STRATEGIC AND HUMAN RIGHTS LITIGATION: BRIDGING THE GAP BETWEEN THE IVORY TOWER AND THE HALLS OF JUSTICE

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This article examines the advantages and limitations of seeking to involve law students in social justice initiatives, including strategic and human rights litigation, through clinical programs and other means. It draws on the author's academic experience in establishing and developing the social justice clinical program at the University of Sydney Law School and professional role as a practising barrister engaged in the conduct of strategic litigation and class actions in the Federal Court of Australia and other courts.

I The Social Justice Program at the Sydney Law School

I have a longstanding interest in clinical legal education. This arose during my period as a law student at the University of Melbourne Law School. In part, this evolved out of my participation in an international law student seminar in Singapore in 1971 on Legal Aid and the Law Student. Jointly with Philip Alston, I presented a paper on the the purpose of setting up legal aid clinics.[1] This grappled with the theory and rationale for such programs. In terms of practical implementation, my then attempt, as a student member of the Melbourne Law School curriculum review committee, to introduce a clinical program resulted in abject failure. The only opportunities for clinical involvement were thus, of necessity, extra-curricular.

My disenchantment with the law school curriculum was offset by my enthusiastic involvement as a volunteer at the then newly established Fitzroy Legal Service. This not only provided legal experience in the real world, but it also provided my first practical insights into the important role of law and lawyers in countering injustice.

Clinical legal education in Australia was slow to develop at the older law schools in both Melbourne and Sydney. By way of contrast in the United States ('US') clinical education emerged in the 1960s out of a desire for more relevant experience:

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1 Published in Philip Alston and Peter Cashman, 'The Purpose of Setting up Legal Aid Clinics' (1971–1972) 3 *Singapore Law Review* 27.

> Spurred by the civil rights movement, young people flocked to law school hoping to work for social change and were discouraged to find a calcified curriculum having little to do with their aspirations.[2]

Having endured a 'calcified curriculum', it took a further 35 years after my graduation before I had an opportunity to develop clinical legal education, on this occasion at the University of Sydney.

Like the Melbourne Law School, the Sydney Law School ('SLS') was slow to introduce and expand its clinical legal education initiatives. Although an optional course had been available for some years,[3] offering students limited clinical placements one day a week with a variety of legal organisations, the course did not have a structured or focused curriculum. Students were placed with a wide variety of legal organisations, without there being any 'social justice' focus.

In 2009, following my appointment to the Kim Santow Chair in Law (Social Justice) and as Director of the Social Justice Program, an opportunity arose to expand the clinical legal education initiatives as part of the social justice program. This was in large measure due to the support of the then Dean, Professor Gillian Triggs.

The additional academic resource commitment was modest. I was only a part-time (0.5) appointment and was saddled with other undergraduate and postgraduate teaching obligations. Thus, my involvement in the clinical program amounted to only one-third of one half of a full-time academic position. Additional administrative support, including arranging placement with the various centres, was provided by a member of the professional staff of the law school.[4] By way of contrast, the University of New South Wales had established the Kingsford Legal Centre with 12 staff and one law firm secondee, plus numerous additional academic staff involved in a variety of clinical programs and internships.[5]

2 Minna J Kotkin, 'Clinical Legal Education and the Replication of Hierarchy' (Legal Studies Research Paper No 618, Brooklyn Law School, October 2019) 5 <https://ssrn.com/abstract=3473809>; See also Minna J Kotkin, 'Clinical Legal Education and the Replication of Hierarchy' (2019) 26(1) *Clinical Law Review* 287; See also Minna J Kotkin 'Clinical Legal Education and the Replication of Hierarchy' (2020) 6(2) *Clinical Legal Education* <https://thepractice.law.harvard.edu/article/clinical-legal-education-and-the-replication-of-hierarchy/>.

3 Originally known as the External Placement Program. Further 'clinical' experience is available to students through the Himalayan Field School. See Ben Saul and Irene Baghoomians, 'An Experimental International Law Field School in the Sky: Learning Human Rights and Development in the Himalayas' (2012) 22(2) *Legal Education Review* 273.

4 During my tenure this was admirably handled by Ruth Machalias.

5 There are a wide variety of clinical programs operating in many Australian law schools. Different models and their distinguishing features are reviewed in Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press, 2017).

Given the resource constraints, and the desire to avoid the professional and financial responsibilities of establishing a full-time legal centre, arrangements were entered into with various legal centres and a law firm.

Each 'clinical partner' agreed to take a specified number of law students, one day a week, The initial clinical partners were the Public Interest Advocacy Centre ('PIAC'); the Refugee Advice and Casework Service ('RACS'), the Public Interest Law Clearinghouse (now known as Justice Connect) and the Environmental Defenders Office. Law firm King & Wood Mallesons also agreed to supervise a limited number of students with a view to developing human rights cases. In addition to taking students each semester, arrangements were also entered into with PIAC to run a separate summer school program, involving both an intensive course content and a clinical placement component. At its inception, the program was offered each semester but was reduced to one semester per year.

Initially, a number of these clinical partners were offered free office accommodation in the then-vacant Phillip Street old law school premises, following the relocation of the law school to its new building on campus. These arrangements were ended when the old law school building was sold by the University for commercial development, but a clinical partnership has endured with most of the original partners other than RACS.

The nature of the work carried out by students on clinical placement was determined entirely by the clinical partners themselves. Most students found this experience enormously rewarding and, in many instances, inspirational. Students were only required to participate for one day per week over the course of one semester, which gave rise to obvious limitations on the quality and quantity of clinical experience. This is discussed further below.

In addition to the clinical partnerships referred to above, a different arrangement was entered into with law firm King & Wood Mallesons ('KWM'). Under this arrangement, students, academics and KWM lawyers worked together to identify and run public interest litigation cases. A small number of high-achieving SLS students were selected to work with KWM to develop human rights test cases, or other cases involving cutting-edge constitutional or other issues. Each student was required to investigate matters of the student's own choice.

Potential cases were often selected following consultation with various individuals and organisations. The student would prepare a detailed research memorandum on a few different cases. This would set out the factual, legal and policy issues relevant to the proposed litigation. The proposals were considered by expert lawyers at KWM.[6]

6 Liam Burgess of KWM was instrumental in the establishment and running of this program.

If the potential case was considered to have sufficient legal merit, an opinion was sought from one or more barristers who had agreed to evaluate cases on a pro bono basis. I also participated in the formulation and review of cases.

Where it was considered that the potential case had sufficient merit, and where a willing client was able to be found, the case would proceed to litigation through KWM. For example, several of the cases developed by students during the course resulted in proceedings, including in the High Court.[7] Students participating in the KWM clinic were also required to keep a developmental journal, recording the potential cases investigated and the reasons for rejection or selection.

Clinical involvement with the legal centres and with KWM was supplemented by the formal curriculum of the social justice clinical course during a weekly two-hour seminar.

The first component of the seminar program focused on legal, procedural and policy issues relating to the theory and practice of 'public interest law'. This encompassed a variety of issues including the concept of 'social justice'; the various strategies involved in public interest litigation; core skills for successful advocacy both in and outside the courtroom; ethical issues; selected areas of substantive law and structural, institutional, economic and political constraints on the practice of public interest law.

The second component of the seminar program involved student feedback and class presentations on issues arising from their clinical placement or internship experience. This was extended to encompass a regular computer-based blog through which students shared their ongoing clinical experience with others enrolled in the course. Critical reflection is an important component of many if not most clinical programs.[8]

At the commencement of the semester students enrolled in the social justice clinical course were asked to answer (anonymously if they preferred) a questionnaire which sought to elicit their views on their reasons for enrolling in the clinical course,

7 Through the clinic an asylum seeker security assessment case was identified and proceedings in the High Court were commenced: *Plaintiff S138/2012 v Director General of Security & Ors*. In this matter Liam Burgess led the pro bono team at KWM. A Tamil asylum seeker family had been held in indefinite detention for four years due to an Australian Security Intelligence Organisation ('ASIO') security assessment. A related case was also before the Court: *M47/2012*. Leave was granted to intervene in an expedited hearing of that case before a full bench of the High Court. Four days before the family's matter was set down for hearing before the High Court, the Tamil family was released from detention following a positive recommendation by an Independent Reviewer of the status of the ASIO security assessment. KWM has been, and continues to be, involved in a variety of pro bono cases and human rights programs in Australia. Other cases in which students were involved and which resulted in litigation include *Ahmadi v Minister for Immigration and Citizenship*, and *Roach v Electoral Commissioner* (2007) 233 CLR 162.

