

## GOOD AND BAD SHARIA: AUSTRALIA'S MIXED RESPONSE TO ISLAMIC LAW

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### I INTRODUCTION

Reflecting on the legal consequences of globalisation in the 21<sup>st</sup> century, Twining predicted that societies in the West would have to 'wrestle with the extent to which the state should recognise, make concessions to, or even enforce norms and values embedded in different religions, cultures or traditions'.<sup>1</sup> This is borne out as the direction across the common law world moves towards entrenching legal pluralism. The concessions each nation has made to minorities with different religions, cultures and traditions have varied. The special character of Islam, as a comprehensive blueprint for life in which law and religion unite, has meant that the negotiations for a special place for Muslims within each common law jurisdiction has been at the forefront of new legal ordering possibilities. This is the crux of the pluralism debate. Cautiously, Australians have watched the, at times histrionic, discourse in Canada and Great Britain on official recognition for Islamic law. The strident 'NO SHARIA' campaign in Ontario was instigated by Canadian Muslim women<sup>2</sup> whereas the rhetoric and dialogue following the Archbishop of Canterbury's speech to the Courts of Justice<sup>3</sup> was amongst Britain's non-Muslim sector. The outcomes have been quite different in each. Canada ultimately denied formal recognition but sanctioned informal processes. Great Britain took the formal route giving a

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1 William Twining, *Globalisation and Legal Theory* (Butterworths, 2000) 51.

2 Muslim activist Homa Arjomand led the International Campaign against a Sharia Court in Canada. See Homa Arjomand, *International Campaign Against a Sharia Court* (16 August 2010) <<http://www.noSharia.com/>>.

3 Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262.

network of Sharia tribunals judicial authority. From late 2008 Sharia<sup>4</sup> based decisions of these tribunals are enforceable, but reviewable, in Britain's County and High Courts. Australia hesitates. At this point in time the nation sees Sharia in mixed terms. Motivated by the possibility of a financial bonanza, Sharia banking and finance is to be embraced, but Sharia family and other interpersonal law is viewed with concern. Other aspects such as the criminal law and the law of evidence stand condemned. This paper reflects on what underpins our assessment of Islamic law – 'good' and 'bad' Sharia – and whether a coherent developed system of law and jurisprudence can be divided and transposed in such a way. It commences with an overview of the key features of the Muslim diaspora in Australia and what Sharia requires of Muslims in non-Muslim lands like Australia. This is legal pluralism in Australia. The second part reflects on the mixed message Australian governments give regarding Islamic law and the vehicle for this discussion is comparing two areas of Islamic law – finance and banking, and family law. In the third part the paper argues that Australia is correct to act with caution before taking either the British or Canadian route, as there may be a third route that better resonates with Australian Muslims and with the wider Australian community. Some options involving existing laws and the courts are explored, but the position advocated is towards harmonisation, rather than formal separation of Sharia from state law, Muslims from non-Muslims.

## II AUSTRALIA'S MUSLIMS: A CASE STUDY IN LEGAL PLURALISM

Several aspects of the Muslim experience in Australia need highlighting. First, internal pluralism is a defining feature of the Australian Muslim community and second, most Muslims have, to varying degrees, developed different strategies to ensure compliance with Sharia and the laws of Australia.

Muslims are a small but significant and increasing sector of Australian society. Three hundred and fifty thousand<sup>5</sup> people identified as Muslim in the 2006 census but as Australians do not have to declare their religious status for census purposes the numbers could be greater. Unofficial estimates range

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4 *Shari'a, Shariah, syariah, Shariat* are transliterations from the Arabic script. Whilst there are debates about whether Sharia precisely equates with the 'Islamic law', the terms are often used interchangeably when English is used. Sharia refers to the divinely ordained law embodied in the *Qur'an* (the actual word of God as revealed to the Prophet Mohammad), *Sunnah* (practices and traditions of the Prophet) and *fiqh* (jurisprudence). The *fiqh* is the means by which jurists can extend principles contained in the *Qur'an* and *Sunnah* to deal with new situations. There are a range of approved juristic techniques including *ijma* (consensus of scholars) and *qiyas* (analogical deduction and application) with *maslaha* (in the public interest) playing an increasing role. For an overview of Sharia from different perspectives see H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 2<sup>nd</sup> ed, 2004) 170–221; Wael B Hallaq, *Introduction to Islamic Law* (Cambridge University Press, 2009); Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford University Press, 2009).

5 Australian Bureau of Statistics, *2006 Census of Population and Housing* (2006) <[www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au)>.

between 400 000–500 000. Muslims comprise the third largest religious group in Australia, after Christians and Buddhists. Just over one third of Muslims are now born in Australia. This diaspora has come from 80 different nations, with 50 different ethnicities and cultures, and speaks a variety of different languages and dialects<sup>6</sup> in addition to English. They personify Australian multiculturalism. These divisions and differences have led legal academic Jamila Hussain to conclude that it is ‘probably more correct to speak of Muslim “communities” in Australia rather than the Muslim “community”’.<sup>7</sup> This diversity has significant ramifications for this topic because it highlights cultural, historical, political and linguistic divergence and allegiances that are a hallmark of the Muslim experience in Australia. There is no homogeneity in Australia, which is in contrast to Britain where there is a concentration of over 75 per cent of Muslims coming from the one region of South Asia (Pakistan, India and Bangladesh).<sup>8</sup>

Islam unites but also divides. Muslims are united by a shared belief in Islam and the supporting concept of the *ummah*, a worldwide community of believers.<sup>9</sup> With this comes adherence to Islamic laws, norms and codes of conduct emanating from the Sharia, the path for life. Sharia regulates the relationships between individuals as well as between the individual and *Allah* (God).<sup>10</sup> Sharia is an integrated part of social organisation, not a separate branch of human activity that can be compartmentalised as ‘religion’ as occurs in modern secular liberal states. Yet adherence to Sharia can take many forms. Islam is not a monolithic entity but has its own pluralism: an internal pluralism seen in the Sunni/Shia divisions, the sub-groupings or schools of law known as *madhabs* in the Sunni tradition;<sup>11</sup> the *sufi/salafi* spectrum;<sup>12</sup> the national and expatriate versions, and the dynamic of *ijtihad* (reasoning) which spawns a spectrum of

6 For background on the Australian Muslim community see Abdullah Saeed, *Islam in Australia* (Allen & Unwin, 2003); Abdullah Saeed and Shahram Akbarzadeh (eds), *Muslim Communities in Australia* (UNSW Press, 2001); Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 2<sup>nd</sup> ed, 2004).

7 Hussain, above n 6, 202.

8 Kathleen M Moore, *The Unfamiliar Abode: Islamic Law in the United States and Britain* (Oxford University Press, 2010) 17; Ishan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate, 2005) 57.

9 The *ummah* is a brotherhood of Muslims bound by common allegiance and shared obligations to a superior divine authority. See Majid Khadduri, *War and Peace in the Law of Islam* (Law Book Exchange, 2006) 4.

10 See Sharon Siddique, ‘Conceptualising Contemporary Islam: Religion or Ideology?’ in Ahmad Ibrahim, Sharon Siddique and Yasmin Hussain (eds) *Readings of Islam in Southeast Asia* (Singapore Institute of Southeast Asian Studies, 1985) 338.

11 These are Hanafi, Maliki, Shafi’i and Hanbali schools. See generally Ian Edge (ed), *Islamic Law and Legal Theory* (New York University Press, 1996).

