfare) also tends to be experienced by victims as demeaning.

The silent and ongoing nature of the pandemic of victims of violence in Australia makes donations from private charity unlikely, with the exception of victims of acts of public violence, for example, terrorist acts, mass destruction, and particular victimizations publicized by the media. That victims of a particular public violent event can garner more charitable attention than similarly situated victims of other public violent events, or other private violent events, also raises issues of equity. State-funded victim compensation schemes are justified in this context in that they are seen to provide a reliable and equitable distribution of limited resources to all deserving persons.

G The Welfare State

The Australian Government via Centrelink provides social security payments for income for persons unable to work for a variety of reasons. This source of income – an amount well below that of the minimum wage – is means tested. People with savings who are unable to work are required to endure mandatory waiting periods before they qualify for assistance; waiting periods are based on level of personal savings and assets and can extend for months, taking no account of the need for urgent personal expenditure. For victims of violence with savings who are unable to work, this means that their prudence in saving is effectively penalised by the Australian government, and they are not infrequently drawn into the poverty cycle. Prior to September 2009, those rare victims of violence who received an amount from

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154 Elias, above n 37, 22. For a discussion of the intersection between private charity and the September 11 Victim Compensation Fund, see Alexander, above n 5, 675-80, noting also the discussion of charitable donations earmarked for certain September 11 victims but not others.

155 Elias, above n 37, 22.

156 Alexander, above n 5, 653-5.

157 Young, above n 1, 11; Alexander, above n 5, 653.

158 Although, as shown above, access by all deserving persons is a matter of fiction.


160 Fair Work Australia sets the minimum wage at $622.20 per week, see National Minimum Wage <http://www.fairwork.gov.au/pay/national-minimum-wage/Pages/default.aspx>. Centrelink income payments range between $250.50 – $447.3 per week ($501 – $894.60 per fortnight) for a single adult with no dependents, see Centrelink, above n 159. Given the sudden increase in health costs many people victimized by violence face – on top of normal living costs – these income amounts really are inadequate.

161 Centrelink, above n 159.

162 Ibid.
their relevant state-funded victim compensation scheme had their welfare payments jeopardized as a result.\textsuperscript{163} As it currently stands, the Australian government maintains an inconsistent stance towards state-funded benefits for victims: although victim benefits are now exempt from Social Security law, the Australian Tax Office might still take a slice of any amount awarded for loss of income.\textsuperscript{164} Given that state-funded benefits to victims already come from the public (that is, taxpayer) purse of the relevant State or Territory, the Australian Government may be accused in this instance of acting unconscionably, by claiming its interest at the expense of the victim and against the intentions of the taxpayers of the State.

The Australian Government via Medicare provides hospital, subsidised medical and pharmacological treatment to all Australians,\textsuperscript{165} which includes victims of violence. Access to Medicare subsidised counselling sessions for Australians was reduced to a maximum of five sessions per annum in 2011, following this services’ recent introduction in 2006 at a higher rate (up to 18 sessions per annum).\textsuperscript{166} Government-funded housing, health, disability and social services are all in crisis due to chronic lack of funding and co-ordination.\textsuperscript{167} For victims of violence who sustain injuries requiring mid-to-long term – if not lifelong – support and specialized services,\textsuperscript{168} these one-size-fits-all welfare provisions do not provide the urgent, ongoing tailored solutions necessary.\textsuperscript{169}

\textsuperscript{163} \textit{Social Security Act 1991} (Cth) s 17(2) (Amended 2009) (State and Territory funded compensation for criminal injury is now unequivocally exempt from Social Security law).

\textsuperscript{164} \textit{Income Tax Assessment Act 1997} (Cth) s 6-5(2), see also Taxation Determination TD 93/58 (Cth) <http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=AND~compulsory~basic~exact&target=FA&style=html&sdocid=TXD/TD9358/NAT/ATO/00001&recStart=1&PiT=99991231235958&recnum=4&tot=33&pn=ALL:::FA>; \textit{Federal Commissioner of Taxation v Dixon} (1952) 86 CLR 540. It is cold comfort that the granting of state-funded victim benefits which include a symbolic gesture towards loss of income is rare amongst approved applications. Amounts awarded for loss of income are also typically capped, for example the Victorian scheme caps loss of earnings at $20,000, see Victims of Crime Assistance Tribunal <http://www.vocat.vic.gov.au/financial-assistance-available/types-assistance-available>. However, it should be noted that Australian Victims of Terrorism Overseas Payments are entirely tax exempt, see \textit{Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012} (Cth) Amendment to \textit{Income Tax Assessment Act 1997} s 52-10(1K).

\textsuperscript{165} Medicare Australia <http://www.medicareaustralia.gov.au/>.

\textsuperscript{166} Australian Psychological Society, \textit{Medicare – Services Provided by Psychologists} <http://www.psychology.org.au/medicare/>.

\textsuperscript{167} See generally \textit{Disability Care and Support}, above n 80.

\textsuperscript{168} See generally ibid Chapters 15 and 16.

\textsuperscript{169} Ibid 15.27-15.28.
Unfortunately, provisions for victims via state-funded victim compensation schemes in Australia fall prey to these same limitations, most notably due to the caps in place and the limited process options available to victims. The maximum total benefit available to a victim of violence ranges between $25,000-$75,000 depending on jurisdiction. To access these limited maximums, a significant level of evidence is required, in addition to surmounting the obstacles already outlined. A result is that victims of violence who manage to surmount the obstacles in applying are still not covered for their future care needs. Tailored process options for victims in state-funded schemes are virtually non-existent in Australia. Victims are expected to report the violence to the police, co-operate with officials ad infinitum, provide all necessary reports to the scheme and then keep on waiting to hear word of the outcome of their application, usually for an unspecified length of time. Multi-process possibilities for victims are discussed in Part Two.

Not only is there the opportunity for state-funded victim compensation schemes to be more generous, it is contended that state-funded victim compensation schemes hold potential to address the desire for justice often held by those victimized by violence. This potential is entirely absent in welfare, charitable and insurance responses. This potential is seldom met by restitution from the offender (as per criminal or restorative justice outcomes) nor through civil remedies, as per the obstacles described above.

Each of the above proffered alternatives to state-funded victim compensation schemes have been tried and found wanting. Elias summarises: ‘Victims have few other ways of seeking assistance, and most of them… are either ineffective, unreliable, or unacceptable.’

Given the wide acceptance of state-funded victim compensation schemes and their proliferation throughout the world, the following section considers a selection of contemporary state-funded victim compensation schemes and the procedural design metaphors that guide their functioning. International comparisons highlight opportunities and challenges for Australia’s response to victims of violence.

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170 Ibid 15.27.
171 Ibid.
172 Ibid 15.27-15.28. See generally Chapters 15 and 16.
173 Elias, above n 73, 106.
IV GOVERNMENT-FUNDED SCHEMES FROM ABROAD: METAPHORS AND EXAMPLES

Although the world is full of suffering, it is also full of the overcoming of it.

– Helen Keller.

The procedural design of a victim compensation scheme ‘will often hinge on how it has been conceived and its fundamental purpose.’

This section presents three foreign schemes, the metaphors that guide them and the remedies available.

A Mass Tort Litigation and Settlement Metaphor

Perhaps the most well-known – and controversial – government-funded victim compensation scheme is the September 11th Victim Compensation Fund of 2001, created by the US Government in the wake of these unprecedented attacks. The September 11th Victim Compensation Fund ‘was a last-minute addition to an airline bailout bill.’ The Fund deliberately mimicked mass tort litigation and settlement amounts with the expressed aim to entice victims away from civil remedies in order ‘to keep the airlines running’ by ‘shielding the airlines from tort liability in excess of their insurance coverage.’ The scheme ‘was not placed within an existing procedural or administrative framework’ but was rather ‘created as a freestanding program to be administered by a special master… whose awards would be paid directly from the national treasury.’ The statute allocated almost every detail of the Fund’s design to the special master. Eligible victims are those who met the criteria specified in the statute (physical injury or death at site of terrorism, medically verified as manifesting within 72 hours) and Special Master Feinberg determined victim’s awards via a hybrid grid he developed, which allowed departures for unusual circumstances. This included a flat sum for non-economic losses ($250,000) plus other tailored provisions based on loss of earnings, actual out-of-pocket health expenses and the like.

174 Megret, above n 13, 143; Alexander, above n 5, 629-30.
175 See note at above n 4 for the legislation.
177 Alexander, above n 5, 635, 672.
178 Ibid 627.
179 Ibid. See generally Fein and Alexander, above n 176.
180 Fein and Alexander, above n 176, 705-6.
181 Ibid 706. This reference provides an excellent table that summarizes the method for calculation of awards.
settlement that the Fund also adopted is its multi-track options.\textsuperscript{182} Claimants could elect one of two ‘tracks’ in advance: Track A (swift and certain remedy of presumed award) or Track B (an evidentiary hearing with opportunity to argue for a higher award).\textsuperscript{183}

According to Alexander,

Many aspects of the September 11\textsuperscript{th} Fund that have troubled claimants and observers flow from the contradiction of adopting a tort litigation and settlement claims administration model for a government entitlement program… Tort-type compensation takes people who were killed together in a terrible national trauma and says some are more valuable than others – and that wealthy people deserve more government assistance. Moreover, a tort measure of compensation makes the system harder to administer, more costly of the taxpayer, and more out-of-sync with how other similarly situated persons are treated.\textsuperscript{184}

The September 11\textsuperscript{th} Victim Compensation Fund is unique and is likely to never be repeated. Specific lessons learned from this Fund point to the importance of the equality and KISS\textsuperscript{185} principles in responding to victims of terrorist violence: standardized payments that are the same for everyone, standardized adjustments based on needs (such as dependents and disability) and non-cash benefits such as housing assistance, education and medical care.\textsuperscript{186} In general, the use of the metaphor of mass tort litigation and settlement highlights the possibility of multi-process options for victims, the provision of a setting where victims can give voice to their experience and its consequences, and to be heard by a sympathetic

\textsuperscript{182} The Dalkon Shield Claimants Trust provides an example of multi-track process in a mass tort litigation and settlement setting, see Alexander, above n 5, 681-3; see generally Menkel-Meadow, above n 7. Claimants could chose from three options regarding their remedy: option 1, short form and instant offer (application in the form of an affidavit claiming use of device and injury, instant fixed payment in exchange for a full release); option 2, claim form and tailored offer (application in the form of medical records substantiating use and injury, scheduled compensation depending on the nature of the injury); option 3, claimant provides more evidence such as evidence of causation and damages, and if proven, receives a settlement offer based on historical litigation settlements and reserves the right to appeal if unsatisfied.

\textsuperscript{183} Alexander, above n 5, 681-3.

\textsuperscript{184} Ibid 689-90 (emphasis added).

\textsuperscript{185} Keep it Simple, Stupid.

\textsuperscript{186} Alexander, above n 5, 690-1. See especially Kenneth R. Feinberg, \textit{What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11} (PublicAffairs, 2005). Unfortunately, Ken Feinberg has since undermined his own recommendations for the future by using a mass tort litigation and settlement model for awarding compensation for the BP oil spill, see \textit{Golf Coast Claims Facility} <http://www.gulfcoastclaimsfacility.com/>.
‘matched’ person endowed with authority.\textsuperscript{187} Independent of the compensatory aspect of the Fund, the thoughtful emergence of the September 11 Memorial and Museum at the World Trade Center site\textsuperscript{188} and the Pentagon Memorial\textsuperscript{189} provide poignant reminders that some of the most helpful choices of system design are actually qualitative in nature, especially in the aftermath of human tragedy.\textsuperscript{190}

**B Insurance Metaphor**

Some countries have moved away from state-funded victim compensation schemes for victims of violence in favour of nationally funded general injury insurance, regardless of the cause of injury. The country of New Zealand has a long history of integration of personal injury law and social welfare principles,\textsuperscript{191} and their scheme provides one of the earliest insurance examples.\textsuperscript{192}

New Zealand’s Accident Compensation Corporation\textsuperscript{193} (ACC) provides comprehensive, no-fault, general injury insurance cover to New Zealand residents and visitors to New Zealand, irrespective of the cause of injury. Injuries sustained by any means (at work, home, school, on the roads, on farms, in schools) are all covered by the ACC. This includes victims of violence and those close to them. Benefits are extensive and are tailored to each individual’s needs. Examples of benefits include medical care (doctors, prescription medications), counselling, weekly compensation, home modifications, transportation (including vehicle modification or a vehicle grant), attendant care, childcare, home help, vocational rehabilitation, and lump sum payments for those permanently impaired by injury and by the deceased’s survivors.\textsuperscript{194} Victims’ rights to sue defendants for exemplary damages – parallel

\textsuperscript{187} See generally Menkel-Meadow, above n 7. See also Alexander, above n 5, 681.

\textsuperscript{188} 9/11 Memorial <http://www.911memorial.org/>.

\textsuperscript{189} Pentagon Memorial <http://pentagonmemorial.org/>.


\textsuperscript{191} Disability Care and Support, above n 80 15.34-15.35.

\textsuperscript{192} See note at above n 56 which specifies the New Zealand scheme’s legislation and history. See also ACC (NZ) <http://www.acc.co.nz/>.

\textsuperscript{193} Accident Compensation Corporation (NZ) <http://www.acc.co.nz/index.htm>. See also Accident Compensation Act 2001 (Amended 2010) (NZ).

\textsuperscript{194} ACC (NZ) <http://www.acc.co.nz/making-a-claim/what-support-can-i-get/index.htm>.
and exempt from ACC compensation – is universally retained. The ACC is funded through levies on people’s wages, businesses’ payrolls, the cost of petrol and vehicle licensing fees, along with government funding. New Zealand’s national, streamlined, comprehensive ‘insurance-model’ response to all injured persons inspired the Australian Productivity Commission and has lead to the creation of Disability Care Australia.

A no-fault National Injury Insurance Scheme (NIIS) was promulgated in Australia by the Productivity Commission as part of its proposal for the National Disability Insurance Scheme (NDIS). The NIIS’s aim is to provide a consistent level of care for those with catastrophic physical injuries. The NIIS does not extend coverage for catastrophic psychiatric nor catastrophic psychological injuries, even though the Productivity Commission cites benefits offered by state-funded victim compensation schemes in Australia to those suffering catastrophic criminal injuries as ‘trivial’. This is an issue of equity: equally deserving persons living in the same state receiving radically different amounts of assistance and radically different access to care and support based merely on the presence or absence of physical injury. The Commission and Disability Care Australia are noticeably silent on how the NDIS and NIIS would interact with the already existing state-funded victim compensation schemes. The national roll-out of the NDIS commenced in mid 2013 and the range of impairments that the scheme covers is welcomed: those with permanent and disabling physical, intellectual, neurological, cognitive, sensory and psychiatric impairments are covered. How this pioneering scheme evolves will be the subject of much scrutiny in the months and years ahead.

196 ACC (NZ) <http://www.acc.co.nz/about-acc/overview-of-acc/how-were-funded/index.htm>.
197 See generally Disability Care and Support, above n 80. See also National Disability Scheme Act 2013 (Cth).
198 Disability Care and Support, above n 80, Chapters 15 and 16.
199 Ibid.
200 Therefore, whilst a very welcome advance for people suffering catastrophic physical injuries, it is contended that these other equally debilitating and costly injuries should receive equal attention, including lifelong, tailored interventions.
201 See Disability Care and Support, above n 80, 822.
202 National Disability Scheme Act 2013 (Cth) Chapter 4, ss 58-9. See generally Disability Care and Support, above n 80, Chapters 15 and 16. It would be interesting to consider the feasibility of Australian state-funded victim compensation schemes purchasing private health insurance as part of their benefits for victims whose injuries are mid-long term, however, that is outside the scope of this paper.
C Alternative to Recovery from the Offender and Social Solidarity Metaphors

The United Kingdom’s Criminal Injuries Compensation Authority (CICA) is an example of a state-funded victim compensation scheme framed primarily on the metaphor of a substitute for recovery from the offender but also alludes to the metaphor of social solidarity. Operating in England, Scotland and Wales, the CICA ‘allows blameless victims of violent crime to get a financial award.’ Awards are considered symbolic gestures of public sympathy and are granted in recognition of the suffering of ‘blameless’ victims – defined as those deemed not to have contributed in any way to their own injuries – and as financial assistance that may help the victim ‘move on.’ Unlike a trial, claims officers decide cases on the balance of probabilities. However, to access the scheme, victims are expected to have fulfilled their ‘public duty’ by making a full police report and doing ‘everything possible’ to help the police and the courts ‘catch and convict’ the perpetrator.

To determine the remedy, the CICA uses a tariff-based methodology where each type of injury is given a value set by Parliament (‘the tariff’) ranging from £1,000 to £250,000. Multiple injuries are calculated on a significantly discounted percentage basis. Loss of earnings (paid from 29th week away from work) and special benefits (approved items which fall outside that provided by the National Health Service) may also be applied for, however, any one claim is capped to a maximum limit of £500,000. Awards are decided as a lump sum using a complex multiplicand and a multiplier.

206 Criminal Injuries Compensation Scheme 2008 – A Guide, above n 204, 24-25 [37]. The CICA has been criticized as falling prey to ‘bureaucratic creep’ by looking for reasons to reduce or refuse claims. For this and other criticisms, see Neil Sugarman, ‘The Criminal Injuries Compensation Scheme’ (2011) 2(2) Social Care and Neurodisability 97, 98-104.
207 Criminal Injuries Compensation Scheme 2008 – A Guide, above n 204, 12 [20], [19].
210 Ibid 51-60.
211 Ibid 2.
212 Criminal Injuries Compensation Authority, above n 205, 25-6.
The scheme does not offer education or training for victim-oriented stakeholders in *legally* discerning and describing the assault and injury: both crucial steps ‘to ensure that full, proper and relevant evidence gathering is undertaken’ so that victims receive their full entitlements.\(^{213}\) Nor does the CICA pay for legal assistance in filing an application.\(^{214}\) The scheme explicitly recognises that ‘the award can never fully compensate for all the injuries suffered,’\(^{215}\) nevertheless, the CICA is internationally regarded as one of the most generous schemes in the world.\(^{216}\) It certainly appears much more generous than current Australian victim compensation schemes which cap maximum benefits between $25,000-$75,000 (all inclusive).\(^{217}\) Importantly, it should be noted that the CICA’s tariff amounts conspicuously favour physical injuries over even medically verified permanently debilitating psychiatric injuries,\(^{218}\) with multiple physical injuries capable of being tallied for an award amount whereas multiple psychiatric and psychological injuries cannot.\(^{219}\)

In an ever increasingly globalised world, key advances for victims at international and regional levels remain highly influential in the domestic context of Australia. The following section provides an overview of these advances and points to implications for Australian state-funded victim compensation schemes.

\(^{213}\) Sugarman, above n 206, 97. Stakeholder education, training and involvement are considered a vital aspects of quality dispute system design, see Smith and Martinez, above n 11, 128.

\(^{214}\) Criminal Injuries Compensation Authority, above n 205, 8 [19].


\(^{216}\) Megret, above n 13, 135. However, substantial criticisms have been raised by those more familiar with the scheme, see Sugarman, above n 206, 98-104.

\(^{217}\) *Disability Care and Support*, above n 80, 15.27-15.28.

\(^{218}\) For example, the maximum tariff award for a permanent mental illness confirmed by psychiatric assessment as severely disabling is £27,000 whereas total deafness in one ear attracts a tariff award of £33,000, see *Criminal Injuries Compensation Scheme 2008 – A Guide* above n 204, 69, 80. How one determines that living with deafness in one ear is *worthy of more public sympathy* than being rendered incapacitated for life (via psychiatric injury) seems an implausible and dangerous exercise. The scheme’s capacity to recognize multiple physical injuries but not multiple psychiatric nor psychological injuries is also of significant concern.

\(^{219}\) Ibid.
V INTERNATIONAL AND REGIONAL ADVANCES FOR VICTIMS OF VIOLENCE

No human interaction is neutral. It is either healing or wounding.

– Dr Balfour Mount, Palliative Care Pioneer.

A International Advances for Victims of Violence

I United Nations

At the international level, the United Nation’s *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985)\(^{220}\) has been heralded by some as the victim’s ‘Magna Carta.’\(^{221}\) It declares the obligations of states towards these two categories of victims. ‘Victims of crime’ are those who suffer harm due to acts or omissions which violate the criminal laws of member states.\(^{222}\) ‘Victims of abuse of power’ are those who suffer harm due to acts or omissions which do not yet constitute violations of member state’s criminal laws – but should do so – because the act or omission violates internationally recognized norms relating to human rights\(^{223}\) (such as the right to freedom from torture\(^{224}\)). States are obliged to ensure victims of crime receive: access to justice and fair treatment (articles 4-7), restitution from offenders (including seizure of assets to facilitate reparations) (articles 8-11), financial compensation from the state (articles 12-13) and social and other kinds of assistance (articles 14-17). States’ obligations to victims of abuse of power are less definitive (articles 18-21). They encompass restitution from the offender and/or state-funded compensation plus other assistance and support as needed (article 19), international co-operation to support victims (article 20), and legal development through legislation (article 21). Although non-binding, echoes of this UN Declaration can be heard throughout the world, including in

\(^{220}\) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 96\(^{th}\) plenary meeting, UN Doc A/RES/40/34 (29 November 1985) <http://www.un.org/documents/ga/res/40/a40r034.htm> (‘The UN Declaration’).


\(^{222}\) *The UN Declaration*, above n 220, art 1.

\(^{223}\) Ibid art 18.

\(^{224}\) *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3\(^{rd}\) session, 183\(^{rd}\) plenary meeting, UN Doc A/810 (10 December 1948), art 5.
Europe (see below) and in Australian state-based victim compensation schemes (for example, Victoria’s Victims Charter Act 2006).

2 International Criminal Court

Also at the international level, the Rome Statute of the International Criminal Court (ICC) provides significant binding advances for victims with respect to international crime. Article 68(3) permits victims to have their own legal counsel during proceedings (subject to the discretion of the Court) – a pioneering step which approximates ‘the situation of parties civiles in civil law systems.’ Article 75 provides for the Court to ‘establish principles relating to reparations to… victims, including restitution, compensation and rehabilitation’, enables the Court to make an order for these reparations against the convicted, and enables the Court to award these reparations from the Court’s own Trust Fund (created by Article 79 of the same statute for the benefit of victims and their families). Thus, articles 75 and 79 enable the ICC to ‘order reparations’ directly from the offender, ‘the Trust Fund can use some of its own resources to "guarantee" compensation as a substitute to convicted reparations, and the Trust Fund can engage in "assistance" that is not strictly compensatory.’ The Rome Statute signifies the first time that victims of international crimes may broadly participate in international criminal proceedings. That restitution, compensation and rehabilitation for victims are also mandated – and most likely funded by the ICC’s new Trust Fund for Victims – ‘marks the emergence for the first time in the history of international criminal justice… the ambitious regime of victim compensation.’

B Regional Advances for Victims of Violence

At a regional level, the European Convention on Compensation of Victims of Violent Crimes (1983) advances a framework to improve the administration of criminal justice with

\[\text{227 Rome Statute above n 225, art 75, art 79. As of 2010, there was no range on amounts payable by the Court’s own Trust Fund for Victims, however, this development is viewed as inevitable, see Megret, above n 13, 140.}\]
\[\text{228 Megret, above n 13, 137 (emphasis in original).}\]
\[\text{229 Megret, above n 13, 139.}\]
respect to victims. Specifically, this document states that it is ‘necessary’ for states to make provision for state-funded compensation for victims of violence and sets forth binding minimum standards for member states’ compensation funds. Like the UN Declaration, the European Convention promotes co-operation between its member countries, to ensure that the minimum standards of compensation are available between the member states, with the state where the victimization occurred responsible to compensate. A significant regional advance for victims of violence that underscores the European Convention is the landmark ruling by the Court of Justice of the European Communities known as the Cowan Case. This decision mandates that compensation to victims of crime must not be restricted to nationals and therefore the aforementioned access to basic standards of victims of crime compensation must be provided by states to victims from across the European Union. These co-operative agreements between countries in Europe provide compelling reason for Australian States and Territories to at least consider possibilities for co-operation.

C Restorative Justice Advances for Victims of Violence Internationally and Regionally

Paralleling these international and regional advances for victims specifically are international and regional advances for restorative justice, of which victims may be considered a central feature. Restorative justice (RJ) is a world-wide social movement which re-

231 Ibid [8].
233 Ibid art 3.
234 Cowan v Tresor Public (C-186/87) [1989] ECR 195 (‘The Cowan Case’). In this case, an English tourist (Ian William Cowan) was the victim of heinous violence whilst on holidays in France. He applied for state-funded victim compensation in France but his application was refused by French officials because he was not a French national. An appeal to The Court of Justice of the European Communities determined otherwise and referred the matter back to the French courts. However, the exact amount of compensation he did receive – indeed whether he received any at all – and the grounds by which it was calculated remain somewhat of a mystery. For English speakers, the trail goes cold after the ECR ruling. We learn from the newspaper The Times’ ‘Tourist Recipients of Services Have Right to Compensation in Assault Cases: European Law Report’ dated 13 February 1989 that Mr Cowan initially applied to the Commission d’indemnisation des victims d’infraction (compensation board for the victims of crime) in Paris for compensation totaling FF36,154 (equivalent to just over $7000AUD in today’s terms). The author would welcome further information on this matter.
235 With the exception of the British scheme, other EU state-funded compensation schemes for victims of crime are territorial and limit eligibility to EU citizens and legal residents injured on EU territory, see Buck, above n 34, 156-58.
236 See generally Umbreit above n 18; Menkel-Meadow above n 16; Strang, above n 15. But see also Daly, above n 15; Cheon and Regehr, above n 18; Richards, above n 17.
237 Umbreit, above n 18, 254. See generally Menkel-Meadow, above n 16.
conceptualizes crime as ‘actions that harm specific people and relationships.’ Such harm gives rise to needs and obligations which necessitate ‘active participation and collaboration’ by affected parties in order for the harm to be addressed. Repairing the harm, restoring the losses, encouraging offenders to take direct responsibility for their actions, reconciliation and re-integration of both offender and victim into the community are common threads present in the variety of this evolving social movement. An example of restorative justice advances for victims at an international level is the United Nation’s *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.

It heavily features voluntary participation and agreement by the victim in restorative processes and outcomes, alongside participation and agreement by affected community members and the offender. Likewise, at a regional level, the Council of Europe Committee of Ministers emphasizes the need for ‘active personal participation in criminal proceedings’ by victim, offender, and other affected parties, and the community. The Committee goes on recognise ‘the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimization’ including communication with the offender, and receiving an apology and reparation.

Restorative justice has been applied in an ever-widening variety of contexts throughout the world; the following portrays a mere sampling. Primary schools (elementary schools) have

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238 Cheon and Regehr, above n 18, 373 (emphasis in original).
239 Ibid.
240 See generally Umbreit above n 18; Menkel-Meadow above n 16; Strang, above n 15; Daly, above n 15; Cheon and Regehr, above n 18.
241 Umbreit, above n 18, 255; Menkel-Meadow, above n 16, 10.2. See generally Umbreit above n 18; Menkel-Meadow above n 16; John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989). But also see Daly, above n 15; Cheon and Regehr, above n 18.
243 Ibid annex [2]-[4], [7]-[11].
246 Prison Fellowship International provides a helpful online tool which organizes information about restorative justice policies, practices and programs by region and country, see *Restorative Justice Around the World* <http://www.restorativejustice.org/university-classroom/02world>. 
used RJ to address bullying and victimization, and RJ is extremely popular as a government intervention targeting juvenile offenders of minor crime. The application of RJ for adult offenders remains decidedly controversial. Restorative justice has also been implemented in indigenous communities and as a larger, public form of justice for entire societies, such as in South Africa’s Truth and Reconciliation Commission.

There are undoubtedly ‘many contested theoretical and practical issues in the uses of restorative justice at its different levels of (personal wrongs, less serious crimes, serious crimes, state crimes, crimes or wrongs against humanity)’. It is nonetheless contended that restorative justice advances highlight possibilities for enhancing victim and victim-oriented parties’ participation and agreement in the processes and outcomes of state-funded victim compensation schemes in Australia, if these schemes are reframed as victim-centred restorative justice interventions.

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252 Menkel-Meadow, above n 16, 10.5. See 10.5-10.6 which provides a literature review of these issues.
Having now observed a selection international and regional advances for victims of violence and a number of foreign state-funded schemes, the following section examines Australia’s own state-funded victim compensation schemes.

VI AUSTRALIA

If you want to go fast, go alone. If you want to go far, go together.

– African Proverb.

Unlike the unitary criminal justice systems and unitary state-funded victim compensation schemes of the United Kingdom and New Zealand, Australia’s criminal justice systems and victim compensation schemes are dispersed, consistent with Australia’s Federation. The Australian criminal justice system comprises nine criminal jurisdictions: one Federal, six States (Victoria, New South Wales, Queensland, South Australia, Western Australia and Tasmania), and two Territories (the Australian Capital Territory and the Northern Territory). Historically, each State and Territory government holds sole responsibility for matters concerning crimes against natural persons that occur in their respective jurisdictions, including sole responsibility for issues pertaining to criminal justice legislation and policy, administration and enforcement, and government-funded victim compensation schemes.

The absence of unity is reflected in the various state-funded victim compensation schemes: each scheme has evolved uniquely and they vary in idiosyncratic ways.

Although each scheme is distinct, the composition of contemporary Australian state-funded victim compensation schemes can be generalised as follows. Schemes are territorial and tend

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253 Garkawe, above n 44, 30.
254 Ibid.
256 For example, the South Australian Government is currently soliciting applications by former child residents of State care who were sexually abused whilst in this environment. Payments are offered as an alternative to legal action, as an acknowledgement of their pain and suffering, and to assist in their recovery, see ‘What’s New and Latest News’, <http://www.voc.sa.gov.au/default.asp>.
to restrict eligibility to victimizations occurring in their jurisdiction. Typically, their respective legislation stipulates qualification criteria and restricts eligibility to victims of violent crimes resulting in personal injury (primary victim), their spouses, dependents or first person witnesses (secondary victims). Amounts awarded and the assistance offered is far less than could theoretically be cognizable through other means (for example, torts or insurance). Australian schemes tend to focus on the severity of the crime (for example, rape, attempted homicide, violent assault) whereas the UK scheme appears to heavily feature the physicality of injuries sustained (for example, total deafness in one ear, dislocated jaw, loss of smell and taste). It is common for Australian schemes to rely on a table provided by legislation which specifies the minimum harm recognised and the range of amounts payable. Schemes cap any one claim at an all-inclusive maximum (which, as stated earlier, range between $25,000-$75,000); any tariff amounts awarded, symbolic amounts for loss of income, and recovery expenses such as costs of medication and counselling are usually presumed to be represented in this maximum. A lower criteria for evidence is required (ie, the

257 Yeend, above n 127, 12. Although, very occasionally an Act of Grace payment has been made by states to their citizens who were victimized whilst overseas. For example, the discretion permitted in the South Australian scheme enabled an Act of Grace payment to be made to its citizens who were injured in the terrorist bombings in Bali in 2002 and 2005, see Garkawe and O’Connell, above n 62, 491. But note the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) permits federal payments to Australian injured in terrorist attacks overseas. However, this payment is not retrospective, which means that Australian victims of the bombings in Bali do not qualify for assistance. On 9 October 2013, Prime Minister Tony Abbott announced he will be making the AVTOP retrospective, see Peter Alford, ‘Tony Abbott fulfills terror compensation pledge’, The Australian (online), 9 October 2013 <http://www.theaustralian.com.au/national-affairs/tony-abbott-fulfils-terror-compensation-pledge/story-fn59niix-1226735436111>.