8 See, eg, the discussion by Carolyn Grose and Margaret E Johnson, 'Braiding the Strands of Narrative and Critical Reflection with Critical Theory and Lawyering Practice' (2019) 26(1) *Clinical Law Review* 203.

suggested components of the seminar program and the role and social responsibilities of the legal profession. At the conclusion of the semester, each clinical placement site was asked to evaluate the performance of each student on clinical placement. The students were also asked to answer a further questionnaire. This not only sought their views on the value or otherwise of their clinical placement but also focused on the performance on and operation of the legal centre or organisation at which they were placed and on the content of the seminars and the value of the course as a whole. This provided valuable feedback to both clinical placement sites and me as the course coordinator.

The development of the social justice/clinical programs at SLS is discussed by the author elsewhere.[9] Clinical legal education guru Jeff Giddings has written more comprehensively on historical developments.[10] He and other Australian clinical legal education experts have written perceptively about designing and operating a best practice clinical program.[11]

The limited clinical and experiential learning programs at SLS may be expanded.[12] During my tenure at the University of Sydney, clinical legal education remained at the periphery of the law school curriculum, unlike at other law schools where it has become a core component. Various proposals for the expansion of clinical and experiential learning initiatives were enthusiastically embraced by the Social Justice Committee but never implemented. This was due to both an unwillingness to commit additional human and financial resources and institutional inertia.

Resource and financial constraints were also invoked in response to suggestions that the Law School should establish an onsite or local legal centre as a vehicle for providing legal services to the community and clinical legal education for students.

9 Peter Cashman, 'Clinical Legal Education: Social Justice, Social Experiment or Social Failure' in Patrick Keyser, Amy L Kenworthy and Gail Wilson (eds), *Community Engagement in Contemporary Legal Education: Pro Bono, Clinical Legal Education and Service Learning* (Halstead Press, 2009).

10 Jeff Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 3 *International Journal of Clinical Legal Education* 7.

11 See Evans et al (n 5).

12 Following the appointment of Professor Simon Rice on a full-time basis.

II Problematic Aspects of Clinical Programs

There is a considerable body of scholarly literature on clinical programs and 'applied' or 'experiential' legal education.[13] As many others have noted, there are problematic aspects of many if not most clinical programs. To some extent, this is inherent in the limited period of clinical placements and the lack of continuity. This is constrained by, inter alia: the other academic demands on students as a result of the number of courses now required to be taken each semester; the tyranny of continuous assessment regimes and the economic necessity, in many instances, for students to have some form of part-time employment.

When I joined the SLS, students enrolled in three or four courses in each of two semesters each calendar year. In each course, there would often be two or more methods of assessment and frequently continuing assessment of work during the semester with an exam or other optional assignment at the end. This imposed a considerable burden on both students and teaching staff. The problem was exacerbated by the continuing decline in the federal funding of universities and the corresponding increase in tuition fees. This made part-time work a necessity for many students thus precluding many from being able to spend one day per week for one semester on clinical placement.

The clinical placements through the SLS program of one day per week for 12 weeks (one semester),[14] total approximately three per cent of the coursework component of a four-year undergraduate degree. The actual percentage of overall student involvement in this clinical program was even less given that the program was optional and only available to a relatively small number of students. By way of contrast, many law schools with a significant commitment to clinical legal education facilitate the clinical involvement of *all* students.

Although law schools in the US had resisted substantial reforms relating to experiential education for more than a century, as noted by Korn and Hlass, in 2014 the American Bar Association mandated a six-credit experiential course requirement for all students graduating from law schools. This was less than the 15-credit proposal advocated by proponents of clinical legal education and only a fraction of the requirements in other professional schools which devoted 25–33 per cent of the

13 See, eg, the research citations compiled by the Center for the Study of Applied Legal Education in 'Citations to Survey Results', *Center for the Study of Applied Legal Education* (Web Page, May 2020) <https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/5eab7aaf289c3421b8f8c1fa_CSALE%20Scholarly%20Citations%20Apr%202020.pdf>.

14 At its inception the course ran each semester but became restricted to one semester per year. In some instances, students were allowed to be on clinical placement outside the semester periods.

curriculum to skills training.[15] Leaving aside the quantitative clinical requirements, the qualitative experiences of students on clinical placement in the Sydney program were varied and patchy. There was little scope for ongoing involvement in individual cases and little continuous contact with clients. In many instances, the student's role at some placement centres was limited to taking initial instructions and arranging for the client or prospective client to be seen by a lawyer with little if any involvement of the student in the progress or outcome of the matter.

Positive benefits included not only insight into legal practice and procedure, and mentoring by practising lawyers, but also exposure of students to the experience of desperate and sometimes destitute persons of different socioeconomic and cultural backgrounds to the students themselves. Insight was often gained into the complex interrelationship between social and economic disadvantage, mental health issues and the legal and financial difficulties experienced by those seeking assistance.

On some occasions, students had some peripheral involvement in test cases, strategic litigation, law reform initiatives and policy work undertaken by the centres with which they were placed.

Many students became motivated to work in areas analogous to those in which they had gained clinical experience. In some instances, contacts made facilitated later professional employment following graduation. For example, many students who had done clinical placements with RACS were subsequently offered employment with refugee advocacy organisations.

III Engaging Students in Strategic Civil Litigation

In addition to the various clinical placement options referred to above, student involvement was facilitated in a few the court cases in which I was appearing as counsel. These cases include:

- the challenge to the patenting of human genes;
- the class action on behalf of Indonesian seaweed farmers arising out of the Montara oil spill; and
- the class action against a pharmaceutical company arising out of allegedly misleading and deceptive conduct in relation to the marketing of Nurofen. The nature of student involvement in these cases is discussed below.

There were various other matters in which students participated. One involved *potential* climate change litigation. Another involved a criminal prosecution of one

15 Allison Korn and Laila L Hlass, 'Assessing the Experiential (R)evolution', (2020) 65(4) *Villanova Law Review* 713.

of the law students in the Law School arising out of a demonstration. Student involvement was not only enlightening for the students involved but also had a crucial bearing on the outcome. The criminal case arose out of a demonstration in Newtown against a 'ban the burqua' mural put up by a resident. Following police engagement, after a can of paint was thrown on the mural, some of the demonstrators were arrested. This included one of the law students. While in custody at Newton Police station, before I arranged for his release on bail, he was identified as the person who had allegedly assaulted police and resisted arrest and charged accordingly. This gave rise to obvious problems for someone seeking to enter the legal profession.

Through my involvement in acting for this student, I arranged for several students to assist in the investigation of the events giving rise to the arrest and prosecution. For this purpose, they located and interviewed a number of people who were present. This included a tourist who had filmed the demonstration, including the altercation with police that led to the arrest of the student. At the trial evidence for the prosecution was given by two female police officers who identified the student as the defendant and gave evidence that he had resisted arrest and assaulted the officer. They each corroborated each other. Although the law student denied involvement, he had no witnesses to support his case. Thus, prima facie it appeared that a conviction was almost inevitable.

Fortunately, the video of the event, that had been obtained by the students, included footage of the altercation leading to the arrest. It showed the student defendant, in the distance, observing but in no way involved in the scuffle with police, which involved someone else. Thus, the police had arrested and charged the wrong person. The student was acquitted and an order for costs was made against the prosecution.