12 Sufis are the mystical strain of Islam whose members seek ideas and practices that will unify them with God. Sufis play music, sing, chant, dance and recite to bring about religious emotion and ecstasy (*wajd*). This religious ecstasy is to allow the soul to communicate directly with God. See Julian Baldick, *Mystical Islam: An Introduction to Sufism* (Tauris Parke, 2000). On the other hand the Salafi try to adopt religious behaviour and practices that capture the purity of Islam. They believe that as the *salaf* (early Companions of the Prophet) learned about Islam directly from the Prophet they attained a pure understanding of the religion. So a life should be based directly on the *Quran* and *Sunnah* of the Prophet and any other accretions must be removed. See Quintan Wiktorowicz, ‘The Salafi Movement in Jordan’ (2000) 32 *International Journal of Middle East Studies* 219.

views on legal, theological and doctrinal matters. A range of descriptors, which are imprecise labels, attempt clumsily to capture a jurisprudential stance and can be found preceding the word Muslim: liberal, progressive, modernist, reformist, secular at one end through to moderate, traditional, orthodox in the mid-range and to conservative, extremist, radical, literalist, neo-revivalist or fundamentalist at the other end. As well, there are different attachments to countries of origin, cultural practices and traditions which also factor into perceptions of law, preferences for dispute resolution and to whom you turn for legal and spiritual guidance, or employ *ifta*, the process for obtaining a fatwa (legal opinion or ruling).<sup>13</sup> Some Muslims are descendants of early settlers, others have recently arrived as immigrants or as refugees, some have fled repressive regimes whilst others have come for economic and family reasons retaining close attachments to their country of origin, and there is also a growing number of local converts to Islam.<sup>14</sup> This diversity is important. It supports the notion of ‘Islams’ rather than one Islam.<sup>15</sup> It also makes the sources of authority on Islamic law complex and gives rise to organisations and individuals who claim to represent or to speak for an homogenous entity – Australian Muslims.

Muslims in Australia have been part of the fabric of Australian society before and after European settlement.<sup>16</sup> It was a quiet presence until more recent times when global migration from Muslim lands increased and world events raised levels of consciousness of the Muslim ‘other’ in our midst. This fact is important because Muslims for more than a century have worked, studied, raised families, worshipped and lived their lives in accordance with the tenets of Islam whilst also adhering to Australian law. The task of navigating through two sets of legal orders was undertaken in diverse ways as different strategies could be, and were, employed. Legal anthropologist John Griffith describes legal pluralism as a ‘state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs’.<sup>17</sup> Whilst the wider community may have been oblivious, the result was the nation became legally pluralistic, not in the juristic or formal sense

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- 13 A fatwa is a legal opinion issued by an Islamic law specialist on a specific issue. In the Sunni schools (*madhabs*) of Islam fatwas traditionally are issued by acclaimed jurists (*muftis*) or by an authoritative specialist body of Islamic scholars (*ulama*). A fatwa will be issued in answer to a question pertaining to Islamic law as asked by an individual inquirer (*mustafti*), or by a judge (*qadi*), or by a government authority or corporate entity. The process is known as *ifta*. The fatwa issued in response to the submitted question may also be published or disseminated in some form to the wider Muslim community. See Ann Black and Nadirsyah Hosen, ‘Fatwas: Their Role in Contemporary Secular Australia’ (2009) 18(2) *Griffith Law Review* 405.
  - 14 See Saeed, above n 6, 1–12, and Ann Black, ‘In the Shadow of Our Legal System: Shari’a in Australia’ in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 239, 241–2.
  - 15 Aziz Al-Azmeh, *Islams and Modernities* (Verso, 2009); Glenn, above n 4, 203; Ann Black, ‘Accommodating Shariah Law in Australia’s Legal System: Can We? Should We?’ (2008) 33 *Alternative Law Journal* 214.
  - 16 Prior to European settlement, Muslim *Makassar* fishermen and traders visited northern Australia. ‘Mohammedans’ were listed in the early musters (censuses) taken in the early nineteenth century and Afghan cameleers played an important role in opening up remote and central Australia, including the building of railways and telegraph lines between Adelaide.
  - 17 John Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1, 2.

of separate courts but in the social science sense where official and unofficial, dominant and subordinate forms of ordering co-exist.<sup>18</sup>

Muslims are comfortable with legal pluralism. It has been a hallmark of Islamic polity from early times when the Compact of Medina was devised. As Islam expanded across the world, Muslim traders, settlers and conquerors introduced Islamic law integrating it with local customs and practices, which were compatible with Islam.<sup>19</sup> Whilst both South-East Asia and North Africa came to adopt Sharia, local culture imbued each with distinctive local features and points of difference.<sup>20</sup> The traditional Islamic spatial categories of *dar-al-Islam* (abode of peace) and *dar-al-harb* (abode of war)<sup>21</sup> conceptually divided the world but within *dar-al-Islam* (abode of peace) Jews and Christians were given special protections. As protected minorities, adherents were allowed to follow their own family and religious laws with the community heads given jurisdiction over such matters. In the Ottoman Empire this was formalised as the *millet* system. The practice of allowing minorities to retain and administer different family, inheritance and religious laws from the Muslim majority has continued in most Muslim countries. Colonial rule further cemented pluralism, officially through parallel court systems and through laws applicable to specific religious or ethnic sectors. Although many European laws were transplanted, rarely did these extend to personal matters. At an unofficial level, there were multiple normative orders and forms of dispute resolution, which continued despite colonial governments.<sup>22</sup>

### III MIXED MESSAGES

In 2008, when Dr Rowan Williams, the Archbishop of Canterbury, declared that adoption of parts of Sharia was 'unavoidable' and that the law of the land can and should be accommodating of minorities' own 'strongly entrenched legal and moral codes'<sup>23</sup> the then Attorney-General of Australia, the Hon Robert

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18 Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869, 872–4.

19 Within Islamic jurisprudence, the technique of *al-urf* or customary practices and usage is a subsidiary source of law when it does not conflict with any part of *Shari'a*. In South-East Asia it is known as *adat*.

20 One example is the practice in South-East Asia of *harta sepencarian*, whereby joint assets accrued during the marriage are shared between husband and wife independently of the Islamic inheritance rules but administered in Sharia courts. On *adat* see Gary F Bell 'Indonesia: The Challenges of Legal Diversity and Law Reform' in Ann Black and Gary Bell (eds) *Law and Legal Institutions of Asia: traditions, adaptations and innovations* (Cambridge University Press, 2011) 262, 268–9.

21 *Dar-al-harb* were the non-Muslim realms. In early writings, Muslims had a duty to withdraw from *dar-al-harb* or use means, or jihad, to turn it into a *dar-al-Islam*: see Michael Nazir-Ali, 'Islamic Law, Fundamental Freedoms and Social Cohesion' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 85, 85–7.

22 On the millet system see, Jean-Francois Gaudreault-DesBiens, 'Religious Courts, Personal Federalism, and Legal Transplants' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 159, 164.

23 Williams, above n 3.

McClelland, quickly reaffirmed the oft stated ‘one law for all mantra’.<sup>24</sup> He said the ‘government is not considering and will not consider the introduction of *any* part of Sharia law into the Australian legal system’.<sup>25</sup> Yet an exception was made a year later for banking and finance. In mid-2009, the Assistant Treasurer, the Hon Nick Sherry said Australians should be ‘open to the potential for Islamic finance to operate in Australia’ and lauded the steps being taken to develop an ‘Islamic finance industry’.<sup>26</sup> Twelve months later in 2010, the vision was grander. Australia was to position itself as a leading financial centre, a ‘financial hub in the Asia Pacific region’<sup>27</sup> with Islamic finance its ‘crucial plank.’ To this end, any impediments in Australian law that may impact negatively on the development of Sharia compliant banking and finance were to be addressed and rectified. Accordingly, in 2010 the government issued a review of Australian taxation laws to ensure Islamic finance products have ‘parity with conventional products’.<sup>28</sup> It was clear the government actively supported ‘the need for greater accommodation of Islamic finance’<sup>29</sup> but accommodation of other aspects of Islamic law was definitely not a priority. When two Muslim leaders called on the government to re-consider legalising polygyny,<sup>30</sup> the Attorney-General made it clear that ‘[T]here is absolutely no way that the Government will be recognising polygamist relationships. They are unlawful and they will remain as such’.<sup>31</sup> It seems that Islamic banking and finance laws are ‘good’ Sharia worthy of adoption, whilst personal status laws (marriage, divorce, separation, custody of children and inheritance) are not.

At the outset, it is recognised that underpinning the two distinct areas examined, family law and finance law, there is the potential for differing dynamics and motivators, which drive the attitudes of the various stakeholders. No doubt, family law is emotive in nature whereas finance law is fiscal in nature.

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24 Peter Costello, ‘Worth Promoting, Worth Defending – Australian Citizenship, What It Means and How to Defend It’ (Speech delivered at the Sydney Institute, Sydney, 23 February 2006).

25 Barney Zwartz, ‘Australia’s Muslims Cool on Change’ *The Age* (online) (Melbourne), 9 February 2008 <<http://www.theage.com.au/news/world/australias-muslims-cool-on-change/2008/02/08/1202234168549.html>> (emphasis added).