258 As noted in section ‘III Alternatives to State-Funded Victim Compensation Schemes: D Insurance’, victims of non-violent crimes such as property crimes and fraud are usually excluded for pragmatic reasons by the government, see Garkawe, above n 44, 27.

259 For example, the Victorian Victims of Crime Assistance Tribunal (VOCAT) attaches the highest level of special financial assistance (compensation) to the crimes of sexual penetration and attempted murder, see Special Financial Assistance: Minimum/Maximum Award Amounts by Act of Violence, Special Financial Assistance Table <http://www.vocat.vic.gov.au/financial-assistance-available/types-assistance-available/special-financial-assistance>. VOCAT reserves the right to ‘uplift’ the maximum amount of special financial assistance available to those suffering lessor categories of violence when the violence has had a particularly severe impact on the victim (for example, permanent life-long serious physical injury) or when a particularly vulnerable individual (child, intellectual disability, mental illness) endured sustained abuse, see <http://www.vocat.vic.gov.au/financial-assistance-available/types-assistance-available/special-financial-assistance>. Victim Assist Queensland considers more complex dimensions related to both the severity of the crime and the category of circumstances (effect upon victim) in every claim when determining level of compensation, see Victims of Crime Assistance Act 2009 (Qld), Schedule 2: Amounts and categories for special assistance.

260 The CICA’s list of possible injuries and the specific tariff amounts they attract is extensive, see Criminal Injuries Compensation Scheme 2008 – A Guide, above n 204, 66-107.

261 Garkawe, above n 44, 30. For example, see the Victorian and Queensland tables cited in above n 259.
balance of probabilities) than is mandatory for successful legal action. Approved applicants in Australian schemes are generally eligible to have their solicitor’s fee reimbursed. Funds and assistance are considered the avenue of last resort, and benefits can be reduced or withheld when funding is available through other means. Benefits can also be reduced or withheld if the victim is deemed to have contributed to their own injuries. Additionally, the claimant must have reported the violence to the police within a certain timeframe (usually within 2 years of the violence with the exception of child victims) and be seen to be cooperating ad infinitum with police and justice personnel. Failure to do any of the above usually results in an unsuccessful application.

Unlike the regional advances for victims across Europe which ensure the availability of minimum standards of provisions to victims between the member states, Australia currently has no internal governing framework for co-operation and consistency between its state-funded victim compensation schemes. As a leading nation in the Pacific Region, it should not be surprising therefore that Australia does not hold reciprocal formal agreements for provision for victims of violence with other nations regionally.

The absence of co-ordination within Australia raises a number of cross-jurisdictional issues. For example, if a resident is victimized by violence whilst in another State or Territory, they will generally qualify for that State or Territory’s state-funded scheme, however these services and benefits are not the same in each jurisdiction. Furthermore, having qualified for that State or Territory’s scheme, they will generally be required to access those services in that State or Territory, which is not their home jurisdiction. In a continent as vast as Australia, being required to travel interstate to access continuing victim-related services will

262 Some schemes provide a schedule setting the amount to which the scheme will reimburse fees related to health, welfare and legal professionals, for example see the Victorian Victims of Crime Assistance Tribunal’s ‘Counseling Session and Report Fees’ <http://www.vocat.vic.gov.au/financial-assistance-available/counselling-expenses/session-report-fees>.
263 Garkawe, above n 44, 30.
264 Ibid.
265 Ibid.
266 Garkawe and O’Connell, above n 62, 488.
267 Ibid 489 (emphasis added). For a detailed discussion of the disparity of services and assistance between the States and Territories, see generally Disability Care and Support, above n 80. Note that the Productivity Commission Report only touches on those victimized by violence in Australia (and not terrorism specifically) and does not refer to those victimized overseas (terrorism or otherwise) at all.
268 Garkawe and O’Connell, above n 62, 489 (emphasis added).
usually be highly inconvenient if not impossible for most victims.\textsuperscript{269} If a home jurisdiction does offer some services for persons in such a predicament, these services are likely to be significantly different to what would be available had the person been victimized in their home state.\textsuperscript{270}

Countries such as the United States have a diffuse criminal justice system somewhat similar to Australia.\textsuperscript{271} However, unlike the United States,\textsuperscript{272} Australia currently has no federally-funded victim compensation scheme.\textsuperscript{273} The absence of a federal scheme for the Federal jurisdiction has a number of cross-jurisdictional implications for Australian victims of violence as well. For example, if an Australian is violently victimized whilst on Norfolk Island, the Australian Antarctic Territory, or Christmas Island – places which have no provisions for victims of violence but over which the Federal parliament holds legislative power\textsuperscript{274} – then there is no guarantee that such victims will receive even the minimum level of benefit available had they been victimized elsewhere in Australia.\textsuperscript{275} The same dilemma extends to persons victimized by violence on a ship or plane which is registered in Australia but is outside the jurisdiction of any Australian State or Territory.\textsuperscript{276}

\textsuperscript{269} Ibid.
\textsuperscript{270} Ibid. Garkawe and O’Connell point to two obvious solutions: (1) that State and Territory jurisdictions co-operate, with the jurisdiction in which the victimization occurred to be responsible to reimburse the home jurisdiction at the rate at which the victim would have received there. Home jurisdictions could ‘top up’ this amount if they classify the victimization or injury as more severe. Alternatively, (2) that States and Territories adopt an agreement for provision for minimum level of services as per the European model, see section ‘V International and Regional Advances for Victims of Violence: B Regional Advances for Victims of Violence’ above.
\textsuperscript{271} Garkawe, above n 44, 30.
\textsuperscript{272} For general information on the Federal US Office for Victims of Crimes, see Office for Victims of Crime <http://www.ojp.usdoj.gov/ovc/>. The US Office for Victims of Crime Training and Technical Assistance Centre’s activities highlight some of the co-ordination possible by a Federal scheme’s jurisdiction, see <https://www.ovcttac.gov/ views/resources/dspResources_Org.cfm>. Centralised information sharing, research, training and survivor scholarships are but a few examples. There is interest in Australia for better co-ordination and services for victims of crime but as yet, these movements are in their infancy and tend to result in groundbreaking conferences only, for example, the ‘Meeting the Needs of Victims of Crime’ (Conference, Mercure Hotel, Sydney, 18-19 May 2011) <http://aic.gov.au/events/aic%20upcoming%20events/2011/victim.aspx>.\textsuperscript{273} See generally Garkawe and O’Connell, above n 62. With the exception of the recently created Australian Victims of Terrorism Overseas Payment (AVTOP), however this payment is only available to Australians victimized by terrorism whilst overseas, see Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth). The AVTOP is discussed in section ‘III Alternatives to State-Funded Victim Compensation Schemes: D Insurance’.
\textsuperscript{274} Australian Constitution s 122.
\textsuperscript{275} See Garkawe and O’Connell, above n 62, 489-490.
\textsuperscript{276} Ibid. The suspicious death of Australian Diane Brimble whilst on a cruise ship provides a chilling example, see R v Wilhelm [2010] NSWSC 378. For an overview of the case, including the various coronial inquests, see
Victims of Federal crimes committed against natural persons, victims of terrorist crimes committed in Australia, and victims of non-terrorist crimes committed against Australians overseas all suffer inconsistencies or an absence of coverage due to the absence of a Federally-funded victim compensation scheme in Australia. Failing provision by other sources, victims of Federal crimes and victims of terrorist acts occurring in Australia are expected to rely on the state-funded victim compensation scheme where the act took place. Australians injured or killed in the overseas Bali terrorist bombings of 2002 and 2005 were not by right entitled to Australian State or Territory state-funded victim compensation (these acts occurred outside State or Territory jurisdiction) and instead were forced to rely upon ad hoc government responses, generalist government services and their own resources. Only as recently as 2012 has the Federal Government created the Australian Victim of Terrorism Overseas Payment (AVTOP), accessible by those injured at the site of an overseas terrorist attack, but this payment is not retrospective. Australian victimized by non-terrorist violence whilst overseas are at the mercy of that countries’ provisions for victims (if eligible at all) and receive only generalist Australian consular or Department of Foreign Affairs and Trade assistance. An important point is that the benefits available to victims from the

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Geesche Jacobsen, ‘Dianne Brimble Unknowingly Drugged, Inquest Rules’, The Age (online) 1 December 2010 <http://www.theage.com.au/national/dianne-brimble-unknowingly-dragged-inquest-rules-20101130-18fbd.html>. In summary, the NSW Coroner now Magistrate Jacqueline M. Millege (formerly Senior Deputy State Coroner) found that Ms Brimble had been knowingly drugged by someone for their sexual gratification which resulted in her death – a finding at odds with the NSW Supreme Court (Inquest into the Death of Dianne Brimble [Glebe Ref:1638/02]).

277 Garkawe and O’Connell, above n 62, 490; Garkawe, above n 44, 30. Historically, there were very few Federal crimes whose victims were natural persons. However, the last two decades has brought a steady increase in such victims, for example, victims of people-trafficking.

278 Ibid 491.

279 Ibid 490-91.

280 See generally Garkawe and O’Connell, above n 62; Garkawe, above n 44.

281 See generally Garkawe and O’Connell, above n 62; Garkawe, above n 44. It is unclear whether any of the States or Territories hold policies that exclusively grant terrorist victims access to their scheme’s benefits even when there is the likelihood of the availability of other funding sources, for example, private charity. In light of the September 11th Victim Compensation Fund, each jurisdiction should consider their response to other funding sources for victims of mass violence or terrorism prior to such an act occurring. Co-ordinated agreement between jurisdictions on this issue is ideal.

282 Garkawe and O’Connell, above n 62, 490-91; Garkawe, above n 44, 30.

283 Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth). See also Yeend, above n 127, 5. The AVTOP is discussed in section ‘III Alternatives to State-Funded Victim Compensation Schemes: D Insurance’. On 9 October 2013, Prime Minister Tony Abbott announced he will be making the AVTOP retrospective, see Alford, above n 257.

284 Garkawe and O’Connell, above n 62, 490-91.
Federal Government’s AVTOP clearly take their lead from state-funded victim compensation schemes. This highlights the potential state-funded victim compensation schemes can hold: developments for victims by States and Territories are likely to be highly influential on the Federal Government’s own initiatives.

The remainder of this article presents a plan for movement towards a national system for victims of violence in Australia.

PART TWO

VII A PLAN: A NATIONAL SYSTEM FOR VICTIMS OF VIOLENCE IN AUSTRALIA

The response of the community has a powerful influence on the ultimate resolution of the trauma.


The proposed plan presents a collection of incremental shifts schemes may consider with respect to Australian victims of violence. These shifts – informed by the analysis above – are conceptualised around key features of dispute system design, restorative justice and

285 The benefits available via the AVTOP are discussed above in section ‘III Alternatives to State-Funded Victim Compensation Schemes: D Insurance’.

286 *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth). See also Yeend, above n 127, 22.

287 The AVTOP are for Australian victims of overseas terrorism: public violent events that are likely to elicit a public outpouring of sympathy. It would obviously not be in the Federal Government’s interests to be seen as stingy in its response to these victims when compared to what is offered to victims of locally occurring terrorism by the States and Territories.

288 This is in recognition of the rich and unique history of each State and Territory state-funded victim compensation scheme, including the expertise developed and body of knowledge accumulated through years of theory and practice.

289 Dispute system design ‘is based on the idea that different processes are necessary for different kinds of contexts and party needs.’ ‘Claimants, victims, parties, defendants, law reformers, judicial officers and other decision makers, and policy analysts all may desire different things from a legal or dispute resolution system. Some want vindication, others want apologies and forgiveness; some want clear legal rules, others want more subtle terms for ongoing relationship. Some desire punishment and retribution.’ Personally injured claimants are likely to vary in their desires ‘for types of processes (public vs. private; fast and final (arbitration) vs. more narrative and cathartic (mediation or some hybrid thereof); as well as type of relief (compensation, accountability, apologies, storytelling, changed practices)).’ Dispute system design, like the modern world, is thus characterized by ‘process pluralism’, see Menkel-Meadow, above n 143, 213, 212, 215, 213. See generally Smith and Martinez, above n 11; Cathy A. Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, 1996);
trauma literature. States and Territories may consider testing these shifts by the creation of a pilot program alongside their state-funded scheme or by simply interpreting and integrating various aspects of these shifts within their existing policies and practice. The plan is structured according to Smith and Martinez’s analytic framework.

A Goals

The suggested goals for the proposed plan for movement towards a national system for victims of violence in Australia are:
1. Increase the profile of state-funded victim compensation schemes in the community.
2. Increase the number of eligible victims of great violence applying and having their claims approved.
3. Enhance the quality of actual assistance available through state-funded schemes.
4. Improve the quality of process experienced by victims and victim-oriented stakeholders.
5. Provide meaningful opportunities for ‘voice’ for victims and victim-oriented stakeholders.
These goals can be broadly summarised as ‘Restorative, Responsive and Respectful’.

B Processes and Structure

Not all victims of violence resulting in personal injury are traumatized, but for the many who are, the consequences can be debilitating. The trauma itself ‘creates a rupture in the...
victims’ lives – between their past, their present and their future.\footnote{297} The ramifications of this harm often expand to rupture relationships as well: ‘victims may feel estranged from families, friends and communities’\footnote{298} whom they feel cannot understand what has happened, or worse, a ‘conspiracy of silence’ is developed in which victims experiences are minimized or ignored as time marches on.\footnote{299} Reintegration requires acknowledgement of the victimization, an understanding of its consequences, and validation from supporters – all of which assists victims to re-establish a sense of belonging in the community.\footnote{300} The parallels between the needs of traumatized victims of violence and the goals of restorative justice are thus evident: a violent act has harmed specific people and relationships; the harm gives rise to needs and obligations; active participation and collaboration is required for the harm to be addressed.\footnote{301} All of these goals can be achieved \textit{without} the necessity of involvement of the perpetrator.\footnote{302} Giving victims voice, repairing the harm, restoring the losses, encouraging victims to direct any blame held for the violence at the perpetrator’s behaviour, and reconciling and re-integrating the victim to their community are all victim-centred restorative justice goals that readily lend themselves to application within state-funded victim compensation schemes. It is contended that re-conceptualising state-funded victim compensation schemes as victim-centred restorative justice interventions – ‘a proactive symbolic program of social response’\footnote{303} – can provide a more effective system of justice for many victims. If programs

\begin{footnotesize}
\footnote{297}{Young, above n 1, 6. See generally Herman, above n 291.}
\footnote{298}{Ibid. See generally Herman, above n 9. See especially Herman, above n 291, 51, 61, 71.}
\footnote{299}{Young, above n 1, 8; Herman, above n 9; Herman, above n 291.}
\footnote{300}{Young, above n 1, 6-7. Herman, above n 7; Herman, above n 9; Herman, above n 291; Rothschild, above n 7; Middleton, above n 7.}
\footnote{301}{Herman, above n 9; Cheon and Regehr, above n 17; Umbreit, above n 18; Daly, above n 15; Strang, above n 15; Menkel-Meadow, above n 16.}
\footnote{302}{Herman, above n 9. Some victims may only be satisfied when the person who attacked them is held to account and is made personally responsible for paying compensation. The option of a full criminal trial and/or civil action remains. However, these are not always possible or successful: hence the creation of state-funded victim compensation schemes. It is contended victim-centered restorative justice schemes \textit{can} assist such victims by validating anger and the desire for vengeance, by apologizing that these ideals cannot be met in this instance, and by offering state-funded benefits as a symbolic gesture of public solidarity with their desires. Professor Peter Jonkers contends that victims deserve not only compassion but also the expression of our solidarity in moral indignation, see Peter Jonkers, ‘Caught Between Indifferent Indulgence and Demonisation: Philosophical Comments on an Ambivalence in Contemporary Culture’ Conference Paper presented at Sexual Abuse in Religious Contexts: An Interdisciplinary Conference, Sydney, Australia, 20-21 June 2008.}
\footnote{303}{Young, above n 1, 8. According to Herman, above n 291 at 70: ‘The response of the community has a powerful influence on the ultimate resolution of the trauma.’}
\end{footnotesize}
are a source of acknowledgement, validation and compassion, the specific benefit levels of a particular scheme might prove less important than the way it is administered.\textsuperscript{304}

Smith and Martinez’s compilation of features of high quality dispute systems\textsuperscript{305} are synthesized with the analysis contained in this article to identify possibilities of enriching state-funded victim compensation schemes’ process. Many of these suggestions are inter-related and may enhance more than one goal at the same time.

\textit{Goal 1: Increase Schemes’ Profile in the Community}

Schemes may consider holding an annual service, open to the public, to remember and acknowledge those victimized and their supporters.\textsuperscript{306} Services may additionally prove to be a meaningful source of reflection, validation and affirmation for victims further along in their recovery.\textsuperscript{307} Schemes could also consider initiating a public memorial such as a shrine, statue, or garden – something public that captures their community’s spirit – as a public symbol of recognition of violent victimization. An open competition for the design and public vote could generate publicity.\textsuperscript{308} Generation of a social movement\textsuperscript{309} is also possible via social media, online forums, art exhibitions, creation of a ‘sound archive’ containing messages of support, and creation of a commemorative talisman (which can be carried discreetly or worn publicly).

\textsuperscript{304} Young, above n 1, 6-7; Menkel-Meadow, above n 16, 10.15; Schneider above n 190, 113-5; See generally Menkel-Meadow, above n 7.

\textsuperscript{305} Smith and Martinez, above n 11 at 128: ‘Multiple process options for parties, including rights based and interest-based processes; Ability for parties to “loop back” and “loop forward” between rights-based and interest-based options; Substantial stakeholder involvement in the system’s design; Participation that is voluntary, confidential and assisted by third party neutrals; system transparency and accountability; Education and training of stakeholders on the use of the available process options.’

\textsuperscript{306} Participation should not be limited to those who submitted applications, nor only to those whose applications were successful.

\textsuperscript{307} Media coverage should be sensitive and not film attendee’s faces, unless an attendee consents. Likewise, advertising should be sensitive.

\textsuperscript{308} This memorial may become a rallying point at anniversaries of victimizations and also in the aftermath of public violent victimization.

\textsuperscript{309} A public competition for the name of this movement and its logo is another possibility.
Goal 2: Increase the Number of Eligible Victims of Great Violence Applying and Having Their Claims Approved

The stark absence of the vast majority of eligible victims’ applications in state-funded schemes points to system dysfunction. To enable greater access by eligible victims, it is suggested that reporting requirements be broadened to include a statutory declaration made to a Justice of the Peace (JP) as an equal alternative to a police report. Schemes could detail their respective procedures in the public domain. Schemes could enlist the assistance of victim-oriented stakeholders to design processes that are more user-friendly. Schemes could rely on triangulation of assessments undertaken by health, welfare and victim-oriented services, the victim’s statement of harm (if included), the police report or JP declaration, and up-to-date research to substantiate claims. Schemes may delegate approval of applications for lesser amounts to subordinates. Early Neutral Evaluators (ENEs) could be enlisted to locate and expedite compilation of necessary documentation for claims that fall within the scheme’s highest levels of assistance. ENEs could also be empowered to more generally notify claimants of the likelihood of success of aspects of their claim, and perhaps even offer a lower amount available immediately without the victim needing to compile further evidence. Schemes could consider adopting timeframes for the resolution of claims and notify claimants and stakeholders when such timeframes will not be met.

Goal 3: Enhance Quality of Actual Assistance

Schemes may consider increasing the variety and amount of benefits available, and including an official signed letter that acknowledges the harm suffered and offers an apology.

310 According to Smith and Martinez, above n 11 at 131: ‘System dysfunction can often be attributed to failure to adequately involve and acknowledge the interests of key stakeholder groups.’


312 Once these stakeholders are convinced of improvements, they may become strong allies in increasing the number of eligible victims applying.

313 This is posited instead of so heavily weighting the result of progress of a police investigation on a claim’s approval. Police investigations may or may not proceed for reasons often beyond the victims’ control.


315 However, this latter possibility is fraught with potential for abuse. For example, with the eye to reducing costs, schemes could use this step to pressure desperately needy, eligible victims into settling for an amount lower than would otherwise be their full entitlement. On the other hand, some victims might be satisfied to forego some assistance with the knowledge that they will receive a lesser amount immediately.

316 A parallel measure mimicking restorative justice apologies. This letter could explicitly state that the community does not blame the victim for their victimization, see Rothschild, above n 7. The content of letters could even be tailored based on what is learnt from the victim’s ‘victim impact statement’, from the hearing, and
alongside approved applicant’s cheques. Notifying all victims and victim-oriented stakeholders linked with a claim of the avenues available for feedback, suggestions, improvements, complaints and appeals could also prove beneficial, as could offering more robust responses to victims and victim-oriented stakeholders, such as those outlined under Goal 1. Providing multiple opportunities for cathartic voicing of experiences by both victims and victim-oriented supporters (see discussion of Goal 5) and providing education, training and resources for victim-oriented supporters regarding the assistance available, the scheme’s process options, and any victim-oriented stakeholder requirements (for example, how to write a legal report) may also strengthen the schemes justice requirements, effectiveness and legitimacy. Enlisting the support of victim-oriented professionals in the training of scheme staff appears a ripe opportunity.

Goal 4: Improve Quality of the Process

Participation in state-funded victim compensation schemes should remain voluntary, even if it is deemed in the public’s interest to award benefits. Multi-track options for those victimized by violence represent the nexus between fairness and individualized responses. Thus, significant stakeholder collaboration and consensus should be considered if gauging viability. Any track chosen should consider giving victims the option of electing for a hearing without having their benefits reduced. All tracks should also permit victims to ‘voice’ their experience in their own (non-legal, non-evidentiary-style) words. Multi-track

from suggestions from victim’s supporters (including professionals). Collaboration with victim-oriented professionals may be of benefit in crafting proformas to guide such letters.

Victims must be able to retain their fundamental right not to apply, see Garkawe, above n 44, 38 [2].

Multi-track options acknowledge the plurality of victims by giving victims choices. However, variations in awards to similarly situated persons can cause controversy, especially if administered by governments, for example, see the above discussion regarding the September 11th Victim Compensation Fund and see especially Alexander, above n 5.

And this should all occur prior to the commission of the next public, mass violent act.

Opting to have a hearing may the increase time taken to resolve a claim but this choice must be weighed by the victim against the opportunity for cathartic expression of ‘voice’. Schemes could consider conducting hearings with a ‘matched’ assessor, as per the Dalkon Shield mass tort settlement, see Menkel-Meadow, above n 7.

This could be in person, via a written ‘victim impact statement’ supplementing the application, or even via alternative media such as ‘Skype’ and video. Menkel-Meadow, above n 16, 10.15 and Schneider, above n 190, 313-5 emphasize the critical importance of being able to tell one’s own story in one’s own words. Not only does this deeply acknowledge the human being who has suffered harm, it also increases victim satisfaction – both with the system and more generally.
processes might include tiered compensation and benefits linked to levels of evidence,\textsuperscript{322} and may or may not include the ability to ‘loop back’ and ‘loop forward’.\textsuperscript{323} These tracks can be conceptualized in any number of combinations; the following is merely one example:

Track 1: Tariff amount at minimum of its range, paid swiftly, evidence minimal (brief police report or JP statutory declaration).\textsuperscript{324}

Track 2: Precise tariff amount within its range, ongoing subsidy to a maximum limit for health, housing, education (may be ‘cashed in’ at a lower maximum), medium evidence required (police report or JP statutory declaration triangulated with reports from health, housing, welfare and/or education professionals); ability to meaningfully appeal decision is maintained.\textsuperscript{325}

Track 3: Precise tariff amount within its range; indefinite subsidy of health, housing, education (can be ‘cashed in at a lower level); symbolic amount for loss of income; consideration of funding for other injury-related needs. Highest level of evidence required (detailed police report or JP statutory declaration triangulated with medico-legal reports and other professionals, evidence of loss of income and other injury-related expenses) and longest time for claim resolution. Ability to meaningfully appeal decision is maintained.\textsuperscript{326}

\textsuperscript{322} The definition of evidence (Evidence of the violent act? Evidence of the injuries sustained? Both?) may be decided by each jurisdiction, with the jurisdiction where the victimization occurred responsible to pay. This may increase cross-jurisdictional variations, however, jurisdictions could ‘top up’ their citizens benefits if those awarded by another jurisdiction are considered unsatisfactory. Additionally or alternatively, States and Territories could agree to minimum standards as per European countries, see Garkawe and O’Connell, above n 62, 489. Bringing cross-jurisdictional issues to the fore can contribute positively to their conscious examination and, ultimately, to more effective handling.

\textsuperscript{323} Smith and Martinez, above n 11, 128.

\textsuperscript{324} The ability to re-enter the program at a later stage could potentially be maintained, by the victim providing more evidence. Re-entry benefits might be capped at a maximum limit payable to health, housing or education providers, or might be ‘cashed in’ at a lower amount.

\textsuperscript{325} Tracks 2 and 3 could additionally offer the possibility of receiving benefits as an annuity.

\textsuperscript{326} The ability to ‘loop back’ to a lessor track could also possibly be maintained, for example, if the claimant finds that compiling the level of evidence for their chosen track proves too difficult, or because of time-frame pressures.
Jurisdictions will also need to consider dimensions related to severely injured or disabled persons who are unable to make a formal statement. Methods of applying on another person’s behalf (with their consent) without jeopardizing choice of track should be considered.

Goal 5: Provide Meaningful Opportunities for ‘Voice’

This may include choice of a less formal hearing where victims and victim-oriented supporters are afforded the opportunity to speak; providing opportunity for victims to submit a ‘victim impact statement’ as part of their application’s documentation; choice of a hearing (with either the scheme’s decision maker or with a ‘matched’ person endowed with authority) or having their claim decided ‘on the papers’; and choice with respect to the publicity of their application’s outcome including any appeal (official public record or privacy). The opening of reporting to include a statutory declaration by a JP also provides an alternative avenue for cathartic ‘voice’ experience. Some of the suggestions in Goal 1 may also be utilized to give voice. Collaboration with victims and victim-oriented stakeholders regarding improving the system is another meaningful opportunity for voice, as is the conducting of research. Making participants aware of – and more generally publicizing – suggestion and complaints mechanisms that enable both confidentiality and assistance by a third party neutral, could also prove a valuable avenues for ‘voice’ (see “Success and Accountability” below).

C Stakeholders

Stakeholders in state-funded victim compensation schemes include: victims of violence themselves; victim-oriented supporters (relatives, friends, professionals, general community); perpetrators of violent victimization and perpetrator-oriented stakeholders (as per victims); actors within the various state-funded schemes (judicial officials and public servants); actors within the broader justice system (police, lawyers, politicians, legislators, public servants); and the broader community. Victims and victim-oriented stakeholders historically hold the

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327 For example, many of the clients referred to in Disability Care and Support, above n 80; Middleton, above n 7.
328 Victims may reserve the right to choose to have their name added or removed from any public records at a later date.
329 The granting of benefits should not be influenced by the participatory mode selected. That is, benefits should not be increased or reduced because an applicant chose to opt for more or less ‘voice’.
least amount of power in the system, and this proposal seeks to address that imbalance. Although the proposed plan is unapologetically victim-centred, it is imperative to ensure that advances for victims do not encroach upon the rights of perpetrators to any great extent; if they do – or are perceived to – victim-related advances are likely to be derailed. Current schemes typically affirm the rights of perpetrators by requiring a police report and by notifying identifiable perpetrators in writing when a claim against them is successful. This author sees no reason to alter the notification perpetrators already receive, except perhaps to ensure that the address of victims and victim-oriented stakeholders are not contained therein for safety reasons. Broadening access to state-funded schemes by allowing a Statutory Declaration via a Justice of the Peace (JP) – in lieu of a police report – might be considered infringing upon perpetrators rights, since JPs do not hold the power to investigate or arrest. However, some violent victimizations reported to police are not actually investigated, and if investigated, an arrest is not always guaranteed: State-funded schemes can already progress applications without these. Also, JPs are renowned by both Australian society and the justice system as being independent and upstanding, so this move may not be as controversial as some may initially allege.

State-funded victim compensation schemes appear to prefer solicitor-facilitated interactions rather than direct correspondence and communication with victims or victim-oriented stakeholders. This can render other victim-oriented stakeholders virtually powerless. It may also leave violently victimized victims feeling that they have been rendered voiceless and impotent, compounding the trauma. Efforts to empower victim-oriented stakeholders might include seeking their input in system design (including training scheme staff), offering education and training in both process options and in legal report writing, and provision of detailed proformas in the public domain. Efforts to empower victims may include measures to broaden access to the scheme, provision of choices (which might include multi-process

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330 For example, legislation will be blocked, or key actors may not co-operate with implementation, see Garkawe, above n 44, 35.
331 Unlike police, JPs do not have agendas such as crime statistics to contend with. The absence of overt agendas might be in the victims’ favour (for example, it may result in a more humanizing interaction in reporting).
332 For example, victim-oriented stakeholders are typically required to submit their professional reports to the scheme via the victim’s solicitor: direct enquiries of the scheme by victims and victim-oriented stakeholders may receive an icy reception.
333 Especially if a determination is decided ‘on the papers’ (that is, without a hearing) or if a hearing is conducted in an unsympathetic manner.
options), victim-sensitively trained staff, opportunities for voice, and other qualitative responses. It is recognised that legislative and policy advances for victims take time to be enacted or implemented, ‘particularly when it involves the government spending money or a challenge to the accepted cultural norms in the criminal justice system’– hence the shared goals proffered in this proposal, the incremental shifts, and the absence of alteration to each jurisdiction’s program structure (Tribunal, Co-Ordinator, etc). Perpetrator-oriented segments of the justice community (such as the corrective services) may be inspired to enact holistic restorative justice programs to enrich their populations, independent of specific victims.

D Resources

State-funded victim compensation schemes are funded by the public purse, via allocation of funds by that jurisdiction’s government. Thus, their generosity is largely determined by legislation by that jurisdiction’s government and the general community’s support (ie, tax contributions, socialist ideology). More applications by eligible victims will, if assessed fairly, give rise to a greater number of approved claims. This is likely to necessitate a review of resourcing by schemes and legislators. Increasing the profile of victim-compensation schemes in the community can assist in easing these changes, for example, it may be leveraged to solicit donations or non-monetary assistance. Wild variations in awards made from year-to-year should be avoided, perhaps by upwardly indexing awards annually in line with inflation. Many of the shifts advocated in this plan do not require great additional expenditure (for example, including a signed letter which acknowledges the harm endured to accompany approved applicant’s cheques). Some shifts, such as the inclusion of the multi-track process options, may even save the scheme’s resources (finances, time, workload); others may generate resources (such as moving towards greater stakeholder involvement and the social interventions).

334 As highlighted in ‘B Process and Structure’ above.
335 Garkawe, above n 44, 35.
Human resources that support the scheme may be narrowly viewed to include that scheme’s staff and the relevant legislators. However, other human resources are crucial to the scheme’s operation. For example, the victims who apply, the victim-oriented supporters and professionals who write reports and who help sustain victim involvement with the scheme, police and justice personnel, and the broader community whose taxpayer funds underwrite the scheme’s operation. There is vast opportunity for schemes to collaborate with stakeholders to design and implement aspects of this plan, many at low cost.337 Ideas and information sharing across jurisdictions is also under-utilized resource.