For pedagogical purposes, this was a particularly potent illustration of the fallibility of eyewitness identification. This was an issue dealt with explicitly in the course content of the clinical program, using video resources from the Innocence Project in the US.[16] This has resulted in the exoneration, based on DNA evidence, of numerous defendants wrongfully convicted on the basis of mistaken eyewitness evidence. For the students involved, and the class, this was a small but significant clinical experience. There were many others, too numerous to detail.

In the aftermath of this case and inspired by the Innocence Project in the US, a program was introduced in a collaboration between the Law School and the Psychology Department whereby both law and psychology students are engaged in the examination of criminal cases which may have resulted in a wrongful conviction.

16 See 'About', *Innocence Project* (Web Page, 2021) <https://innocenceproject.org/about/>.

This was largely an initiative of the Psychology Department but was enthusiastically embraced by the Law School.[17] However, relatively few students are involved. The work undertaken by the students is largely, if not exclusively, based on an examination of trial and/or appeal transcripts and documentary evidence. The focus is on eyewitness misidentification, false memories and false confessions. While a valuable learning tool, to the author's knowledge, no case examined has resulted in any forensic action or successful appeal. A similar project has been conducted at Griffith University for more than 20 years and at other Australian universities.[18] The Innocence Project in the US, which was initiated at the Cardozo Law School in New York, has resulted in numerous wrongful convictions being overturned or quashed, in many instances based on DNA evidence.[19]

Apart from this experimental program, and the placement of some students with criminal prosecution or defence organisations, the strategic litigation element of the clinical program was mainly civil in orientation. The rationale for student involvement in a number of civil matters was three-fold. First, it provided an opportunity for direct student involvement in interesting, complex and, in some instances, cutting-edge civil litigation. Second, it allowed students to see first-hand some of the challenges and constraints in seeking to conduct civil litigation with strategic public interest objectives. Third, it was a means by which the legal team involved in the conduct of the cases had an opportunity to not only share their experience but also to benefit from the research and other input from talented and enthusiastic students.

As noted below, the nature of the student involvement in the development and conduct of cases varied from case to case. In some instances, this also involved setting assignment topics, for the class as a whole, based on complex and contentious issues that had arisen or were likely to arise in the conduct of the litigation.

The fact that students were asked to analyse legal issues arising out of ongoing or anticipated cases in which I was involved appeared, to me at least, to qualitatively improve not only their approach to the assignments but also discussion of the cases and issues in class. Their appreciation that they were grappling with real issues, involving real people in current contemporary cases, with the benefit of my professional and strategic insights into the litigation in which I was appearing, meant that they became more 'engaged' in the matters than might otherwise have been the case with ordinary 'traditional' legal assignments. The fact that their input in many

17 See 'Not Guilty: The Sydney Exoneration Project', *University of Sydney* (Web Page) <https://www.sydney.edu.au/science/our-research/research-areas/psychology/not-guilty-project.html>.

18 See Robert N Moles, 'The Australian Miscarriages of Justice Alliance', *Networked Knowledge* (Web Page) <http://www.netk.net.au/AMOJOAHome.asp>.

19 63% of the wrongful convictions involved eyewitness misidentification.

instances was assisting in the forensic conduct of the litigation appeared to also enhance both their motivation and their satisfaction. It is accepted, however, that merely setting essay topics based on current legal controversies is neither innovative nor a methodology for clinical legal education.

On another occasion, rather than set an 'abstract' essay question, students were provided with the terms of reference of the inquiry by the Australian Law Reform Commission ('ALRC') into class actions and litigation funding. The assignment required each student to prepare a 'submission' dealing with one or more issues arising out of the terms of reference. The individual submissions were analysed by me and integrated into a comprehensive submission to the ALRC to assist it in its inquiry. Therefore, the focus in the course on institutional mechanisms for law reform and areas in need of reform was enhanced by practical participation in the law reform process. It is accepted that there is nothing particularly novel or innovative about this.[20]

Before discussing particular legal cases in which students were involved, it is perhaps useful to clarify what is meant by 'strategic' litigation.

A *What Is 'Strategic' Litigation?*

Given that all litigation involves a strategy, the use of the term 'strategic' litigation may be problematic. In the same way that there are differing judicial views as to what may constitute 'public interest' litigation[21] there is much scope for scholarly debate as to the nature of *strategic* litigation. Ramsden and Gill[22] conducted an empirical investigation of the use of the term based on an analysis of the 'top 100' results obtained through an internet search using the term. They analyse use of the term by academics, practitioners and activists and compare it to pre-existing concepts relating to the underlying use of the law for legal or social change. The present paper does not seek to develop or elaborate a comprehensive definition and taxonomy of strategic litigation.

For present purposes, the 'strategic' litigation analysed encompasses a number of specific cases that were intentionally engineered to achieve a defined outcome, pre-determined as being in the 'public interest' and not merely of benefit to the litigants themselves. They are not cases that were initiated simply out of an inter-personal

20 More recently, at the instigation of Professor Simon Rice, a law reform project has been introduced at Sydney Law School to facilitate student involvement in law reform. However, it is an extra-curricular project without course credit.

21 For example, contrast the views of McHugh J in *Oshlack v Richmond River Council* (1998) 193 CLR 72 with the views of Basten J in *Hastings Point Progress Association Inc v Tweed Shire Council (No 3)* (2010) 172 LGERA 157.

22 Michael Ramsden and Kris Gledhill, 'Defining Strategic litigation' (2019) 38(4) *Civil Justice Quarterly* 407.

dispute, per se, between the litigants. The nature of the 'public interest' in question varies from case to case. In all instances, the cases were initially conceived and orchestrated by persons other than the litigants themselves.

In a number of the cases, including the gene patent litigation referred to, the applicants had no personal direct or indirect interest in the outcome. However, the law on standing will often, depending on the causes of action in issue, require that the litigant have a sufficient *interest in* the case for it to be justiciable. In some jurisdictions, such as the US, this is a constitutional requirement. Whereas in Australia, there are many causes of action that may be pursued by 'any person' whether or not they have a specific personal pecuniary or other interest in the outcome. The gene case discussed below falls into that category.

There are, of course, a number of pitfalls in seeking to bring public 'interest' or 'strategic' litigation. Leaving aside adverse costs consequences for the unsuccessful litigant, an undesirable result may have negative and unintended consequences.

In the first case discussed below, the possible adverse consequences of losing the case were considered in some depth before resolving to proceed with the matter. It was concluded that the only impact of losing the case would be to preserve the status quo in relation to the patenting of human genes.

In terms of consequences for the litigant bringing the case, an adverse costs order was avoided by an agreement entered into between the parties, at the stage of the High Court appeal, whereby each side agreed not to seek costs of the appeal or the proceedings below. This turned out to be to the financial detriment of the applicant's lawyers and the legal aid authority that had provided limited financial assistance for the case. The case was conducted without any payment being required from the applicant.[23] As it was ultimately successful this would, absent the costs agreement between the parties, have resulted in an order for costs in favour of the applicant. Thus, the lawyers conducting the case[24] and the Commonwealth legal aid authority agreed to forego their own pecuniary interests in order to protect the applicant from an adverse order for costs and to ensure that the case was litigated to a final conclusion following two appeals. In other instances, much strategic litigation is constrained or precluded by the possibility of an adverse costs order notwithstanding the jurisprudence on costs in public interest litigation.[25]

23 A limited grant of legal aid was provided by Commonwealth legal aid authorities that covered some of the costs incurred. Apart from such limited financial contribution, all lawyers involved in the case acted pro bono.

24 I appeared in the case with David Catterns QC, instructed by Rebecca Gilsenan of Maurice Blackburn, with the assistance of Oscar McLaren.