26 Nick Sherry, ‘Opening Address to the La Trobe University, National Australia Bank and Muslim Community Corporation of Australia’ (Speech delivered at the Symposium on Banking and Finance, Melbourne, 6 July 2009) <<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2009/003.htm&pageID=005&min=njsa&Year=2009&DocType=1>>.

27 Nick Sherry, ‘The Future of Islamic Finance in Australia’ (Speech delivered at the 2010 Islamic Finance Conference, Melbourne, 8 June 2010) <<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2010/019.htm&pageID=005&min=njsa&Year=&DocType=1>>.

28 Board of Taxation (Cth), *Review of the Taxation Treatment of Islamic Financial Products* (Discussion Paper, October 2010) 1.

29 Ibid.

30 Polygyny is the practice of having more than one wife at the one time. It is a subset of polygamy which is the term used for the condition of having one or more spouses, which could be either wives or husbands, at the one time. As Islam does not allow a wife to be married to more than one husband, polygyny is technically the more correct term, although the generic polygamy is widely used, especially in media reporting.

31 Australian Broadcasting Corporation, ‘No Recognition for Polygamous Marriages: AG’ *ABC News*, 25 June 2008 <<http://www.abc.net.au/news/stories/2008/06/25/2285423.htm>>.

This article does not dispute these fundamental differences, nor does it attempt to dismiss them as reasons why the two areas are at odds with each other. In fact, these reasons lie at the very foundation as to why family law can be described as 'bad' Sharia whilst finance law can potentially be described as 'good' Sharia. What is suggested however is that whether the reasons are emotive or fiscal, commonality of the approach to all Sharia law may be possible.

### A The Good Sharia – Banking and Finance

Reading the statements in support of legislative change to facilitate Islamic banking and financial services in Australia, it appears that our newfound endorsement comes from 'its great potential for creating jobs and wealth'.<sup>32</sup> The reckoning is that the value of worldwide Islamic finance assets will reach 'US\$1.6 trillion by 2012' with a 'market potential of at least \$US5 trillion' which demonstrates, the Assistant Treasurer says, 'the enormous extent of the opportunities available for both business and government' in Australia.<sup>33</sup> In response, local firms are setting up Islamic finance specialist units to take advantage of the opportunities this trillion-dollar sector offers. The potential is attributed to petrodollar liquidity; a rapidly growing Muslim population worldwide noting Australia's proximity to one billion Muslims who live in the Asia-Pacific region;<sup>34</sup> low penetration levels; and the ethical character and financial stability of Islamic financial products.<sup>35</sup> Towards the end of the Assistant Treasurer's speech of strong endorsement for Islamic finance, comes the statement:

We also recognise there are Muslims in Australia who would use Islamic financial services if they were more accessible. Offering retail Islamic finance products *may foster social inclusion*, enabling Australian Muslims to access products that may be more consistent with their principles and beliefs.<sup>36</sup>

Social inclusion is a factor in the embrace but clearly not the guiding one. It sends an interesting message to Muslims in Australia about what is important. Unlike the imperative in Muslim nations, which is singly religious, the rationale in Australia for adopting Sharia-informed finance comes from a pragmatic assessment that it will benefit the Australian economy. This means scrutiny of what is genuine compliance with Islamic tenets is not warranted. When your rationale comes from a religious imperative, actual Sharia compliance is all-important. In the speeches, white papers and policies online, there is a general acceptance that the various products outlined as Sharia compliant are in fact so. The twelve products summarised in the Discussion Paper for the Review of

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32 Board of Taxation (Cth), above n 28.

33 Sherry, above n 27.

34 Simon Crean, 'Landmark Islamic Finance Publication' (Media Release, 12 February 2010) <[http://www.trademinister.gov.au/releases/2010/sc\\_100212.html](http://www.trademinister.gov.au/releases/2010/sc_100212.html)> .

35 Board of Taxation (Cth), above n 28, 5.

36 Sherry, 'La Trobe University, National Australia Bank and Muslim Community Corporation of Australia', above n 26 (emphasis added).

Taxation Treatment of Islamic Financial Products<sup>37</sup> are introduced as complying with the principles of Sharia. Not all Muslims would agree, nor would all jurists and Islamic scholars. This point is missed. There has been, and still is, much scholarship on the topic of Islamic finance. Fatwas (religious opinions issued by eminent jurists) give nuanced and varied opinions, and the decisions of courts and legislation in Muslim majoritarian nations diverge.<sup>38</sup> Muslim nations address compliance concerns by having financial offerings validated by individuals or entities with highly regarded religious credentials. In Malaysia, for example, where there are now more than 40 Islamic products and services offered by banks,<sup>39</sup> the issue of compliance is dealt with by a central authority, the National Syariah Advisory Council on Islamic Banking and Takaful (insurance). The scholars on this Council determine each product's compatibility with the Sharia principles<sup>40</sup> and harmonise Sharia interpretations on compliance for Malaysia. This is not possible in Australia. Even if there were a similar Council, Australia's internal pluralism means that Muslims would not see Sharia finance through the same prism. This may be why the Assistant Treasurer used the services of a commercial Malaysian company, Zaid Ibrahim Financing, and not one of Australia's Islamic Councils, Muslim organisations or Sharia scholars to endorse and explain Islamic financing for Australians and 'correct misconceptions'.<sup>41</sup>

The reason for legitimate divergence on Islamic banking and finance comes from its genesis in principles laid down 1400 years ago in the *Qur'an* and the *sunnah* of the Prophet. The *Qur'an* is believed by Muslims to contain the direct word of God, transmitted to the Prophet Muhammad through the Archangel Gabriel. These laws are considered sacred and immutable. *Sunnah* are the rules derived from *hadith*, traditions, practices and sayings of the Prophet Muhammad which were later verified, recorded and compiled by great jurists. Together with the *Qur'an*, *sunnah* make up the primary sources for Sharia. Both contain important principles for commerce and finance. This is not surprising as, at the time of the revelations, Arabia was an important regional centre for trade and commerce. Both the Prophet and his first wife Khadija engaged in trade and

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37 Board of Taxation (Cth), above n 28, 8–9. These include *murabahah* (cost plus profit sale); *tawarruq* (cash finance sale), *istisna* (purchase order), *salam* (forward sale), *musharakah* (profit and loss sharing partnership), *musharakah mutanaqisah* (diminishing partnership), *mudarabah* (profit sharing partnership), *ijarah* (operating lease), *ijarah muntahiah bi tamlik* (finance lease), *sukuk* (Islamic bond), *takaful* (insurance) and *wakalah* (agency).

38 Nazir Ali reports a long line of scholarly opinion in Egypt from Muhammad Abduh, to Dr Tantawi, Sheikh of Al-Azhar and Sheikh Ali Goma'a, Egypt's Grand Mufti who have declared that interest paid and received by banks is not contrary to Islam as it is not *riba*: Nazir-Ali, above n 21, 84.

39 Mei Pheng Lee and Ivan Jeron Detta, *Islamic Banking and Finance Law* (Longman, 2007) 10.

40 Bank Negara Malaysia, 'Central Bank of Malaysia' (Press Release, January 2011) <<http://www.bnm.gov.my/>>.

41 Zaid Ibrahim & Co, *Demystifying Islamic Finance: Correcting Misconceptions, Advancing Value Propositions* (Company Publication, Zaid Ibrahim & Co, 2010) <<https://www.zaidibrahim.com/wp-content/uploads/2010/05/Demystifying-Islamic-Finance-soft-copy.pdf>>.



commerce.<sup>42</sup> The Islamic message of honest, fair and ethical business dealings imbued with concern for persons in need or experiencing hardship<sup>43</sup> would have resonated with early Muslim communities just as it does today. Central to the Islamic law of finance is a series of prohibitions: on usury or interest (*riba*), uncertainty (*gharar*), dealing with forbidden (haram) products, such as pork and alcohol, practices and activities such as gambling (*maysir*), monopoly (*ihtikar*), deception and misrepresentation (*ghish*).<sup>44</sup> The strong theme of alleviating suffering and using one's wealth to assist others recurs as seen in *Qur'an* 2:275: 'Allah will deprive *riba* of all blessing, but will give increase for deeds of charity.' It pleases God and cleanses the soul.<sup>45</sup> This duality culminates in the obligatory charity tax or levy (*zakat*) which is one of Islam's five pillars.<sup>46</sup>

Today worldwide, the charging of interest is central to modern banking and finance. This makes the *riba* prohibition of particular importance. There are four revelations in the *Qur'an*<sup>47</sup> which prohibit the taking or giving of *riba* supported by related *hadith*.<sup>48</sup> These verses and *hadith* have been interpreted differently in place and time. Although the prohibition against *riba* is clear, the meaning of *riba* itself is not certain.<sup>49</sup> This can be seen in Qur'anic verse 3:130 'do not devour *riba*', followed by the words 'doubled and multiplied.' Are the latter words included to qualify the meaning of *riba*?