E Success and Accountability

State-funded victim compensation schemes are conducted by the State on behalf of their citizens, for their citizens. The transparency of the system to the broader public is thus critical. ‘Transparency increases credibility and therefore participation, and encourages further feedback from participants’338 – three aspects, it is contended, that state-funded victim compensation schemes require. Each scheme’s ‘operation, access to processes… and results’339 could be made available in the public domain via the internet. Schemes could make information on accessing complaints mechanisms and appeals processes public, and also actively solicit feedback from victims and victim-oriented stakeholders.340 Feedback from both repeat player and repeat ‘avoider’ victim-oriented stakeholders may be particularly valuable, so long as such feedback can be provided frankly and without fear of reprisal. Mechanisms to integrate learning should also be considered.341

337 For example, Australian trauma experts could be invited to conduct training for scheme staff. A special interest group of scheme-experienced social workers could work with justice personnel to write the proforma to guide other social workers in legal report writing. The effectiveness of such measures would be relatively easy to measure, for example, the number of letters sent by state-funded schemes to victim-oriented professionals to seek clarification about their report could be tallied, as could subsequent days of delay taken to resolve an application. A survey of victim-related professionals who use these proformas could also be utilized.
338 Smith and Matinez, above n 11, 133 (emphasis added).
339 Ibid 132.
340 The names and other identifying features of those who appeal, complain or offer feedback should not be published in the public domain unless the party consents. For example, Victoria’s practice of publicizing Relevant Review Cases permits non-disclosure of the party’s name, see <http://www.vocat.vic.gov.au/publications/relevant-review-cases>.
341 Quality systems are systems that learn and adapt, see for example, Smith and Martinez, above n 11, 132-3.
External, independent evaluation that assesses progress towards the above stated goals is ideal. However, external evaluation is not always possible or desirable. In such cases, evaluation should begin – at a minimum – with state-funded schemes conducting their own ‘internal monitoring, including some combination of data collection on usage, surveys and focus groups designed to obtain candid feedback from key stake-holder groups.’ In addition to basic data collection and monitoring of appeals and complaints, schemes could conduct random exit surveys with victims and with victim-oriented stakeholders. Schemes could also conduct qualitative interviews or focus groups with frequent players and avoiders, such as trauma experts and victim advocates. The creation of an Ombuds office could be seen to be providing the level of confidentiality, independence and political authority desired for participation by as many stakeholder groups as possible. A partnership with a consortium of universities could also provide an ongoing source of independent research and development expertise. Evidence of improvements in citizen satisfaction can be used to develop strong, legislative support for public resource spending in victim-centred restorative justice.

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342 Progress towards these five goals, as well as any changes within legal and societal norms, could all be assessed.
343 External evaluation provides a more detailed and objective assessment of a system’s functioning ‘if outcomes are made available to and studied by’ independent researchers. However, ‘cost, privacy concerns, difficulty and wariness to exposure’ can hinder meaningful results, see Smith and Martinez, above n 11, 132-3.
344 Ibid 133.
345 Victim-oriented stakeholders who actively discourage clients from applying for state-funded compensation might be researched relatively easily through snowball sampling, although confidentiality is likely to be a critical factor.
347 Umbreit, above n 18, 302.
VIII CONCLUSION

*All progress ... depends upon ‘unreasonable’ people.*

– George Bernard Shaw.

Some of these shifts might be considered implausible in light of current legal norms, however it is contended that legal norms can incrementally be enlarged to facilitate a more robust and co-ordinated response by Australians to Australians victimized by violence. Victim-centred restorative justice presents a credible and enabling forum. In light of world events, it cannot be too soon to contribute to the discussion.\[348\]

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\[348\] The attached Appendix highlights a number of further recommendations illuminated by the analysis contained herein.
APPENDIX: FURTHER RECOMMENDATIONS

Recommendation 1: That the Australian Government clarify the nexus between the National Disability Insurance Scheme and already existing state-funded victim compensation schemes.

Recommendation 2: That all Australian jurisdictions consider lifting the ‘two year from act of violence’ time limitation on applying for those victimized by mass violence and terrorism. This will enable those suffering injuries that manifest many years after the event to still qualify for assistance.

Recommendation 3: That jurisdictions consider extending the reach of their state-funded schemes to include state citizens gravely injured in non-terrorist violence whilst abroad.

Recommendation 4: That the Federal Government clarify whether it’s Australian Victims of Terrorism Overseas Payment is intended to meet the costs victims of terrorism incur whilst overseas or if this amount is in addition to the usual ad hoc government support provided to victims whilst overseas.

Recommendation 5: That the Federal Government make explicit it’s stance towards other sources of payment (including private charity) for victims of overseas terrorism who qualify to receive the Australian Victims of Terrorism Overseas Payment. This stance may or may not be useful for consideration by States and Territories with respect to their policies for compensating victims of terrorist acts occurring within Australia.

Recommendation 6: That the Federal Government consider changing the mandatory waiting periods based on personal savings and assets for victims of great violence who would otherwise immediately qualify for the Disability Support Pension.

Recommendation 7: That the Australian Government consider increasing the number of counselling sessions subsidized through Medicare, at least with respect to practitioners who are trauma-accredited.

Recommendation 8: That the Federal Government pass legislation so that amounts awarded for loss of earnings by state-funded victim compensation schemes are guaranteed to be
exempt from income tax. Failing changed Federal legislation, State and Territories shall consider creating a mechanism that gives victims the option to select the form that payment amounts for loss of earnings take. This could be as a lump sum (taxable), as a payment in the form of an annuity (potentially tax-free) or as a mixture of both.

**Recommendation 9:** That the Federal Government consider ongoing funding for its own innovative pilot projects that have proven to be highly successful for victims of violence, for example, the internationally award winning ‘BSafe’ program. Funding these projects could readily fall within the purview of a yet to be created Federally-funded victim compensation scheme for the Federal jurisdiction.

**Recommendation 10:** That the Federal Government consider creating a federally funded victim compensation scheme for the Federal jurisdiction, which also acts as anchor point for research and co-ordination between States and Territories and between international and regional jurisdictions.

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349 The annuity could be chosen to pay at a rate that does not adversely affect social security income and which also falls below the Federal Governments threshold for taxable income.

350 Women and children with a restraining order against a violent partner are supplied with a personal alarm button similar to those used by the elderly (enabling them to remain living in their own homes). When in danger, pressing the button contacts a 24 hour response centre which has their details on file and calls the police. It also starts recording for evidence of breach of intervention order, see Sharman Stone, ‘BSafe funding must continue’ <http://www.sharmanstone.com/MediaandSpeeches/MediaReleases/Murray/tabid/75/articleType/ArticleView/articleId/374/BSafe-funding-must-continue.aspx>.
COMPULSORY LICENSING AND PATENTED PHARMACEUTICALS: LESSONS FROM INDIA

MARK HUBER *

ABSTRACT

This article focuses on the usability and consequences attributed with the use of the intellectual property compulsory licensing mechanism contained within the WTO’s Agreement on Trade Related Aspects of Intellectual Property Rights. The high profile decision of Bayer Corp. v Union of India & Others of the Indian Intellectual Property Appellate Board, whereby Natco Pharma Ltd. was provided a compulsory license to produce a Bayer patented anti-cancer drug, Nexavar, is examined. In addition, the wider successes and failures of other States in granting pharmaceutical compulsory licenses are discussed. Comparing the successes and failures of other States with the Bayer/Natco case, this article highlights key lessons which ought to be followed in order to ensure that states, in granting compulsory licenses, do not attract unwanted retaliation.

I INTRODUCTION

On the 14th of September 2012 the Indian Intellectual Property Appellate Board (IPAB) rejected an appeal by Bayer Corporation (‘Bayer’) against the issuing of a compulsory license by the Controller of Patents.¹ The Bayer-patented pharmaceutical, Nexavar, is an anti-cancer medicine used in the treatment of advanced stage kidney and liver cancers.² According to Controller General Kurian (‘CG’), the right of exclusivity provided to the patentee through intellectual property (‘IP’) is not absolute, but one that carried with it an obligation to provide a benefit to the public at large.³

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¹ Bayer Corporation v Union of India & Ors [2012] Intellectual Property Appellate Board, Chennai M.P.Nos.74 to 76 of 2012 & 108 of 2012 in OA/35/2012/PT/MUM.
³ Ibid.
India has a long history of permitting compulsory licensing. The first instance of compulsory licensing was legislated in 1911.\(^4\) Regardless, this particular license is, in every respect, unique.\(^5\) The compulsory licence is the first to be granted by the Controller of Patents since India joined the World Trade Organisation\(^6\) (‘WTO’) and implemented the Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’) Agreement.\(^7\) It is the first compulsory licence issued by India for a cancer pharmaceutical; and the first compulsory licence issued directly to a company rather than a government.\(^8\)

In our WTO-governed ecosystem, the Indian approach towards intellectual property rights in the pharmaceutical industry is noticeably different from the approach taken by other developing countries (‘DCs’) and least developed countries (‘LDCs’).\(^9\) Many other WTO members have issued compulsory licences in the past. Unfortunately the public benefit derived therefrom has often been accompanied by a downturn in foreign direct investment (‘FDI’).\(^10\) Understandably, many states are accordingly unwilling to explore compulsory licencing. Going further, some states have consciously negotiated away such rights through bilateral and regional trade agreements in an attempt to encourage FDI.

The following article explores the Indian patent framework and Natco compulsory licence in depth, and contrasts the varied approaches taken by other States. In doing so this article will seek to answer three key questions: first, given the large population living without the means to pay for urgent medicines, why has it taken India so long since joining the WTO to issue its first compulsory licence? Secondly, why did India not simply revoke Bayer’s Nexavar intellectual property rights to permit generic production, as it has done for many other

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\(^9\) See United Nations, *UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States* <http://www.unohrlls.org>

medicines? Finally, given the adverse effects of pharmaceutical-related compulsory licensing on FDI, what can be learnt from the Indian approach to achieve an effective balance is between public health and encouraging FDI?

The article will analyse whether the TRIPS framework is adequate for its intended use, with a key focus on the Indian patent system and Natco compulsory licence. The analysis will first explicate the impetus for the compulsory licence and its role within TRIPS. Secondly, it will deconstruct the Indian compulsory licence landscape, followed by an analysis of the Bayer compulsory licence proceedings. Thirdly, the article will examine the ways that states have been hindered in their use, or desire to use, compulsory licences. Finally, the article will discuss the key lessons LDCs and DCs can learn from the Indian approach to IPR and compulsory licences. Chief to this article will be the demonstration that utilisation of compulsory licensing need not be a risk to FDI, so long as any use balances the needs of the citizenry with the rights of the patentee, and the rationale is not trivial or disingenuous.

II COMPULSORY LICENSING

A The Patentee vs. the Citizenry

The balance between the rights of the patent holder and the health of the public has long been a source of heated debate and frustration.\(^\text{11}\) Those who advocate for increased patentee rights argue such rights are necessary to incentivise the research and development of life saving pharmaceuticals.\(^\text{12}\) Given that cost of bringing a new medicine to market is estimated to frequently be in excess of US$1 billion, such arguments appear vindicated.\(^\text{13}\) However at what point does the patent protection of pharmaceuticals cease to be an incentive to innovate and become a vehicle for abuse? LDCs and DCs have oft been proponents of the view that patent rights should not only benefit the patentee, but also the State through development, technology transfer, and improved access of pharmaceuticals to the greater population.\(^\text{14}\)

\(^{11}\) McGill, above n 10.
\(^{12}\) Ibid.
Compulsory licensing is an authorisation by a state which permits a third party to produce, exploit, or sell an invention, which is otherwise protected by patent, without the consent of the patentee.\textsuperscript{15} The ultimate beneficiaries of a compulsory licence are typically LDCs and DCs,\textsuperscript{16} where the license is utilised to improve access to pharmaceuticals.\textsuperscript{17} Since the General Agreement on Tariffs and Trade (‘GATT’) Uruguay Round\textsuperscript{18} the WTO has made unprecedented inroads into the harmonisation of intellectual property rights (‘IPR’),\textsuperscript{19} with 157 member States adopting TRIPS standards to date.\textsuperscript{20} However, such harmonisation has come at a cost to LDCs and DCs, which may not have previously enforced IPR or provided patents for pharmaceutical products, particularly those that were not locally produced. As one of the world’s largest manufacturers and exporters of generic medicine to LDCs and DCs,\textsuperscript{21} India traditionally acknowledged process patents for pharmaceutical products. India was, however, was required to adopt a stricter IPR regime in order to join the WTO.\textsuperscript{22}

B Impetus

The recognition of basic IPR dates back as far as 15\textsuperscript{th} century Venice.\textsuperscript{23} The compulsory license, however, is a much more recent concept dating back only as far as 18\textsuperscript{th} century England,\textsuperscript{24} first attaining international recognition within the 1883 Paris Convention For The

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  \item \textsuperscript{16} For example, Africa is home to 11% of the world’s population, yet it accounts for 25% of the world’s disease burden. See Gareth Coetzee, Generic drugs are vital for a healthy Africa (6 October 2012) Mail & Guardian <http://mg.co.za/article/2012-10-06-generic-drugs-are-vital-for-a-healthy-africa>.
  \item \textsuperscript{17} Richard Epstein and Scott Kieff, ‘Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents’ (2011) 78 University of Chicago Law Review 71.
  \item \textsuperscript{18} General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 UNTS 194.
  \item \textsuperscript{21} Kristina Lybecker and Elisabeth Fowler, ‘Compulsory Licensing in Canada and Thailand: Comparing Regimes to Ensure Legitimate Use of the WTO Rules’ (2009) 37 Journal of Law, Medicine & Ethics 222.
  \item \textsuperscript{22} Basheer and Kochupillai, above n 4.
  \item \textsuperscript{24} Natco v Bayer [2011] Controller of Patents, Mumbai, Compulsory License Application No. 1 of 2011.
\end{itemize}
Protection Of Industrial Property (‘Paris Convention’).\textsuperscript{25} By the 1990’s over 100 countries contained compulsory licensing provisions within their patent framework.\textsuperscript{26} The compulsory license is a product of the tension that began to exist as stronger IPR gained traction, and achieving a balanced trade-off between economic policy and health policy became increasingly problematic.\textsuperscript{27} Compulsory licenses are considered by many States to be a public right, utilised where the patent holder does not exercise their patent to an extent that the State regards as acceptable.\textsuperscript{28} The chief justification for the use of compulsory licenses is in the event of an emergency such as a disease epidemic. However, they have also been justified in other instances, for example where the patentee is seen to be abusing their right by refusing to adequately price, distribute or manufacture the product within a state.\textsuperscript{29}

The modern impetus for compulsory licensing is by and large the emergence and exponential growth of HIV/AIDS infections, particularly in LDCs and DCs.\textsuperscript{30} Although the use of compulsory licenses in relation to other diseases, particularly treatable cancers, have begun to gain traction more recently, the statistics concerning the prevalence and impact of HIV/AIDS and access to treatment remain incomparable. Approximately two-thirds of all people infected with HIV/AIDS are located within Africa, with the largest concentration in South Africa.\textsuperscript{31} With respect to women and children infected with HIV/AIDS globally, 61% and 90% respectively are located within sub-Saharan Africa.\textsuperscript{32} It is pertinent to note, however, that HIV/AIDS is not solely of major concern in Africa. Within South-East Asia HIV/AIDS continues to spread, with Thailand’s prevalence rate in excess of 1% of the population\textsuperscript{33} (compared to a 0.3% prevalence rate in Central and Western Europe\textsuperscript{34}). For LDCs, the

\textsuperscript{25} Paris Convention For The Protection Of Industrial Property Article 5(A), 20March 1883, 21 UST 1538, now cited as Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, 14July 1967, 21 UST 1583; 828 UNTS 303.
\textsuperscript{26} Lybecker and Fowler, above n 21.
\textsuperscript{29} Ibid.
\textsuperscript{30} Lybecker and Fowler, above n 21.
\textsuperscript{31} McGill, above n 10.
\textsuperscript{32} Ibid.
\textsuperscript{33} Tejavanija, above n 27.
\textsuperscript{34} Ibid.
consequences of such a high prevalence rate are profound, directly affecting all aspects of society from social welfare to productivity to FDI.

Because many HIV/AIDS antiretroviral (‘ARV’) treatments are still protected by patent, the cost to the individual is often upwards of US$10,000 per person per year for first line treatment, with second line – administered once the body has built up a resistance to the first line treatment – and onwards treatment increasing in price. At this price, the majority of individuals within LDCs and DCs cannot afford treatment, nor can their governments afford to purchase, distribute, and often lack the capability to produce, domestically, a comparable treatment. Consequently, the only viable option is to compulsorily license the product. Since generically produced ARVs can cost up to 98% less than the patent holders product, the compulsory license provides the government and citizenry an unparalleled opportunity to control HIV/AIDS.

C TRIPS and Compulsory Licensing Within the WTO

Prior to TRIPS, the recognition of IPR within a state was by and large a reflection of development and innovation within the state. Developed states, such as the United States of America (‘US’), central Europe and the United Kingdom maintained a high level of IPR; DCs, such as Jordan, India and Chile maintained a lesser scope of rights; and LDCs maintained very limited, if any, IPR. The IPR of DCs predominantly focused on process of manufacture rather than end product or formula, allowing the generics industry (especially with respect to pharmaceuticals) to flourish through the production of replica goods. The key comparative advantage for the generics producer was their ability to avoid the cost and time associated with research, development, and approval processes, as well as all associated capital expenditure.

36 Coetzee, above n 16.
39 Babovic and Wasan, above n 35.
40 Ibid.
The Uruguay Round of Multilateral Trade Negotiations which commenced in 1986 ushered in a new era of international trade harmonisation, concluding with the establishment of the WTO in 1994. The Uruguay Round, which oversaw a renegotiation and update of the 1947 General Agreement on Tariffs and Trade, incorporated a cluster of agreements including TRIPS. TRIPS remedies the inequality in international IPR by enforcing a compulsory standard for WTO member states, including a minimum 20-year exclusivity period in favour of the patentee (albeit with exceptions). TRIPS’ foremost objectives are to liberalise international trade through the protection and enforcement of IPR; eliminate free riding within States with no IPR; reduce impediments to international trade; and promote the effective protection of IPR.

TRIPS is a victory for developed countries and innovators, including the pharmaceutical industry. In return for increased market access, LDCs and DCs are forced to implement and enforce IPR standards that may be economically burdensome, unnecessary in the circumstances, or negatively affect social welfare. However, the inclusion of compulsory licensing provisions within TRIPS, albeit with conditions, is an important negotiation victory for LDCs and DCs. A compulsory license is defined within TRIPS in Article 31, which states that the Member is entitled to enact legislation permitting other use of the patented good absent of any authorisation by the patentee. Utilisation of the compulsory license is subject to specific conditions that includes, inter alia, non-exclusivity, mandatory unsuccessful prior negotiation with the patent holder (waived in emergency situations), manufacture predominantly for domestic use (except where remedying an anticompetitive practice), and remuneration payable to the patent holder. Despite the aforementioned restrictions the text

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43 TRIPS, Article 27; McGill, above n 10.
44 TRIPS, Article 33.
45 Donald Harris, ‘TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing’ (2010) 18 Journal of Intellectual Property Law 367.
46 McGill, above n 10.
47 TRIPS, Article 31.
48 TRIPS, Article 31(d).
49 TRIPS, Article 31(b).
50 TRIPS, Article 31(f).
51 TRIPS, Article 31(h).
is ambiguously worded, providing the compulsory licensor unfettered discretion to determine on a case-by-case basis what amounts to adequate negotiation, what constitutes an emergency situation and what amount of remuneration is sufficient.

The requirement that the compulsory license be predominantly for domestic use embeds the inability of LDCs and many DCs to access essential medicines. This is due by and large to the fact that these states lack the capacity to domestically produce the good and/or obtain the ingredients. Historically these states have relied upon the ability of other generics producers, particularly India, to produce these pharmaceuticals on their behalf. Under TRIPS the producing State would only be entitled to export 49.9% of their compulsory license production quota. Realising the tension and humanitarian impacts of this provision, a solution was adopted by WTO General Council on 30 August 2003, during the Doha Round of negotiations. Hailed as proof that the WTO could deal effectively with socially concerning issues, Article 31bis increases the flexibility for trade in compulsorily licensed medicines by permitting any state (with the capability to produce the required pharmaceuticals) to issue a compulsory license in favour of the country requiring the pharmaceutical (who must themselves also issue a mirror compulsory license to import the pharmaceutical).

Article 31bis is a clear negotiation victory for LDCs and DCs, of which 80% lack the capacity to domestically produce ARV. However, any proposal that it was an easy victory is mistaken. Despite LDCs and DCs expressing concern over TRIPS Article 31(f) during initial negotiations, the European Union (‘EU’) and US were unwilling to budge, deferring further negotiations until the Doha Round. This unwillingness was also repeated on 20 December 2002, when the US blocked a consensus to approve the renegotiation of Article 31(f), forcing negotiations to continue until approval on 28 August 2003. During the negotiations the US

52 Reichman, above n 41.
53 World Trade Organization, Ministerial Declaration [Doha Declaration], Nov. 14, 2001, WT/MIN(01)/DEC/1
56 McGill, above n 10.
58 Abbott, above n 54.
in particular pursued an agenda focused on restricting Article 31\textsuperscript{bis} in its scope, state eligibility and TRIPS applicability.\textsuperscript{59} Although the US acknowledged that there were currently diseases which ought to be addressed through compulsory licences,\textsuperscript{60} it argued that the scope of Article 31\textsuperscript{bis} must be restricted to a list of specific diseases.\textsuperscript{61} The motivation of the US and major-patent holding pharmaceutical companies was clear: the less pharmaceutical products available to compulsory licences the lesser the risk that revenues earned by domestic patent holders will decrease, and the lesser the risk that research and development funding for future diseases would decline.\textsuperscript{62}

Ultimately, this argument failed as it was in direct conflict with the Doha Declaration, that each member is entitled to determine the grounds upon which the compulsory licences is granted;\textsuperscript{63} that all members recognised the significance of public health problems,\textsuperscript{64} that the [TRIPS] Agreement supports access to medicines for all;\textsuperscript{65} and that TRIPS includes all “products of the pharmaceutical sector.”\textsuperscript{66} This failure ultimately is a win for common sense. As Abbott notes, there is no justification for denying a patient access to treatment because a trade official decided that it should not be on a list.\textsuperscript{67} Such an argument is against the public interest for the simple reason that existing diseases evolve and mutate over time, and so too does their corresponding treatment.\textsuperscript{68} Likewise, new diseases continue to be discovered and possess the ability to inflict unknown damage upon a state, often requiring urgent access to tailored medicines and treatments.\textsuperscript{69} Nevertheless, the US, EU and other developed States were successful in limiting the automatic import-State eligibility to LDCs only, with other States at a greater stage of development required to satisfy key transparency and entitlement criteria.

\textsuperscript{59} Ibid
\textsuperscript{61} McGill, above n 10.
\textsuperscript{62} See Abbott, above n 54.
\textsuperscript{63} Doha Declaration, above n 57, [5].
\textsuperscript{64} Ibid, [1].
\textsuperscript{65} Ibid, Para [4].
\textsuperscript{66} Ibid, Para [6].
\textsuperscript{67} Abbott and Reichman, above n 60.
\textsuperscript{68} Abbott, above n 54.
\textsuperscript{69} Ibid.
It is pertinent to note that Article 31\textsuperscript{bis} remains in quasi-limbo, with only a single compulsory licenced export (Canada to Rwanda) being successfully completed, with significant delay at that.\textsuperscript{70} Meanwhile the proliferation of bilateral and regional trade agreements as a means of bypassing WTO reform means it is unlikely that any beneficial changes to TRIPS Article 31 will occur in the near future.

III INDIA

A Compulsory Licensing and the Legislative Landscape

1 Pre-WTO

The Indian patent landscape has been in existence since 1856, originally drafted in line with the British Patent Act 1852 (UK).\textsuperscript{71} India was the first country outside of the developed world to possess a patent framework.\textsuperscript{72} Within this time is has undergone four significant revisions: first in 1911, after which it was renamed the Indian Patents and Design Act 1911;\textsuperscript{73} secondly in 1950 in response to the Tek Chand Committee Report;\textsuperscript{74} thirdly in 1970, where it was renamed the Patents Act 1970 (‘the Act’) and implemented the Ayyangar Committee Report;\textsuperscript{75} and most recently in 2005, implementing TRIPS compliance requirements.\textsuperscript{76} As India rapidly developed, rising to the status of ‘advanced developing country’,\textsuperscript{77} so too did its pharmaceutical industry. The major contributing factor that allowed this rapid development was the inclusion of process-only pharmaceutical IPR, as well as broad compulsory licence eligibility.\textsuperscript{78} This allowed any pharmaceutical manufacturer to reproduce a generic copy of existing pharmaceuticals so long as the process of manufacture did not infringe an existing patent.

\textsuperscript{71} Basheer and Kochupillai, above n 4.
\textsuperscript{73} Act II of 1911 (Royal Assent by the Governor General on 2 March 1911).
\textsuperscript{74} Act No XXXII of 1950 (assent by the President on 18 April s1950).
\textsuperscript{77} Damodaran, above n 77.
\textsuperscript{78} Babovic and Wasan, above n 35.
The 1911 Act was the first to establish the authority of the Controller of Patents and patent administration.\textsuperscript{79} After the expiration of a 3 year exclusivity period any interested person was permitted to apply to the Controller of Patents for a compulsory licence. The compulsory licence is granted where the patentee fails to manufacture the patent to the fullest extent possible within India; demand for the patented pharmaceutical has not been met; the domestically producing patentee was unwilling to grant a reasonable license to the applicant to pursue an unexploited export market; or because the patent provided was causing unfair prejudice to domestic industrial activities.\textsuperscript{80}

Following independence from British rule the Tek Chand Committee was established. The final Committee report largely echoed the findings made in the Swan Committee’s (United Kingdom) report which was produced at the same time.\textsuperscript{81} Nevertheless, the existing compulsory licence framework was widened as a result.\textsuperscript{82} The additions to the compulsory licence landscape included a provision to allow for a compulsory licence where the patentee was imposing a condition of use upon the good that was hindering local industry; or where the Indian Government was of the view that a compulsory licence was in the public interest.\textsuperscript{83} Despite the increase in compulsory licence eligibility, the reforms were not as effective as anticipated and another committee (Ayyangar) was commissioned.\textsuperscript{84}

The Ayyangar Committee set about to ensure that forthcoming reform recommendations stimulated local industrial innovation and development.\textsuperscript{85} In its investigation the Committee found that foreign entities held upwards of 85\% of Indian patents,\textsuperscript{86} 90\% of which were not worked inside of India.\textsuperscript{87} To promote local production and ownership the report focused on reform to assist technology-transfer, improve know-how, permit brand association,\textsuperscript{88} making specific goods (i.e. chemicals and pharmaceuticals) unpatentable, removing patent abuse

\textsuperscript{79} Basheer and Kochupillai, above n 4.
\textsuperscript{80} Indian Patent and Design Act 1911 (India), s22.
\textsuperscript{81} Tanuja Garde, ‘India’ in Paul Goldstein and Joseph Straus (eds), Intellectual Property in Asia: Law, Economics, History and Politics (Springer-Verlag Berlin Heidelberg, 2009) 59.
\textsuperscript{82} Basheer and Kochupillai, above n 4.
\textsuperscript{83} Basheer and Kochupillai, above n 4.
\textsuperscript{84} Ibid.
\textsuperscript{85} Garde, above n 81.
\textsuperscript{86} Ibid.
\textsuperscript{87} Basheer and Kochupillai, above n 4.
\textsuperscript{88} Ibid.
loopholes including a local ‘work’ requirement, and providing special licensing provisions for inventions relating to food and medicine.\textsuperscript{89} These proposals became the foundation for key reforms made to the 1970 Act.

The consistent decision by the Indian Government to restrict the scope of pharmaceutical IPR is based upon the rationale patents were granted in the interest of the national economy and citizenry as a whole.\textsuperscript{90} Following this rationale the Government believed that permitting a single entity to hold monopoly power over a medicine was not in the interest of the public as a whole.\textsuperscript{91} India has not been alone in this school of thought, with other States including Austria, Brazil, Canada, Italy, Japan, Poland, Spain, Sweden, and Switzerland not providing full IPR to pharmaceuticals at some point in the 20\textsuperscript{th} century.\textsuperscript{92}

2 Post-WTO
Following the conclusion of a 10-year transitional period (1995-2005) provided at the time of joining the WTO, India was required to amend the 1970 legislation to comply with TRIPS as of 1 January 2005.\textsuperscript{93} To accommodate patent requests that were lodged throughout this transitional period India established a patent ‘mailbox’ in accordance with TRIPS Article 70(8). This mailbox permitted the lodgement of patent applications for otherwise currently unpatentable pharmaceuticals, to be withdrawn from the mailbox and examined for patent eligibility on 1 January 2005, with IPR applied retrospectively from the date of lodgement. However, where pharmaceuticals were being produced and marketed within India by a third party prior to 1 January 2005, the mailbox patent holder will only be entitled a “reasonable royalty”, with the existing producer indemnified against infringement proceedings.\textsuperscript{94}

The broad scope of change applied through the 2005 amendments concerns not just to a narrow class of pharmaceuticals, but rather the pharmaceutical market of supply as a whole.\textsuperscript{95} Although many medicines required by LDCs (including ARVs) were already

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\item \textsuperscript{89} Garde, above n 81.
\item \textsuperscript{90} McGill, above n 10.
\item \textsuperscript{91} Ibid.
\item \textsuperscript{92} Ibid.
\item \textsuperscript{93} TRIPS, art 65.4 permits developing members without patent protection for pharmaceuticals until 1 January 2005 to legislate and implement the necessary protections.
\item \textsuperscript{94} Patents Act 1970 (India), s11A(7).
\item \textsuperscript{95} Abbott, above n 54.
\end{itemize}
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produced generically within India prior to 2005, a greater weight has been placed on the compulsory licencing framework to ensure that new medicine patents are not abused.\footnote{Ibid.} Under the present patent framework Basheer and Kochupillai highlight that a compulsory licence may be granted where the applicant is able to satisfy 1 of 4 broad categories, namely: that the patentee has abused their IPR,\footnote{Patents Act 1970, s84.} the compulsory licence is in the public interest,\footnote{Patents Act 1970, s92.} one of the amendments inserted in 2005 is satisfied,\footnote{Patents (Amendment) Act 2005 (India) (Act 15 of 2005).} or the applicant has satisfied one of the other provisions (e.g. s91 - licensing related patents).\footnote{Basheer and Kochupillai, above n 4.} Each of these 4 categories will now be briefly summarised.

\textit{(a) Abuse of IPR}

Section 84 of the Act provides that any interested person is permitted to apply for a compulsory licence to the Controller General of Patents, Designs and Trademarks, so long as 3 years have passed since the patent was first approved. In order for the application to be successful the must applicant establish that the patentee has failed to meet the reasonable requirements of the public with respect to the patent; failed to provide the patented good at a reasonably affordable price; or failed to work the patent within India.

\textit{(b) Reasonable Requirements of the Public}

- Section 84(7)(a)(i) states that the reasonable requirements of the public will include a failure to grant a license to utilise the patented thing on reasonable terms, resulting in a prejudice or hindrance to the establishment of a new trade/industry.

- Section 84(7)(a)(ii) is more straightforward, stating that a compulsory licence will be granted where demand for the thing has not been reasonably met.

- Section 84(7)(a)(iii) however is more complicated, focusing on export demand. This section, which Basheer and Kochupillai identify may contravene TRIPS Article 31(f) (unless Article 31\textsuperscript{bis} is complied with),\footnote{Basheer and Kochupillai, above n 4.} states that a compulsory licence will be granted
where the applicant is able to establish that an export market is available that the patentee (who is an Indian manufacturer) has chosen not supply.

- Section 84(7)(b) once again is more straightforward, permitting a compulsory licence to be granted where the patentee has licensed use of the thing conditionally, however the conditions imposed are hindering the establishment or development of a local trade or industry, or impeding the use of a non-patented good.

- Section 84(7)(c) is designed to preclude anticompetitive practices by a patent holder, and operates in tandem with India’s competition legislation. Where a patent holder licenses the use of the good in a manner which prohibits the licensee from challenging the validity of the patent, is exclusive, or forces the licensee to use other goods manufactured by the patentee, then the reasonable requirements of the public will be regarded as not met.