25 See generally, Grata Fund, *Unlocking Justice: Reforming the Adverse Cost System* (Report, Forthcoming).

B *The Challenge to the Patenting of Human Genes*

In June 2010 a proceeding was commenced in the Federal Court seeking to invalidate the patenting of human genes. The case was brought on behalf of Yvonne D'Arcy, a Brisbane woman who had previously suffered cancer, and Cancer Voices Australia, a national consumer organization representing Australians affected by cancer. As 'any person' may bring proceedings challenging a patent, it was not necessary for either of the applicants to satisfy any standing requirement (unlike in the parallel US litigation, referred to below, where issues of standing loomed large). The initial Respondents were Myriad Genetics Inc ('Myriad'), The Centre De Recherche Du Chul, the Cancer Institute (Japan) and Genetic Technologies Limited ('GTL').

For various reasons, the proceedings ultimately continued on behalf of Ms D'Arcy against the US corporation Myriad, and the Australian company GTL. These were the companies purporting to have the exclusive right to carry out genetic tests to determine whether certain women had a predisposition to developing breast or ovarian cancer.

Such testing involved the analysis of isolated[26] DNA from patients containing all or portions of the BRCA1 and BRCA2 gene sequence. The purpose was to identify the presence of genetic mutations which had been found to be associated with a hereditary predisposition to breast or ovarian cancer.

In July 2008 the chief executive officer of GTL had written to medical, pathology and cancer centres in Australia alleging that they had infringed and were continuing to infringe its exclusive patent rights by carrying out diagnostic testing to determine whether patients had the mutations in question and requesting that such bodies cease such testing, with the threat of legal action if they did not.

The proceedings arose out of a concern at the increasing number of patents being granted in Australia and worldwide to companies giving them exclusive rights in respect of parts of the human genome and the consequential adverse impact of this, including on diagnostic testing by the medical profession and medical research generally.

The case was brought for the strategic purpose of establishing that such patents were invalid. The test case in question was carefully selected in order to limit the issues in question and to keep the case as simple as possible, with a view to reducing costs and minimizing delay. Thus, the legal challenge was confined to three claims in one of the patents.

26 Genetic information cannot be ascertained from the human body, per se. Normally, a tissue, blood or other sample is obtained from the patient. In order to examine the genetic information material is substantially separated (or *isolated*) from other cellular components that naturally accompany a *native* human gene sequence or protein.

The legal contention advanced was that such claims did not constitute a (patentable) 'invention' within the meaning of the *Patents Act 1990* (Cth) and were therefore at all material times invalid. The claims were said to relate to the mere 'discovery' of naturally occurring genetic mutations.

This relatively straightforward legal contention gave rise to considerable controversy and legal and factual complexity. This led to substantial delay and cost.

In the initial proceedings in the Federal Court before Nicholas J the applicant failed.[27]

In view of the importance of the matter, the Federal Court constituted an enlarged bench of five judges for the appeal. Before the Full Court, Ms D'Arcy contended that isolated nucleic acid was not materially different to cellular nucleic acid and that naturally occurring DNA and RNA, even in isolated form, are products of nature that could not form the basis of a valid patent. Myriad contended that its claims were for a product consisting of an artificial state of affairs providing a new and useful effect of economic significance and that isolated nucleic acid differed from the nucleic acid found in a human cell chemically, structurally and functionally. The challenge to the validity of the patent was rejected by all five judges on 5 September 2014.[28]

Thereafter the High Court granted special leave and the appeal was heard by seven justices.[29] The result is discussed below. The parallel US litigation had a similarly chequered history. Similar to the Australian litigation, this involved the question of whether patent claims to isolated genomic DNA from the human BRCA1 and BRCA2 genes were patentable subject matter. The same US company was involved in both the Australian and US proceedings. The history of the US litigation is as follows:

- At first instance, a Federal District Court judge upheld the challenge to the patentability of the genetic material by way of a summary judgment.[30]
- This was overturned by the Court of Appeals in a majority 2:1 decision.[31]
- This was reversed by the Supreme Court,[32] in light of its decision in another case to invalidate the patent claimed for a method of medical treatment.[33]

27 *Cancer Voices Australia v Myriad Genetics Inc* (2013) 99 IPR 567. It was accepted, inter alia, that the claims in the patent constituted a patentable 'manner of manufacture' within the meaning given to that term by the High Court in *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252.

28 *D'Arcy v Myriad Genetics Inc* (2014) 224 FCR 479.

29 *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

30 *Association for Molecular Pathology v United States Patent and Trademark Office*, 702 F Supp 2d 181 (SD NY 2010) (Sweet J).

31 *Association for Molecular Pathology et al v United States Patent and Trademark Office* 653 F 3d 1329 (Fed Cir, 2011) (Lourie, Bryson and Moore JJ).

32 *Association for Molecular Pathology v Myriad Genetics Inc*, 568 US 1045 (2012).

33 *Mayo Collaborative Services v Prometheus Laboratories Inc*, 566 US 66 (2012). This concerned the

- The matter was remitted back to the Court of Appeals.
- The Court of Appeals again rejected the challenge to the validity of the patents by the same 2:1 majority in the earlier decision.[34]
- The matter then went back to the Supreme Court for a second time.
- The Supreme Court, in a further unanimous decision, held that the patents were invalid thus overturning decades of patent practice in allowing the patenting of various forms of isolated DNA.[35]

In the US, litigation public interest input and academic and student participation arose through the involvement of the not-for-profit Public Patent Foundation, which assisted the American Civil Liberties Union in conducting the case.[36]

Student involvement in the Australian patent case occurred at both its inception and at its conclusion. At the beginning, two social justice course students opted to work on the case as part of the clinical component of the course. One had a background in genetics. Their task was to review the expert evidence and briefs filed in connection with the parallel US litigation and to assist the legal team in determining what expert evidence was required for the purpose of the Australian litigation.

This was a vexed question because, on the case propounded by the applicant, the issue was a straightforward legal one that did not necessitate expert evidence, other than by way of a background primer on genetics and molecular biology to assist the trial judge.

However, as noted above, the respondents contended that the *isolated* DNA was patentable because it differed from DNA in the human body in terms of functional, chemical and structural attributes. The respondents sought to rely upon detailed expert evidence to support its contentions.

The applicants contended that notwithstanding such functional, chemical and structural differences between naturally occurring and isolated DNA, which were not disputed, such differences were irrelevant. This was because there was no material difference between natural and isolated DNA in terms of the *genetic information* which was the subject of the claims in the patent which were being challenged (and the basis for carrying out diagnostic testing).

At first instance, although upholding the validity of the patent, Nicholas J did not accept that the patent could be supported on the basis of the alleged functional, chemical and structural differences between naturally occurring and isolated DNA.

patentability of a process for using particular drugs to treat auto immune diseases.

34 *Association for Molecular Pathology v United States Patent and Trademark Office* 689 F 3d 1303 (Fed Cir, 2012) (Lourie, Bryson and Moore JJ).

35 *Association for Molecular Biology v Myriad Genetics Inc*, 569 US 576 (2013).

36 Amicus briefs were also filed, at various stages of the proceedings, including by legal academics.

In upholding his decision, however, the Full Court accepted the Notice of Contention filed by the respondents and held that such differences supported patentability.

Leaving aside the nature of the expert evidence in relation to the differences between native and isolated DNA said to be relevant to the claims to patentability, both the Australian and US litigation gave rise to some interesting questions concerning the relevance of *policy* questions and arguments in determining patentability.

In the US litigation a multitude of amicus briefs were filed, on both sides, concerning the alleged benefits and disadvantages of patenting isolated DNA. The briefs canvassed a wide range of legal and scientific issues and the implications for companies, consumers, the medical profession and the community generally. Eighteen briefs were filed by amici seeking to support the appellants. Thirteen briefs were filed by amici seeking to support the respondent Myriad. These briefs addressed a broad range of policy, economic, medical and scientific issues in respect of the competing adverse and beneficial effects of patenting biological discoveries generally and isolated genomic DNA in particular.

Ultimately, neither the non-legal contentions in favour of patentability nor the non-legal contentions opposing patentability were considered by the US Supreme Court to be relevant to the legal issues that arose for determination in the proceedings.