From the passages in the *Qur'an* and elaborations in *hadith* arose varied interpretations of *riba*, and in particular its applicability in a range of circumstances. Islamic jurisprudence (*fiqh*) allows extension of the primary sources to be undertaken for clarification particularly when new situations arise. Thus *riba* has been interpreted as 'interest' however small and also as 'usury', excessive interest.<sup>50</sup> For some scholars<sup>51</sup> *riba* is regarded as a prohibition that

42 For an introduction to Islam and the development of Islamic law see R Michael Feener, 'Islam – Historical Introduction and Overview' in R Michael Feener (ed) *Islam in World Cultures – Comparative Perspectives* (ABC-CLIO, 2004) 1.

43 Abdullah Saeed writes that the *Qur'an* reiterates the need to spend to relieve the suffering or the poor, needy and destitute 75 times. See Abdullah Saeed, *Islamic Banking and Interest: a Study of the Prohibition of Riba and its Contemporary Interpretation* (Brill, 2<sup>nd</sup> ed, 1999) 18.

44 Gopala KK Sundaram, 'How Crisis Resistant is Islamic Finance?' in Mario Devos (ed), *International Monetary and Financial Law* (Oxford University Press, 2010) 397. On Islamic Financing principles see, eg, Mervyn K Lewis and Latifa M Algaoud, *Islamic Banking* (Edward Elgar Publishing, 2001) 28–32.

45 *The Holy Qur'an: Text, Translation and Commentary* (Abdullah Yusuf Ali, trans, Amanat Corporation, 1989) verses 8:72; 49:15; 74:43–44; 68:17–33 ('*Qur'an*').

46 Also the declaration of faith (*shahada*), daily prayers (*salat*), fasting during the holy month of Ramadan (*sawm*) and the pilgrimage to Mecca at least once in a lifetime for those all to do so (*hajj*). These five pillars united all Muslims. See generally Lewis and Algaoud, above n 44, 19–20.

47 *Qur'an*, above n 45, verses 2:275–80, 3:130, 4:161, 30:39.

48 The most famous of which is 'gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, each kind for each kind, in hand; he who increases or asks for increase commits *riba*, alike whether he gives or takes', cited by Chibli Mallat, 'The Debate on Riba and Interest in Twentieth Century Jurisprudence' in Chibli Mallat (ed), *Islamic Law and Finance* (Graham & Trotman, 1988) 69.

49 The Caliph Umar lamented that more guidance on what *riba* encompassed was not given. See Lewis and Algaoud, above n 44, 35.

50 Mallat, above n 48, 69.

applies to all transactions in all circumstances including those undertaken by banks and corporations, but for others it is limited to the transactions of individuals.<sup>52</sup> This distinction is largely based on the fact that institutions such as banks, corporations, stock exchanges did not exist in the time of the Prophet nor did communities have welfare institutions and social security entitlements for persons experiencing financial hardship, illness or poverty. Some scholars, such as Abdullah Saeed,<sup>53</sup> take a contextual approach to interpret the *riba* injunctions within in their Qur'anic setting where doing justice and preventing hardship is the foundation. Saeed writes that '[E]xamination of the issue of *riba* in the *Qur'an* suggests that the Qur'anic prohibition was based on moral and humanitarian considerations, not legalistic ones'.<sup>54</sup>

Where there are no moral, equitable and humanitarian implications then the charging of interest may be acceptable. Others such as Waqar Masood Khan take a strictly literalist approach arguing that there is 'intensely vitriolic tenor in the Qur'anic castigation of *riba*' so that any increase, in any situation is 'fragrantly violative of the Qur'anic injunctions'.<sup>55</sup> There is increasing support for that view that *riba* is interest however small or nominal<sup>56</sup> and that Islamic banking derives its '*special raison d'être* from the fact that there is no place for the institution of interest in the Islamic order'.<sup>57</sup> The consequence has been the creation in the last few decades of numerous – forty or more – Islamic financial products designed to be Sharia compliant. That said, different opinions and inconsistencies do exist amongst the scholars on compliance due in part 'to the complexity of transforming the historical and verbal Shariah sources into quantifiable and formal guidelines'.<sup>58</sup>

Where has this left Australia's Muslims? Given there is a concentration, but not unanimity of scholarly opinion on whether *riba* has equivalency with bank interest, there are choices to be made. If the majoritarian view on equivalency is accepted then a decision has to be made on which products and services do in fact genuinely comply both in form and substance with Sharia prohibitions. In Australia, where some conventional banks are proposing 'Sharia windows', can you use their products knowing they will have come from funds sourced from

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51 Mohammad Omar Farooq summarises the reasoning of prominent Islamic scholars past and present on *riba*, including those who takes a literalist view claiming consensus on the matter, and those who diverge. See Mohammad Omar Farooq, *The Riba-Interest Equivalence: Is there an Ijma (consensus)?* (2006) <<http://www.globalwebpost.com/farooqm/writings/islamic/r-i-consensus.html>>.

52 Ghulam Ishaq Khan, 'Divine Banking System' (1984) *Journal of Islamic Banking and Finance* 21.

53 Saeed, above n 43.

54 Ibid 142.

55 Waqar Masoor Khan, *Transition to a Riba Free Economy* (Islamic Institute of Islamic Thought, 2002) xiv.

56 Lewis and Algaoud takes this position citing a 1983 *Council of Islamic Ideology Report* as concluding there was 'complete unanimity among all schools of thought ... that the term *riba* stands for interest in all its types and forms.' See Lewis and Algaoud, above n 44, 37.

57 Ibid 3.

58 Ulrich Derigs and Shehad Marzban, 'New Strategies and a New Paradigm for Shariah-compliant Portfolio Optimization' (2009) 33 *Journal of Banking and Finance* 1166, 1166.

interest bearing activities even though your own transaction will come under the profit and loss, not interest, model?

Muslims who accept the *riba* as equating with 'any interest' have to decide whether the financial products on offer accord with his or her own belief. Farooq recommends that 'every Muslim must do his/her own due diligence and conscientiously reach [his/her] own position/decision in regard to personal practice'.<sup>59</sup> This is not just applicable in Western nations but also in most Muslim nations, including Saudi Arabia, where operating alongside Islamic financial institutions are conventional western banks, which charge and give interest.<sup>60</sup> Muslims will not necessarily take a descriptor 'Islamic financial product' at face value but will seek to assess it through their own research or refer it to a scholar for compliance determination. There is reason to do so. El-Gamal argues that conventional practices were reproduced by institutions and labelled as Islamically acceptable. He argues that in some situations the injunctions on *riba* or *gharar* in the *Qur'an* are circumvented rather than complied with,<sup>61</sup> and the bulk of Islamic financial practices 'would easily be classified by any [MBA] student as interest-based debt financing'.<sup>62</sup> Furthermore, he contends that insisting on Arabic words for products is all about maintaining Islamic credibility<sup>63</sup> and is why Arabic words such as *ijara* for 'lease' and *murabahah*<sup>64</sup> for 'cost-plus' or 'sale with mark-up' are used. Hamoudi also finds 'semantic alterations' and 'legalistic acrobatics' largely artificial as in substance these products are the same as their 'forbidden counterparts'.<sup>65</sup> Harooq agrees that current practices in Islamic financial institutions resemble conventional ones and that 'even though they aim to be interest-free and thus avoid monetary debt contracts, in reality they have landed on *hiyal*' (ruse)<sup>66</sup> following the prohibition in form, whilst circumventing it in substance.<sup>67</sup> Hamoudi reports that some American mosques and Muslim institutions have refused to deposit their funds in

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59 Farooq, above n 51.