- Section 84(7)(d) and (e) requires that the patented good be worked within India. This provision is designed to promote technology transfer and local industry, in line with the Ayyangar Committee report. The sections states that a compulsory licence may be granted where the patentee is not producing the good on a commercial scale or to the fullest extent possible within India, or hindering such development by importing the good from another country.

(c) Reasonably Affordable
Basheer and Kochupillai note that what constitutes a reasonable price for a pharmaceutical will depend upon individual circumstances. Where a patentee charges an excessive price, a compulsory licence may be obtained. This issue was recently dealt with in detail by the Controller of Patents in Bayer v Natco, discussed below at 3.2.

(d) ‘Worked’
The Act requires that the patentee work the patent within India, as noted in s84(1)(c). Whether or not this requires that the good be produced within India has been of significant
debate since India began TRIPS compliance. While argument exists that working must include importation, as demand is still being serviced, s83(b) of the Act prohibits patents being provided for import only products, meaning that there must be some degree of local manufacture. This is reinforced through s90(3) which allows the Indian Government to issue a direction to the Controller of Patents at any time to grant a patent for a wholly imported good. Whether the work requirement is satisfied through a simple process (e.g. packaging) or requires physical manufacture of the good is also unknown.

Within the Act, s84(7) (as summarised above) makes several references to working, however also refers to importing as an individual term. Because they are treated as separate terms it would appear that the legislation is following the Paris Convention, which articulates a difference between working and importing at Article 5(B). However, TRIPS Article 2(1) requires that members adhere with the Paris Convention, while Paris Convention Article 5A(1) states that importation of a patented good will not forfeit that patent. As Basheer and Kochupillai argue that while solely importing a patented good will not forfeit a patent, compulsory licence is not a forfeiture of patent, and thus is valid. Further, there is an argument to be made that TRIPS Article 30 and 31 permit members to maintain a local working requirement within their IP framework.

(e) Public Interest
Section 92 of the Act permits the Indian government to grant a compulsory licence in the event of a national emergency; for non-commercial use; or in a time of extreme urgency. Where the government has made such a declaration any private entity can apply for a licence to produce the good on behalf of the government. In short, this provision is in line with TRIPS Article 31. Unlike the other compulsory licence provisions within the Act there is no 3 year grace period for the patent holder, and the government is not required to negotiate prior to granting the compulsory licence. Predictable rationale for utilising this provision


105 For example, s84(7)(e) mentions the inability of one to work the patent within India due to the importation of the same good from abroad.

106 Basheer and Kochupillai, above n 4. This argument was raised within *Natco v Bayer*, as discussed below at 3.2.

include stockpiling inoculations or treatments,108 treating an epidemic, or to counter disease outbreaks following large-scale natural disasters.

Where TRIPS Art31 is invoked the country must ensure its rationale is genuine and justified, or risk backlash by both foreign governments and the pharmaceutical industry. A recent example, discussed within the article at 4.1 is Thailand and its decision to compulsory licence ARVs for claimed non-commercial use.109

(f) 2005 Amendments
The TRIPS compliance amendments to the Act included two new forms of compulsory licencing, namely: for mailbox patent applications; and for export to countries without manufacturing capabilities (as permitted within Article 31bis).

Although the mailbox provision is unique to India, its rationale is warranted given the enormous generics industry and its need to become accustomed to TRIPS and heightened IPR. The mailbox compulsory licence, as located within s11A of the Act, provides that where a mailbox patent application is approved any existing generic manufacturer of the same good will be entitled to an automatic compulsory licence. To be eligible, the generic manufacturer must show that they made a significant investment in order to produce the pharmaceutical, and were producing and marketing the pharmaceutical prior to 1 January 2005.

(g) Other Provisions
The Act contains three additional grounds for a compulsory licence, located within sections 88(3), 90 and 91. Sections 88(3) and 90 are both add-on provisions for applicants pursuing a compulsory licence under one of the abovementioned grounds, while section 91 operates in isolation, notwithstanding any other compulsory licence provisions. Section 88(3) provides that where a patentee holds multiple patents and a compulsory licence applicant establishes the reasonable requirements of the public are not satisfied for one or more of these patents, then the Controller of Patents may also grant a compulsory licence for other patents too. The conditions attached to this provision are that the compulsory licence of the other patents is

necessary to work the licence granted; and that the other patents involve a technical advancement or are of economic significance to the existing compulsory licence.\(^{110}\) Section 90 of the Act adheres to TRIPS Article 31, stating that the Controller is required to ensure that the specific objectives within Article 31 are upheld. Section 91 is focused on cross-licensing. The provision states that a patentee or licensee may apply to the Controller of Patents for a compulsory licence of a subsequently granted patent where they can prove that in the absence of the compulsory licence they are hindered or prohibited from working the patent/licence they currently possess. This section is limited in its scope though, as an applicant who holds the subsequent patent cannot compel the holder of a previous patent to cross-license it. This incentivises current patent holders to not improve existing patents as they can simply cross-license the use of an improved patent when another party creates it.

\section*{B \textit{Bayer} v \textit{Natco}}

The \textit{Bayer} v \textit{Natco} decision is a milestone in Indian intellectual property law. As the first compulsory licence decision since TRIPS compliance took force in 2005, the outcome is not only significant to those who will benefit directly (i.e. the qualifying cancer patient), but also the global pharmaceutical industry as a whole. While Médecins Sans Frontières (‘MSF’) have welcomed the decision to grant the compulsory licence, indicating that they hope it will lead to additional successful compulsory licence applications,\(^{111}\) pharmaceutical companies have condemned the decision, stating that it will spark a domino effect across the developing world and severely hamper innovation and research.\(^{112}\)

\subsection*{1 Overview and Judgement}

Bayer (patentee) and Natco (applicant) contested a compulsory licence over the patented pharmaceutical ‘Sorafenib tosylate’ (\textit{Carboxy Substituted Diphenyl Ureas}), sold under the name ‘Nexavar’ by Bayer.\(^{113}\) Sorafenib (‘the drug’) is able to extend the life of an advanced stage liver or kidney cancer patient by 6-8 months. The drug requires a continuous dosage to be administered throughout the life of the patient, and the current retail cost is Rs2,80,428

\begin{thebibliography}{9}
\bibitem{110} Basheer and Kochupillai, above n 4.
\bibitem{111} Médecins Sans Frontières, \textit{MSF statement on India's dismissal of Bayer's request for a stay on compulsory licence} (17 September 2012) <http://www.msfaccess.org/content/msf-statement-indias-dismissal-bayers-request-stay-compulsory-licence>.
\bibitem{112} Suchman, above n 8.
\bibitem{113} \textit{Natco} v \textit{Bayer}, [2011] Controller of Patents, Mumbai, Compulsory License Application No. 1 of 2011, 2, 3.
\end{thebibliography}
(AU$5,000AU)/month. The application by the applicant is under section 84(1) of the Act (as discussed above at 3.1.2.1). As 3 years had passed since the patent was approved and the patentee categorically refused to grant a negotiated voluntary license, the applicant satisfied the eligibility criteria within both the Act and TRIPS.\(^{114}\)

In making out a *prima facie* case, the applicant established that the patentee did not manufacture the drug in India (despite operating local oncology product manufacturing facilities); from 2006 to 2008 it did not import the drug into India; and in 2009/2010 it only imported minute quantities well below the number of eligible recipients.\(^{115}\) In response the patentee submitted that the reason behind this failure to import to satisfy demand was due to the unauthorised production of the drug by another company, Cipla, with whom it is currently engaged in a court dispute over the unauthorised sale.\(^{116}\) In awarding the compulsory licence, the CG issued the patentee with a royalty entitlement of 6% of net sales/quarter (to comply with TRIPS Article 31(h)), as well as price and output conditions upon the applicant.\(^{117}\) These will not be discussed within this article, as they are not directly relevant.

In his judgement, the CG stated that main issues to be decided were whether the reasonable requirements of the public had been satisfied (by the patentee with the drug); whether the drug was reasonably priced; and whether or not the drug had been worked inside India. Each of these issues are discussed below.

**(a) 84(1)(a) – Public Requirements**

In arguments, the patentee and applicant heavily relied upon the GLOBOCAN 2008 statistics.\(^{118}\) The CG therefore accepted these statistics. Whilst the patentee estimated the number of eligible persons (with the requisite advanced stage kidney or liver cancer) to be approximately 8,800,\(^{119}\) the applicant estimated the number to be far greater, in the vicinity of 23,000.\(^{120}\) Given the state of the healthcare system in India, the CG acknowledged the logic

\(^{114}\) Ibid, 8.

\(^{115}\) Ibid.

\(^{116}\) Ibid, 8(d).

\(^{117}\) Ibid, 60-62.


\(^{120}\) Ibid, 10.
in the patentee’s submission.\textsuperscript{121} However, the CG believed that the number of eligible persons was closer to the applicant’s estimate. Whether the number of eligible persons was 8,800 or 23,000 is of little importance, given that the patent holder had only supplied the drug to 200 persons to date - drastically below the market demand.\textsuperscript{122}

With respect to the patentee’s submission that this low investment in the Indian market was due to the unauthorised sale of the drug by Cipla, the CG stated that the patentee’s obligation to supply cannot be discharged by an infringing party. Further, the patentee did not show willingness to compete with Cipla, which was selling the drug at approximately AU$500/month, as opposed to the approximately AU$5000/month price of the patentee.\textsuperscript{123} Any argument that Cipla saturated the market is also invalid given that it only sold 4686 packets in 2011 (with each patient requiring 1 packet per month, again, well below the market requirement).\textsuperscript{124}

Highlighting the long history of the patentee within India, its established distribution network, and its market power, the CG found that the amount of the drug supplied within India was insignificant when compared to the total number of eligible persons, failing the public reasonableness requirement.\textsuperscript{125} Further, the CG noted that s84(7)(a)(ii) of the Act is invoked beyond doubt (as discussed above at 3.1.2.1.1), and accordingly a compulsory licence may be granted in favour of the applicant.

\begin{itemize}
\item[(b)] 84(1)(b) – Price
\end{itemize}

The patentee argued that price is not only determined with reference to the end consumer, but also with reference to the patentees cost of bringing the drug to market and maintaining growth. The patentee submitted that the true cost of bringing the drug to market to be in excess of €2bn,\textsuperscript{126} and that affordability must be determined with respect to the different

\begin{footnotesize}
\begin{enumerate}
\item[121] Ibid, 17.
\item[122] Ibid, 22.
\item[123] Ibid, 21.
\item[124] Ibid, 22.
\item[125] Natco v Bayer, [2011] Controller of Patents, Mumbai, Compulsory License Application No. 1 of 2011, 23.
\item[126] Ibid, 29.
\end{enumerate}
\end{footnotesize}
classes or sections of the public. Both parties agreed, however, that the value is notional in nature,\textsuperscript{127} depending upon the facts and circumstances of each case.\textsuperscript{128}

Whilst the CG agreed with the patentee with respect to affordability as a determinative factor, it questioned why the patentee did not price the drug on a differential scale depending upon their class/section of the public.\textsuperscript{129} Treating unequal as equal (i.e. upper and lower classes) was discriminatory, unreasonable, and cannot be the intention of the legislature.\textsuperscript{130} The reasonably affordable price was one which is predominantly concerned with the public, not the patentee.\textsuperscript{131} Further, because the drug was granted ‘orphan status’ within the US and Europe,\textsuperscript{132} the patentee has received significant tax incentives whilst conducting research and development, raising doubt over its submitted total costing.\textsuperscript{133} Given that the sales by Cipla were not admissible by the patentee, the drug was not made available to the public at a reasonably affordable price, invoking s84(1)(b) and consequently a compulsory licence was granted in the applicant’s favour.\textsuperscript{134}

(c) 84(1)(c) – Worked

The patentee contended that the work requirement, as originally located within s84(7)(a)(ii) prior to the 2005 amendments, was removed so that TRIPS Article 27 would not be contravened.\textsuperscript{135} The CG stated that such an argument is incorrect and misguided. The CG identifies that the phrase was in fact deleted from s90(a) of the unamended \textit{Patents Act 1970} (‘unamended Act’), however s84(7) is the corresponding provision under the existing Act.\textsuperscript{136} Section 90(a) of the unamended Act was in fact in relation to the reasonable requirements of the public, and for this reason existed in a different context. The CG states that the work requirement is now a standalone compulsory licence ground, removed from any previous context (i.e. public requirement), and altered in scope. s84(1)(c) of the Act is an entirely

\textsuperscript{127} Ibid, 32.
\textsuperscript{128} Ibid, 35.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid, 30,31.
\textsuperscript{131} Ibid, 36.
\textsuperscript{134} \textit{Natco v Bayer}, at 36.
\textsuperscript{135} Ibid, at 39.
\textsuperscript{136} Ibid, at 40.
different provision to s90(a) of the unamended Act, and it cannot be said therefore that the intention of the legislature to remove s90(a) was to remove the work requirement in its entirety.

In compliance with Article 27 of the Vienna Convention, the CG stated that due regard must also be paid to TRIPS, and also the Paris Convention through TRIPS Article 2(1). The CG noted that Article 5(A)(1) of the Paris Convention states that while importation will not forfeit a patent, it does not preclude a compulsory licence being issued. Further, the Paris Convention at Article 5(A)(2) permits legislation to prevent abuse (such as failure to work). TRIPS Article 27(1) also states that patents are to be enjoyed irrespective of their place of invention, field of technology, or place of production. The CG stated that Article 27(1) is to be construed in line with the Paris Convention, and as such the location of manufacture will not result in the forfeiture of a patent. Because a compulsory licence is not a forfeiture, it is therefore permitted.

With respect to the local work requirement the patentee submitted that the use of the term ‘commercial scale’ in s84(1)(c) of the Act was absolute. The CG disagreed with this argument, stating that such a requirement would be absurd and restrictive. S83(b) states that a patent is not to be granted merely so the patentee can enjoy an import monopoly; while s83(c) states that the patent must contribute to the promotion of technological innovation, transfer and dissemination. What more, s83(f) prohibits a patentee from utilising practices that restrain trade or international technology transfer. As such the work requirement implies local manufacture occur within India to as reasonable extent as possible. Because the patentee has established means and market to manufacture the drug within India, and chose not to do so for four years, there was a clear failure to work the invention within India. Consequently a compulsory licence was granted in favour of the applicant.

139 Ibid, 42.
140 Ibid, 42.
141 Ibid, 43.
142 Ibid, 43.
143 Ibid, 44, 45.
144 Ibid.
2 Review

In the most recent stay appeal their honours Prabha Sridevan J and Shri Parman once again firmly rejected Bayer’s reliance on the Cipla’s unauthorised use of the drug as a justification for not working the patent.\textsuperscript{145} Because there was no reason why Cipla should succeed against Bayer in an action for patent infringement, or even an injunction application, there is no weight to suggest that Bayer should be entitled to rely on their sales. The fact that an injunction had not been sought as yet gives the connotation that Bayer was perhaps waiting on the outcome of the case before doing so, at which point it would once again maintain a monopoly.

As Enrico Bonadio highlights, the decision by the CG to interpret TRIPS and the Paris Convention as permitting a compulsory licence where the patentee does not locally work the product is unique.\textsuperscript{146} The interpretation by the CG is very much in line with Indian domestic jurisprudence, as evidenced through its pre-TRIPS attitude towards pharmaceutical patents. This does not suggest that the interpretation by the CG is incorrect, as a compulsory licence is definitely not a forfeiture of patent, though it does remove the patentee’s absolute monopoly.

With respect to ‘work’ the WTO has taken a different view to Article 27(1) than the CG, holding in \textit{Canada-Patent Protection of Pharmaceutical Products} that a State cannot discriminate on the basis of whether the product is locally manufactured or otherwise.\textsuperscript{147} Likewise, the EU Court of Justice has held in \textit{Commission v Italy} that a local working requirement is akin to quantitative restrictions on imports, which are not permitted under EU or WTO law.\textsuperscript{148} As Bonadio notes, the CG failed to engage in any depth with the international application or jurisprudence of TRIPS, paying no regard to the travaux préparatoires or WTO decisions.\textsuperscript{149} This silence by the CG ultimately leaves India wide open to a WTO dispute by a concerned state.

\textsuperscript{145} \textit{Bayer Corporation v Union of India & Ors} [2012] Intellectual Property Appellate Board, Chennai M.P.Nos.74 to 76 of 2012 & 108 of 2012 in OA/35/2012/PT/MUM.
\textsuperscript{147} \textit{Canada-Patent Protection of Pharmaceutical Products},WT/DS114/R (17 March 2000), [7.69].
\textsuperscript{148} \textit{Commission v Italy} (C-235/89) [1992] E.C.R. I-777, [23].
\textsuperscript{149} Bonadio, above n 146.
As the CG and commentators have highlighted, this case provides an incentive for pharmaceutical companies to price their goods on a differential scale, especially in DCs and LDCs where public healthcare is poor and a large disparity exists between those with and without the means to afford life-saving treatment. Whether other DCs and LDCs follow suit will depend upon whether this decision is challenged at the WTO. Should it not be challenged, one can assume that other DCs with pharmaceutical industries such as South Africa and Thailand will adopt a similar line to India, ultimately forcing patentees to lower prices, differentiate pricing, license to local manufacturers, or exit the market.

IV HINDRANCES

Despite a great number of States possessing compulsory licencing legislation, in practice a compulsory licence is rarely granted.\(^{150}\) The main use of compulsory licence is predominately focused at leverage and bargaining with pharmaceutical companies.\(^{151}\) The use of compulsory licences as a bargaining tool transcends countries in all stages of development, from the US (Anthrax vaccines)\(^ {152}\) to Brazil (ARVs).\(^ {153}\) There are even suggestions that as a tool it is so successful that LDCs should pool together to address access issues with key pharmaceutical companies.\(^ {154}\) For DCs and LDCs though who lack bargaining power, access to key pharmaceuticals, or simply have a population who are largely unable to afford cost price medicines, why is there such a reluctance to engage in compulsory licencing? This section will briefly highlight the key factors hindering the utilisation of compulsory licences, namely: the pharmaceutical industry, other States, and bilateral/regional trade agreements.

A The Pharmaceutical Industry

The pharmaceutical industry is one of the largest factors hindering compulsory licence. The power of pharmaceutical companies to influence the price, volume, access to its patented goods, and FDI, as well as lobby governments, is not to be underestimated.


\(^{151}\) Anderson, above n 14.

\(^{152}\) Sands, above n 37.


\(^{154}\) Abbott and Reichman, above n 60.
In 2001, in response to one of the world’s worst HIV/AIDS pandemics, the South African government passed the *South African Medicines and Related Substances Control (Amendment) Act* 1997. This amendment granted the local medicine manufactures a compulsory licence over HIV/AIDS drugs, or the power to parallel-import them if cheaper than manufacture. The rationale was simple: allow all the local producers to flood the market with affordable ARVs, and reclaim control of the pandemic. In response, 39 patent owners of the ARVs, along with the US (where many of the patent owners are based) objected, claiming TRIPS violations. In addition, many closed their South African factories or cancelled their investment initiatives. Although these objections were eventually withdrawn, the response of the pharmaceutical industry had a profound impact, leading to associated discussions at the Doha Round.

Likewise, in Thailand, the government implemented a public health care strategy known as the 30 Bhat Scheme (referring to the amount citizens would have to pay for cover) in 2001. The scheme enabled universal access to basic medical services such as hospital cover. In November 2006, following a coup, the scheme was heavily expanded, and a compulsory licence was granted for HIV/AIDS ARVs, while the 30 Baht fee was dropped. Further, in 2007 it again issued two more compulsory licences, one for Kaletra (an ARV), and another for Plavix (a blood thinner). At the same time it flagged additional drugs for compulsory licencing, including those for the treatment of cancer and other diseases. The scheme provided ARVs to over 50% of eligible persons, and saved the Thai government over 4 billion Baht ($125.5 million approx). In response, the pharmaceutical heavily criticised the scheme, in particular the compulsory licence for Plavix. Abbott, an ARV patent holder, withdrew registration of seven of its patents, including an ARV, Aluvia, which did not

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155 Harris, above n 45.
156 Ibid.
157 Ibid.
158 World Trade Organization, Ministerial Declaration [Doha Declaration], 14 November 2001, WTO Doc No T/MIN(01)/DEC/1, at 756.
159 Lybecker and Fowler, above n 2.1
160 Tejavanija, above n 27
161 Ibid.
162 Lybecker and Fowler, above n 21.
163 Tejavanija, above n 27.
require refrigeration and was therefore better suited to the climate of many LDCs. Although Abbott eventually agreed to supply Aluvia, it did not return the other six remaining medicines to the Thai market. Whilst legitimate concerns were raised (discussed below at 4.2) by the industry, the ability of a single pharmaceutical company to object to domestic policy and to subsequently refuse to import an improved, life-saving drug is concerning, especially to LDCs where there is no capacity to domestically produce a generic alternative.

B The Conduct of States

The way a state approaches compulsory licencing has a lasting impact on other states which may be considering similar initiatives. States which show a disregard for IPR and compulsorily licence medicines regarded as non-life saving, or which grant a compulsory licence on false pretences will ultimately make it more difficult for other states with legitimate access needs. So too will governments that enact compulsory licencing legislation that are dogged by bureaucracy and excessive limitations. Likewise, the retaliatory action or threat of such action (such as trade sanctions or other FDI disincentives) by a state or multiple states can hinder or eliminate any incentive for others to engage in compulsory licencing. In 2002, Egypt granted a patent to Pfizer for Viagra. However, due to domestic lobbying by local pharmaceutical companies a compulsory licence for the drug was granted only two months later. The compulsory licence was granted to any company that wanted to produce it. Egypt argued that the reduced cost of Viagra would benefit the poor. Pfizer was less than impressed, and halted the construction of a manufacturing facility in Egypt. What more, FDI in Egypt decreased by half for the 2002 financial year, and has only recovered due to extractives investment since then, with very minimal pharmaceutical investment. This compulsory licence, as well as the others granted by Egypt, display a disregard for international IPR, and are a typical example of compulsory licence abuse.

As aforementioned, the compulsory licences issued by Thailand were met with firm resistance and condemnation by the pharmaceutical industry, Abbott in particular. It is

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164 Ibid.
165 Ibid.
166 McGill, above n 10.
167 Bird and Cahoy, above n 153.
168 Ibid.
169 McGill, above n 10.
pertinent to note that in addition to life-saving ARVs, Thailand later issued a compulsory licence for eleven non-life saving drugs, and made a profit in the process. Although the drugs were to be distributed to the public at below the patentee’s advertised price, Lybecker and Fowler identify that the government pharmaceutical manufacturing company was running at a profit, and intended to continue to grow its profit base annually. Additionally, many of the drugs were being sold at a price higher than generic imports. As a consequence annual FDI growth in Thailand between 2005 and 2007 fell from 10.6% to .5%.173

The case of Canada is unique as it is currently the only country to issue a compulsory licence under TRIPS Article 31 bis. The Canadian Access to Medicines Regime (‘CAMR’) was amended in May 2004 by Jean Chretien’s Pledge to Africa (‘CJPA’) to adopt TRIPS Article 31 bis, and soon after an application was made by MSF to obtain a compulsory licence to export a HIV/AIDS drug, TriAvir, from Canada to Rwanda. Despite the drug manufacturer, Apotex, having a suitable drug ready within 4 months of the compulsory licence application, the first batch was not exported to Rwanda until May 2008. In its evaluation, MSF concluded that the JCPA was too onerous, requiring harsh anti-diversion measures, an extended negotiation and notification period, and unrealistic production specifics limiting quantities and export time. Furthermore, it was bureaucratically time consuming; only permitting pharmaceuticals listed within the Schedule to be granted a compulsory licence, and required the oversight of the government health agency. As a consequence, no other country has since utilised the Canadian process.

As the world’s largest economy and firm advocate of strict IPR, the US has a considerable influence over the trade decisions made by many DCs and LDCs. The “Special 301” review

170 Ibid.
171 Lybecker and Fowler, above n 21.
172 Ibid.
173 McGill, above n 10.
174 Abbott, above n 54.
175 Médecins Sans Frontières Canada, ‘Neither Expeditious, Nor a Solution: The WTO August 30th Decision is Unworkable — An Illustration through Canada’s Jean Chrétien Pledge to Africa’ (Paper presented at XVI International AIDS Conference, Toronto, August 2006).
177 Ibid.
178 Médecins Sans Frontières Canada, above n 175.
of global IPR protection and enforcement is a significant consideration for any State contemplating granting a compulsory licence or similar measure.\textsuperscript{179} The Special 301’s “Priority Watch List” lists States which the US believes possess weak IPR, or are abusing IPR.\textsuperscript{180} Despite the US committing to the WTO multilateral process for dispute settlement it maintains the Special 301, issuing sanctions based upon bilateral trade relationships.\textsuperscript{181} As a result of being placed on this list States are subjected to increased pressure by the US to tighten IPR, often through threats to remove preferential trade conditions or impose stricter trade restrictions.\textsuperscript{182}

\textbf{C Bilateral and Regional Trade Agreements: ‘TRIPS-Plus’ Provisions}

The continued stagnation of the WTO Doha Round has resulted in a considerable increase in bilateral and regional trade negotiations.\textsuperscript{183} Although trade negotiations can yield considerable benefit for both parties through reduced barriers to trade, where a party has considerably greater bargaining power, the end benefit is often considerably skewed. The introduction of so called “TRIPS-plus” standards, whereby trade agreements impose IPR requirements upon a party in excess of those set within TRIPS, have a considerable impact upon a state not only financially though increased expenditure enforcing IPR, but also its ability to encourage domestic technology transfer, and react in emergency situations (through use of compulsory licences).\textsuperscript{184}

The US and EU possess free trade agreements (‘FTA’) with many states, including Jordan, Australia, Singapore, Morocco, Bahrain, and Chile, to name a few. The agreements impose US equivalent or greater standards of IPR upon signatories, including greater patent exclusivity periods, patent linkages for new uses, methods of treatment, or improvements of existing drugs (known as “evergreening”); shift the IPR enforcement onus from the patentee to the signatory; limit the grounds for patent revocation;\textsuperscript{185} remove a signatory’s ability to

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\textsuperscript{179} Harris, above n 45.  \\
\textsuperscript{180} Office of the United States Trade Representative, \textit{2012 Special 301 Report} (2012)  \\
\textsuperscript{181} Harris, above n 45.  \\
\textsuperscript{182} Tejavanija, above n 27.  \\
\textsuperscript{183} Abbott, above n 54.  \\
\textsuperscript{184} El-Said, above n 38.  \\
\textsuperscript{185} Anderson, above n 14.
\end{flushleft}
issue compulsory licences, and prohibit generics manufacturers from using a patentees research data when applying for drug approval.\(^{186}\) As El-Said argues, the social, economic and political burdens of these agreements are disproportionately greater than the promised increased wealth through reduced trade restrictions and increased FDI confidence.\(^{187}\)

The US pharmaceutical patent model, first introduced by Henry Waxman in 1984 (aka the “Hatch-Waxman law”), delays the introduction of generic drug alternatives in order to incentivise pharmaceutical manufacturers to develop new drugs.\(^{188}\) However, imposing this framework on DCs and LDCs is inappropriate due to their differing circumstances, social and economic weaknesses, and weaker institutional capacities.\(^{189}\) As Waxman himself notes, imposing such obligations on LDCs and DCs which lack the public medical safety nets that the US and many other developed countries possess whilst delaying the introduction of cheap life-saving drugs is fundamentally irresponsible and unethical.\(^{190}\)

V LESSONS

The Indian approach to IPR is one that is achieves a balance between the rights of the public and innovation. This approach however is one that has historically shunned innovation in favour of replication. The consequence has been the establishment of India as a niche manufacturer, servicing a market that a patent holder may otherwise avoid due to the high volume of sales required to achieve a similar profit. As India continues to come to terms with its TRIPS commitments, decisions such as *Bayer v Natco* will play a key role in continuing to achieve an appropriate balance.


\(^{187}\) El-Said, above n 38.


\(^{189}\) El-Said, above n 38.

To date India has not engaged in any FTA with the US. 191 Despite discussions taking place, India remains defiant over its approach to IPR. As highlighted, for LDCs and many DCs, TRIPS-plus obligations do not produce a benefit proportionate to the sacrifice being made to domestic IPR flexibility. For LDCs and DCs with large populations a pharmaceutical company is likely to continue to invest as the country develops, realising the potential gains outweigh the losses attributed to compulsory licence or relaxed IPR.

Developed countries, particularly the USA and EU will likely continue to object to use of compulsory licence on principle, because as the leading innovators of pharmaceutical goods any compulsory licence will cause them some financial discomfort. Nevertheless, one must remember that these countries also utilise compulsory licences as and when necessary. Compulsory licencing is an valuable bargaining tool that LDCs and DCs should continue to maintain in trade negotiations. Where a compulsory licence is legitimately utilised by an LDC or DC, the process undertaken must include dialogue and cooperative engagement with the concerned pharmaceuticals, public transparency, and allow any appeal to be tested in an impartial judicial system. The Indian approach is an example of a system which is able to counter negative FDI consequences through such processes, ensuring that the public continues to receive the full benefit, while international legal obligations are appropriately satisfied.

VI Conclusion

Are TRIPS Articles 31 and 31bis adequate for their intended use? In this author’s opinion, they are. However, the chief lesson is that their intended use is not to be manipulated to satisfy disingenuous motives. Local innovation, international collaboration, and technology transfer have the power to achieve significant long term development and prosperity, whilst also creating improved social utility in the short term through increased employment. Consequently the maintenance of IPR is essential to the development of a country, and must be strengthened as industry and the country as a whole develops in order to continue to promote innovation and stability. States should not grant a compulsory licence for short term

political gain, for profit, or for non-lifesaving pharmaceuticals. Compulsory licencing is a tool designed to assist in emergency situations, where the impact being felt by disease is placing irreparable harm on a country (or sections of a country) to function and develop.

Should India not be pursued at the WTO for its decision in *Bayer v Natco* the case serves as an example to other counties on how to appropriately engage in compulsory licencing, with the Indian compulsory licencing framework an ideal blueprint for minimising FDI backlash.
CONSIDERATION: A TOOL FOR WHAT TASK?

SIMON ARMSTRONG-BAYLISS

ABSTRACT

This article investigates the usefulness of the doctrine of consideration by presenting an overview of the relevant underlying values and contract theory, then continues with an explorative view of the means by which the doctrine of consideration does and does not meet these policy objectives, and concludes with a comparison of proposed alternatives. To this end, recent developments in the law of contract in New Zealand and Canada, as invigorated by Walton Stores v Maher, are explored, and in particular how these developments have influenced the Australian common law.

I INTRODUCTION

‘It is the essence of contract... that there is a voluntary assumption of a legally enforceable duty.’
- Dixon CJ, Williams, Webb, Fullagar and Kitto JJ

‘The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself.’
- Baragwanath J

The law of contract, serving increasingly complex commercial bargains, requires an ability to adapt. This necessity has at times produced undesired results, encouraging the attention of jurists. Of all the elements of the law of contract, the doctrine of consideration has received

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1 Australian Woollen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424 at 457 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ.
significant scrutiny from both academics⁵ and the Judiciary.⁶ In response to the doubts raised over the doctrine, this article presents the opinion that consideration, although useful in its ‘gatekeeper’⁷ form, would be better utilized in an evidentiary role in strong support of a party’s intention to be legally bound.

II THE VALUES UNDERPINNING CONTRACTUAL ENFORCEMENT
AND THE ROLE OF CONSIDERATION

A What values is contractual enforcement responding to?

The values supporting the doctrine of consideration are necessarily linked to the values underpinning contractual enforcement. Such an assessment relies on a clear understanding of what a contract is – an enforceable agreement giving rise to rights and obligations,⁸ distinct from an enforceable gift given under seal, and gratuitous gifts, which are typically unenforceable.⁹

Various theories of contract law share the view that a contract is an intentional exchange of one or more promises for a legitimate purpose.¹⁰ The history of contract has included a number of iterations and an exhaustive discussion on the matter is not included here, suffice to say, this to-and-fro is the very cause of the issues touched upon by this article. This inquiry begins by considering what values urge the enforcement of some promises and not others.