Similarly, in the challenge to the patentability of a method of medical treatment various amicus briefs were filed in the US proceedings seeking to invoke various policy arguments as to the desirability or undesirability of patenting methods of medical treatment. As Justice Breyer of the US Supreme Court observed: 'We do not find this kind of difference of opinion surprising. Patent protection is after all a two-edged sword'.[37] He proceeded to conclude that the Court 'need not determine here whether, from a policy perspective, increased protection for discoveries of diagnostic laws of nature is desirable'.[38]

In the Australian litigation, at least up until the High Court appeal, the parties conducted the proceedings on the basis of legal and scientific contentions and evidence without seeking to argue one way or the other whether the patenting of isolated human DNA was a good thing or a bad thing from different perspectives. However, prior to the hearing of the High Court appeal, an application for leave to appear in the appear as amicus curiae was filed on behalf of the Institute of Patent and Trade-Mark Attorneys of Australia (the Institute). Evidence filed in support of the application for leave to appear sought to raise a multitude of contentious policy

37 *Mayo Collaborative Services v Prometheus Laboratories Inc*, 132 S Ct 1289, 1305 (2012).
38 Ibid.

issues concerning the desirability of permitting the patenting of isolated DNA and the alleged adverse impact of invalidating such patents.

The proposed amicus also sought to raise a purported constitutional question[39] as to whether an isolated nucleic acid, specifically an isolated nucleic acid coding for polymorphic BRCA1 polypeptide, is an 'invention' within the meaning of s 51 (xviii) of the *Constitution*.[40] This issue had not previously been given any consideration by the parties or the courts below. A further submission was filed on behalf of the Attorney General of the Commonwealth proposing to intervene in the event that the High Court granted the application of the Institute to be heard as amicus curiae. The submission drew attention to errors in the Institute's arguments and urged caution against ruling on a constitutional point that had not been raised by the parties.

The appellants filed submissions opposing the application by the Institute. It was argued that in considering the legal question of patentability broader questions of 'public interest' or 'social costs and public benefit' are irrelevant. Attention was drawn to the decision of the Full Federal Court[41] in *Grant v Commissioner of Patents*.[42] As that Court held: 'It is not relevant, in our view, that some may think that a method or product will not advance the public interest … Nor is the Court in a position to determine the balance between social costs and public benefit'.[43]

Just prior to the hearing of the appeal the parties were informed that the High Court had rejected the application by the Institute to be heard as amicus curiae.

As noted above, student involvement occurred both at its inception and at its conclusion. A number of students enrolled in the social justice clinical course travelled to Canberra for the hearing of the High Court appeal. They attended the hearing and met with the legal team and the client over a period of two days. For most this was the first occasion on which they had attended a sitting of the High Court.

In a unanimous decision, handed down on 7 October 2015, the Court allowed the appeal.[44] All justices agreed, albeit in three separate judgments. Thus, the decisions of six Federal Court judges were unanimously overturned by seven High Court justices.

39 Letter from Corrs Chambers Westgarth to Maurice Blackburn, 19 March 2015.
40 As discussed in *The Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479.
41 Heerey, Kiefel and Bennett JJ.
42 (2006) 154 FCR 62.
43 Ibid 72.
44 *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334.

The High Court accepted that none of the purported chemical, structural or functional differences between isolated nucleic acids and nucleic acids in the cellular environment were relevant to the claims in the patent, which focus on the genetic information which was the same in both the isolated and naturally occurring nucleic acid. The patent was found to be invalid.

However, what was intended to be a relatively simple test case, concerned with whether the claims to patentability of isolated DNA were invalid (because they encompassed naturally occurring genetic information and thus did not constitute an 'invention'), took over five years to resolve. The case also gave rise to the divergent opinions of 13 federal judges, with seven High Court judges coming to a radically different conclusion from the six Federal Court judges. The outcome is of considerable national and international significance.[45]

C *The Class Action Arising Out of the Montara Oil Spill*

In 2016 a class action was commenced in the Federal Court on behalf of the applicant and group members who are seaweed farmers in Indonesia. They claim to have suffered loss by reason of the effect of an oil spill that occurred at the Montara Oil Field in 2009 (the Montara Oil Spill). The oil field is situated within the offshore area of the Territory of Ashmore and Cartier Islands. The respondent held the petroleum production licence for an area that included the Montara Oil Field – it was responsible for the operation of the oil wells there.

In summary, as noted by Yates J,[46] the applicant alleges that the hydrocarbons from the Montara oil spill reached certain areas within Indonesia, including the southern coastal area of Rote, an island where the applicant lives and carries on his occupation as a seaweed farmer. He alleges that the hydrocarbons and/or dispersants that were used had the effect of killing or destroying seaweed and causing a drop in the production of seaweed cultivated by him and the group members. It is further contended by the applicant that the respondent owed him and the group members a duty of care in respect of the operation and suspension of the oil well in question and that the respondent breached that duty of care, thereby causing the oil spill and the loss or damage suffered by him and the group members.

In its defence, the respondent has contended, inter alia, that it did not owe a duty of care to those making claims and that, in any event, the oil from the Montara Oil Spill did not reach the allegedly affected areas and/or did not bring about the decline

45 The decision, and the outcome of the parallel United States *Myriad* case, has resulted in a considerable body of legal, medical and intellectual property literature in numerous jurisdictions. A detailed consideration of this is outside the scope of the present article.

46 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* (No 3) [2017] FCA 1272, [6].

in seaweed production. The case was not without legal, evidentiary and procedural complications arising out of, inter alia, the geographic location of the oil blowout and the fact that the limitation period in respect of the claims had expired before the action was commenced, thus necessitating an application for an extension of time within which to pursue the claims.

This gave rise to the determination of a separate question concerning the ability of the Court to consider and determine whether to extend the limitation period under the *Limitation Act 1981* (NT) in such a proceeding and, in particular, the Court's power to extend the limitation period in accordance with s 44 of the *Limitation Act* in respect of the claims of group members in a representative proceeding.[47] The applicant succeeded in his application for an extension of time within which to bring his claim.[48]

Following considerable procedural[49] and evidentiary disputation,[50] the trial was held at the end of 2019 and the judgment of Yates J was delivered on 19 March 2021.[51]The applicant was successful and awarded damages and a number of common questions were determined. However, a number of issues remained to be determined, along with the claims of the remaining class members, and thus the case is continuing, with no end in sight.

Prior to the commencement of proceedings, some interesting and complex questions arose as to the applicable law. The oil blowout occurred at the Montara oil field which is within the offshore area of the Territory of Ashmore and Cartier Islands, approximately 250 km north-west of Western Australia and 700 km from Darwin. Although outside Australia, this is in an area over which Australia exercises jurisdiction.

Curiously this is an area in respect of which, by virtue of Australian federal law, the substantive law of the Northern Territory is applicable (as federal law).

Thus, in determining the limitation questions, the *Limitation Act* applies to the applicant's claim because ss 8, 80 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) have the combined effect that the laws of the Territory of Ashmore and Cartier Islands apply to certain identified lands and waters, including the area where the Montara oil field is located.

47 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* (2017) 347 ALR 647 (Griffiths J).

48 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* (No 3) [2017] FCA 1272 (Yates J); *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* (No 4) [2018] FCA 74 (Yates J).

49 See, eg, *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 2)* [2017] FCA 644 (Yates J).

50 See, eg, the rulings on evidence: *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 5)* [2019] FCA 932 (Yates J); *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 6)* [2019] FCA 1853 (Yates J).

51 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237.

Further, s 6 of the *Ashmore and Cartier Islands Acceptance Act 1933* (Cth) provides that the laws of the Northern Territory apply to the Territory of Ashmore and Cartier Islands.

During the early period during which the claim was being considered and complex questions as to the applicable law were being investigated student, engagement was facilitated through a research project undertaken by one of the law school's outstanding honours students. Under my supervision, she carried out extensive and insightful investigation into important legal and procedural questions.