60 There are also conventional insurance companies providing insurance for Muslims.

61 Mahmoud A El-Gamal, *Islamic Finance: Law, Economics and Practice* (Cambridge University Press, 2006) 11. And he adds that the contemporary practices marketed under some pre-modern Arabic name bear little resemblance to the pre-modern financial practice discussed in classical jurisprudence: at 12.

62 Mahoud A El-Gamal, 'Interest and the Paradox of Contemporary Islamic Law and Finance' (2003) 27 *Fordham International Law Journal* 108, 109. See also El-Gamal, *Islamic Finance*, above n 61, 12.

63 El-Gamal, *Islamic Finance*, above n 61, 12.

64 Eighty per cent of current transactions by volume undertaken by Islamic banks use the *murabaha* model. See Frank E Vogel and Samuel L Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Brill, 1998) 198.

65 Haider Ala Hamoudi, 'Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance' (2007) 40 *Cornell International Law Journal* 89, 92.

66 The *hiyal*, ruse or legal stratagem argument is also supported by Hamoudi, above n 65 and El Diwany, who likens it to *contractum trinius*, a device used by medieval merchants to get round the usury prohibition of the Catholic Church: Tarek El Diwany, *Islamic Banking Isn't Islamic* (2000) <[http://www.islamic-finance.com/item100\\_f.htm](http://www.islamic-finance.com/item100_f.htm)>. Opinions on *hiyal* in the schools of law are discussed in Glenn, above n 4, 201.

67 Mohammad Omar Farooq, 'Partnership, Equity-Financing and Islamic Finance' (2007) 11 *Review of Islamic Economics* 67, 86. See also El Diwany, above n 66.

Islamic banks in the United States for this reason.<sup>68</sup> In countries like Australia where a wide range of views, scholarly or otherwise, are readily accessible, Muslims are likely to approach Islamic financial products with some caution. This reflects a reported worldwide trend of ‘generalised hesitancy among even Muslim investors to pursue Islamic financing options’<sup>69</sup> attributed to different countries having different interpretations, inconsistent enforcement and inaccurate risk estimation.<sup>70</sup> Rammal and Zurbruegg suggest a lack of awareness as to the basic rules and principles of Islamic finance in Australia.<sup>71</sup> Muslims who want a sound religious foundation for financial products will scrutinise products and services more closely than perhaps a non-Muslim who is satisfied with the ethical character, security of the investment and other non-religious factors.

At present some Muslims limit the *riba* injunction to personal loans between family, friends and business colleagues but accept conventional financing when dealing with corporations and banks. This enables homes to be purchased with a conventional bank mortgage secure in the belief that to do so is *halal* (permissible). Accepting the literalist position does not leave one without options. There are Islamic financing institutions purporting to provide *halal* alternatives,<sup>72</sup> renting rather than buying, or saving to buy a small home, keeping in mind it can be later sold and any profit made can be used towards the purchase of a more expensive home. These are not always easy choices from a practical perspective of life in a western consumer focussed society and many Muslims do wrestle with this issue. Questions seeking clarification and guidance ‘on interest’ recur on all fatwa sites as Muslims from all parts of the world, including *au.domains*.<sup>73</sup> On the Darulfatwa (High Islamic Council of Australia) website which issues fatwas (which it calls Islamic judgments)<sup>74</sup> for Muslims in Australia, the following fatwa was given in response to a question on how to buy a house in an Islamically approved way:

As to your question, the answer is that a loan based on *riba* (usurious gain) is Islamically unlawful whether one is in the West or in the East, whether it's for the first house or more, and this is what the majority of scholars such as Ash-Shafi'yy, Malik, Ahmad are others are on.

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68 Hamoudi, above n 65, 94 fn 30.

69 Holly E Robbins, ‘Soul Searching and Profit Seeking: Reconciling Competing Goals of Islamic Finance’ (2010) 88(5) *Texas Law Review* 1125, 1125.

70 *Ibid.*

71 Hussain Gulzar Rammal and Ralf Zurbruegg, ‘Awareness of Islamic Banking Products among Muslims: The Case of Australia’ (2007) 12(1) *Journal of Financial Services Marketing* 65.

72 Muslim Community Credit Union (MCCU) and the Muslim Community Co-operative Australia (MCCA) and Iskan Finance offer a range of financial and investment services. Each has its own Sharia Board.

73 *Islam Q and A* has issued over 400 fatwas on *riba* and financing related questions, and *Ask the Imam* has a separate business section where there are many interest related questions: Sheikh Muhammad Salih al-Munajjid, *Islam Q&A* <<http://www.islam-qa.com/en>>; Mufti Ebrahim Desai, *Ask Imam* <<http://www.askimam.org>>.

74 Darulfatwa, *Islamic Fatwas*, Islamic High Council of Australia <<http://www.darulfatwa.org.au>>. See generally Black and Hosen, above n 13, 405–27.

Based on this, it is not permissible to take a loan based on *riba* and patience is needed. You either find a good loan without *riba*, or you save the right amount of cash for the purchase. Alternatively, you can choose to live in a rented house or the like.

Allah Knows best.<sup>75</sup>

The questioner who sought this ruling may follow it, but is not in any sense legally bound to do so. He or she may instead heed the advice of the local Imam, read what local and international scholars have to say, or 'surf the net' for a plethora of online sources including online fatwas, or personally engage with the sources of law using the process of *ijtihad* (reasoning). There is a democratic tenor to the choice Muslims have in Australia, which will only increase if the anticipated reforms bring about parity of treatment. Employing *ijtihad* (reasoning) brings different outcomes for individual believers just as occurs with Islamic jurists and judges. It gives rise to the internal pluralism within Muslim communities and highlights how Muslims can adhere to Sharia in Australia. If the government and wider community's embrace of Islamic financial products brings more certainty and more options for Muslims then it may aid 'social inclusion' as well as enabling Australia to 'be part of the action' in what the Minister for Trade believes could be a lucrative and booming sector for the economy.<sup>76</sup> If changes to financial regulations and taxation are required to do this, then these have the imperator of approval.

## B The 'Not So Good' Sharia – Family Law

Unlike the Sharia banking and finance laws which are recent legal constructs of principles laid down in the *Qur'an* and *sunnah*, the laws dealing with family relationships have developed, strengthened and generationally been transmitted through Muslim societies from the time of the Prophet Mohammad to the present. This unbroken continuum, minimally affected by colonial rule<sup>77</sup> gives family and inheritance law particular significance. Poulter argues Islamic family law is seen as 'precious and worthy of preservation worldwide' and cannot be 'discarded lightly' especially as other aspects of Sharia have 'given way to' Western models.<sup>78</sup> The *Qur'an* has many verses pertaining to family matters and the example of the Prophet as a married man and father further cements the importance. If family law embodies the 'quintessential culture of a distinctive group'<sup>79</sup>, adhering to it in a Western society becomes a way to unite as a group and to distinguish, even, defend your family and community from what may be

75 Darulfatwa, *Islamic Fatwas: Fatwa in response to a 'question about buying a house'* Islamic High Council of Australia <<http://darulfatwa.org.au/content/view/31/156/>>.

76 Crean, above n 34.

77 Family laws were generally not abolished by colonial powers but retained in codified and modified forms. For an analysis of the impact of British colonisation see Ann Black, 'The Stronger Rule of the More Enlightened European: The Consequences of Colonialism on Dispute Resolution in the Sultanate of Brunei' (2009) 13 *Legal History* 91, 93–122.

78 Sebastian M Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in Chibli Mallat and Jane Connors (eds), *Islamic Family Law* (Graham & Trotman, 1990) 147.

79 Ibid.

seen as ‘corrupting’ western influences and ‘*haram*’ (not permissible) practices (such as prostitution, alcohol and drug use, pornography, child abuse, marital breakdown, extra-marital affairs, illegitimate children, same-sex relationships, and the neglect of the elderly).<sup>80</sup> Family law, much more than banking and finance law, remains central to identity and belonging.

Yet, non-Muslims view this category of Sharia with trepidation, guaranteed to evince the ‘one law for all’ response. Is it just that there is no ‘financial boom’ associated with family law or are there other reasons why Australia is reluctant to embrace it with the same sort of enthusiasm given to banking and finance? Apart from the lack of benefit to the Australian economy, there are possibly several additional reasons.