On the occasion of a breached promise and the ensuing psychological response of ‘injury’¹¹, Fuller and Perdue suggest that the protection and enforcement offered by the law is analogous

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⁵ See, eg, Mescher, above n 3.
¹⁰ Mescher, above n 3, 536.
¹¹ Fuller, above n 9.
to the loss of property.\textsuperscript{12} Interwoven with this premise is their declaration that enforceable promises should be valued in a similar manner to property.\textsuperscript{13} This protection is limited in its application – without reference to the degree of emotional stress caused – to those promises that are sufficiently important.\textsuperscript{14} Although relevant, this suggests that protection from psychological stress is not the sole reason for enforcing contracts.

The jurisprudence suggests that the limited enforcement of promises imparts some intangible value to those promises that are deliberately left unenforceable.\textsuperscript{15} The value is evident in the trust shown by those who rely upon the promise. This concept has been described as the value of ‘freedom from contract’\textsuperscript{16} and is understood to allow and encourage necessary societal transactions.\textsuperscript{17} The benefit of these informal exchanges, although difficult to quantify, is not doubted, and neither does it go to the root of contractual enforcement.

Complimentary to the above is the freedom of contract and its underlying values. Continuing from their proposition of a breached promise being analogous to lost property, Fuller and Perdue postulate that in choosing to contract, parties are submitting to their own private law and subsequently, enforcement acts as the recognition of this private will.\textsuperscript{18} This alone does not clarify any additional or alternative underlying values but when viewed in the light of commercial bargaining, the author suggests that enforcement of specific streams of private will is a pre-requisite of a vibrant economy as it is enforcement that breeds the predictable behavior that supports societal transactions.

In the author’s view, the ‘will’ concept is described more satisfyingly by the assumption theory of contract law. Under the assumption theory, parties willingly assume obligations, as distinct from incurring them, and merely utilize the rules of contract to express their

\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
\textsuperscript{17} Tan Cheng Han, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17 \textit{Singapore Academy of Law Journal} 566, 577.
\textsuperscript{18} Fuller, above n 9.
intention.\textsuperscript{19} This position was envisaged in the 1954 case of \textit{Australian Woollen Mills Pty Ltd v The Commonwealth} where contract was described as the legal enforcement of voluntarily assumed obligations.\textsuperscript{20} In a hypothetical society where contract law is undeveloped and citizens continue to assume obligations under private agreement, it is clear that attempts to enforce these agreements would enliven substantial heartache. It then follows naturally that under the assumption theory, contractual enforcement is founded on the classic values of ‘peace, order and good government’.\textsuperscript{21}

Values, due to their subjective nature, are inherently cumbersome to define. The brief overview above supports the conclusion that the values underpinning the enforcement of properly made promises are the freedom to privately legislate and to do so with predictability and confidence in the outcome.

Having garnered an appreciation of society’s need to assume obligations, this investigation turns to the legal tools of contract and how they empower the judiciary to distinguish those promisors that have opted into the enforcement regime.

\textbf{B How are contracts enforced?}

Contract law is predominantly formal and its essential elements are widely accepted. If the concomitant rules, exceptions and subtleties of each element are adhered to, a contract is formed and will be enforced. The difficulty, as is most often the case, is in the subtleties. Other than consideration, this article will not examine the other essential elements of a contract in any great depth, other than the brief discussion below.

A contract requires these essential elements – offer and acceptance, intention to be legally bound, consideration, legal capacity, genuine consent and a legal purpose.\textsuperscript{22} Offer and acceptance is required for sufficient certainty in the establishment of an agreement between each party. Each party must express their intention to assume legally enforceable obligations

\begin{itemize}
\item \textsuperscript{19} A Phang ‘Contracts as Assumption: The Scholarship and Influence of Professor Brian Coote’ (2011) 27 \textit{Journal of Contract Law} 247.
\item \textsuperscript{20} \textit{Australian Woollen Mills Pty Ltd v The Commonwealth} (1954) 92 CLR 424, 457 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ.
\item \textsuperscript{21} Brian Coote, \textit{Contracts as Assumption – Essays on a Theme} (Hart, Oregon, 2010), 1.
\item \textsuperscript{22} Mescher, above n 3, 537.
\end{itemize}
under their agreement. Legal capacity is the recognition under the law of the ability to contract, typically exempting minors. Genuine consent is required but may not be given under a number of exceptions such as duress. The requirement of legal purpose is more properly the refusal to enforce contracts initiated for illegal purposes or obliging illegal acts.

The doctrine of consideration has always had a role in the formation of contracts. Its precise origin and initial form are not extensively known.\(^{23}\) The continuing role of consideration and how it has been characterised has not been consistent. It has been described as having its fundamental roots in the circumstances and resulting motivating factors that were contemplated by those entering into a contract.\(^ {24}\) This first principles description is a far cry from the technical legal role consideration has evolved to play in contemporary contract law.

Consideration holds two doctrines within its ambit, these are known as the primary and secondary doctrines.\(^ {25}\) The two principle theories of consideration, benefit-detriment and bargain theory find their origins in the primary and secondary doctrines respectively.

The primary doctrine responds to the concept of maintaining value in non-enforceable promises and has been utilised to distinguish between those promises the law deems important enough to warrant enforcement. Under this doctrine, consideration is understood as a detriment incurred by the recipient of the promise in response to the benefit gained by that promise.\(^ {26}\)

The secondary doctrine is one of economic origin, seeking to recognise the bargaining nature in which commercial promises, presumably as an indicator of those warranting enforcement, are made. At its most basic, the secondary doctrine is described in *Strangborough v Warner*\(^ {27}\) as in contract law a promise is consideration for another promise and consequently both are enforceable. This approach has been criticised and the doctrine has come to be

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\(^{25}\) Samuel Stoljar ‘Bargain and Non-Bargain Promises’ (1988) 18 University of Western Australia Law Review 119, 120.


\(^{27}\) *Strangborough v Warner* (1589) 4 Leon. 3, 74 E.R. 686.
understood as a promise is enforceable if made properly through a bargain and if a breach of that promise would result in a material loss to the promisee.\textsuperscript{28}  

Wherever it finds its origins, the modern doctrine of consideration encompasses rules that attempt to set limits on what is acceptable consideration for a promise, the first rule being that consideration must move from the promisee to the promisor.\textsuperscript{29} The second rule dictates that consideration must be sufficient but not adequate.\textsuperscript{30} In practical terms, this requires consideration to be something seen as having legal value but which need not instill in the parties any notion of adequate market value or commercial fairness in the exchange. Under the third rule, past or moral consideration is not sufficient.\textsuperscript{31} The exclusion of pre-existing duties as good consideration falls within the third rule but as will be discussed, it has become a point of discussion and recent evolution in the law.  

When read in conjunction with the values and policies underpinning contractual enforcement, the rules of contract formation and more specifically consideration, provide a framework for the enforcement of privately assumed obligations. This framework can be utilized when seeking to determine why an enforceable contract requires consideration. When making such a determination the key factor will be how the modern doctrine of consideration responds to these values.  

\textbf{C What role does consideration play in contractual formation and enforcement?}  

Consideration has been described as the ‘indicia of seriousness’.\textsuperscript{32} There are a number of roles that it has evolved to play, finding justification through form, the determination of liability and damages, and also as the principle differentiating element between gratuitous and non-gratuitous promises.

\textsuperscript{28} Stoljar, above n 25, 124.  
\textsuperscript{29} Koo, above n 23, 468.  
\textsuperscript{30} \textit{Thomas v Thomas} (1842) 2 QB 851.  
\textsuperscript{31} Koo, above n 23, 469.  
\textsuperscript{32} Konrad Zweigert and Hein Kotz, \textit{An Introduction to Comparative Law} (New York: Oxford University Press, 3\textsuperscript{rd} ed, 1998), 389.
Fuller, an avid supporter of consideration in the formal roles, theorised that there are three roles of consideration. His model described these as evidentiary, cautionary and channeling.\(^\text{33}\)

Consideration in the evidentiary role can be further defined as providing evidence of the existence of a contract.\(^\text{34}\) In the formal sense the act of passing consideration between parties can aid in identifying the time that a contract came into existence as in practical terms, consideration is often the final essential element to be put in place. This approach appears to have more practical application in contracts for the purchase or exchange of goods and services where identifying the consideration is arguably a simpler task than in more complex circumstances.

When consideration is classified in accordance with the primary doctrine, as a detriment, it is expected that a party will be naturally wary of the bargain they have struck. This follows Fuller’s cautionary role of consideration. It is intended that this wariness will encourage a negotiating party to appreciate the seriousness of their position and to seek clarity in the terms of the eventual bargain.

The assumption theory characterizes consideration as a tool that the parties have at their disposal.\(^\text{35}\) Under Fuller’s model, consideration fulfills the channeling role and allows the parties to formally indicate that they intend to be bound to their agreement. This is often the situation when nominal consideration is required in exchange for what is promised.\(^\text{36}\)

Although the formal roles of consideration are widely accepted, there are other justifications for its continuing role in the recognition of contractual promises.

Further justification is found by exploring the moral reasons for denying enforceability for gratuitous gifts;\(^\text{37}\) this can be well highlighted through a hypothetical. Suppose that contract law simply stated that all promises are assumed unenforceable until a party seeking

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\(^\text{33}\) Lon Fuller, ‘Consideration and Form’ (1941) 41 *Columbia Law Review* 799, 800-1.

\(^\text{34}\) Koo, above n 23, 470.

\(^\text{35}\) Phang, above n 19.

\(^\text{36}\) Koo, above n 23, 471.

\(^\text{37}\) Ibid, 472.
enforcement can provide reasons for the enforcement in their circumstances. The claimant’s case will naturally be more compelling when they are able to show a loss on their part – consideration under the primary doctrine.\footnote{Guenter H Treitel, \textit{The Law of Contract} (London: Sweet & Maxwell, 11\textsuperscript{th} ed, 2003), 67; Stoljar, above n 25.} The role of consideration does not cease with the determination of enforceability. It has additional justification in that at a fundamental level the loss incurred ‘for’ the now broken promise can act as the basis for determining liability for that contractual breach.\footnote{Mindy Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor’s New Clothes’ in Jack Beatson and Daniel Friedmann (eds), \textit{Good Faith and Fault in Contract Law} (New York: Oxford University Press, 1995), 123.}

Clearly there are varying theories of consideration and each finds justification by referencing different values and practicalities. These theories have common ground – the modern doctrine of consideration is a tool. It is a tool that the judiciary has used to raise a fence between enforceable and non-enforceable promises. This separation exists in response to both the need for freedom from contract and the need for certainty in transactions.

D \textit{Why does the Common Law require consideration before it will enforce a contract?}

The Common Law, built on underlying societal values and responding to change throughout history has placed pressures on the doctrine of consideration and contract law alike. By exploring these values of public policy and tying the rules and justifications of consideration to these values it is clear that consideration is required for contractual enforcement at Common Law for the following reasons: the policies underpinning the need to enforce contracts exist and are valued by society and consideration, in conjunction with the other ‘essential’ elements, is a tool that is capable of fulfilling the roles required to maintain public policy in this area.

III \textbf{CONSIDERATION IS A BLUNT TOOL}

It may seem as though the strict requirement for consideration is indeed ‘useful’, fulfilling the roles that it does, however this apparent usefulness may flow from our ingrained adherence rather than its inherent aptitude at this task. This position is supported by the judiciary’s ease
at finding consideration in circumstances where it would otherwise be left wanting\textsuperscript{40} and their ability to disregard it in the pursuit of fairness\textsuperscript{41} – a clear signal that a re-characterisation of the doctrine is warranted.

This movement has crossed national boundaries, extending its reach to all those under the Common Law. Where it was once not possible to find consideration in the performance of a pre-existing duty, the English Court of Appeal’s decision in \textit{Williams v Roffey Bros}\textsuperscript{42} has distinguished \textit{Stilk v Myrick}\textsuperscript{43}, laying it out under new light and birthing the practical benefit test. Despite criticism,\textsuperscript{44} such is the momentum that the decision has been adopted in Australia\textsuperscript{45} and invigorated discussion elsewhere. New Zealand\textsuperscript{46} and Canada\textsuperscript{47} have taken the reform beyond the practical benefit test and done away with the requirement for consideration for contract variations all together.

The Common Law’s assault on the doctrine of consideration is further aided by equity’s promissory estoppel.\textsuperscript{48} The recent decisions above highlight the discomfort the law has with the strict technical requirement that consideration has become. Although these decisions step away from consideration’s gatekeeper role, they do not satisfactorily address the issue that contractual variations are contracts in their own right. The law would benefit from consistent doctrinal application. To date the ongoing debate has sprouted many diverging opinions and consequent proposals but none that have been widely accepted.

Usefulness is more than mere adequacy; it envisages ideas of advantage and helpfulness. To appreciate the contemporary usefulness of consideration it is necessary to both critique its application and explore alternative mechanisms that may fulfill the roles and uphold the values discussed earlier.

\textsuperscript{40}\textit{Williams v Roffey Bros \& Nicholls (Contractors) Ltd} [1990] 1 All ER 514.
\textsuperscript{41}\textit{Foakes v Beer} (1884) 9 App Cas 605.
\textsuperscript{42}\textit{Williams v Roffey Bros \& Nicholls (Contractors) Ltd} [1990] 1 All ER 514.
\textsuperscript{43}\textit{Stilk v Myrick} (1809) 170 ER 1168.
\textsuperscript{45}\textit{Musumeci v Winadell Pty Ltd} (1994) 34 NSWLR 723.
\textsuperscript{46}\textit{Antons Trawling Co Ltd v Smith} [2003] 2 NZLR 23.
\textsuperscript{47}\textit{Nav Canada v Greater Fredericton Airport Authority Inc} [2008] 290 DLR (4th) 405.
A Fuller’s formal roles

As noted above, under Fuller’s model strict adherence to the doctrine of consideration and the formal requirements it encompasses is justified under three limbs – evidentiary, cautionary and channeling.

The range of decisions where courts have been able to find consideration in a variety of forms indicates that there is no clear reliance on their part on the evidence it provides. In fact the court in Walton Stores v Maher,49 although decided on an estoppel, was able to identify the material characteristics of the agreement without having to identify any consideration.

Formal requirements are generally appreciated as intending to bring about reflection and caution in the parties.50 Although relevantly under a deed, the formal requirements may be replaced by true and proper consent.51 It is suggested that in theory formality meets this intention by requiring the parties to turn their mind to the terms of their agreement.52 As noted by Benson, the contract law does not require that the parties actually intend or are aware that the passing of consideration is a means of incurring legal obligations.53 The sufficient but not adequate rule bolsters this view in so far as consideration of economic insignificance will be upheld.

The assumption theory is reliant on there being a set of tools that allow parties to an agreement to express that their agreement is to be enforced at law. Fuller’s channeling consideration is capable of achieving this requirement. Recalling that a separate essential element of contract formation is that the parties have the intent to be legally bound causes one to query the usefulness of the channeling role of consideration. Arguably, a party has a variety of means of expressing their intent to be bound without resorting to the passing of consideration.

50 Stoljar, above n 25, 130.
51 Ibid.
52 Koo, above n 23, 472.
Where form is required as a precondition to enforcement it is generally understood to be in the interest of protecting less sophisticated parties (cautionary) from their naivety.\textsuperscript{54} It is put forward that form should discourage rather than allow the weaving of technical traps such as those found in \textit{Foakes v Beer}.\textsuperscript{55} If the above are accepted as the highest aspirations of form,\textsuperscript{56} the notion of nominal consideration and the law’s lack of a requirement of the parties to intend consideration to be a means of incurring obligations must bear heavy inconsistency.

\textbf{B Extent of liability and the expectation measure of damages}

It is not a contentious assertion that commercial parties benefit from measurable and predictable liability in their agreements. This can be further expanded to include predictable outcomes, should their counterparty breach that agreement. These benefits respond to the underlying values of encouraging economic activity for the betterment of society.

It is widely theorised that the expectation measure of damages is rooted in the concept of the exchange of consideration.\textsuperscript{57} This may be so but it is a far cry to claim that absent of consideration, the expectation measure cannot be provided. This can be seen in the Common Law’s ability to award the expectation measure of damages for the breach of a deed.\textsuperscript{58} It is the party’s clear intention to be bound to their promise for the making of a deed that enables a court to award such damages. Such a clear intention could equally be found through other elements of contract formation.

\textbf{C Consideration for encouraging economic activity}

Not all promises can be enforceable and as discussed, there is societal value to be found in the unenforceability of gratuitous promises. The concept that it is the exchange of


\footnotesize{\textsuperscript{55} \textit{Foakes v Beer} (1884) 9 App Cas 605.}

\footnotesize{\textsuperscript{56} Beale, above, n 54.}

\footnotesize{\textsuperscript{57} Benson, above n 53, 153; Joseph M Lookofsky, \textit{Consequential Damages in Comparative Context: From Breach of Promise to Monetary Remedy in the American, Scandinavian and International Law of Contracts and Sales} (Copenhagen: Jurist-og Okonom forbundets Forloag, 1989), 140 referred to in Koo, above n 23, 471.}

\footnotesize{\textsuperscript{58} Andrew Kull, ‘Reconsidering Gratuitous Promises’ (1992) 21 \textit{Journal of Legal Studies} 39, 50.}
consideration alone that increases the net wealth of society has been criticised. Although a line must be drawn between enforceable and gratuitous promises, the pursuit of economic betterment does not rely on the exchange of consideration.

D Allowing freedom from contract

Consideration has been understood to provide the tool necessary for those who wish to, to opt out of the enforcement regime they would otherwise incur under contract law. This point appears to be again inconsistent with the requirement of the intent to be legally bound. For example, this conflict is clear under the circumstance where consideration is found but there is clear evidence that a party does not intend to be bound to their promise.

If the act of not providing consideration is intended to be a means of opting out of enforcement – how does this rationalise with the law’s lack of a requirement that a party intend consideration to be a means of assuming legal obligations? It is arguably simpler to take a position that parties will assume legal obligations when they intend to. This intent is necessary for contract formation and the subsequent enforcement. As it is served by the intention to create legal relations test it is not necessary for consideration to fulfill this role.

E The pursuit of fairness

In situations such as arose in Foakes v Beer the doctrine of consideration has been utilised by the courts to offer protection to the victim of an otherwise unfair agreement. Although the courts have made use of consideration in their pursuit for fairness, it is suggested here that they did so because they had that option but that that option was not their sole recourse. For example, among others, the defense of duress, estoppel and in Australia, misleading and deceptive conduct, could also be available in specific circumstances.

If consideration is to fulfill this protective role, problems may arise in a similar manner as discussed earlier where the exchange of nominal consideration could require that a court

59 Roy Kreitner, Calculating Promises: The Emergence of Modern American Contract Doctrine (Stanford, Stanford University Press, 2007), 76.
60 Beale, above, n 54, 478.
61 Foakes v Beer (1884) 9 App Cas 605.
} In light of this issue consideration has been said to ‘strip the [court’s]… power to regulate substantive fairness’.\footnote{Koo, above n 23, 480.}

In some instances of less than strict compliance with the rules of contract formation, fairness may still be found by applying the doctrine of promissory estoppel.\footnote{See, eg, *Waltons Stores v Maher* [1988] 164 CLR 392.}

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**F Estoppel fills the gaps**

*Waltons Stores v Maher*\footnote{*Waltons Stores v Maher* [1988] 164 CLR 392.} was a case principally concerned with circumstances where the finding of a fair outcome could not be achieved under the doctrine of consideration and promissory estoppel was ultimately relied on. In order that an understanding of how estoppel may act to support fair outcomes can be gleaned, a view of the High Court’s findings follows below.

The case was on appeal from the New South Wales Court of Appeal and was concerned with whether or not the appellant was, through their conduct, estopped from denying that a binding contract had been formed with the respondent. The remedy sought was damages in lieu of specific performance – contractual breach remedies. The question can be reframed as whether equity can create a legal relationship when the Common Law requirements were not met.

The decision of Mason CJ. and Wilson J. makes reference to the views of a number of previous rulings. It was the fervent view of Holmes J. and Denning L.J. in 1951 that allowing estoppel to effectively create a contract would be wholly inconsistent with the doctrine of consideration and such legal relationships should be unenforceable.\footnote{Commonwealth v Scituate Savings Bank (1884) 137 Mass. 301 at 302 per Holmes J; *Combe v Combe* [1951] 2 K.B. 220 per Denning LJ referred to in *Waltons Stores v Maher* [1988] 164 CLR 392, 400.} The two and a half decades since their comments must have seen development in the law as in 1976...
Lord Denning M.R. stated that it is the role of equity to alleviate the pains induced by strict technical requirements of the Common Law.\textsuperscript{67}

Mason CJ. and Wilson J. continue by referring to the situation in America whereby under the Restatement on Contracts it is found that promissory estoppel can act in place of consideration in an equivalent manner.\textsuperscript{68} Estoppel requires reasonable reliance to one’s detriment, similarly consideration under the primary doctrine is also characterised as a detriment. This similarity leads to the statement that estoppel and consideration work in conjunction towards the same end – estoppel being capable of filling the gaps left by consideration.\textsuperscript{69}

The court upheld the lower court’s finding and the appellant was subsequently estopped from resiling from their implied promise to complete the contract.\textsuperscript{70} Although much was discussed on the doctrine of consideration it is understood that a strict application would not have allowed a fair outcome. This is interesting as it provides a clear example of the Common Law’s ability to find fairness when faced with the non-compliance of technical rules.

\textbf{G The judiciary shifts away from strict adherence to consideration}

The English case of \textit{Williams v Roffey Bros}\textsuperscript{71} was concerned with whether the performance of a pre-existing duty could be consideration and consequently whether a promise made for that performance could be enforced. This case was specifically related to variations to existing contracts. It is relevant to the discussion of the usefulness of consideration as variations are, at law, contracts in their own right.

The facts of the case were as follows. A building sub-contractor who was not able to complete their works on time, negotiated additional payments over and above the agreed contract sum to enable them to complete on time. The head contractor agreed to the extra

\textsuperscript{68} \textit{Waltons Stores v Maher} [1988] 164 CLR 392, 401.
\textsuperscript{69} Ibid, 402.
\textsuperscript{70} Ibid, 408.
\textsuperscript{71} \textit{Williams v Roffey Bros & Nicholls (Contractors) Ltd} [1990] 1 All ER 514.
payments as they held the view that that option was more beneficial than incurring late completion penalties under the head contract or changing sub-contractors.\textsuperscript{72}

The sub-contractor claimed that the negotiations resulted in an enforceable contract to pay. The head contractor responded by arguing that as completing on time was a pre-existing duty under the sub-contract, there was no consideration. Thus, the additional payment was not enforceable.\textsuperscript{73}

The head contractor’s argument relied on \textit{Stilk v Myrick}\textsuperscript{74} where the ratio was such that in contract variations, performance of a pre-existing duty was not sufficient consideration.\textsuperscript{75} This finding has been since criticized,\textsuperscript{76} a more recent view being that \textit{Stilk v Myrick} was decided on the public policy of the times.\textsuperscript{77} Perhaps of relevance at the time of \textit{Stilk v Myrick} the defense of economic duress was not yet developed.\textsuperscript{78} If it were, there may not have been a need to attribute the decision to the non-provision of consideration.

With the defense of economic duress available, the court was able to find that in the case of contractual variations the performance of a pre-existing duty can be consideration as long as there is an ascertainable practical benefit for the counter party.\textsuperscript{79} This has since been termed the practical benefit test.

Much like in \textit{Waltons Stores v Maher} the decision in \textit{Williams v Roffey Bros} appears to have been made in the pursuit of fairness. In both situations fairness would not have been achieved by the strict application of the doctrine of consideration. This is suggestive of a developing recognition of the shortfalls of the strict doctrine. Concurrent developments in the areas of estoppel and economic duress have provided a means to a fair end when consideration would have failed.

\textsuperscript{72} \textit{Williams v Roffey Bros & Nicholls (Contractors) Ltd} [1990] 1 All ER 514, 514.
\textsuperscript{73} Ibid, 515.
\textsuperscript{74} \textit{Stilk v Myrick} (1809) 170 ER 1168.
\textsuperscript{75} Ibid, 1169.
\textsuperscript{77} Ibid.
\textsuperscript{78} \textit{Williams v Roffey Bros & Nicholls (Contractors) Ltd} [1990] 1 All ER 514, 520.
\textsuperscript{79} Ibid, 522.
The reception of this decision has not been wholly positive. However, importantly for the discussion on consideration, courts across the Common Law jurisdictions have not had significant issue with the situational expulsion of the pre-existing duty rule. In fact, as noted earlier, New Zealand and Canada have gone even further and moved towards a reliance model in circumstances of contractual variation.

H New Zealand severs the need for consideration from variations to existing contracts

Unlike *Waltons Stores v Maher* and *Williams v Roffey Bros, Antons Trawling Co Ltd v Smith* did not involve a factual circumstance where strict application of traditional contract law and the doctrine of consideration would have produced an unfair outcome. This did not prevent the court from abolishing the practical benefit test and along with it, the requirement for consideration in contractual variations.

In place of the practical benefit test a reliance model was proposed. This model comprises four elements that encourage fair dealing and restrict opportunities to apply pressure through economic duress. The first element mimics the intention to create legal relations test, where-as the second and third elements only allow enforcement when a variation agreement has been both acted on and duly performed. The fourth element simply states that variation agreements made contrary to public policy will continue to be unenforced.

At this point the reliance model of ‘consideration’ is only applicable to variations to existing contracts. This distinction is founded on the presumption that variations to existing relationships will be agreed on the basis of ongoing and continuing commercial benefit to the parties. It is inconsistent to hold this presumption for variations without extending it to new relationships generally.

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81 *Antons Trawling Co Ltd v Smith* [2003] 12 NZLR 23.
82 Scott, above n 76.
83 Ibid, 208.
85 Ibid.
86 Ibid.
87 Ibid, 216.
IV IS CONSIDERATION COMPARATIVELY USEFUL?

The justifications for the usefulness and continuation of the modern doctrine of consideration are, as has been shown, broad. What the doctrine is not capable of doing is recognizing that some promises are gratuitous and others are onerous.88 The successes of consideration in the areas discussed, evidentiary, cautionary, channeling, basis of liability, economic encouragement and freedom from contract are able to be met or exceeded by a variety of alternative means.

The continued application of consideration as a ‘formula for denial’89 although useful, is not necessary for the law of contract to function90 and therefore may not be the most useful application of the concept. When read in conjunction with the judiciary’s shift from the technical application of consideration, the outcome of the exploration undertaken here is that an apparent and particular failing of consideration is its capacity to render a party’s intent to be bound void and general inability to enforce onerous promises. Both of these concerns would arguably benefit from a strengthening of the intent to enter legal relations test. This should be achieved by re-characterizing consideration as strong evidence of that intent.

88 Ibid, 216.
90 Coote, above n 44; Burrows, above n 44, 119-20.
THE UEFA HOME-GROWN RULE:
A VIOLATION OF EUROPEAN UNION LAW?

CHRISTOPH JESCHECK*

ABSTRACT

This article analyses the UEFA home-grown rule with respect to its compatibility with the free movement of workers within the European Union. The European Court of Justice has applied European Union law to sport, leaving only a very narrow exemption for the applicability of EU law in the context of sport. As such, the home-grown rule constitutes indirect discrimination and therefore needs to be justified in order not to violate the free movement of workers. Applying the European Court of Justice’s prescribed three-step test, an analysis of the objectives of the home-grown rule is presented in order to determine whether its restriction on the free movement of persons within the EU is justified. However, it appears that none of the objectives is capable of justifying the home-grown rule as the three step test is not met.

I INTRODUCTION

It was a record season for the German Bundesliga team FC Bayern Munich. In the past season (2012/13), they won all possible club competitions: the national championship, the DFB-Cup and the UEFA Champions League.1 They are the first German team to win the treble.2 In the Bundesliga ladder they ended up first place with a record of 91 points and a gap of 25 points to the second Borussia Dortmund.3 They only lost one match.4

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1 Associated Press, ‘Jupp Heynckes says he will not coach again after leading Bayern to treble’ The Guardian 17 June 2013 <http://www.guardian.co.uk/football/2013/jun/16/jupp-heynckes-not-coach-again>.
2 Ibid.
4 Ibid.
The competitive balance in European soccer is decreasing. In Europe’s top five soccer leagues (England, Spain, Germany, Italy and France); the same four to six teams regularly win their national championships. Similarly, one study has shown that there is a decreased competitive balance in the European top five divisions. The European soccer association ‘Union des Associations Européennes de Football’ (UEFA), and the world soccer association ‘Federation Internationale de Football Association’ (FIFA) plan to stop this trend by introducing home-grown rules, requiring soccer clubs to have less foreign, and instead more local, players in their squads. Both, UEFA and FIFA made different proposals. FIFA planned to implement a ‘6+5’ rule, which obliged clubs to field at least six players eligible for the national team of the club’s country. The UEFA home-grown rule requires clubs, competing in the UEFA club competitions Champions League and Europa League, to have at least eight home-grown players in their squad. While UEFA’s home-grown rule has been in force since season 2006/07, FIFA stepped back from its plans to implement its home-grown rule in 2010. The FIFA rule was criticized for breaching European Union principle on the freedom of movement of persons.

The UEFA home grown rule was designed to encourage clubs to invest into youth development programs, to enhance competitive balance, to maintain the traditional link between a club and its local communities and to strengthen national teams. By requiring a

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5 Below VII. C. 2.
9 Ibid.
12 UEFA, Investing in Local Training of Players - Key Messages <http://www.uefa.com/MultimediaFiles/Download/uefa/UEFAMedia/273604DOWNLOAD.pdf> (‘Investing in Local Training of Players - Key messages’).
minimum of home-grown players in each squad, the home-grown rule is considered essential for achieving these aims.

European sporting rules, introduced by sports associations, have come into the focus of European Union (EU) law several times. The FIFA 6+5 rule was criticized by the European Parliament and the European Commission for violating European anti-discrimination law. Several other sporting rules have been invalidated by the European Court of Justice (ECJ). Whilst sporting bodies are autonomous in governing their sport, they do not act in a legal vacuum. Sporting rules which restrict athletes or players freedoms as guaranteed by EU law are invalid. Art 45 Treaty on the Functioning of the European Union (‘FEU’) prohibits measures or rules which restrain the free movement of workers. As soccer players can be considered as employees, they can claim that there has been a violation of art 45 FEU. Sporting rules which restricted the number of foreign players that may participate in sport competitions have been invalidated by the ECJ as they restricted the freedom of players seeking employment in other Member States within the EU. In the famous Bosman decision of 1995, the ECJ nullified UEFA’s ‘3+2 rule’, which restricted the number of foreign soccer players a club was permitted to field in a match. According to the Court, the rule restrained the free movement of workers.

Sport is, in some ways, different from normal businesses. Youth development, maintaining the competitive balance between clubs and promoting national teams may justify special treatment of sporting rules. These special characteristics of sport have to be taken into account when assessing whether sporting rules breach the law. This article will analyse how

13 See European Commission, above n 11.
17 See below VII. A.
20 Ibid I-5078 [137].
far these characteristics justify any special considerations or exemptions for sporting rules. The article then discusses whether the UEFA home-grown rule restricts the freedom of movement for workers, guaranteed by art 45 *FEU*. It will be noted that the rule discriminates against foreign players by setting criteria which local players are more likely to fulfil. The rule might, however, be justified by pressing reasons in the public interest.\textsuperscript{21} The special characteristics of sport may be generally capable of justifying a discriminative sporting rule. However, as this article notes, this is not the case with the home-grown rule. The rule is not likely to achieve the aims UEFA alleged the rule could achieve. Further, more effective non-discriminatory measures will be suggested. This article then concludes that the home-grown rule is not justified by the public interest argument, and breaches the freedom of movement for workers. The home-grown rule may also limit the competition between clubs on the transfer market as clubs may be inhibited in their ability to recruit foreign players in order to comply with the home-grown rule.\textsuperscript{22} The rule might, thus, be in breach of EU competition law.\textsuperscript{23} However, a thorough analysis of competition law is beyond the scope of this article. The home-grown rule is thus solely examined on the basis of the free movement of workers under art 45 *FEU*.