D *The Class Action Against the Manufacturer of Nurofen*

In 2016 a class action was commenced against the company Reckitt Benckiser, the manufacturer of the pain relief pharmaceutical Nurofen. The proceedings arose out of allegedly misleading and deceptive conduct whereby Reckitt Benckiser had marketed a particular form of Nurofen as being targeted for effective action against specific types of pain. This product was sold at a much higher price, alongside other types of Nurofen and generic products containing the *same* active ingredient (Ibuprofen). Thus, consumers who paid the higher prices were paying more than they needed to pay given that therapeutically equivalent products were available at lower prices.

In addition to the class action proceedings seeking compensation on behalf of those who paid the higher prices, penalty proceedings were also brought against the company by the Australian Competition and Consumer Commission. The penalty imposed by the Federal Court[52] was increased on appeal.[53]

Although the case was brought for the obvious purpose of seeking to recover compensation for those who had paid the artificially high prices for the product(s), the losses of each consumer were relatively modest. It was considered unlikely that most consumers would take steps to make a formal claim following any judgment or settlement. Moreover, the transaction costs of processing claims might exceed the amounts of compensation sought in each individual case. Furthermore, if each class member was required to prove the nature and quantum of their purchasers this was likely to lead to evidentiary complications given that these were over the counter products and not pharmaceuticals only available on prescription (where there were likely to be reliable records of purchases).

52 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 5)* [2016] FCA 167 (Edelman J); *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 6)* [2016] FCA 355 (Edelman J).

53 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 (Jagot, Yates and Bromwich JJ).

With such difficulties in mind, the case was conceived and commenced as a test case to determine whether the Federal Court had the power to award a cy-prés remedy, by way of judgment following a determination of liability.

Without reference to the specific case in question, student engagement in this and other cutting-edge legal issues was facilitated by setting the following essay topic for students enrolled in the social justice clinical course in first semester 2017:

> You are a lawyer acting for the lead Applicant in a class action against a manufacturer of an over-the-counter product for the relief of pain. The product is labelled and marketed as providing *targeted* pain relief for *specific* types of pain. There are separate packages of the product for the targeted relief of 'migraine pain'; 'back pain' and 'period pain', etc. Each is sold at twice the price of the 'general' pain relief product sold by the same company (which contains exactly the same therapeutic ingredient). The more expensive product does not in fact target specific types of pain. The targeted pain relief products were purchased by large numbers of Australian consumers. Each person's loss is said to be the difference between the price of the standard product and the more expensive 'targeted' pain relief product.

The assignment required students to advise on:

- what causes of action were available;
- whether individual class members would be required to prove individual reliance on representations about the product;
- whether damages can be awarded in an aggregate amount in respect of the losses suffered by the consumers as a whole;
- whether any unclaimed damages could be distributed to a public interest organisation or some other entity such as a medical research body focusing on effective pain relief; and
- whether class actions are in the public interest.

The framing of the essay was based on complex and contested issues which loomed large in the Nurofen class action.

The issue of cy-prés remedies remains a controversial issue in class action litigation. Recommendations by the Victorian Law Reform Commission for conferral of an express judicial power to make cy-prés orders were not implemented before the then Victorian Government lost office.[54] The inclusion of such provisions in the draft NSW

54 See chapter 8 'Improving Remedies in Class Actions' in Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March, 2008). The author was the Commissioner in charge of the Civil Justice Review. The VLRC recommended that the Victorian Supreme Court should have express power to order cy-près remedies where: (a) there has been a proven contravention of the law; (b) a financial or other pecuniary advantage has accrued to the person or entity contravening the law as a result of such contravention; (c) the loss suffered by others, or the pecuniary gain by the person contravening the law, is capable of reasonably accurate assessment; and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered the loss.

class action reform proposals was removed after lobbying by the business community.[55] More recently, the power of the court to make cy-prés orders in a settlement of a class action has been considered in detail in incisive judgments of Justices Lee and Beach in the Federal Court.[56] As his Honour Lee J noted:

> Law reformers have an abiding interest in specific statutory reform, sometimes when it is unnecessary. A real question arises as to the necessity for such specific provisions because of the width of the powers the Court already has (under provisions such as ss 33V(2) and 33ZF of the Act) and also, importantly, because of the powers of the Court, as a court of equity (s 5(2) of the Act), to fashion appropriate remedies to respond to exigencies such as the inability or impracticability of distributing a fund.[57]

In a more recent judgment Beach J considered cy-prés remedies in the context of a class action where there was likely to be a surplus of settlement funds available after the deduction of various amounts, including legal costs, payment to a funder and the payment of the claims of class members who had registered timely claims.[58] In that case, the estimated losses of approximately 27,000 class members totalled $47.9 million. However, the settlement was only for $9.5 million. After legal and funding costs etc an amount of approximately $3.6 million was available to pay the claims of class members (37.4% of the settlement sum).

However, only 1,244 class members had registered within the required time (including those allowed in as later registrants). Thus, payment of the claims of all *these* class members in full would absorb a total of $2.2 million out of the $3.6 million. Rather than allow this surplus to be distributed to the claimants, which would amount to a 'windfall', Beach J required the settlement distribution scheme to be re-drawn 'to ensure that such a windfall does not occur'.[59] Options for dealing with this 'surplus' include a charitable payment or return of the amount to the respondent, depending on what the Court considered to be 'just' in the circumstances.[60]

55 See: Vice Morabito, 'Lessons from Australia on Class Action Reform in New Zealand' (2018) 24 *New Zealand Business Law Quarterly* 178, 190–191.

56 *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196.

57 Ibid [18].

58 *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70.

59 Ibid [104].

60 Within the meaning of s 33V(2) of the *Federal Court of Australia Act 1976* (Cth). At the time of writing, this issue was still under consideration by the Court.

His Honour went on to say:

> Now in that context and as I have said, one would not be making a cy-prés order as such. One would be considering and applying the statutory framework and determining what was 'just' (see *Simpson v Thorn Australia Pty Ltd (t/a Radio Rentals) and Others (No 5)* (2019) 141 ACSR 424 at [26] per Lee J). But I should flag that academic commentary suggests that it would be preferable not to rely upon any current powers under Pt IVA and that specific legislative change is desirable and perhaps even necessary (see Cashman, P and Simpson, A, *Research Paper 6 - Class Action Remedies: Cy-prés; 'An Imperfect Solution to an Impossible Problem'* (2020) UNSWLRS 67, 40 and Mulheron, *The Modern Cy-prés Doctrine: Applications and Implications*, 232). I do not agree. In my view, s 33V (2) is fit for the purpose.[61]

While this is no doubt correct in the context of an agreed settlement, a more problematic legal question is whether, in the absence of a settlement, the Court is empowered:

- to make an order for damages in an aggregate amount (in this case, for AUD 47.9m) in respect of the claims of the (27,000) members of the class as a whole[62] and then, after the claims of eligible class members who make claims have been determined; and
- make an order,[63] for payment of the residue or surplus to some consumer or charitable body, rather than return such surplus to the respondent.[64]

Such a result may not have been achievable in any event on the facts of this case because of economic issues about limited assets and insurance cover. However, the issue remains potentially significant in other contexts.[65]

In the Nurofen class action, it was contended that the existing powers of the Federal Court were wide enough to facilitate such a 'cy-prés type' order as part of a judgment (as distinct from settlement). This was vigorously contested by the Respondent which argued that the court had no such power and threatened a constitutional challenge to the purported statutory power of the court to make such an order.[66]

61 *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [106].

62 Assuming that the threshold requirements of s 33Z (3) of the *Federal Court of Australia Act 1976* (Cth) are satisfied.

63 Pursuant to s 33Z(1)(g) of the *Federal Court of Australia Act 1976* (Cth), or some other power.

64 Assuming that the respondent makes an application for return of the money, as provided for in s 33ZA(5) of the *Federal Court of Australia Act 1976* (Cth).