One is that Sharia family law is exclusive to one small sector of society. Unlike the Islamic law on banking and finance, which creates products and services available to anyone (non-Muslims included) and indeed is marketed that way as an ethical alternative for all, Sharia family law is the preserve of Muslims. This is re-enforced by the accompanying religious limitations including rules on custody, inheritance and also intermarriage between Muslims and non-Muslims. The *Qur’an* does not permit a Muslim woman to marry outside the faith.<sup>81</sup> Whilst a Sunni Muslim man can marry a *kittabiyah* (woman of the scripture)<sup>82</sup> namely a Christian or Jew, in practice some schools such as Shafi’i make this close to impossible.<sup>83</sup> Marriage to women of other faith traditions, such as Buddhism or Hinduism, or atheists, is prohibited. This exclusivity brings a distance between Muslims and the broader community even though other ethnic and religious sectors of society may also promote intra-faith and restrict inter-faith marriage.

A second reason develops from Poulter’s argument that family law embodies the quintessential culture of a distinctive group. This applies also to those who self-identify as Australian and the culture they seek to protect. Although Australian family law is derived from a common law inheritance<sup>84</sup> with foundations distinctively British and Protestant, changes from the 1970s onwards brought a sense of ownership over family law. The reforms were significant and informed Australian conceptions of marriage, divorce, maintenance and custody

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80 Ann Black, ‘In the Shadow of Our Legal System: Shari’a in Australia’ in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 240. Furthermore, Yilmaz, writing on Britain, states that Muslims ‘see Western society as aimless and rootless, marred by increasing vandalism, crime, juvenile delinquency, the collapse of marriages, growing numbers of illegitimate children, and near constant stress and anxiety. They view Islam as the positive alternative’: Ihsan Yilmaz, ‘Muslim Alternative Dispute Resolution and Neo-ijthad’ (2003) 2(1) *Alternatives* <<http://www.alternativesjournal.net/volume2/number1/yilmaz.htm>>.

81 *Qur’an*, above n 45, verses 60:10; 2:221.

82 *Ibid*, verses 5: 6.

83 The Shafi’i school has a restrictive definition of *kittabiyah* as a woman whose ancestors were Jews or Christians before the time of the Prophet Mohammad. This is why in South-East Asia, where the Shafi’i school is dominant, interreligious marriage is not possible. Some Shia schools do not permit marriage with a *kittabiyah*. See Hussain, above n 6, 79–80.

84 The earliest jurisdiction for family law however was the ecclesiastical courts of England. See Anthony Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish, 2009) 97.

so that the era of fault divorce,<sup>85</sup> with legal concepts of 'father-right', 'maternal preference' and 'illegitimacy'<sup>86</sup> seem relics of a distant past. In a similar way Sharia family law may be seen as antiquated and inconsistent with current Australian realities and family practices. As Australia moves to new and multiple conceptions of 'family life' and expanded notions to 'marriage' with same-sex marriage now on the agenda of Parliament, Sharia family law can seem 'out of step' and grounded in a way of life incompatible with the 21<sup>st</sup> century.

This factor and the 'foreignness' of Sharia family law is increased by media reports which highlight 'differences' and feed into fears about the Muslim presence in Australia. Our national newspaper, *The Australian*, has had reports on honour killings,<sup>87</sup> female genital mutilation,<sup>88</sup> young girls forced to marry old men,<sup>89</sup> apostasy,<sup>90</sup> forced marriages,<sup>91</sup> arranged marriages,<sup>92</sup> stonings for adultery,<sup>93</sup> treatment of homosexuality,<sup>94</sup> women punished for not wearing Islamic clothing<sup>95</sup> and of course, polygamy.<sup>96</sup> This all feeds into the notion of 'otherness' and 'badness' and increases fears of what Sharia family law could mean if recognition were given. As these were lawful practices in some parts of the Muslim world, Sharia family law is seen as running 'counter' to Australian family law and human rights protections. This misses the point that many Muslims have come to Australia precisely because of such practices, and support the protections in place for human rights. Whilst newspapers have an obligation to report news, these reports can distort the picture not only of what Sharia family law entails but whether in fact Muslims in this country do want parts of it to be officially recognised and enforced by the Australian legal system. As would be expected, there are quite different views on what role, if any, Sharia family law should play. Despite the publicity given to provocative comments of Sheik Taj Din al-Hilali,<sup>97</sup> Keysar Trad<sup>98</sup> and Ibrahim Siddiq-Conlon<sup>99</sup> and demands for

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85 *Matrimonial Causes Act 1959* (Cth).

86 See Colin James, 'Winners and Losers: The Father Factor in Australian Child Custody Law in the 20<sup>th</sup> Century' (2006) 10 *Legal History* 207.

87 'Mercy for Jordanian: Daughter Killed to "Save Honour"', *The Australian* (Melbourne), 25 January 2011, 12.

88 Caroline Overington, 'Court Bar for Father on Genital Operation', *The Australian* (Melbourne), 13 April 2009, 3.

89 Ruth Gledhill, 'Bride 8, Divorces Husband Aged 50', *The Australian* (Melbourne), 2 May 2009, 11.

90 Amanda Hodge, 'Sharia rules as Pakistan divides Swat Valley', *The Australian* (Melbourne), 15 April 2009, 8.

91 'Muslim Harry Potter Star, Beaten and Threatened with Death by Family', *The Australian* (Melbourne), 22 December 2010, 12.

92 Caroline Overington, 'Family Banned from Taking Girl for Arranged Marriage', *The Australian* (Melbourne), 3 June 2010, 3.

93 Ida Lichter, 'Campaign Must Continue to End Stoning', *The Australian* (Melbourne), 13 August 2010, 8.

94 'Saudi Prince on Trial in "Sexual" Killing of Aide', *The Australian* (Melbourne), 7 October 2010, 10.

95 Sally Neighbour, 'Facing up to Tehran's Tyrants', *The Australian* (Melbourne), 24 May 2010, 113.

96 'Pakistani Man Marries Two in 24 Hours', *The Australian* (Melbourne), 19 October 2010, 9. Note, technically this is polygyny but the generic polygamy is more commonly used in the media: see above n 27.

97 Richard Kerbaj, 'Muslim Leader Blames Women for Sex Attacks', *The Australian* (Melbourne), 26 October 2006, 2.

full Sharia implementation by groups such as Sharia4Australia and *Hizb ut-Tahrir*, the more prevalent view is obscured. This is, there are relatively few Australian Muslims advocating or wanting recognition of practices that have been either condemned or reformed in many parts of the Muslim world, although recognition of other aspects would be welcomed. Abdullah Saeed writes that the majority of Muslim Australians are not advocating the full implementation of Sharia law,<sup>100</sup> but are seeking recognition for relatively few areas including marriage, burial practices and interest free financing as a ‘compromise between the demands of religion and the requirements of Australian society and law’.<sup>101</sup>

Concern about aspects of Sharia family law entering the Australian legal system is borne out in the research that Muslims are the least liked of all immigrants and are seen as the most threatening.<sup>102</sup> Recently, in response to a question on how to counter the fear that migrants want to change Australia and introduce things like Sharia law, the Minister for Immigration Chris Bowen replied that, ‘[a]nybody who calls for Sharia law is not doing so in the name of multiculturalism. They are doing so as extremists and extremists need to be dealt with, whatever their creed’.<sup>103</sup> It seems not to be realised that Muslims in Australia can and do adhere to Sharia in matters of family law, as they do with other areas such as banking and finance. It happens quietly. Australian family law is, by and large, relatively accommodating. This enables Muslims to comply with both Sharia and Australian law or to prioritise one over the other. There are however some points of friction and contention. The *Marriage Act 1961* (Cth) allows marriages to be performed and registered by a recognised marriage celebrant or minister of religion, which for Muslims will usually be an Imam.<sup>104</sup> No separate registering event is required. However, not all Muslims choose to have their marriages officially registered, opting instead for an Islamic marriage knowing that in the eyes of their community it will be valid and any children of the marriage will be legitimate according to Islamic law. For many Muslims keeping autonomy over marriage ensures autonomy over family life and keeps alive religion, tradition and culture. It also allows marriages to take place that would not be valid under the *Marriage Act 1961* (Cth), including polygynist marriages<sup>105</sup> and marriages where one party is under the lawful marriage age.<sup>106</sup>

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98 Natalie O’Brien, ‘Probing Polygamy’, *The Australian*, 26 June 2008.