II THE ORGANISATION OF EUROPEAN ASSOCIATION SOCCER

As distinguishable from national team soccer, European association soccer is an organised sport in which soccer clubs compete against each other on national and European level. Each club is a member of the national soccer association of the country it is located in.\textsuperscript{24} For example, Manchester United belongs to the English Football Association (FA). The national associations organise national championships, which are structured into several divisions, classified from the best teams in the first division to the weaker teams in lower divisions. The national soccer associations are members of FIFA, which organises soccer at world level.\textsuperscript{25} UEFA, which was founded in Switzerland in 1954, is one of the six continental

\begin{footnotes}
\item[21] *Olympique Lyonnais* C-325/08 [2010] ECR I-2177 [38].
\end{footnotes}
confederations of FIFA. UEFA is head of 54 national member associations. The members keep their autonomy in governing association soccer in their countries but have to comply with the statutes, regulations and decisions of UEFA. Thus, each national association is responsible for organising their national club competitions. For example, the FA regulates the English Premier League (EPL).

UEFA organises the two main European soccer competitions, the UEFA Champions League and the Europa League. Teams have to qualify by achieving a certain top rank in their national championship in order to take part in the European competitions. Teams can only qualify for one European competition with the Champions League being the highest competition.

III HISTORICAL BACKGROUND

In 1978, UEFA introduced regulations which restricted the number of foreign players that clubs would be permitted to employ. Clubs were permitted to field a maximum of two players of non-EU origin and an unrestricted number of foreign players who had lived in the country of that club for at least five years. The total number of foreign players that a club held under contract was, however, not limited.

27 Ibid.
32 Ibid.
33 Ibid.
In 1991, UEFA implemented the 3+2 rule which included guidelines for national soccer associations concerning the number of foreign players a team may field. Associations were not allowed to introduce rules reducing the number of foreign players allowed on the field to less than three. Additionally, a minimum of two players on the field must have played in the association’s country for a continuous period of five years, including at least three years as a junior player. Because the rule was introduced a minimum limit, associations were allowed to implement rules permitting more than three foreign players. The 3+2 rule was also directly applicable in the UEFA club competitions Champions League and the then UEFA Cup, the predecessor of the Europa League. In Donà v Mantero, however, the ECJ invalidated nationality clauses which prohibited foreign players from playing in soccer matches. UEFA tried to circumvent the ruling in Donà by permitting a minimum number of three foreign players on the field and by not restricting the total number of foreigners allowed in a club’s squad. However, in 1995 the 3+2 rule was put under scrutiny by the ECJ.

In the landmark Bosman decision between the Belgium soccer association, UEFA and the soccer player Jean-Marc Bosman, the ECJ held that the 3+2 rule contradicted EU law as it restricted the free movement of workers, according to art 45 FEU (at this time art 48 EEC Treaty). UEFA argued that the rule pursued legitimate aims of public interest, namely, that the rule maintained the traditional link between clubs and their local communities, enhanced competitive balance and provided a pool of talented players which fostered national teams. The court, however, rejected UEFA’s arguments as not being able to justify the restrictions of the free movement of workers. Notably, the court held that the scope of art 45 FEU was not limited to acts of public authorities but also applied to rules laid down by sports associations. This paved the way for the ECJ to assess the 3+2 rule under art 45 FEU. So the question is

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McDermott, above n 31, 276.
Ibid.
McDermott, above n 31, 276.
Ibid.
McDermott, above n 31, 277.
Ibid I-5075 [84]-[87].
whether UEFA’s new proposal for a nationality clause – the home-grown rule – will suffer the same fate as the 3+2 rule or whether it has to be evaluated differently.

IV THE UEFA HOME-GROWN RULE

On 21 April 2005, the XXIX Ordinary UEFA Congress approved the home-grown players rule in Tallinn, Estonia. According to the rule, clubs playing in the UEFA Champions League or the Europa League have to include a minimum number of home-grown players in their teams from season 2006/07 onwards. Clubs qualified for one of the UEFA club competitions have to submit two lists of players. Only players named on the lists are eligible to play. On ‘list A’, clubs must not have more than 25 players, of which eight have to be home-grown. On ‘list B’, clubs can additionally have an unlimited number of players under the age of 21 who must have been under contract of the club for at least two seasons. UEFA wants to increase the number of home-grown players in European soccer clubs.

A home-grown player may either be a club-trained player or an associated-trained player. A player is club-trained when he has been registered with his current club for three, not necessarily continuous, years between the age of 15 and 21. A player is associated-trained when he has been registered with a club affiliated to the same association as his current club for the same period of time between the age of 15 and 21. A player can be considered home-grown irrespective of his age and nationality. Since season 2008/09, clubs need to have at least eight home grown players in their squad. Four of them have to be club-trained. The home-grown rule is therefore also referred to as the 4+4 rule. The total number

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45 McDermott, above n 31, 283, citing UEFA, above n 7.
46 UEFA, above n 7.
47 Regulations of the UEFA Champions League, above n 29, art 18.04.
48 Ibid art 18.01.
49 Ibid art 18.08.
50 Ibid 18.17.
51 UEFA, above n 7.
52 Regulations of the UEFA Champions League, above n 29, art 18.09
53 Ibid art 18.10.
54 Ibid art 18.11.
55 Ibid 18.10-18.11.
56 Ibid art 18.08.
57 Ibid.
of players in a squad must not exceed 25 players. The home-grown rule only applies in the UEFA Champions League and the Europa League. It is not applicable in national club competitions such as the EPL or the German Bundesliga. However, the presidents of the 52 member associations of UEFA endorsed the 4+4 rule in a separate declaration on the congress in Tallinn, where they approved the UEFA rule. Accordingly, several national soccer associations have implemented rules which are either identical or at least similar to the home-grown rule.

UEFA argued that the home-grown rule was necessary in order to remedy several shortcomings of European soccer. A lack of investment in the training of young players led to a decrease in competitive balance, weakened national teams and caused the ‘erosion of local identity’. The 4+4 rule was said to encourage clubs to invest in youth development by requiring a minimum number of home-grown players in their 25-man squad. The home-grown rule was, thus, aimed at addressing the problems at their source. However, whether the UEFA rule may in fact offer incentives to invest in local talent is scrutinised below.

UEFA’s proposal was endorsed by the European Commission and the European Parliament. The European Commission held in its White Paper on Sport (which the Parliament supported) that rules requiring a certain number of home-grown players may be permitted under the free movement of persons provisions if they were not directly discriminatory based on nationality. Indirect discrimination caused by such rules could be justified if they pursued legitimate aims, such as the protection of the training and development of young talented

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58 Ibid.
61 See Lizenzordnung Spieler (Germany) [License Agreement Players] § 5a <http://www.bundesliga.de/media/native/dfl/ligastatut/neue_lo/lizenzordnung_spieeler_los.pdf>.
62 Investing in Local Training of Players - Key messages, above n.
63 Ibid.
64 Ibid. See also Homegrown Plan Wins Approval, above n 7.
65 See below VII. C. 1.
68 European Parliament Resolution, above n 11, 65 [98].
players. As the home-grown rule did not include any nationality conditions, it did not cause direct discrimination. The rule might have indirect discriminatory effects as young players attending a training academy at a club of a Member State were more likely to be of that Member State rather than from different EU Member States. However, the home-grown rule pursued legitimate objectives, namely, improving the training of young players and enhancing competitive balance. Notwithstanding the European Commission’s and the European Parliament’s point of view, it is unsure how the ECJ would judge the home-grown rule and whether the rule could withstand a scrutiny on the basis of art 45 FEU. UEFA’s arguments for the home-grown rule are equivalent with the ones in support of the 3+2 rule which were rejected by the court in Bosman.

V FIFA’S 6+5 RULE

On 30 May 2008, the 58th FIFA Congress voted in favour of the 6+5 rule. The FIFA 6+5 rule required clubs to begin each match with at least six players eligible for the national team of the country of the club. The 6+5 rule was planned to be introduced from season 2010/2011 onwards. Likewise the UEFA home-grown rule, the FIFA rule was designed to improve youth development and competitive balance. However, before season 2010/11 had started, FIFA stepped back from its proposition and abandoned the 6+5 rule at its congress in South Africa, just before the World Cup in June 2010. Beforehand, the European Commission and the European Parliament had criticized the FIFA rule as being incompatible with EU law. Legitimate aims could only justify indirect, not direct, discrimination. The 6+5 rule appeared to be directly discriminatory. The rule restricts the number of players not eligible for the national team of the home country of the club they are playing for. A player’s eligibility for the national team does not necessarily coincide with his

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69 Ibid.
70 European Commission Press Release, above n 11.
71 Freeburn, above n 24, 186.
74 Ibid.
75 Ibid.
76 British Broadcasting Corporation, above n 10.
77 European Commission Press Release, above n 11.
78 European Parliament Resolution, above n 11, 65 [98].
79 Ibid.
nationality. In the United Kingdom, for example, four different national teams exist: England, Scotland, Wales and Northern Ireland. Each player of those teams has, however, the nationality of the United Kingdom. Furthermore, players may be eligible for a national team independent of their citizenship under certain conditions. Nevertheless, these are exceptional and extraordinary circumstances. In most cases, citizenship equated with eligibility for a national team. Thus, the 6+5 rule cannot be regarded as merely indirectly discriminatory. The FIFA rule constitutes direct discrimination on the basis of nationality. As direct discriminations are very difficult to justify under EU discrimination law, the 6+5 rule was at a high risk of breaching EU law. There is no official statement of FIFA concerning its reasons for not introducing the 6+5. However, the high probability of inconsistency with EU law is likely to have been a determinative factor of why FIFA stepped back from its plans to introduce its rule.

VI APPLICATION OF EU LAW ON SPORT

Before measuring the home-grown rule on the free movement of workers, this article examines whether EU law applies to sport.

A Autonomy of Sports Associations

The European Commission respects the autonomy of sports associations in its White Paper on Sport. Sporting bodies are considered as responsible for the governance of their own sport. However, as noted above, they do not operate in a legal vacuum. They are, of

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81 Ibid.
82 Ibid.
84 McDermott, above n 31, 291.
85 Ibid.
87 White Paper on Sport, above n 67, 4.
88 Ibid.
89 Alexandrakis, above n 15, 333.
course, subject to the rule of law like any other association. Additionally, the ECJ extended the scope of art 45 FEU to rules imposed by sports associations in Bosman. Nevertheless, sport has special characteristics which will have to be taken to account when applying EU law on sport. But what is it that makes sport different to normal business?

**B Special Characteristics of Sport**

The European Parliament regards ‘European sport [as] an inalienable part of European identity, European culture and citizenship’. Due to the special characteristics of sport, the European Parliament considers sport under certain circumstances as distinguishable from normal economic activity. According to the European Commission, the ‘specificity’ of sport is reflected in sport activities and rules as well as in sport structure. The specificity of sporting activities and rules involve for instance assuring uncertainty of results and promoting competitive balance between teams in a competition. The specificity of sport structure includes, for example, the autonomy of sport associations. The specificity of sport is now even acknowledged by European legislation. In 2009, the Treaty of Lisbon introduced a sport competence into the European Treaties for the first time. According to art 165 (1) FEU, ‘[t]he Union shall contribute to the promotion of sporting issues, while taking into account the specific nature of sport, its structure based on voluntary activity and its social and educational function’. Art 165 (2) FEU states that ‘Union action shall be aimed at … developing the European dimension in sport, by promoting fairness and openness in sporting competitions’. According to the European Commission, the special characteristics of sport have been acknowledged in various decisions of the EJC. So the question remains in what way the ECJ recognizes the specificity of sport when applying EU law in sport matters. It is also important to examine the impact of art 165 FEU on the application of EU law to sport.

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90 Ibid.
93 Ibid.
94 Freeburn, above n 24, 187, citing White Paper on Sport, above n 67, 4.1.
95 Ibid.
96 Ibid.
98 White Paper on Sport, above n 67, 4.1.
C Decisions of the ECJ Concerning the Application of EU Law to Sport

The ECJ does not generally exempt sport from the scope of EU law. However, the court takes the specificity of sport into account in various ways.

1 Non-Economic Activity and Purely Sporting Rules – A Sporting Exemption?

In Walrave, the first notable decision of the ECJ dealing with sport, the court held that EU law applied to sport ‘only in so far as it constitutes an economic activity’. The court ruled further that the anti-discrimination laws of the EU (at that time the European Community) did not have an impact on the composition of sport teams, especially national teams, as this was considered as ‘a question of purely sporting interest and as such ha[d] nothing to do with economic activity’. This exception of the application of EU law was however ‘limited to its proper objective’. Subsequently, ‘purely sporting’ rules were considered as creating an exemption of sport from EU law. However, as the exemption is limited to its proper objective, the purely sporting character of a rule does not alone prevent the application of EU law on that rule.

The ECJ clarified its position in Donà. First, professional soccer was considered as an economic activity as players exercised gainful occupation. Hence, professional soccer fell within the scope of EU anti-discrimination law according to the ruling in Walrave. Second, rules excluding foreign players due to non-economic reasons, which are related to the special character and framework of these matches and therefore are solely affecting sporting interests, were exempt from the scope of EU anti-discrimination law. Similar to Walrave, the ECJ considered provisions excluding foreign players from matches between

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99 Ibid.
101 McDermott, above n 31, 274.
102 Ibid 1418.
103 Ibid.
104 Miettinen and Parrish, above n 86, 4.
national teams as an example for rules based on purely sporting interests and therefore exempt from the application of EU law.\textsuperscript{110}

In summary, according to the decisions in \textit{Walrave}\textsuperscript{111} and \textit{Dona},\textsuperscript{112} there is a narrow exemption for sport from the application of EU anti-discrimination law. First, the sport must relate to a non-economic activity such as national team matches. Second, the exception must be limited to its proper objective.

2 \textit{Objective Justification}

Three subsequent decisions of the ECJ took the special characteristics of sport into account for deciding whether a sporting rule or measure was justified by legitimate objectives.\textsuperscript{113} In \textit{Bosman},\textsuperscript{114} the court considered the sporting exemption as expressed in \textit{Walrave}\textsuperscript{115} and \textit{Dona}\textsuperscript{116} and added that, due to the limitation to its proper objective, the exception cannot ‘exclude the whole of a sporting activity from the scope of the Treaty’. The court, thus, rejected a broadening of the sporting exemption. The court, however, regarded special characteristics of sport as generally capable of justifying the restrictions of the free movement of workers, resulting from the former 3+2 rule. As such special characteristics were regarded, the competitive balance between soccer clubs, the ‘recruitment and training of young players’ and the promotion of national teams. The court regarded these objectives as legitimate.\textsuperscript{117}

As stated above, the ECJ, however, rejected a justification of the 3+2 rule on these grounds.\textsuperscript{118} The 3+2 rule was not regarded suitable for achieving its objectives.\textsuperscript{119} Nevertheless, the court considered the special characteristics of sports as basically potential justifications.\textsuperscript{120} Even though a justification was rejected regarding the 3+2 rule, it does not mean that future sporting rules will not be able to be justified due to the special

\textsuperscript{110} \textit{Dona} C-13/76 [1976] ECR I-1334, 1340.

\textsuperscript{111} C-36/74 [1974] ECR I-1405.

\textsuperscript{112} C-13/76 [1976] ECR I-1334.


\textsuperscript{114} C-415/93 [1995] ECR I-4921, 5063 [73], 5064 [76].

\textsuperscript{115} C-36/74 [1974] ECR I-1405.

\textsuperscript{116} C-13/76 [1976] ECR I-1334.

\textsuperscript{117} \textit{Bosman} C-415/93 [1995] ECR I-4921.

\textsuperscript{118} Ibid I-5077 [133]-[135].

\textsuperscript{119} Ibid I-5076 [130]-[135].

\textsuperscript{120} See also Freeburn, above n 24, 203.
characteristics of sport. This is especially true when it is possible to establish that the rule in fact achieves proper objectives.

The ECJ followed Bosman\(^{121}\) in two subsequent decisions Kolpak\(^{122}\) and Simutenkov.\(^{123}\) In Kolpak,\(^{124}\) the court considered, but in the end rejected, the argument that a rule restricting the number of players of non-EU Member States in a squad was ‘justified on exclusively sporting grounds’, for example, promoting the training of young players. The nationality clause was not limiting the number of players from other EU Member States and therefore not achieving one of its intended purposes. Similarly, in Simutenkov,\(^{125}\) the ECJ held that squad limitations based on nationality were not capable of being justified by sporting reasons as the restriction did not relate to national team competitions but to club matches.

Hence, the ECJ appears to validate nationality clauses only in the context of national team competitions. National teams, naturally, consist solely of national players. The exclusion of foreign players in national teams is therefore justified. For club competitions, however, the Court has not yet accepted a justification of nationality clauses on grounds of sporting interest.

3 Inherent Sporting Rules

In Deliége v Ligue Francophone de Judo et Disciplines Associées ASBL,\(^{126}\) the ECJ held that a rule regarding selection criteria, which was ‘inherent in the conduct of an international high-level sports event’, did not constitute a restriction of the freedom to provide services, according to art 56 \textit{FEU}.\(^{127}\) In Meca-Medina v Macjen, the ECJ considered certain anti-doping rules as ‘inherent in the organisation and proper conduct of competitive sport’ and thus not violating EU competition law.\(^{128}\) Both decisions, however, do not appear to actually exempt a sporting rule from the scope of EU law even if it is inherent in the proper conduct

\(^{122}\) C-438/00 [2003] ECR I-4135.
\(^{123}\) C-265/03 [2005] ECR I-2579.
\(^{124}\) C-438/00 [2003] ECR I-4135, 4172 [56].
\(^{125}\) C-265/03 [2005] ECR I-2579, 2610 [38].
\(^{126}\) Joined cases C-51/96 and C-191/97 [2000] ECR I- 2549, 2618-9 (‘Deliége’).
\(^{128}\) C-519/04 P ECR I-7006, 7023-4 (‘Meca-Medina’).
the Court considered the question whether the rule was exempted as a rule of ‘purely sporting’ interest under Walrave and Dona separate from the question whether the rule was inherent in the conduct of the sport. In Meca-Medina, the Court even appears to require a rule for being inherent in the organisation of sport to be justified by a legitimate objective. Additionally, it is important to note that both cases did not involve rules which discriminated based on nationality. Deliége concerned selection criteria for international competitions, independent of nationality. Meca-Medina was related to an anti-doping rule. Hence, the decisions appear to apply solely to non-discriminatory rules.

**D The Impact of Art 165 FEU on the Application of EU Law on Sport**

As discussed above, the specificity of sport is now explicitly recognised by the European Union according to art 165 FEU. The question, however, is how art 165 FEU will affect the application of EU law on sport and how the ECJ will deal with it. Sport associations considered art 165 FEU as strengthening their autonomy. The ECJ, however, appears to follow settled case law regarding the application of EU law on sports.

In Olympique Lyonnais, the first decision dealing with the application of EU law on sport since the enactment of art 165 FEU, the ECJ considered the recruitment and training of young players as a legitimate objective by citing Bosman. The court further held that the special characteristics of sport as well as its social and educational function have to be taken into account when determining whether a sporting rule that restricts fundamental freedoms can be justified by reference to a legitimate objective. So far, there is nothing new

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129 See also Miettinen and Parrish, above n 86, 5.
136 Miettinen and Parrish, above n 86, 7.
140 Olympique Lyonnais C-325/08 [2010] ECR I-2177 [40].
compared with the decision in *Bosman*.\textsuperscript{141} The court only adds that the relevance of these specificities is underpinned by their mentioning in art 165 *FEU*.\textsuperscript{142} This is the court’s only reference to art 165 *FEU*. The decision in *Olympique Lyonnais*\textsuperscript{143} does not, therefore, change the ECJ’s position on the application of EU law on sport. The court, rather, seems to consider the enactment of art 165 *FEU* as a confirmation of its rulings in *Bosman*\textsuperscript{144} and its subsequent cases.\textsuperscript{145}

Hence, the expectation of sport associations (UEFA, for example) for a stronger recognition of the specificity of sports does not appear to have been fulfilled by the Court. Instead, art 165 *FEU* appears to codify the existing case law of the ECJ.\textsuperscript{146}

E Application of the Case Law of the ECJ to the UEFA Home-Grown Rule

The UEFA home-grown rule only applies directly to the Champions League and the Europa League. Only the best European teams can qualify for these competitions. In order to take part, clubs have to achieve a top rank in their national division. In England, for instance, clubs need to achieve at least fourth place in a season in the EPL before qualifying for the Champions League.

The home-grown rule, thus, applies to professional club soccer. As the ECJ held in *Dona*,\textsuperscript{147} professional sport is not exempted from EU law as it constitutes an economic activity. It therefore cannot be regarded as a rule of ‘purely sporting’ interest. Hence, the home-grown rule is not generally exempted from the EU law. Furthermore, the home-grown rule cannot be considered as ‘inherent in the organisation and proper conduct of competitive sport’, according to *Deliège*\textsuperscript{148} and *Meca-Medina*.\textsuperscript{149} As stated above, the decisions were applicable

\textsuperscript{141} C-415/93 [1995] ECR I-4135.
\textsuperscript{142} Ibid.
\textsuperscript{143} C-325/08 [2010] ECR I-2177 [38].
\textsuperscript{144} C-415/93 [1995] ECR I-4135.
\textsuperscript{145} Alexandrakis, above n 15, 337.
\textsuperscript{146} Ibid 336.
\textsuperscript{147} C-13/76 [1976] ECR I-1334.
\textsuperscript{148} Joined cases C-51/96 and C-191/97 [2000] ECR I- 2549.
\textsuperscript{149} C-519/04 [2006] P ECR I-7006, 7023-4.
only to non-discriminatory rules. The home-grown rule has, however, discriminatory effects, as demonstrated below.\textsuperscript{150} Hence, the decisions are not applicable to the present case.\textsuperscript{151}

The ECJ considers the special characteristics of sport have when assessing whether a sporting rule is justified by legitimate aims (as held in \textit{Bosman},\textsuperscript{152} \textit{Kolpak}\textsuperscript{153} and \textit{Simutenkov}).\textsuperscript{154} The Court clarified in \textit{Simutenkov}\textsuperscript{155} that nationality clauses may be justified in the context of national team competitions. The UEFA rule, however, applies to professional club competitions. Hence, the rule requires strong reasons to be justified, particularly since the ECJ has not yet validated nationality clauses applying to club competitions.

\textbf{VII Compatibility With The Free Movement Of Workers}

\textbf{A Applicability of Art 45 FEU on the UEFA Home-Grown Rule}

The free movement of workers has to be demarcated from two other fundamental freedoms of the \textit{FEU}: the freedom of establishment\textsuperscript{156} and the freedom to provide services.\textsuperscript{157} As the three fundamental freedoms are mutually exclusive,\textsuperscript{158} only one of them is applicable. Which freedom applies depends on whether professional soccer players can be considered as workers. If they have to be regarded as self-employed, the freedom of establishment or the freedom to provide services applies.\textsuperscript{159} If they are employees, the free movement of workers applies instead.

According to the ECJ, the definition of worker in art 45 \textit{FEU} must not be interpreted narrowly. Hence, a worker is defined as a person who ‘for a certain period of time performs services for and under the direction of another person in return for which he receives

\begin{itemize}
\item \textsuperscript{150} See below VII. B.
\item \textsuperscript{151} See also Miettinen and Parrish, above n 86, 17.
\item \textsuperscript{152} \textit{Bosman} C-415/93 [1995] ECR I-4135.
\item \textsuperscript{153} C-438/00 [2003] ECR I-4135, 4172 [56].
\item \textsuperscript{154} C-265/03 [2005] ECR I-2579, 2610 [38].
\item \textsuperscript{155} C-265/03 [2005] ECR I-2579, 2610 [38].
\item \textsuperscript{156} Art 49 \textit{FEU}.
\item \textsuperscript{157} Art 56 \textit{FEU}.
\item \textsuperscript{158} \textit{Gebhard} v Consiglio dell’Ordine degli Avvocati e Procuratori di Milan C-55/94 [1995] ECR I-4165, 4193 [20].
\item \textsuperscript{159} \textit{Ritter-Coulais} v Finanzamt Germersheim C-152/03 [2006] ECR I-1711, I-1745 [19].
\end{itemize}
remuneration’. The relevant demarcation criterion to arts 49 and 56 FEU is whether the person is ‘under the direction of another person’. Whether a person is subject to directions depends on various factors such as ‘the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants’.

Applying these criteria to soccer players, it can be observed that soccer clubs determine training schedules. Further, soccer associations set the match schedules, in the way that the FA does Premiere League matches. Hence, soccer players cannot choose their own working hours. Additionally, players do not share the commercial risks of the business any more than other employees in other industries. They are, of course, not able to engage an assistant for their services as they must, naturally, play themselves. Thus, professional soccer players are subject to directions and can be considered as employees. In addition, the ECJ applied the free movement of workers on the former 3+2 rule in Bosman. In order to do so, the court necessarily had to consider professional soccer players as workers, even if it did not explicitly raise the issue. Consequently, the free movement of workers is applicable on the UEFA home-grown rule.

B Discrimination between Workers Based on Nationality

Art 45(2) FEU prohibits ‘any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’. The question is whether the home-grown rule constitutes discrimination between workers.

According to the ECJ, the free movement of workers not only forbids direct or overt discrimination ‘but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result’. Applying this principle to the home-grown rule, it can be observed that the home-grown rule does not relate to nationality directly as non-nationals are also able to meet the requirements of a home-grown player.

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160 Petersen v Landesgeschäftsstelle Arbeitsmarktservice Niederösterreich C-228/07 [2008] ECR I-6989, [45].
Hence, the UEFA rule does not constitute overt or direct discrimination, though it may be regarded as indirectly discriminatory. The home-grown rule makes it more difficult for soccer players to move to clubs outside their home country. Clubs may be forced to decline a transfer of a foreign player due to the restrictions of the 4+4 rule. A club may, for example, already employ seventeen foreign players leaving eight spots available which are reserved for home-grown players. A national player would be, more likely to fulfil the requirements of a home-grown player than a player from a different country. In most instances, a foreign player would have to move abroad before the age of 18 in order to play the prescribed three seasons before turning 21. As art 19 of the FIFA Regulations on the Status and Transfer of Players\(^\text{164}\) permits the transfer of players under the age of 18 only in exceptional circumstances, transfers of minors in other countries appear unlikely. The home-grown rule thus leads to fewer spots for foreign players in a club’s 25 man squad.\(^\text{165}\) Hence, the UEFA home-grown rule can be considered as an indirect or covert discrimination because national players are more likely to fulfil the required conditions than non-national players.\(^\text{166}\) The rule ‘leads to the same result’ as direct discrimination.\(^\text{167}\) The home-grown rule, therefore, constitutes a prohibited indirect discrimination under art 45 FEU.

\[\text{C Objective Justification}\]

A discriminatory measure or rule may nevertheless be justified on ‘grounds of public policy, public security or public health’, according to art 45(3) FEU. According to the ECJ, a rule that is indirectly discriminatory may also be justified due to ‘overriding reasons in the public interest’.\(^\text{168}\) A justification of the home-grown rule under art 45(3) FEU due to reasons of public policy, security or health does not come into consideration. The home-grown rule might be justified by ‘overriding reasons in the public interest’, according to the case law of


\(^{166}\) See also Freeburn, above n 24, 197; McDermott, above n 31, 286; Miettinen and Parrish, above n 86, 17.


the ECJ.\textsuperscript{169} Pursuant to the ECJ in \textit{Olympique Lyonnais}, a measure or rule which is indirectly discriminatory can be justified if it ‘pursues a legitimate aim compatible with the treaty’, ‘ensure[s] achievement of the objective in question’ and does ‘not go beyond what is necessary for that purpose’.\textsuperscript{170}

Accordingly, the home-grown rule would need to comply with this three step test. First, the rule needs to pursue a legitimate aim. Second, the rule must ensure that the aim is achieved. Third, the rule must ‘not go beyond what is necessary for that purpose’.\textsuperscript{171} Overriding reasons in the public interest which might justify the home-grown rule are, for example, improving youth development and competitive balance, promoting national teams and maintaining the traditional link between clubs and their local communities.

1 \textit{Improving Youth Development}

UEFA argues that clubs do not invest enough money in the training and education of young players.\textsuperscript{172} Instead, clubs prefer choosing the quick solution by buying fully developed players.\textsuperscript{173} As there were insufficient incentives to invest into youth development,\textsuperscript{174} the home-grown rule purported to encourage clubs to promote the training of young players.\textsuperscript{175} In order to justify the home-grown rule, the objective of improving youth development must constitute a legitimate aim. The home-grown rule must ensure achievement of that aim and the rule must ‘not go beyond what is necessary’ for that aim.

(a) \textit{Legitimate Aim}

In \textit{Bosman},\textsuperscript{176} the ECJ recognized ‘the aim of … encouraging the recruitment and training of young players … as legitimate’. Accordingly, the UEFA home-grown rule can be considered as pursuing a legitimate interest.


\textsuperscript{170} \textit{Olympique Lyonnais} C-325/08 [2010] ECR I-2177, [38].

\textsuperscript{171} Ibid.

\textsuperscript{172} \textit{Investing in Local Training of Players - Key messages}.

\textsuperscript{173} Ibid.

\textsuperscript{174} Ibid.


\textsuperscript{176} C-415/93 [1995] ECR I-4135, 1-5071 [106].
(b) Ensuring Achievement of that Aim

It is doubtful whether the home-grown rule is suitable to achieve an improvement of youth development. It is also uncertain as to whether clubs will increase investment in youth development under the home-grown rule. Firstly, the home-grown rule does not put any obligation onto clubs regarding the training and education of young players.177 The rule does not oblige clubs to invest in or to introduce any youth development programmes.178 It depends on clubs to start initiatives for improvement. Hence, the rule may only indirectly promote training and education of young players.179 Secondly, wealthy clubs are still able to just buy players who already fulfill the requirements of an associated-trained home-grown player, as only four players have to be club-trained. As there is no age limit, once a player fulfils the conditions of an associated-trained player, he retains this status until he finishes his career. Thus, clubs can add four strong and experienced associated-trained players to their non-national players so that they have 21 powerful players of which no one has to come from their own youth academy. They are then able to just fill their squads with four weaker club-trained players. This scenario shows that the home-grown rule is less likely to encourage clubs to invest in the training of their young players.180 The requirement of four associated-trained players is not justified,181 and it does not provide any incentive.182

Third, strong incentives for clubs to invest in the training of young players already exist. Financially weaker clubs have always been dependent on their own youth academies in order to compete with financially strong clubs. Additionally, even wealthy clubs such as the FC Barcelona or Bayern Munich have been relying on their academies for decades. Barcelona’s top players such as Lionel Messi, Andres Iniesta and Xavi stem from its academy ‘La Masia’.183 Also Bayern Munich players Philipp Lahm, Bastian Schweinsteiger and Thomas Mueller all originate from Bayern’s own soccer academy.184 Clubs can save a lot of money

177 Freeburn, above n 24, 211.
178 Ibid.
179 Ibid.
180 See also ibid 213.
181 Ibid.
182 Ibid.
184 Maximilian Bensinger, The Bundesliga giants will be relying on several youth products from their academy in the second leg of their Champions League semi-final tie against Real Madrid (25 April 2012) Goal.com
by investing in their youth development programmes. This is, however, more encouraging than the home-grown rule. Soccer clubs depend on training personnel like any other business company. A club which ignores the promotion of youth training would not be able to remain competitive. Fourthly, the home-grown rule may even have a negative effect on the development of young players. International experience is considered beneficial for young players’ professional soccer career. As the home-grown rule will diminish possibilities for young players to move abroad, the rule is likely to negatively affect the development of talents. For these reasons the UEFA home-grown rule is not likely to ensure achievement of promoting education and training of young players.