65 For a recent analysis of cy-prés remedies see Georgina Dimopoulos and Vince Morabito, 'Cy-prés Remedies in Class actions-Quo Vadis' (2021) 95 *Australian Law Journal* 710.

66 More recently the High Court has held that neither the Federal Court nor the NSW Supreme Court have power to make common fund orders on an interlocutory basis pursuant to s 33ZF of the *Federal Court of Australia Act 2006* (Cth) or s 183 of the *Civil Procedure Act 2005* (NSW): *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 374 ALR 627, by a 5–2 majority (Kiefel CJ, Bell and Keane J, with Gordon and Nettle JJ agreeing; Gageler and Edelman JJ dissenting). The decision leaves open the question of whether the courts have power to make such an order at the conclusion of the proceeding,

This was one of the key issues with which students were asked to grapple in the assignment set. However, such issues were not eventually judicially determined. After considerable procedural skirmishing,[67] the class action proceeding was settled on the eve of trial.[68]

E *Climate Change Litigation*

In my capacity as a member of the Board of the Grata Fund and in my role as a practising barrister, I continue to be involved in a number of potential cases which may seek the judicial determination of some cutting-edge issues involving climate change.[69] At the time of writing, most such matters remain confidential.

The question of whether or not there are justiciable issues, and judicial remedies, available to those seeking to bring strategic climate change litigation gives rise to vexed issues. At one end of the spectrum has been the enormously successful Dutch *Urgenda* litigation.[70] At the other end is the ill-fated US *Juliana* class action.[71]

Bearing in mind the complexity of the legal issues, and the significant and increasing public interest in the failure of successive Australian governments to take sufficient remedial or other action, as part of the Public Interest Law Clinic in 2019 the following essay topic was set:

> You have been asked to advise a group of indigenous inhabitants of the Torres Strait islands concerned about the present and future impact of climate change as to what avenues may be available to them, both nationally and internationally, to bring a claim or proceeding against the Australian Government. In your advice, discuss the legal merits of any options available and the obstacles that may be encountered in seeking any potential remedy.

At the time of setting the topic I was aware, albeit on confidential terms, of a number of cases under investigation in Australia, including a potential complaint on behalf of inhabitants of Torres Strait islands to the United Nations Human Rights Committee ('UNHRC') in Geneva.

either by way of judgment or in approving a settlement, pursuant to other statutory powers.

67 *Hardy v Reckitt Benckiser (Australia) Pty Limited* [2017] FCA 341 (Nicholas J); *Hardy v Reckitt Benckiser (Australia) Pty Limited (No 2)* [2017] FCA 785 (Nicholas J).

68 *Hardy v Reckitt Benckiser (Australia) Pty Limited (No 3)* [2017] FCA 1165 (Nicholas J).

69 A not-for-profit body established to provide financial assistance in strategic and public interest litigation.

70 See the recent decision of *The Netherlands v Stichting Urgenda*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], ECLI:NL:HR:2019:2007 (20 December 2019) concerning whether the Dutch State is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990 and whether the Dutch courts can order the State to do so.

71 *Juliana v United States*, 947 F 3d 1159 (9th Cir, 2020). The Court dismissed the case for lack of standing. Although satisfied as to the evidence of concrete injury and the causation, the Court found that the issues were not redressable because they were beyond the power of an Article III court to remedy.

Prior to the student assignment being due, a complaint was filed by the London based organisation Client Earth and there was considerable media coverage of the issue.[72] Being ever resourceful, this did not escape the attention of students. Thus, the public disclosure of this matter gave them some assistance in dealing with part of the assignment topic. In any event, the students' analyses of the legal, procedural and strategic issues involved in possible domestic and international claims were very insightful and, in a number of instances, inspiring.

At the international level, the United Nations complaint contends that by failing to take adequate action to reduce emissions or to implement proper adaptation measures on the islands, Australia is failing its human rights obligations to Torres Strait inhabitants. The UNHRC has been asked to pressure Australia to reduce its carbon emissions by 2030 and to phase out coal usage.[73]

At the time of writing the complaint remains under consideration by the UNHRC. Other domestic litigation is in the pipeline.

IV The Advantages and Limitations of Seeking to Engage Students in Strategic and Human Rights Litigation

The involvement of law students in strategic, human rights and other complex civil cases, including class actions, not only provides students with invaluable clinical experience but can also make a significant contribution to the work of the legal teams conducting the cases.

As the above examples illustrate, the student role(s) may be varied and challenging. This may encompass assistance with complex expert evidence (eg Myriad); insight into thorny legal and jurisdictional issues (eg Montara); developing test case strategies to resolve contentious legal issues (eg Nurofen); investigating and formulating their own test case or human rights claim (eg KWM Project) or developing creative forensic pathways to overcome what may otherwise appear to be insuperable legal and procedural obstacles (climate change).

Apart from the practical legal and procedural information and experience that students obtain through their involvement is such cases, they develop important insights into both the strengths *and weaknesses* of seeking to bring about change through the higher courts in the civil justice system.

72 See, eg, Katharine Murphy, 'Torres Strait Islanders take Climate change Complaint to the United Nations' *The Guardian* (online, 13 May 2019) <https://www.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations>.

73 See Ebony Black and Rebecca Lucas, 'Climate change and Human Rights to collide before the United Nations Human Rights Committee', *Australian Public Law* (Web Page, 17 July 2019) <https://auspublaw.org/2019/07/climate-change-and-human-rights-to-collide-before-the-united-nations-human-rights-committee/>.

The strengths are evident from the successful gene patent litigation. However, that case was not without its challenges after the initial resounding defeats at first instance and in the Full Federal Court. The pitfalls are well illustrated by the five-year duration of the case before it was eventually successful.

The problems are also evident from the Nurofen litigation. The test case issue sought to be resolved, and the result sought to be achieved by way of a cy-prés remedy, fell by the wayside when an offer to settle the case for a substantial payment, together with payment of all of the costs incurred in conducting the litigation, was accepted on the eve of the trial after several years of forensic warfare.

One obvious limitation, from the perspective of both the students and the legal practitioners involved in the conduct of cases, is that student involvement is limited in both scope and time. Their experience and contribution are constrained by the fact that such cases are usually protracted and extend well beyond the period of the students' clinical participation. As the gene patent case illustrates, however, there is scope for student involvement at both the inception and conclusion of such litigation.

At SLS clinical involvement of students enrolled in the Public Interest Law Clinic was only required for one day per week for one semester. Enrolment in the course also required them to participate in a weekly two-hour seminar and to complete a major essay. Such students were also usually enrolled in three other courses in each semester, each with its own examination and continuous assessment requirements.

There are of course a variety of ways in which such clinical experience and experiential learning may be increased throughout the law course, many of which have been implemented at other law schools and some of which are now being implemented at SLS. A detailed consideration of this is outside the scope of the present article.

Supervision of student clinical work can be time-consuming for both academics and practitioners engaged. This can be beneficial and personally rewarding for all those involved, at least from the perspective and experience of the writer.

As noted above, clinical experience may both motivate students to get involved in public interest legal work when they graduate and facilitate specific employment opportunities. Anecdotal evidence confirms that this has been the case with the SLS program, but this has not been systematically evaluated. Nevertheless, the impact of a clinical course in law school on the motivation of law students to practice public interest law has been studied by others.[74]

74 See, eg, Sally Maresh, 'The Impact of Clinical Legal Education on the Decisions of Law Students to Practice Public Interest Law' in Jeremy Cooper and Louise G Trubeck (eds), *Educating for Justice: Social Values and Legal Education* (Routledge, 1997).

The connection between the law school and community legal centres is by no means unique to SLS.[75] As is the case elsewhere, apart from the formal connection through the clinical program, many law students volunteered at numerous legal centres during their course.

Although the design and operation of the SLS clinical program met a number of 'best practice' requirements, the limited scope and nature of the initiatives fell well short of constituting a core part of the curriculum.[76] It did, however, seek to facilitate student reflection and focus on the ethical responsibilities of the legal profession and the duty to make a meaningful contribution to achieving justice, particularly for the disadvantaged.[77] Thus, the avowedly 'social justice' focus of the SLS clinical program was both designed and defensible.