99 Sally Neighbour, ‘Full-bred Aussie with a Longing for Sharia Law’, *The Australian*, 21 January 2011, 11; Sally Neighbour, ‘Gillard Should Step Down and Let the Muslims Take Over’, *The Australian*, 20 January 2011, 7.

100 Abdullah Saeed, ‘Reflections on the Establishment of Shari’a Courts in Australia’ in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 231. He also notes that legal academic Jamila Hussain speculates that most Muslims are happy with Australian law: at 231.

101 Ibid.

102 Scott Poynting et al, *Bin Laden in the Suburbs: Criminalising the Arab ‘Other’* (Sydney Institute of Criminology, 2004).

103 Sabra Lane, ‘Multiculturalism is Back’ *ABC News AM Program*, 17 February 2011 (Hon Chris Bowen) <<http://www.abc.net.au/am/content/2011/s3141073.htm>>.

104 *Marriage (Recognised Denominations) Proclamation 1999* (Cth) includes Islam.

105 *Marriage Act 1961* (Cth) s 94 makes bigamy a crime.



Also it means that any separation, divorce or custody issues can be resolved by applicable Sharia principles within the community and kept private without the intrusion of the state. A survey of the Muslim diaspora in Britain revealed that 66 per cent would follow Islamic family law if there were a conflict between it and English law.<sup>107</sup>

For divorce, compliance with both Sharia and Australian law is again possible. The Australian requirement of irretrievable breakdown of the marriage evidenced by 12 months separation is straightforward. For Muslims, whilst divorce is permissible it is disliked,<sup>108</sup> and options for reconciliation and mediation<sup>109</sup> inform the process, although in some cases, strong pressure may be brought to reconcile and stay married. Divorce is also quite complex as there are different legal processes for men and women. A husband-initiated divorce is straightforward as men can divorce extra-judicially through unilateral pronouncement of divorce known as *talaq*. Under Islamic law he has to wait three months<sup>110</sup> before the divorce takes effect but after that time has lapsed he can remarry in accordance with Sharia. Under Australian law he would need to be separated and wait a further nine months. For some, this is seen as unfair and unwarranted.

For the wife initiating divorce, unless she can persuade her husband to pronounce *talaq* or there is mutual agreement (*mubarat*), under Sharia law she will need a legal pronouncement of divorce. In the absence of the Sharia Court or tribunal in Australia, she must either find an authoritative Muslim individual or body to grant a divorce here or go overseas. Without Sharia courts, a wife may consider going to an Imam or a Sheikh, or to a local legal scholar or group of scholars, such as *Majlis Ulama* (Council of Islamic Scholars in Queensland) or an organisation such as Australian Federation of Islamic Councils in order to obtain a lawful divorce.<sup>111</sup> Islam gave a wife the right to divorce her husband in a range of circumstances, including fault divorce, seen in *ta'liq* or *talaq-i-tafwid*

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106 *Marriage Act 1961* (Cth) s 11 sets the minimum age as 18 years. A person between the ages of 16 and 18 years may apply to a court for an order authorising him or her to marry under *Marriage Act 1961* (Cth) s 12.

107 Sebastian Poulter, *Ethnicity, Law, and Human Rights: The English Experience* (Clarendon Press, 1989) 203.

108 A famous hadith is: 'Among lawful things, divorce is most disliked by Allah' (Reported by Abu Dawud). See Shalzal Iqbal Sham, *Some Aspects of Marriage and Divorce in Muslim Family Law*, 24 <<http://www.docstoc.com/docs/55238863/Islamic-Law-of-Marriage-and-Divorce>>. See also Ann Black, 'Window in Islamic Family Law; Part II: Aspects of Divorce' (2010) 16 *Family Relationships Quarterly* 11, 11.

109 *Qur'an*, above n 45, verses 4:128; 4:35.

110 Known in Arabic as the *iddah/iddat* period. This is a time in which reconciliation can take place and also ensures three menstrual periods have occurred confirming the wife is not pregnant. If pregnant, the period is extended.

111 Ann Black, 'Legal Recognition of Sharia law: is this the Right Direction for Australian Family Matters?' (2010) 84 *Family Matters* 64, 65.

where the husband has breached a stipulated term in the marriage contract,<sup>112</sup> thereby ending the marriage through breach; and *fasakh* which requires her to establish fault in one of the recognised categories, such as absence, impotency, certain illnesses, cruelty, failure to maintain his wife and child.<sup>113</sup> There is also a form of no-fault divorce, *khula*, a divorce whereby the wife returns her *mahr* (marriage portion/dowry)<sup>114</sup> effectively buying her way out of the marriage. The issue of *mahr* can become important in divorce cases and determining whether a husband should pay or keep the remaining *mahr* can be a significant issue to be mediated or adjudicated. Again, in the absence of an established state authority such as the Sharia court in Singapore or the Sharia tribunals in England, Muslim women here can be left in unhappy marriages or be divorced under Australian law but not have that recognised under Islamic law. Without the Islamic divorce she remains still married in the eyes of her community and prevented from remarriage and from forming other sexual relationships – the phenomenon known as the limping marriage.<sup>115</sup>

Deciding who retains care and control over children is an area that can be emotive and difficult. For Muslims it is particularly important to ensure transmission of Islamic values. In Islamic law the distinction between custody and guardianship is important. Irrespective of custody arrangements, the father will retain guardianship of his children until they are adults. If the father is deceased or incapable it will devolve along paternal lineage to the grandfather or uncle. Custody is based on the presumption (*hadhanah*) that a young child should be with the mother. Depending on the school of law this presumption can end when a child is old enough to make an informed choice as to which parent he or she wishes to be with.<sup>116</sup> Importantly, a mother can lose custody by her conduct, for instance if she remarries, is of a bad conduct (including the concept of *nusyuz*)<sup>117</sup>, mistreats a child, makes it difficult for the father to have supervision of, and contact with, his child, or if she converts out of Islam. The inclusion of

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112 The marriage contract may specify any conditions the wife requires for her consent to the marriage, which if breached by the husband, can be a ground for terminating the marriage contract, and thus a divorce by contractual breach results. Conditions can include, for example, that the husband cannot take a second wife, or cannot do so without the wife's permission; that they live in a particular location; that the wife will receive regular specified amounts of money; or will not have to do certain tasks.

113 Hussain, above n 6, 108–11.

114 Under Sharia, a marriage contract is required in which the wife's *mahr*, marriage gift or portion is set out. The *mahr* is the property of the wife and is negotiated for prior to the marriage traditionally on her behalf by her *wali* (male marriage guardian usually her father) but today the bride may be also involved. The *mahr* can be prompt (paid at the time) or deferred until the marriage terminates through divorce or death, or a combination of both. Also known as *mas-kahwin*, *sidaq*, and *mehrieh*. See below n 144.

115 This also occurs in other religious traditions, such as Catholicism and Judaism where rules for divorce diverge from state law. Data from the Islamic Sharia Council in Britain during the 1990s was that the Council had dealt with some 1500 cases of divorce whereby the wife had obtained a civil divorce but the husband refused to pronounce a *talaq*. What the Council attempts to do in such cases is to grant a divorce certificate issued to the wife, but only in so far as the wife is willing to return the *mahr*. See David Pearl, 'Dispute Settlement Amongst the Muslim Community in the UK' (2003) 20 *Recht van de Islam* 1, 8.

116 Hussain, above n 6, 95; Black above n 108, 12.

117 '*Nusyuz*' is defined in *Islamic Family Law Order 1999* (Brunei Darussalam) s 2 as 'an act by a wife against her husband which is considered as unfaithful in accordance with *Hukum Syara*' (Sharia law).

apostasy as an automatic ground for loss of custody shows the significance of the mothers as the transmitter of Islam, its practices, ethos and values. The Australian legal position requires decisions to be guided by presumptions of best interest of the child and equal shared parental responsibility<sup>118</sup> in which the religious rules have no place; rather, an impartiality is said to prevail in matters of religion. As Hussain notes the result is that 'some Muslims have decided to disregard Australian laws entirely in family matters ... marriage under Australian law does not apparently confer any greater benefits than religious marriage and divorce is costly and difficult'.<sup>119</sup>

Whilst it is apparent that Australian Muslims are adapting to life in a secular, liberal polity, that does not mean that greater accommodation of tenets of Islamic law and practice should not be considered. The question, how far can or should a liberal democracy go in accommodating its minorities especially in giving legal recognition to requirements of a specific religion, Islam, is being asked throughout the West. Britain and Canada have provided different answers. If Australia's Muslims are, as Abdullah Saeed indicates, seeking recognition for relatively few areas as a 'compromise between the demands of religion and the requirements of Australian society and law',<sup>120</sup> then these should be the focus.