(c) Not Going ‘Beyond What Is Necessary for that Purpose’

Notwithstanding the fact that the home-grown rule is unlikely to encourage investment into the training of young players, no other means may exist that restrict the free movement of workers. Otherwise, the rule goes ‘beyond what is necessary’. Alternative, less discriminatory, measures which might have the same or even better positive effect on the development of young talents have to be examined. Several measures come into consideration.

One possibility is to introduce rules that oblige clubs to invest a minimum amount or percentage of their total revenues into the development of youth training. A similar approach would be to require minimum standards of youth training for every club. UEFA, for instance, already runs a club licensing programme since season 2004/05 requiring participants in the UEFA Champions League and the Europa League to fulfil a number of quality standards. These include training, infrastructure, human resources, administration and financial


\[186\] Ibid.


\[188\] Olympique Lyonnais C-325/08 [2010] ECR I-2177, [38].

\[189\] Ibid.

matters.\textsuperscript{191} Such a licensing system is not discriminatory and may be more likely to enhance youth development than the home-grown rule.

Other alternatives could be the implementation of training compensation\textsuperscript{192} or creating funds to compensate clubs which operate high standard youth academies.\textsuperscript{193} As distinguished from licensing systems, they would, however, restrict the free movement of workers as players might be restrained from transferring abroad.\textsuperscript{194} Nevertheless, the measures would not constitute discrimination based on nationality as they would restrict local and non-local players equally. Additionally, the training compensation was recognized as encouraging the promotion of youth training in \textit{Bosman}.\textsuperscript{195}

Another alternative would be the implementation of a development league following the example set by the United States National Basketball Association (NBA) in 2001.\textsuperscript{196} The NBA Development League recruits young players through drafts, player assignments and tryouts which are organised in all of the United States.\textsuperscript{197} Young players who are not already affiliated with a club may thus have access to training facilities and can draw attention to them.\textsuperscript{198} NBA teams are able to pick young talents from this league.\textsuperscript{199} The development league may enhance opportunities for young players as the league makes it easier to draw the attention of talent scouts to them. Where young talents are spread out in amateur leagues, as it is currently the case in Europe, it is harder to be spotted by a scout. However, the development league would constitute a completely foreign element in European soccer as players of the NBA Development League are recruited in a draft, clubs may pick players out of a pool of mostly high-school or college players\textsuperscript{200} in the reverse order the clubs finished on

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Freeburn, above n 24, 217, citing \textit{Bosman} C-415/93 [1995] ECR I-4135, I-5022 [239].
\item Freeburn, above n 24, 217.
\item Ibid.
\item Ibid.
\end{enumerate}
\end{footnotesize}
the rankings of their leagues.\textsuperscript{201} The worst team of the past season has the first choice followed by then the second worst team and so on.\textsuperscript{202} The best team of the past season has the last pick.\textsuperscript{203} A draft may take several rounds.\textsuperscript{204} After a player is drafted he must sign a contract with the club drafting the player.\textsuperscript{205} As a rule, the player needs permission when he wants to transfer to another club.\textsuperscript{206}

In European sports, however, drafts are uncommon.\textsuperscript{207} European players are free to sign contracts with their preferred club. A drafted player is, however, restricted in transferring to another club. Hence, it is doubtful whether a development league would find an echo in Europe.\textsuperscript{208} In addition, the implementation of a development league would constrain the free movement of workers more than the UEFA home-grown rule. If every EU Member State had its own development league, a draft would make it impossible for a player of the development league to seek employment abroad. Drafted players would therefore be restricted in their selection of the clubs they wish to play for. This would not only evidently contradict the free movement of workers but also art 15 of the \textit{Charter of Fundamental Rights},\textsuperscript{209} which guarantees the ‘[f]reedom to choose an occupation and right to engage in work’. According to art 6 (1) \textit{Treaty on European Union} (‘\textit{EU}’),\textsuperscript{210} the charter is now recognized and part of EU law and of equal rank as the two main European treaties, the \textit{FEU} and the \textit{EU}. Hence, the introduction of a development league following the example of American Basketball must be rejected.\textsuperscript{211}

The home-grown rule may also have negative effects on the development of minor soccer players. As club-trained players have to be trained in the current club between the age of 15 and 21, clubs have to recruit them at an early age. They must not be older than 18 when moving in order to fulfil the requirement. By encouraging clubs to recruit players at young

\begin{footnotesize}
202 Ibid.
203 Ibid.
204 Ibid.
205 Weiler et al, above n 200, 170.
207 Weatherill, above n 185, 59.
208 \textit{Contra} Weatherill, above n 185, 59.
211 \textit{Contra} Snyder, above n 196.
\end{footnotesize}
age in order to have talented club-trained players, the home-grown rule might also contradict
the Nice Declaration on Sports in which the European Council expressed its ‘concern about
commercial transactions targeting minors in sport’.212 Additionally, the European Parliament
stated that ‘additional arrangements are necessary to ensure that the home-grown rule does
not lead to child trafficking, with clubs giving contracts to very young player’.213 FIFA tries
to face this issue by the FIFA Regulations on the Status and Transfer of Players which in art
19 generally prohibits international transfers of players under the age of 18.214 The home-
grown rule, however, offers incentives to circumvent this prohibition. Art 19 permits
international transfers of minors in three exceptions. According to art 19(2)(a), a minor is
permitted to transfer to a club of a different country when the parents move to it as well for
reasons not related to soccer such as job changes.215 There have been instances where parents
have been supplied with jobs by clubs in the region where the new club was allocated.216
Although art 19(4) now requires a committee to examine every transfer of a minor, new ways
of circumvention are likely to be invented.217 The home-grown rule encourages clubs to do so
and thus contribute to trafficking.218 The UEFA rule consequently even has negative effects
on the development of young players.

2 Restoring Competitive Balance

UEFA argues that since the Bosman219 decision in 1995, the competitive balance in UEFA
club competitions and in European top national leagues has decreased.220 According to UEFA

212 Ibid 19, citing European Council, Nice Declaration on the Specific Characteristics of Sport and its Social
Function in Europe, of which Account Should Be Taken in Implementing Common Policies (6 December 2000)
2 [13].
213 Miettinen and Parrish, above n 86, 19, citing Ivo Belet, European Parliament Report on the Future of
Professional Football in Europe (Report, No 2006/2130(INI), Committee on Culture and Education, 13
February 2007) 9 [33].
214 Regulations on the Status and Transfer of Players (2010), above n, art 19.
215 Simon Gardiner and Roger Welch, ‘Bosman — There and Back Again: The Legitimacy of Playing Quotas
216 Ibid, citing Matt Scott, ‘Chelsea Facing Legal Threat over Signing Boy of 11’ Th e Guardian (online), 5
September 2009 < http://www.guardian.co.uk/football/2009/sep/05/chelsea-legal-threat-alleged-player-
poaching>.
217 Simon Gardiner and Roger Welch, above n 215, 848.
218 Ibid.
220 UEFA, UEFA out to get the balance right (3 February 2005)
out to get the balance right’).
Chief Executive Lars-Christer Olsson ‘there have been fewer teams winning [these] competitions’. Is UEFA’s supposition correct?

Competitive balance is defined as ‘the degree to which a league is evenly matched’. According to a 2013 study of Roland Berger Strategy Consultants and the University of Tuebingen (Germany), competitive balance has declined in Europe’s top five soccer leagues (England, Spain, Germany, Italy and France) from the 90s to the 00s. In order to determine the degree of competitive balance, the study examined the average difference of points between the top five teams in one season and the performance variation for one team over several seasons. Accordingly, the degree of competitive balance in Europe’s top five leagues has on average decreased by 23 per cent comparing seasons 1991/92 to 2000/01 and seasons 2000/01 to 2010/11. However, the examiners of the study do not blame Bosman for this development but rather the increase of Champions League revenues.

The lack of competitive balance is also reflected in the winners of the top five leagues. The same four to six clubs have regularly won their national league competitions since Bosman. In the EPL for instance, only five teams won the title between 1996 and 2013 with Manchester United ranked first 11 times. In the Bundesliga just six different clubs won the championship between 1996 and 2013. The most dominant club, Bayern Munich, was ranked first 10 times in the same period. As mentioned earlier, the German team beat several records in the past season 2012/13, ending up first place with a huge lead. Similar statistics apply to the other top five leagues. In the Spanish La Liga, only four different teams won the title with the FC Barcelona and Real Madrid winning the title 14 times between 1996

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221 Ibid.
222 Bloching and Pawlowski, above n 6, 2.
223 Ibid 11.
224 Ibid 12.
225 Ibid.
228 Ibid.
230 Ibid.
231 See above part I.
and 2013. In the Italian Serie A, only five teams won the championship in the same period. The French Ligue 1 appears to be the most balanced competition with 10 clubs finishing first place between 1996 and 2013. However, between 2002 and 2008 Olympic Lyon won seven times in a row. Hence, competitive balance is, in fact, a problem in current European soccer. However, the question will be whether the home-grown rule is suitable for improving competitive balance. But first of all, enhancing competitive balance must constitute a legitimate aim.

(a) Legitimate Aim

In Bosman, the ECJ accepted the purpose of ‘maintaining competitive balance between clubs by preserving a certain degree of equality and uncertainty as to results’ as legitimate. Additionally, the European Commission recognizes competitive balance as a legitimate aim. Furthermore art 165 FEU states that ‘Union action shall be aimed at [the] openness in sporting competitions’.

Competitive balance is a key element of sports. When sports competitions become predictable, they lose their excitement. Fans might get disinterested which may result in decreasing stadium attendance and television viewers. Also, clubs depend on the competitive balance, as less fan attendance would automatically lead to a reduction of revenues. Hence, competitive balance is a legitimate aim. Consequently, restoring competitive balance constitutes a legitimate aim.

(b) Ensuring Achievement of that Aim

To be justified, the UEFA home-grown rule must also ensure achievement of enhancing the competitive balance in UEFA club competitions. It is, however, doubtful whether the home-grown rule is capable of doing so. In Bosman, the ECJ rejected the notion that the 3+2 rule would enhance competitive balance by hindering the wealthiest clubs from buying the

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236 Ibid.
238 White Paper on Sport, above n 67, 4.1.
239 Ibid 7.
240 Ibid.
strongest foreign players. This was because the rule did not prevent the richest clubs from buying the best national players which decreased the balance equally.\textsuperscript{242} The argument of the ECJ is transferable to the home-grown rule. The UEFA rule does likewise not inhibit rich clubs from maintaining their powerful position. They are still able to buy the best associated-trained players.\textsuperscript{243} Thus, the home-grown rule does nothing to prevent rich clubs from holding 21 strong players who may all be expensive purchases. In effect, the home-grown rule actually limits the overall number of a squad to 21 players who can all be acquired by financial means. Only the mandatory four club-trained players cannot be purchased directly. Financially strong clubs are capable of investing more into youth academies and talent scouts which will enable them to even recruit four strong club-trained players.\textsuperscript{244} Wealthier clubs are also able to pay higher salaries which makes it likely that talented players will move from smaller, less solvent clubs to the richer ones. Hence, the home-grown rule does not appear to change anything to the powerfulness of the financially strong clubs.

(c) Not Going beyond What Is Necessary for Achieving that Purpose
The following section discusses the several measures which achieve the same or even better results regarding the enhancement of competitive balance which are less restrictive.

(d) Shortening the Financial Gap by Equal Distribution of TV revenues
One possibility is creating a better financial balance by distributing television revenues more even between clubs. In the EPL\textsuperscript{245} and the Bundesliga,\textsuperscript{246} broadcasting rights are sold on a collective basis. The entire TV revenues are collected by the national soccer associations and then distributed to the clubs. However, the size of the share a club received is still dependent on its performance. Thus, the better clubs get a larger share of the revenues than the weaker teams. In the Bundesliga season 2012/13, for instance, the first ranked team Bayern Munich received a share of €36 million whereas the last placed team Greuther Fürth only got €14.4 million.\textsuperscript{247} In the EPL the revenues are a little better balanced with Manchester United earning the largest share of £60 million compared to Blackburn Rovers receiving the lowest

\textsuperscript{242} Ibid.
\textsuperscript{243} Miettinen and Parrish, above n 86, 18
\textsuperscript{244} Ibid 18-19.
\textsuperscript{245} Premier League Handbook Season 2012/13, above n 60, D. 15.-D.17.
share of £40 million in season 2012/13. In La Liga, where broadcasting rights are sold on an individual basis, the financial gap between high performing teams like the FC Barcelona or Real Madrid and the lower performing teams is the largest with Madrid receiving €140 million and Granada only €12 million. However, La Liga plans to introduce a collective marketing of the media rights within the next three years in order to make the league more balanced and thereby exciting. Barcelona and Madrid won the La Liga title 9 out of 10 times in the last 10 seasons. Equal payouts which are not linked to the performance will shorten the financial gap between clubs and thus equalize competitive imbalances.

Well performing clubs could argue that they deserve a higher share than smaller clubs as they contributed more to the overall revenues because more people watch their games on television. However, sport competition is distinguishable from usual business. Companies are usually lucky when there are no or few competitors in their business sector. On the other hand, sport clubs taking part in competitions depend on each other. Rich clubs need the smaller clubs in order to perform. Without competitors, there is no competition. Hence, the special situation in sport competitions may justify a more equal distribution of TV revenues.

Even payouts of television revenues do not lead to any discrimination. They also do not restrict the free movement of workers. However, the introduction of equal payouts would raise serious competition law issues. The collective selling of media rights in the Bundesliga was examined by the German Federal Cartel Office. According to the Federal Cartel Office, the pooling and central marketing of media rights constitutes an anti-competitive

249 Ibid.
250 Ibid.
253 See also Bosman C-415/93 [1995] ECR I-4135, I-5017 [227].
254 Miettinen and Parrish, above n 86, 28.
agreement as the clubs do not individually sell the broadcasting rights. Television broadcasters cannot buy the media rights from the clubs directly. Hence, the central marketing restricts the competition between the clubs as well as the competition between the TV channels. However, the Federal Cartel Office considered the central marketing as permissible as it offered several benefits. The anti-competitive agreement was therefore justified, according to art 101(3) FEU (the German competition law provisions are equivalent with the European ones). The central marketing enabled TV broadcasters to show the entire matches of the Bundesliga. This was not only regarded as an advantage for the broadcasters but also for the consumers who are thus able to view the entire Bundesliga matches at a convenient time. Otherwise, every club could decide on the way it reports its own matches which was considered as less beneficial for both broadcasters and consumers.

The central marketing systems of the Bundesliga and the EPL do not equally distribute TV revenues but depending on the club’s performance. Equal payouts would further restrict the competition between clubs. There might be a disincentive to perform well as every club gets the same share of TV revenues independent from its performance.

Economists distinguish between utility maximisers, which act to achieve the highest possible sportive success, and profit maximisers, which act for the highest achievable profit. Performance disincentives resulting from equal TV payouts do not affect utility-maximising clubs as they act for the purpose of sportive success anyway. However, even profit-maximising clubs would still have enough incentives to perform well. Players naturally want to perform well in order to draw attention on them. They are also granted premiums for winning and sportive success of the club. Additionally, profit-maximising clubs seek to be sportive successful in order to qualify for the financially attractive Champions League or the Europa League. Lower teams without chances for qualifying for the UEFA club competitions

256 Ibid.
257 Ibid.
258 Ibid.
259 Ibid.
260 Ibid.
are equally encouraged to perform well in order not to be relegated into a lower division as this would lead to lower revenues. Sportive success also safeguards stadium attendance and attractive sponsorship agreements. There is no lack of incentives to perform well, even for profit maximisers.

An equal or at least more equal distribution of TV revenues would enhance competitive balance and therefore make matches more exciting and club competitions more unpredictable.\(^\text{262}\) There are benefits flowing from this proposal which were considered as legitimating an anti-competitive agreement by the German Federal Cartel Office. It appears likely that equal distributions would be considered as permissible under EU competition law if challenged. Consequently, shortening the financial gap by equally distributing TV revenues appears to be a less restrictive but more effective measure than the home-grown rule. While the UEFA rule is not likely to achieve its aim of restoring competitive balance, the proposed measure enhances chances for smaller clubs with little income. Accordingly, Advocate General Lenz considered redistribution measures far more appropriate for achieving competitive balance than the challenged system of transfer fees in *Bosman*.\(^\text{263}\) Equal distributions ensure that the gap between the rich and the poor clubs does not grow any further. The measure is therefore preferable to the home-grown rule.

\(\text{(e) Financial Fair Play}\)

Another measure which might be less restrictive and more effective to improve competitive balance could be UEFA’s Financial Fair Play regulations (‘FFP’)\(^\text{264}\) which were approved by UEFA’s Executive Committee in May 2010.\(^\text{265}\) The core principle of the *FFP* is the break-even requirement laid down in arts 58-63 *FFP*.\(^\text{266}\) According to the break-even rule, a club is generally prohibited from making losses.\(^\text{267}\) However, a deficit up to €45 million may be

\(^{262}\) Miettinen and Parrish, above n 86, 28.


\(^{265}\) UEFA, *Financial Fair Play Regulations are approved* (13 April 2012) <http://www.uefa.com/uefa/aboutuefa/organisation/executivecommittee/news/newsid=1493078.html#financial+fair+play+regulations+approved> (‘*Financial Fair Play Regulations are approved’).

\(^{266}\) *FFP*, above n 264.

\(^{267}\) Ibid art 60, 63.
acceptable when it is compensated by contributions from ‘equity participants and/or related parties’. If the deficit is not covered, expenses may not exceed income by €5 million. Clubs qualifying for 2013/14 UEFA club competitions have to comply with these rules first. In order to qualify, clubs must have met the criteria of the FFP during the last two seasons 2011/12 and 2012/13. A team which does not fulfil the requirements of the FFP may be excluded from UEFA club competitions and sanctioned as it happened to the FC Malaga, for example. The FFP may enhance competitive balance by reducing possibilities of clubs to cover their losses and strengthen their teams through enormous payments of benefactors such as Abramovich for the FC Chelsea or Sheik Mansour for Manchester City. However, the FFP may also have negative effects on the competitive balance. Powerful clubs will continue to be dominant according to the glory hunter phenomenon: A club’s market size depends on its historical success. When a team is successful, it attracts more attendance, creating a larger market size and future success which again increases the market size. However, due to the FFP ‘small clubs can no longer overspend or invest in a greater market size’. They are unable to stop the strong teams from being dominant and hence, the FFP do not appear to improve competitive balance.

Additionally, the FFP may be just as restrictive as the home-grown rule as it runs the risk of violating EU law in the same manner. Only recently, in June 2013, Jean-Louis Dupont, who was also Bosman’s lawyer, took legal action in the European Court of First Instance.

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268 Ibid art 61.
269 Ibid.
270 UEFA, above n 265.
275 Ibid 2, 10.
276 Ibid.
277 Ibid.
278 Ibid.
279 Ibid.
challenging the break-even requirement of the *FFP*. Beforehand, Dupont already had challenged the UEFA regulations with the European Commission in May 2013. The Bosman-lawyer, who now represents a player’s agent, argues that the break-even rule was anti-competitive as it decreased the number of transfers, transfer fees and player salaries.

The rule further breached fundamental freedoms of the *FEU* such as the free movement of capital (concerning club owners), the free movement of workers (regarding players) and the free movement of services (concerning players’ agents). There were alternative measures which were less restrictive such as redistribution measures or luxury taxes.

The break-even rule may, indeed, inhibit players from moving from one club to the other as clubs have less money to buy players. It may therefore restrain the free movement of workers. However, the break-even requirement can be considered as less restrictive as it is not discriminatory on the basis of nationality like the home-grown rule. Instead, the *FFP* affect national and international transfers equally. Although non-discriminatory measures may likewise be prohibited when creating obstacles to the free movement of workers, it is doubtful if the *FFP* rule constitutes a larger impediment to the free movement than the home-grown rule. The break-even rule appears to be less restrictive concerning the free movement of workers. The *FFP* rule would additionally raise serious competition law issues, though this issue is beyond the scope of this article. Notwithstanding the legality under EU law, the break-even rule does not appear to improve competitive balance. The *FFP* are therefore not a suitable alternative to the home-grown rule.
(f) Further Measures

Further measures include salary caps, caps on transfer fees, player drafts, luxury taxes and pan-European leagues. The question is whether these alternatives are less restrictive while ensuring achievement of competitive balance to the same or a higher degree than the home-grown rule. These issues go beyond the scope of this article. Drafts and pan-European leagues formed by classifying clubs from smaller to bigger national soccer associations would be unlikely to be introduced. As already mentioned, drafts are completely foreign to European soccer. Pan-European leagues would turn the current organisation of European soccer upside down and are thus unlikely to be very well received in Europe.

Salary caps, caps on transfer fees and luxury taxes are non-discriminatory as they would apply irrespective of the nationality of players. Therefore, they appear to be less restrictive than the home-grown rule. Their effectiveness regarding competitive balance would have to be analysed further.

In summary, equal payouts of TV revenues would be a less restrictive but more effective alternative. Other measures, such as the FFP fail to improve competitive balance. For other measures like salary caps, caps on transfer fees and luxury taxes further research would be necessary in order to evaluate whether they improve competitive balance. Given that are less restrictive but more effective alternatives, the home-grown rule does not comply with the third requirement of the three step test. The rule goes beyond what is necessary to achieve the aim of improving competitive balance. The objective to enhance competitive balance is, therefore, not capable of justifying the home-grown rule.

3 Protecting National Teams

The home-grown rule may be justified by promoting national teams. UEFA argues that the home-grown rule protects national teams by improving the development of young players. Equally, it was alleged in Bosman that the former 3+2 rule was necessary to supply

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291 See Miettinen and Parrish, above n 86, 29-30; Snyder, above n 196, 519.
292 Gardiner and Welch, above n 215, 847.
293 Snyder, above n 196, 524.
294 Miettinen and Parrish, above n 86, 34.
295 Ibid.
296 Homegrown Plan Wins Approval, above n 7.
national teams with ‘a sufficient pool of national players’. In order to justify the home-grown rule, the objective to protect national teams must constitute a legitimate aim.

The promotion of national teams was considered as ‘an overriding need in the public interest’ by the Advocate General in Deliege.\textsuperscript{298} The European Commission also emphasized the importance of national teams in strengthening the peoples’ identity with their country and to maintain solidarity with grassroots sport in its White Paper on Sport.\textsuperscript{299} National teams, therefore, deserved to be supported,\textsuperscript{300} and the promotion of national teams constituted a legitimate interest.

In order to be justified, the home-grown rule must ensure achieving the aim of supporting national teams. However, according to the ECJ in Bosman,\textsuperscript{301} the players of a national team do not necessarily need to play in that country’s league. Players under contract in a country different from their nationality are permitted to be assigned to their national teams for national team matches.\textsuperscript{302} The home-grown rule is, therefore, not likely to promote national teams, even though there will be more national players playing in the same country’s league.

The ECJ, additionally, held that free movement within the EU did not lead to fewer possibilities for national players due to more foreign players in that country.\textsuperscript{303} The opening up of the labour market rather created more opportunities to seek employment in other Member States.\textsuperscript{304} As stated above, international experience is an important step in a player’s career. Hence, free movement of players may also contribute to the promotion of national teams.

In addition, the home-grown rule is not likely to enhance the training and education of young players.\textsuperscript{305} Given that national teams depend on the development of young talents, the home-grown rule does not appear to protect national teams either. There are less restrictive ways to support national teams with talented young players such as obligations to improve and

\textsuperscript{298} Opinion of Advocate General Cosmas – joined cases C-51/96 and C-191/97 [2000] ECR I-2553, I-2582 [84].
\textsuperscript{299} White Paper on Sport, above n67, 4.2.
\textsuperscript{300} Ibid.
\textsuperscript{301} C-415/93 [1995] ECR I-4921, I-5077 [133].
\textsuperscript{302} Ibid.
\textsuperscript{303} Ibid [134].
\textsuperscript{304} Ibid.
\textsuperscript{305} See above part VII(C)(1).
invest into youth development programmes as for instance the UEFA club licensing system, as discussed above. The aim of protecting national teams is therefore not capable of justifying the home-grown rule.

4 Maintaining Clubs’ Connections with their Local Communities

According to UEFA, another objective of the home-grown rule is to maintain the club’s link with its local communities. As increasingly foreign players play in the top five leagues, clubs should maintain their local and regional identity. UEFA’s Chief Executive Lars-Christer Olsson states that there are studies showing that ‘compared to around 1995/96, when the Bosman ruling was introduced, the number of players trained in an association and playing in [that association’s] top league has gone down by 30 per cent’. Indeed, there is a 2008 study with reference to a UEFA 2005 study underpinning UEFA’s claim. According to the 2008 study, the average number of club-trained players in Europe’s top five leagues (England, Germany, Spain, Italy and France) decreased from 6-7 in 1990 to 4-5 players between 2000 and 2004.

The ECJ did not recognise the aim of maintaining the traditional link between clubs and their local communities as legitimate in Bosman. The Court rejected the existence of such a connection between the club and the Member State or between the club and its locality, town or region. There was no rule that restricted the number of players from other localities in matches between teams from different regions. Rivalries between fan communities from different clubs situated in the same city, such as between the FC Chelsea and Arsenal London, show that fans rather identify themselves with the club itself than the region the club is located. It is also questionable whether the home-grown would, in fact, maintain a club’s local identity. There are economic, sociological and legal arguments which state the contrary.

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306 Ibid.
308 UEFA out to get the balance right, above n 221.
309 Consulting and Taj, above n 190, 26.
311 Ibid.
313 Miettinen and Parrish, above n 86, 20.
(a) Economic Arguments

The increased number of foreign players in Europe’s top five leagues has not led to a decreased interest in European soccer. The opening of the labour market to players from different Member States after *Bosman*[^14] has not led to a decrease in the value of the soccer market.[^315] Quite the opposite, according to Deloitte’s 2013 Review of Football Finance,[^316] the entire European soccer market increased by 11 per cent to €19.4 billion in season 2011/12 compared to 2010/11. The entire revenue of the clubs in the EPL grew from £170 million in 1991/92, in the former Football League First Division, to over £2.3 billion in 2011/12 which is almost 14 times more.[^317] Furthermore, five clubs each had a higher income than the entire First Division 20 years ago.[^318] The value of UEFA Champions League media rights has increased by 468 per cent from £25 million in 1996 to £142 million in 2012 in the United Kingdom.[^319] The value of broadcasting rights in the EPL has even grown by 1000% from £60 million in 1992 to £661 million in 2012.[^320] The growth of the soccer market does not reflect a decrease in the peoples’ interest in soccer. If people had become less interested in soccer, this would have led to diminished revenues. However, the provided statistics show quite the opposite. European soccer is still recording an upward trend.

(b) Sociological Arguments

Fans do not only sympathise with their clubs through players but through ‘the community's sense of belonging and pride’.[^321] In most instances, players only stay for a limited period in any one club. Hence, fans can identify themselves with them only temporarily. According to Advocate General Lenz in *Bosman*,[^322] fans are much more interested in seeing their team

[^315]: Ibid 21.
[^317]: Ibid 2.
[^318]: Ibid.
[^320]: Ibid.
winning than having local players in their teams.\textsuperscript{323} Furthermore, foreign players ‘attract the admiration and affection of football fans’ not far less than local players.\textsuperscript{324} For instance, Lionel Messi, who is from Argentina, is nevertheless endorsed by the supporters of the FC Barcelona. Foreign players may also attract support from international fan communities in the country the player’s club is located in and in the player’s country itself.\textsuperscript{325}

\textit{(c) Legal Arguments}

The home-grown rule does not appear to improve the connection between a club and its local communities. The requirement of four club-trained players may, on the one hand, enhance the club’s connection with their local communities.\textsuperscript{326} Such players are likely to be from the region of the club although they do not even have to come from the same country as the home-grown rule is not based on nationality. On the other hand, the necessity of four associated-trained players is not at all suitable for improving the link of a club with its the local communities.\textsuperscript{327} Additionally, the home-grown players do not have to play on the field and are therefore not necessarily representing the club.\textsuperscript{328} The team playing might still exist out of 11 foreign players.\textsuperscript{329}

\textbf{VIII Conclusion}

The analysis of this article shows that the home-grown rule violates the free movement of workers and is therefore prohibited by art 45 \textit{FEU}. The objectives of the home-grown rule are cannot justify its own discriminatory effects. The aims of the rule are not legitimate, and/or not likely to be reached. Whilst the promotion of youth development, competitive balance and national teams can be considered as legitimate (and therefore generally capable of justifying discrimination in sport), the aim of maintaining the link between clubs and their local communities cannot, given the arguments above, be regarded as legitimate. Furthermore, there are more effective non-discriminatory measures which are preferable to

\textsuperscript{324} Ibid.
\textsuperscript{325} Freeburn, above n 24, 217 citing Miettinen and Parrish, above n 86, 22.
\textsuperscript{326} Freeburn, above n 24, 216.
\textsuperscript{327} Ibid.
\textsuperscript{328} Miettinen and Parrish, above n 86, 23.
\textsuperscript{329} Ibid.
the home-grown rule. Whilst contemporary European soccer is confronted with a lack of competitive balance, the UEFA home-grown rule is not the solution.
HOW DOES BHUTAN’S GROSS NATIONAL HAPPINESS APPROACH ENVIRONMENTAL SUSTAINABILITY AND HOW HAS THIS IMPACTED ON POLICY DECISIONS IN FRANCE?

INGRID JOHANSON*

ABSTRACT

GDP is a misguided measure of progress. It is a financial, not substantial, indication of positive development or change. The effects of environmental degradation, climate change and other serious social issues are dismissed by GDP rankings, let alone the wellbeing and happiness of a people. Success needs to be redefined. What is measured, matters. And what matters, must be measured.

I INTRODUCTION

Gross Domestic Product (‘GDP’) has been used to measure a country’s success for many decades. Although the measure was developed as a specific way to record national economic behavior, it has been misinterpreted for decades as a greater indicator of wellbeing and is often understood to indicate a nation’s overall success and rate of development.1 In contemporary times, some have argued that the western economic model and GDP focused policy is flawed due to its lack of consideration of other factors of national interest, such as environmental concerns, economic sustainability or individual wellbeing.2 Leading up to and in the aftermath of one of history’s most severe global financial crisis in 2008, economists and politicians have been questioning the promotion of constant economic growth. Krugman laments, however, that even considering the severe financial crash there has been little change in mainstream neoliberal economic thinking.3 The effects of environmental degradation and human induced climate change are becoming increasingly clear, however a

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1Justin Fox, ‘The Economics of Well-Being: Have We Found a Better Gauge of Success than GDP?’ Harvard Business Review (Boston) January-February 2012, 81.
nation’s environmental respect or the contentment of its population are never considered in global rankings of GDP and national prosperity. As mainstream thinking focuses on narrow monetary indicators when measuring success, integral wellbeing is forgotten and true progress is being mismeasured.