Others have been critical of such a focus and have advocated different clinical orientations. James, for example, has drawn attention to the limitations of clinical legal education in preparing students for commercial legal practice, with implications for stress and dissatisfaction amongst lawyers.[78] While Kate Seear highlighted the need for added focus on the role of emotions in clinical legal education.[79]

Particularly in North America, there is an increasing focus on the tension between new 'business oriented' clinical subjects and those grounded in 'community lawyering' and whether this represents a complete departure from the social justice mission of clinical education.[80]

As Kotkin has noted, there has been a decrease in general civil clinics focusing on poverty law and an increase in clinics with a business and intellectual property orientation:[81]

75 See, eg, Mary Anne Noone, 'Australian Community Legal Centres: The University Connection' in Jeremy Cooper and Louise G Trubeck (eds), *Educating for Justice: Social Values and Legal Education* (Routledge, 1997).

76 Evans et al (n 5); On 'best practice' recommendations in connection with clinical legal education in the United States see Korn and Hlass (n 15).

77 See Anna Coady, 'Reflection and Clinical Legal Education: How do Students Learn about their Ethical Duty to Contribute towards Justice' (2020) 23(1–2) *Legal Ethics* 13.

78 Colin James, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education' (2008) 18(1&2) *Legal Education Review* 123.

79 Kate Seear et al, 'Exploring the Role of Emotions in Clinical Legal Education: Inquiry and Results from an International Workshop for Legal Educators' (2019) 53 *The Law Teacher* 487.

80 Minna J Kotkin, 'Clinical Legal Education and the Replication of Hierarchy' (Legal Studies Paper No 618, Brooklyn Law School, 22 October 2019) <https://ssrn.com/abstract=3473809> ('Paper 618').
See also Minna J Kotkin, 'Clinical Legal Education and the Replication of Hierarchy' (2019) 26(1) *Clinical Law Review* 287; Minna J Kotkin '*Clinical Legal Education* and the Replication of Hierarchy' (2020) 6(2) *Clinical Legal Education* <https://thepractice.law.harvard.edu/article/clinical-legal-education-and-the-replication-of-hierarchy/>.

81 Paper 618 (n 80) 20.

> Transactional law, particularly that involving entrepreneurs, has been deemed 'happy law'. It avoids the conflict and the win–lose dynamic inherent in litigation settings. It does not invoke the struggle for justice and fairness that permeates poverty law. As a general matter, it does not create a learning environment where empathy and cultural awareness are daily concerns.[82]

The author is critical of the demand for and expansion of business-oriented clinics with questionable social utility that replicate the hierarchy of legal practice:

> Representing a college-educated computer whiz who is developing a cool new app that turns your face into a cartoon image may make for a 'happy' clinical experience, one that may be appealing to many of our students and in line with their career aspirations. But this is not what clinical education was designed to accomplish, nor should we squander our limited resources on these ventures.[83]

By way of contrast, Kosuri provides an interesting critique of the 'norms' of social justice and law reform as the primary drivers behind clinical legal education and advocates the need for greater 'ideological neutrality' in determining the path forward.[84]

According to the author, the design, scope, and status of modern-day clinical programs in the US is due in large part to the clinicians who were typically lawyers involved in the social and political movements of the 1960s and 1970s who lived through and participated in an era of unprecedented political and social unrest which gave birth to the modern clinical legal education movement.

Whether the same may be said of the development of clinical legal education in Australia is a vexed issue, although it is true that many clinical programs were established by Baby Boomers with an avowedly social justice mission. Moreover, as in the US, in Australia '[c]linical legal education has always included words like "poverty" and "indigency", but rarely words like "business" and "profit"'.[85]

Although we do not appear to have seen the recent development of widespread commercially oriented or 'ideologically neutral' clinical programs in Australia, it is clear that many recent experiential learning initiatives in Australian law schools do not have an overt 'social justice' mission.

The notion of ideological *neutrality* is, however, an illusory concept. Commercial and business-oriented clinical and experiential learning programs are by no means inherently 'neutral' in terms of their ideological orientation. They may serve useful

82 Ibid 22.

83 Ibid 24.

84 Praveen Kosuri, 'Clinical Legal Education at a Generational Crossroads: X Marks the Spot' (2010) 17 *Clinical Law Review* 205.

85 Ibid 214.

pedagogical purposes albeit with overt or covert 'political' dimensions. Very few, if any, areas of the practice of law are devoid of normative parameters. Very few principles of public or private law do not have policy objectives or social consequences in their practical application.

A clinical focus on 'commercial and business' areas of practice, such as patent law, intellectual property and taxation, may seek to enhance narrowly defined commercial expertise and skills in a purported ideologically 'neutral' manner. This, however, would be in an intellectual vacuum if it failed to encompass a consideration of the overreach of patent law, the abuse of intellectual property rights and the use and abuse of tax laws to minimise and/or avoid tax or to relocate assessable income to low tax jurisdictions.

Unless universities retreat from their broader educational responsibilities and become narrowly conceived technical training institutes, even clinical programs with a commercial law focus need to encompass a broader public interest perspective and not just a purely technical focus on legal mechanisms for maximising corporate profit.

In relation to intellectual property, in US gene patent litigation, which ran in parallel with the abovementioned Australian litigation, the Public Patent Foundation which assisted the American Civil Liberties Union in conducting the case all the way to the US Supreme Court (twice), is a not-for-profit legal services organisation based at the Cardozo School of Law that focuses on the commercialisation of intellectual property. In doing so, it 'represents the public's interests against the harms caused by the patent system, particularly the harms caused by undeserved patents and unsound patent policy'.[86] Its work is facilitated by the involvement of law students as interns.[87]

The explicit social justice orientation of many Australian clinical legal education programs is not only defensible but desirable. Legal education, clinical experience and the practice of law will be enriched, and society will be improved, if commercial and business imperatives are tempered by the inculcation and application of both skills and mindsets that seek to advance broader public interests. The challenge for law schools is how to make that happen.

Clinical legal education and experiential learning programs can play a part. In the case of the SLS, the social justice and clinical legal education initiatives referred to in this article, to date at least, have been a peripheral rather than a core component of the curriculum.

86 Mathew Rimmer, 'Patent-Busting: The Public Patent Foundation, Gene Patents and Seed Wars' in Charles Lawson and Jay Sanderson (eds), *The Intellectual Property and Food Project: From Rewarding Innovation and Creation to Feeding the World* (Routledge, 2013) 201.

87 The experiential learning options at the Cardozo Law School encompass 11 in house clinics, 14 field clinics and numerous externships. It is also the birthplace of the Innocence Project, referred to above.

Increasing contemporary organisational lip service about the importance of experiential learning is yet to be translated into comprehensive action in many law schools in universities, such as Sydney, whereas clinical experience is a core part of the curriculum in other schools and departments, particularly in medicine and the health sciences.

Clinical experience and experiential learning should not simply focus on narrowly defined technical skills and practical knowledge. Legal education, through all its methodologies, needs to foster or inculcate a desire to attain and the means to improve social justice. That is a greater challenge than the mere provision of limited clinical education programs and experiential learning opportunities for a small subset of the student population.

Many law schools that have established full-time legal centres for the purposes of providing legal services to the local community and clinical legal education opportunities for students have embraced a broader social justice mission that transcends the traditional role of merely seeking to provide individual legal advice and representation on a diverse range of topics to those who serendipitously come through the door. Their role is analogous to legal practices elsewhere and 'an emerging critical lawyer model with its new social justice mission'.[88]

While small in number and limited in scope, the cases and projects referred to in this article have hopefully made a small contribution to advancing social justice and providing a rewarding and formative experience for the students involved.

88 Luz Herrera and Louise G Trubek, 'The Emerging Legal Architecture for Social Justice' (2020) 44(3) *NYU Review of Law and Social Change* 355.