This article will discuss an alternative measurement to Gross Domestic Product as offered by the Kingdom of Bhutan and will look at how this has influenced policy making abroad. This alternative measurement, named ‘Gross National Happiness’ (‘GNH’), considers sustainable environmental practices, biodiversity and human contentment as well as other traditional wellbeing standards when evaluating the progress of a successful and prosperous society. Bhutan’s alternative approach to national statistics has had some far reaching influences on international policy decisions, forming some inspiration for the former French President Sarkozy to create the ‘Commission on the Measurement of Economic Performance and Social Progress’. France’s attempt to appreciate environmental behaviors and personal wellbeing in its national statistics is a progressive step. The French effort to address environmental sustainability within its mainstream wellbeing statistics was ultimately imperfect, however it indicates a shift in thinking and may influence other developed, resource dependent states in the future. France’s approach continues the conversation about how to move beyond entrenched GDP focused states towards more wholesome and reflective wellbeing rankings.

Part II of this article will discuss the failings of the GDP measurement and indicate why the GDP is incompatible with environmental preservation. Part III will look at the GNH in Bhutan and its approach to environmental protection, followed by a discussion in Part VI of how this alternative approach has affected policy change in France. This article will maintain that while France’s efforts are commendable, they are only the start of a necessary global conversation, which rethinks the way nations measure success.

II FAILINGS OF THE GDP

The way nations have measured success has varied greatly throughout history. The current economic approach and GDP rankings only became popular in the 1930s and 40s, according
to Fox in the *Harvard Business Review*.\(^4\) Around 2,000 years ago in Ancient Greece Aristotle believed a society should aspire to achieve individual liberties, meaning political and social entitlements for the population.\(^5\) European thinkers of the 17\(^{\text{th}}\) and 18\(^{\text{th}}\) centuries turned away from a societal structure shaped by religious doctrine and worship toward more scientific and tangible societal advances, and greater emphasis was placed on intellectual thought.\(^6\)

Jeremy Bentham is known as one of the first philosophers to propose ‘happiness’ as a viable goal for society, expressed in his theory of the ‘philosophy of utility’.\(^7\) Regarded by Cutler as the ‘founder of utilitarian analysis’, Bentham categorised the experience of life into 12 pains and 14 pleasures.\(^8\) Not surprisingly, he/she who experienced more of the latter was seen as having a greater quality of life. In contrast to the 20\(^{\text{th}}\) century idea that GDP increase could be in itself a legitimate goal, Bentham’s measurements only recognised ‘the pleasure of wealth’ as one of 14 other contributors to personal happiness.\(^9\) Bentham’s theory was embraced for some decades, however as economics as a field emerged further on the global scale, more quantifiable wellbeing indicators were pursued.\(^10\)

Thinkers on the subject in the 20\(^{\text{th}}\) century gravitated toward using economic measures to assess people’s needs and societal success, creating a trend which has essentially continued up to present day. While the last decade has witnessed more criticism of using GDP as a measurement of national prosperity, and the international community has been forced to face global threats such as resource depletion, refugees and climate change, the GDP measurement remains popular. According to Cutler, in our world today economists and leaders continue to believe that people’s wants and needs can be measured by what they spend money on.\(^11\)

The GDP, a calculation of the value of goods and services produced within a nation during a certain time period, was first developed by Simon Kuznets and expressed in a US Congress

\(^4\) Fox, above n 1, 80.  
\(^5\) Ibid.  
\(^6\) Ibid.  
\(^7\) Ibid.  
\(^9\) Ibid.  
\(^10\) Fox, above n 1, 80.  
\(^11\) Cutler, above n 8.
report in 1934.\textsuperscript{12} It was intended as a specific measurement to evaluate the US’s economic activity during the Great Depression and assist in monitoring economic activity. Kuznet’s report warned strongly against the use of GDP beyond its intended purpose, highlighting in the report the GDP’s inability to account for wholesome wellbeing measures which he called ‘national welfare’.\textsuperscript{13} Kuznets wrote that ‘the welfare of a nation can… scarcely be inferred from a measurement of national income’ and that peoples tendency to oversimplify figures and measures ‘becomes dangerous when not controlled in terms of definitely stated criteria’.\textsuperscript{14} Visionary in his warnings of the limitations and dangers of GDP, Kuznet’s warnings have been overlooked and the oversimplification of GDP as a reflection of the standard of living has continued to grow.

Following the Bretton Woods conference of 1944, Kuznet’s warning had been forgotten and the World Bank and International Monetary Fund adopted GDP as a key indicator of a nation’s success.\textsuperscript{15} The economic and business notion that suggests ‘what gets measured, gets managed’ has played out since these international institutional reforms. Not only has measuring GDP taken priority and been the focus of many institutional resources, it has also allowed the Bank to ignore alternative indicators such as gender equality, positive environmental practices and overall happiness.\textsuperscript{16}

Nobel Prize winning economist and former Chief Economist of the World Bank Joseph Stiglitz has been outwardly critical of the appropriation of GDP as an indicator of overall national success.\textsuperscript{17} Stiglitz emphasised that GDP was only ever intended to monitor market growth and has been used inappropriately to measure a population’s standard of living.\textsuperscript{18} While GDP was developed to assess an economy ‘through financial crises and wars’, Fox illustrates how the notion that an individual’s spending patterns will reveal what they want (ie. what makes people ‘happy’) is nowadays a commonly accepted idea.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Kuznets, above n 12.
\item Fox, above n 1.
\item Ibid.
\item Ibid.
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\end{footnotesize}
cases economic growth can enhance societal wellbeing to the extent it allows basic needs such as health care, food, sanitation to be met, studies show that beyond relatively basic levels of income an increase in financial capital does not correlate with an increase in life satisfaction. While the globe seems lost in the assumption that ‘economic growth will enhance social wellbeing’, many decades ago Mahatma Gandhi was already emphasising that development must embrace the ‘indivisible whole’. Gandhi stated that when measuring the development of a country it would be a ‘fallacy to suppose they can be developed piecemeal or independently of one another’.22

Criticism of GDP-focused national rankings is not isolated to the last decade; rather opposition to the concept has been voiced for decades. From the heart of western economic thinking, US Presidential Candidate and Senator for New York Robert F Kennedy spoke out on the failings of the GDP measurement in his address to the University of Kansas in March 1968.23 The Presidential Candidate began his address by outlining multiple factors that cause harm to society but improve a nation’s GDP measurement, noting examples such as cigarette advertising, ambulances clearing away highway bloodshed, ‘special locks for doors as well as the jails for the people who break them’, nuclear warheads and armoured cars.24 Kennedy contrasted these with the positive factors in society which go unmeasured by GDP, such as the quality of education, the health of children, the ‘beauty of poetry’, personal compassion and the natural environment.25 These failings lead Kennedy to powerfully conclude that ‘GDP measures everything…except that which makes life worthwhile’.26

Progressive for this day and age, Senator Kennedy’s address mentions most mainstream criticisms of GDP cited today, and also reveals an appreciation for environmental and sustainability issues. Expressing alarm at the increasing environmental degradation in the world, Kennedy highlighted that GDP measurements would usually embrace damage to the natural world as a positive contributor. Kennedy stated that in neoliberal economics ‘the

20 Dixon, above n 2.
21 Ibid.
24 Ibid.
25 Ibid.
26 Ibid.
destruction of the redwood and the loss of our natural wonder in chaotic sprawl’ are translated as a good thing.27 Although Kennedy criticised reliance on GDP many decades ago, Fox states that the address received minimal attention until recent times, and the Senator’s critique of GDP had little influence during his time in power.28 According to Stiglitz GDP has been the ‘yardstick’ by which the world measures economic and social progress for around 60 years, which has led to detrimental degradation of the environment and severe natural resource exploitation.29

A GDP and the Environment

The promotion of unconditional growth has had alarming effects on the natural world and environment internationally. While neoliberal economic theory requires that profits increase constantly, contemporary knowledge reveals this pattern is not only environmentally unsustainable but will severely threaten future economic prosperity. In a critique of the current western economic system, Dixon states that it ‘distorts price signals, makes illogical growth assumptions, under-values future generations and compels irresponsible behaviour’.30 While economists focus on greater production, environmentalists lament the loss of species, the irreversible ecological damage internationally and the harsh change in global weather patterns.31 In contrast to the capitalist concern for a decreasing GDP, Dixon states that in reality ‘failure to restrain growth equals death’ for the environment and the economy.32 Despite Kennedy’s address highlighting that environmental destruction is not a new phenomenon, Stiglitz comments that ‘economists and government have been slow to incorporate (environmental damage) into their measurements’.33

The notion ‘what gets measured gets managed’ has had grave implications concerning the environment, as key sustainability indicators are according to Heal ‘almost entirely unmeasured and often unmanaged too’.34 Not only is environmental damage not often considered in GDP measures, exploiting resources and environmental crises are often

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27 Ibid.
28 Fox, above n 1.
30 Dixon, above n 2, 23.
31 Stiglitz, above n 29, 2
32 Dixon, above n 2.
33 Stiglitz, above n 29, 2.
34 Heal, above n 16.
included as a positive contributor to GDP growth. This conundrum leads Dixon to believe that not only are GDP measurements innately misleading, they are a metric entirely ‘incomplete’.35

The falling water table in parts of India is an example of environmental degradation which contributes positively to GDP growth.36 Environmental degradation and the change in global weather have led to severe water shortages in parts of rural India.37 This has increased the need for labour and the costs required in drilling deeper bore holes and transporting water to villages, factors indicating a ‘positive effect’ on local economies.38 The short lived economic activity aroused by the water shortage does not factor in the long term implications on lives and livelihoods. While increased work has an immediate financial impact, the long-term consequences for prosperity and community wellbeing are not considered. Heal warns that ‘there is little in our current economic measures which would warn us of an impending environmental crisis’, something worth addressing in the face of the scientific revelations in relation to international climate warming.39

While the flaws of the western economic model may seem entrenched in the global system, a fresh perspective from the Kingdom of Bhutan has promoted an alternative approach for decades. Embracing the interconnectedness between economic growth, wellbeing and the environment, Bhutan’s ‘Gross National Happiness’ has gained increasing attention on the global stage in recent times. Although it will be a grand effort to shift the current neoliberal mindset and approach to measuring national progress, Bhutan’s unique approach has affected government policy decisions that far outreach its humble Himalayan origins.

35 Dixon, above n 2.
36 Heal, above n 16.
37 Ibid.
38 Ibid, 147.
39 Ibid.
III AN ALTERNATIVE: GROSS NATIONAL HAPPINESS

A GNH and Environmental Protection in Bhutan

Bhutan has taken a dramatically different approach to national measurements, committing to the pursuit of ‘happiness’ before economic measures.\(^{40}\) In this Himalayan kingdom, boasting a population just over 700,000, the fourth King publicly declared in 1972 that ‘Gross National Happiness is more important than Gross National Product’.\(^{41}\) This notion has subsequently been enshrined in Bhutan’s national Constitution.\(^ {42}\) Bhutan’s alternative understanding of national achievement can be traced to deeply historic origins, dating back to the country’s legal code from 1629. With many principles from this early document now enshrined in the Bhutanese Constitution, the 1629 legal code boldly states that ‘if the government cannot create happiness for its people, then there is no purpose for the government to exist’.\(^ {43}\)

Nestled between the two booming economies of China and India, Bhutan’s unique philosophy has deep roots in Buddhism and reveals vastly different values to a modern western state. The Royal Government of Bhutan has legislation embracing GNH and environmental protection dating back to the *Forest Act (1969)*,\(^ {44}\) which states that ‘the forest is the most important natural wealth of this country…[it is] vital in the preservation and continuation of aesthetic views, rainfall and temperature regime’.\(^ {45}\) In more recent times multiple environmental laws have been passed. The legislation includes *the Biodiversity Act of Bhutan (2003)*,\(^ {46}\) *the Forest and Nature Conservation Act (1995)*\(^ {47}\) and most recently the *National Environmental Protection Act (2007)*.\(^ {48}\) All acts strengthen Bhutan’s GNH philosophy of ecological diversity.

\(^{40}\) Miller, above n 22, 52.
\(^{42}\) The Constitution of Kingdom of Bhutan, adopted Male Earth Rat Year (2008), adopted in Thimphu.
\(^{43}\) The Centre for Bhutan Studies ‘Bhutan GNH Index’ (2013) http://www.grossnationalhappiness.com/articles/.
\(^{44}\) Bhutan Forest Act 1969 (Royal Government of Bhutan).
\(^{45}\) Ibid, Preamble.
\(^{46}\) Biodiversity Act of Bhutan; Year of Water Sheep 2003 (Royal Government of Bhutan).
\(^{48}\) National Environmental Protection Act, 2007 (Royal Government of Bhutan).
International interest toward the GNH has flourished and has led to multiple global seminars and workshops. At one such workshop in 2009 Prime Minister of Bhutan Lyonchen Jimi Thinley stated that the GNH is not simply a ‘feel-good’ measure, rather it is something that comes ‘from serving others, living in harmony with nature, and realizing our innate wisdom and the true and brilliant nature of our own minds.’

Environmental protection is one of the four fundamental pillars to what the GNH paints as a ‘happy society’. Dixon states that among all nations Bhutan understands that ‘economy and business are not separate from any other part of society or the total earth system’.

The four fundamental pillars of the GNH are 1) good governance, 2) sustainable development, 3) cultural preservation and 4) environmental conservation; two of the four measures particularly relating to the well-being of our natural environment. Progressing from a form of philosophy, the GNH has now progressed to a quantifiable index which is gaining increasing global interest. In forming the index the Government of Bhutan broke down the four fundamental pillars into nine measurable dimensions, then conducted a nationwide survey on issues ranging from health standards to education to ecological understanding.

In a recent paper by Deutsche Bank Research, places such as Scandinavia, Canada, the UK and New Zealand are showing interest in GDP alternatives and alternative measures of wellbeing.

The GNH model has been criticised due to the subjective and intangible nature of personal or communal happiness and has faced the traditional skepticism surrounding qualitative data sets. Critics have highlighted the issue of linguistic difference in what ‘happiness’ actually means, some arguing that questioning somebody’s happiness will reveal more about how they use language and not indicate their state of wellbeing. Zurick offers further criticism of Bhutan as a nation, indicating that Bhutan has a ‘rigidly hierarchical’ societal structure which

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49 Miller, above n 22, 52.
50 Dixon, above n 2, 23.
52 Fox, above n 1, 80.
55 Ibid, 7.
56 Ibid, 8.
exists contradictorily in comparison to the basic tenants of equality and wellbeing expressed through GNH.\textsuperscript{57} Further to this the government has been criticised for its discriminatory treatment of the Lhotshampa (Nepali ethnic minority people who live in southern Bhutan).\textsuperscript{58}

While criticism of GNH or of various Bhutanese policies exists, the GNH has returned impressive results when looking to conventional development statistics. Life expectancy in Bhutan has risen 18 years in the last 5 decades and infant mortality has more than halved after a policy focus on public healthcare.\textsuperscript{59} This has meant Bhutan is significantly ahead of many other nations in the region in reaching their Millennium Development Goals.\textsuperscript{60} Bhutanese people enjoy one of the highest incomes per capita in south Asia and while some of the population earn less than $1.25 US a day, national free healthcare, free education and generous social welfare has created ‘high levels on human development indicators and relatively wide-spread social well-being’.\textsuperscript{61} Primary and secondary education has expanded rapidly with the number of teachers trebling in the last few decades and statistics show an impressive gender balance in the workforce.\textsuperscript{62} Regardless of the fact that economic growth is not prioritised by Bhutanese policy makers, the nation has experienced ‘robust growth’ in its economy compared to many of its Asian neighbours and enjoyed a 6 percent growth per annum in the early 2000s.\textsuperscript{63}

In environmental terms Bhutan remains far advanced beyond much of the developing and developed world. Over 70\% of Bhutanese land is native forest and shrub, with much of it being ‘permanently protected’ and not eligible for future development.\textsuperscript{64} This figure has grown since the 1990s when it was reported that there was less than 60\% forestland, indicating the success of the government’s strict environmental policies.\textsuperscript{65} Bhutan is one of the only nations which expressly bans the use of plastic bags, restricts the introduction of

\textsuperscript{57} David Zurick, ‘Gross National Happiness and Environmental Status in Bhutan’ (2000) 96(4) \textit{American Geography Society} 657, 658.
\textsuperscript{58} The Centre for Bhutan Studies, Bhutan GNH Index (2013) http://www.grossnationalhappiness.com/articles/.
\textsuperscript{59} Tandin Dorji, Pelzom Dorji, Robert Gibbons and Tashi Tobgay, ‘Progress and delivery of health care in Bhutan, the Land of the Thunder Dragon and Gross National Happiness’ (2011) 16 \textit{Tropical Medicine and International Health} 6, 733.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid, 666.
\textsuperscript{62} Ibid.
\textsuperscript{63} Ibid.
\textsuperscript{64} Zurick, above n 57, 661.
\textsuperscript{65} Ibid, 666.
western style fast food businesses, while also combating the negative environmental impact of tourism by charging a tourist tax (more than $200 US daily charge). Much of this tax is then directly put to environmental education programs and forest maintenance. Although GNH may be difficult to export due to Bhutan’s unique cultural and geographical situation, recent interest in the GDP alternative would suggest otherwise.

While Bhutan may be perceived as an ‘idyllic kingdom’ by outsiders, it runs the risk of devaluing other rights and mainstream indicators of progress in its pursuit of happiness. Poverty alleviation, disease eradication or greater life expectancy are not expressly targeted in the GNH, and Bhutan has abstained from adopting the UN Declaration on the Rights of Indigenous Peoples which may reflect another international concern not deemed within GNH principles. Bhutan’s emphasis on environmental protection may be noble, however the right to development and other rights such as the right to livelihood, to work or to economic development, the latter explicitly mentioned in the Declaration on the Right to Development Article 1, have perhaps been devalued.

While ‘trade-offs’ in the human rights context are ever present and often unavoidable, the GNH shows clear bias toward long term sustainability over short term improvements. While the emphasis on non-economic success and mental wellbeing may be hard to conceive from a western economic mindset, the Bhutanese President emphasizes GNH promotes a ‘development path which balances sustainable and equitable development with environmental conservation.’ While the nation of Bhutan may not be paradise, compared to the economic centric system with increasing ‘obesity, drug use, teenage pregnancy, depression, suicide’ and often unrestricted environmental degradation, perhaps it is time to start considering exactly how we are measuring success.

The United Nations has shifted away from relying on economic measures in the past few decades towards a more wholesome ‘Human Development Index’ and the Secretary General

66 Ibid, 670.
69 Miller, above n 22, 52.
70 Dixon, above n 2, 20.
has expressly commended Bhutan’s innovation in appreciating sustainable environment.\footnote{United Nations Secretary-General, ‘Happiness and Well-being calls for Rio+20; Outcome that Measures More than Gross National Income’ (2012) SG/SM/14204, United Headquarters meeting convened by Permanent Mission of Bhutan.} Declaring March the 20\textsuperscript{th} to be ‘World Happiness Day’ at a UN meeting convened by the Permanent Mission of Bhutan, UN Secretary General Ban Ki-moon stated ‘we need a new economic paradigm’. The Secretary General continued that since Bhutan already has, the world must also embrace the fact that ‘social, economic and environmental well-being are indivisible’.\footnote{Ibid.} The UK has been inspired by the shift towards wholesome wellbeing measures and in one of Prime Minister David Cameron’s most publicised reforms he created a national wellbeing institute.\footnote{Fox, above n 1, 80.} The Organisation for Economic Cooperation and Development (OECD) has also recently changed their approach towards a more wholesome ‘Better Life Index’, and their 2011 report focusing on happiness and wellbeing measures was titled ‘How’s Life?’.\footnote{Ibid.}

In one of the western world’s ‘most remarkable breakthroughs in economist’s thinking’, President Nicolas Sarkozy of France outwardly condemned mindless following of GDP figures and promoted a shift in national measurements away from economic indicators.\footnote{Richard Easterlin, ‘Policy Implication of the Sarkozy Report’ (Draft Report, University of Southern California Publishing, 14 November 2010).} While various examples of GDP alternatives are developing in the western world, the French example is one of the most powerful attempts to incorporate GNH into a developed western democracy. While the shift in policy and mindset was not without challenges in France, particularly when factoring the environment into national measures of success, the change furthers the debate about which measure we strive to achieve and reveals that an alternative to GDP is possible in the West.

IV THE GNH ABROAD

A France’s Wellbeing Commission

In 2008 President Sarkozy created the Commission on the Measurement of Economic Performance and Social Progress in France. Expressing his dissatisfaction with the current measurements of social and economic progress, the President empanelled the commission to
explore alternative measures to GDP with a particular interest in Bhutan’s GNH model.\textsuperscript{76} Assembling a twenty-five member group to the task, the commission included five Nobel Prize winning economists as well as various respected scholars and academics. The common thread between the group, according to Easterlin, was that all members boasted an expertise in behavioral economics and economic theory.\textsuperscript{77} The President of the Commission was Joseph Stiglitz, Nobel prize winner and former chief economist of the World Bank. Stiglitz was joined by welfare economist and also Nobel Prize winner Amartya Sen as the commission’s Advisor. With Jean Paul Fitoussi as the coordinator and France’s then President the chief instigator of the project, the initiative gained worldwide attention.\textsuperscript{78} Although the commission was initially criticised for its lack of female representation (there were only two women among the twenty-five members), Easterlin suggests this merely reflects the era of the members’ professional training.\textsuperscript{79}

Interest in the group was mainly due to the high profile members and presidential support; yet it also garnered attention because it showed economists criticising the reliance on current economic measurements.\textsuperscript{80} Victor Fuchs, President of the American Economic Association, stated in 1983 that economists believe ‘what people do is more important than what people say’.\textsuperscript{81} The commission however spoke out against this mainstream economic thinking in a move that according to Easterlin could be seen as ‘close to economic heresy’.\textsuperscript{82} The idea that economists and statisticians should give due regard to social measures and non-quantifiable indicators, such as feelings of future economic forecasts, was a huge shift in economic discourse. Stiglitz was outspoken about the necessity for the shift in mindset after leaving the World Bank and throughout the formation of the commission, stating that ‘in the quest to increase GDP we may end up with a society in which most citizens have become worse

\begin{thebibliography}{99}
\bibitem{78} Fox, above n 1, 80.
\bibitem{79} Easterlin, above n 77, 119.
\bibitem{80} Ibid, 120.
\bibitem{81} Victor Fuchs, \textit{How We Live: An Economic Perspective on Americans from Birth to Death} (Harvard University Press, 1984).
\bibitem{82} Easterlin, above n 77.
\end{thebibliography}
In direct reference to the current environmental practices Stiglitz stated that ‘if we are borrowing unsustainably from the future, we should want to know’.  

The commission’s major aim was to create a report proposing an alternative measurement to GDP for France, and potentially other nations, which accounted for sustainability and wellbeing in national measures. The report, titled ‘Commission on the Measurement of Economic Performance and Social Progress Report’, was released in September 2009 and covered three distinct topics titled ‘Classical GDP Issues’, ‘Quality of Life’ and ‘Sustainable Development and Environment’. Expressing concern with how the West is ‘mis-measuring success’, the executive summary form the report states that ‘what we measure affects what we do; and if our measurements are flawed, decisions may be distorted’. 

The report categorises four levels for measuring national success. The report consistently emphasises how traditional economic measurements—such as GDP—are not sufficient as wholesome measures, and sees this as especially important in the current climatic and economic global state.

Starting at the most traditional measure and ending with the ideal measure, the list reads:

1. production (economic performance);
2. material living (economic well-being);
3. overall wellbeing (multi-dimensional); and
4. wellbeing of current versus future generations.

While the report was released only months before the serious economic downturn that came to be known as the ‘Global Financial Crisis’ (GFC), the commission emphasised that the instability of the current financial system only proved the necessity of looking toward alternative models of measuring national progress. The GFC had the potential to result in the abandonment of alternative approaches altogether as the world focused on restoring economic growth or effective fiscal policies. To the contrary however, economists such as

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83 Stiglitz, above n 17.
84 Ibid.
85 Commission on the Measurement of Economic Performance and Social Progress, above n 76.
86 Ibid, 7.
87 Ibid.
88 Easterlin, above n 75.
Easterlin emphasised that the commission’s initiative was even more important in a global economic downturn. Easterlin rejected the approach of following faceless indicators such as economic output in the crisis aftermath and encouraged a focus on human indicators such as employment rates and labour market-related indicators.\(^89\)

In a similar vein, Stiglitz wrote in his article ‘Progress, what progress?’ that the West’s reaction to the crisis failed to recognise the factors which make a true difference in people’s lives, such as ‘security, leisure, income distribution and a clean environment’.\(^90\) The Commission created a follow up report following the GFC titled ‘Progress Revisited: Reflections and Overview’.\(^91\) The report emphasised ‘what we are doing is not sustainable, but current statistics do not reflect this’, continuing that current measurements gave ‘little indication of the unsustainability of the U.S. economic growth in the years preceding the crisis.’\(^92\) In effect the GFC did not detract credit from the alternative measures in a time of economic fear, yet compounded the urgency for the West to re-consider the path it is taking.

### B The Commission’s Approach to Measuring Sustainability

The commission’s work was divided into three major working groups, one with the specific focus on ‘Sustainable Development and Environment’. The group expressed grave concern about current economic measures, highlighted in the group’s analogy on GDP deficiency in the report, stating:

> The commonly used statistics may not be capturing some phenomena, which have an increasing impact on the well-being of citizens. For example, traffic jams may increase GDP as a result of the increased use of gasoline, but obviously not the quality of life. Moreover, if citizens are concerned about the quality of air, and air pollution is increasing, then statistical measures which ignore air pollution will provide an inaccurate estimate of what is happening to citizens’ well-being.\(^93\)

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\(^{89}\) Ibid.

\(^{90}\) Stiglitz, above n 29.


\(^{92}\) Commission on the Measurement of Economic Performance and Social Progress, above n 91.

\(^{93}\) Commission on the Measurement of Economic Performance and Social Progress above n 76, 8.
While being a main tenant of the new approach, the commission was criticised for its struggle to create serious and measurable ways to include environmental concerns into well being measures. While the group’s discussion and report was informed and thorough, Chapter Three: Sustainable Development and Environment maintained that sustainable development and environmental measures should be kept separate from wellbeing and quality of life statistics.\textsuperscript{94} Although it was expected that an all-inclusive measure of national wellbeing would emerge from Sarkozy’s commission, one which incorporated sustainability into the French wellbeing model, the commission took a less grandiose approach.\textsuperscript{95}

The working group was outwardly critical of ‘all-inclusive’ approaches to measuring environmental sustainability and wellbeing together, stating these approaches were misleading to the public and ‘overly-ambitious’.\textsuperscript{96} The group cited Nordhaus and Tobin’s ‘Sustainable measure of economic welfare’ from the 1970s as the first initiative of this kind, and discussed it as a failed figure. While the group saw the measure as innovative in recognising the negative effect of environmental degradation on economic growth, they felt dissatisfied that the measure was created in a misleading and unconvincing manner.\textsuperscript{97} The group turned away from creating a single metric figure to measure environment along with wellbeing as they saw this approach as multiplying competing numbers.\textsuperscript{98} The Brundtland report from 1987 and the Rio Summit at the turn of the 1990s are both attempts of incorporating sustainability measures within a broader figure of wellbeing. While some nations—such as Costa Rica or Bhutan—have embraced similar, more inclusive national figures, the commission did not encourage France to adopt this approach.\textsuperscript{99}

According to the commission, the clustering of heterogeneous items is only possible when focusing on human and physical capital, but the addition of natural assets (due to their fluctuating market value and interaction with predicting future sustainability issues) is

\textsuperscript{94} Ibid, 61.
\textsuperscript{96} Commission on the Measurement of Economic Performance and Social Progress, above n 76, 70.
\textsuperscript{97} Ibid, 65.
\textsuperscript{98} Commission on the Measurement of Economic Performance and Social Progress, above n 76, 62.
currently too ambitious of a task.\textsuperscript{100} While the report proposes radical change to France’s approach in assessing national wellbeing and progress, its reluctance to attack climate issues and sustainability concerns detracted from its power.

On the other hand, measurements of quality of life and national wellbeing were seen as attainable using existing data and current quantifiable trends, and the commission made serious advances in monitoring such trends.\textsuperscript{101} The commission acknowledged that while many proposals in the past have tried to ‘sum up in a single number’ the measures covered by the three subgroups of the commission; the commission itself did not see this as desirable technique. Michalos’s claimed that from all the insights of the report, the environmental element was ‘the weakest feature.’\textsuperscript{102}

The commission’s approach to environment and sustainability has been critiqued by various academics and economists.\textsuperscript{103} Easterlin’s critic states that while a great percentage of the report was dedicated to discussing sustainability concerns, it offered too few muted recommendations and rejected aggregative indices of sustainability in the way of using multiple indicators of sustainability.\textsuperscript{104} Adams on the other hand regards it as a ‘serious attempt’ to address the growing global concern and maintains that factoring sustainability into a national measure was ‘intellectually the most challenging’ task.\textsuperscript{105} Surrendering the method in which sustainability should be measured to further ‘public debate’ or ‘specialists from other fields’, in a somewhat disappointing move the commission defers monitoring national sustainability to a later date.\textsuperscript{106} The commission maintains that in regards to producing an all inclusive wellbeing measure for states to embrace, it is opening the conversation and not offering the answer.\textsuperscript{107}

\begin{footnotes}
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid, 61.
\textsuperscript{102} Alex Michalos, ‘What did Stiglitz, Sen and Fitoussi get right and what did they get wrong?’ (2011) 102(1) Social Indicators Research 117, 121.
\textsuperscript{103} See generally Richard Easterlin, ‘Policy Implication of the Sarkozy Report’ (Draft Report, University of Southern California Publishing, 14 November 2010), 2;Michalos, above n 102.
\textsuperscript{104} Easterlin, above n 77, 2.
\textsuperscript{106} Commission on the Measurement of Economic Performance and Social Progress, above n 76, 62.
\textsuperscript{107} Ibid.
\end{footnotes}
An ever present and overarching issue when approaching sustainability and environment is whether any measurement can be truly national, or whether sustainability and environmental preservation must be an international initiative to be effectual. It has been doubted frequently that sustainability can really be assessed by just looking at the ‘behaviour of a particular country’ given our knowledge that pollution, resource depletion, rising sea levels and an increase of temperature are not factors which are confined within state boarders.108 While Stiglitz claimed that nowadays ‘taking into account resource depletion and some aspects of sustainability is fairly easy’, the current attitude seems reluctant to create global consensus or embrace international environmental standards.109 The failing of the commission to create a national measure for sustainability also brings home the failure of the international community to create an agreement to address climate change and promote sustainable futures. In our globalised world, where the interconnectedness of everything is only increasing, the transportation of goods and people will undoubtedly increase our ability to transport and trade ideas and good practices. Although France could not produce a single metric to incorporate a different wellbeing measure as well as environmental practices, it is clear that the Bhutanese approach is making nations think twice about what they measure, and seriously reassess just what makes a successful nation now and in the future.

V Conclusion

The GNH in Bhutan measures national progress using multiple well-defined criteria, and while these have proven effective in the Bhutanese context, it seems such measures are perhaps more easily implemented in non-industrialised and sparsely populated regions. Bhutan’s direct incorporation of ecological diversity and sustainable practices into national measures is impressive in ways, however does not avoid trade-offs of different measures of progress such as better housing standards, access to outside cultures or increased consumption of goods. While Bhutan’s focus on environmental values has fuelled discussion in the western world, the French commission’s attempt to incorporate an alternative system has shown the difficulties of adopting such a change. While the GNH approach has forced the world to consider just exactly what it is measuring, the challenges of reflecting sustainability in a new measure for developed and heavily resource dependent states remains. While the GNH as well as the commission in France both encourage the debate on how to measure a

108 Adams, above n 105.
109 Fox, above n 1, 82.
nation’s progress, it is clear that neither have a global answer. As this issue receives increasing attention and new ideas are transported and shared globally, the quest for more sustainable measures will continue to thrive and a more wholesome understanding of national wellbeing will be fostered.