#### IV NEGOTIATING THE FUTURE

The question of the role for Sharia is not one for specialists alone. If we operate from the premise that Sharia makes claims to function in the public square then everyone, Muslim *and* non-Muslim, have a stake in the task of what Abdullahi Ahmed An-Na'im calls 'negotiating the future of Sharia'.<sup>121</sup>

To give effect to freedom of religion, to ensure equality between religions and ethnic traditions and to promote an inclusive polity, legal systems across the common law realm are in this 'negotiating the future of Sharia' identified by An-Na'im. The nature of a negotiation means that in the 'give and take' the degree of accommodation is likely to vary between jurisdictions as each government (representing majoritarian views) decides the aspects on which there can or cannot be compromise and Muslim communities determine 'what is core and what is discretionary in their religious lives'.<sup>122</sup> The Australian government is enthusiastic about those aspects of Sharia which apply to banking and finance, rejects Sharia criminal and evidentiary laws and remains hesitant about the most

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118 *Family Law Act 1975* (Cth) s 61DA.

119 Hussain, above n 6, 219.

120 Saeed, above n 100, 231.

121 Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 1, 3, citing Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press, 2008) viii.

122 Witte writes 'Not every religious belief can be claimed as central: not every religious practice can be worth dying for': John Witte Jr, 'The Future of Muslim Family Law in Western Democracies' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010) 279, 289.

important part of Sharia for Australia's Muslims – family law. Whilst there are Muslim voices calling for greater accommodation ranging from Ibrahim Siddiq-Conlon's<sup>123</sup> demand for 'everything' to the moderate 'a relatively few aspects' enunciated by Saeed, there is not a united Muslim position on what is 'core and what is discretionary.' This reflects the heterogeneity of Muslim communities in Australia as its spokespersons; organisations, mosques, scholars and individual believers articulate different views, the more extreme of which received the greater media coverage. It must also be borne in mind that this negotiation has been on the national agenda for less than decade and as Witte notes, it takes time and patience for a 'secular legal system to adjust to the realities and needs of new religious groups and to make the necessary legal accommodations'<sup>124</sup> just as it requires religious communities to be flexible and innovative to make adjustments for life in western secular systems.<sup>125</sup>

### A Islamic Banking and Finance: Small Modifications

A sound financial market requires a suitable legal and regulatory framework in which to operate, and, like common and civil law jurisdictions, Sharia offers a separate framework for Islamic financial products.<sup>126</sup> There are, however, few countries which offer such a separate regime to govern these products. This does not mean that the way forward is to simply apply the current banking regime in its existing form to Islamic banks and Islamic finance products. It is possible to adopt a third route: small modifications. Moreover, this would currently appear to be the approach of the Australian federal government. Adopting a methodology that embraces a third route, that is an inclusionary approach which maintains Australian regulation as the relevant law whilst meeting the needs of the Islamic community, is a positive step towards greater accommodation of Islamic law. However, it raises its own unique issues, each relatively easily overcome. Three broad matters arise: the role of the Australian regulatory and legal regime in determining what constitutes a genuine Islamic finance regulatory and legal system, the facilitation and accommodation Islamic banks and financial institutions, and the facilitation and accommodation of Islamic finance products. Each is addressed in turn.

The first question to be asked is the extent to which Australia should attempt to address the issue of what constitutes an Islamic compliant financial institution or product. No doubt, questions surround the adoption of a genuine Islamic finance regulatory and legal regime. With a broad spectrum of interpretation,

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123 Sally Neighbour, 'Full-bred Aussie with a longing for Sharia Law', *The Australian* (Melbourne), 21 January 2011, 11; Sally Neighbour, 'Gillard Should Step Down and Let the Muslims Take Over', *The Australian* (Melbourne), 20 January 2011, 7.

124 Witte, above n 122, 289.

125 Ibid.

126 Abu Umar Faruq Ahmad, Noor Mohammad Osmani and Mohd Fazlul Karim, 'Islamic Finance in Australia: The Potential Problems and Prospects' (Paper presented at Seventh International Conference – The Tawhidi Epistemology: Zakat and Waqf Economy, Bangi, 2010) 220, 222  
<<http://www.ukm.my/hadhari/sites/default/files/prosiding/p12.pdf>>.

there is no global consensus as to the underlying moral principles of Islamic finance. As stated by Thomson, much of the problem is to 'ascertain the prescriptive moral underpinnings of Islamic teaching and ensure that these are not contravened in commercial transactions.'<sup>127</sup> The internal pluralism already outlined in this paper is, as stated, a defining feature of the Australian Muslim community generally, and Islamic finance and banking laws specifically. This was highlighted in the earlier discussion on *riba* or, what is generally understood in Western societies as the charging of interest. Currently, a Muslim seeking clarification and guidance about a finance product or arrangement may seek a fatwa.<sup>128</sup> This is clearly at the discretion of the individual and is not in conflict with current Australian practices. This should not be altered. When it comes to institutions offering Islamic products, again it is at the discretion of the consumer to determine whether that institution is Islamic compliant. For example, some will accept that 'Islamic windows' are compliant, while others will not. As such, the way forward, as suggested, is one that we must tread cautiously and negotiate to ensure a balance between core principles, such as the ban on *riba* per se, and the subsidiary and divergent views, such as the various interpretations of the ban against *riba*. Similarly, Australian law should be (and it appears, is) reluctant to decide whether an institution is Islamic compliant, instead facilitating the introduction of these institutions and leaving the choice of use to the consumer. Principally, the question becomes one of the degree to which the Islamic principles of banking and finance are incorporated into Australia's conventional banking and finance laws.<sup>129</sup> The current view of the Federal Government is an inclusionary one, focusing on legislative amendment to remove impediments rather than implementing a prescriptive regime. Such an approach complements the current Islamic approach, which allows for self-determination.

The second question to be asked is the extent to which the regulatory and legal regime should facilitate and accommodate Islamic banks and financial institutions. This question is one which relates to the *provider* of Islamic finance products and generally provides economic benefits to a country's economy. The potential benefits of Islamic finance, which have been highlighted in various recent reports and media releases, primarily focus on the economic and political benefits of Islamic finance to Australia. For example, the Johnson Report, released by the Federal Government in January 2010<sup>130</sup> identified that '[t]he greatest opportunity for Australia in terms of accessing offshore capital pools at competitive rates would appear to be in the area of developing Sharia compliant

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127 Judith Thomson, 'Developing Financial Law in Conformity with Islamic Principles: Strict Interpretation, Formalism or Innovation?' (1997–2000) 4(2) *Deakin Law Review* 77.

128 See on fatwas, above n 13.

129 Although, there are advocates for a separate legal framework: see, eg, Ahmad, Osmani and Karim, above n 126, 220.

130 Australian Financial Centre Forum (Cth), *Australia as a Financial Centre: Building on our Strengths* (2009) 70 ('Johnson Report'). Australia's interest in becoming a player in the Islamic finance market is also evidenced by government body delegations to the Gulf Cooperation Council ('GCC') as well as recent visits from GCC delegations: Abdul Rahim Ghouse 'Islamic Finance: How Serious is Australia?' (2010) 124 *InFinance* 24.

wholesale investment products'.<sup>131</sup> Without a doubt, the focus here is on the fiscal benefits associated with cost effective finance. As such, any regulatory modification will be driven by federal economic policy. Australia's financial regulatory framework consists of the Reserve Bank of Australia ('RBA'), the Australian Prudential Regulation Authority ('APRA') and the Australian Securities and Investments Commission ('ASIC'). Authority to carry on the business of banking must be granted by APRA. Traditionally, it has been difficult for foreign banks to enter the Australian market. However, this has not and is not a result of the type of banking and finance being undertaken but rather the strict entry policy. Further, as outlined below, Islamic finance providers have previously been established in Australia. Established in 1989, the Muslim Community Cooperative Australia ('MCCA') was the first Australian Islamic finance provider in Australia.<sup>132</sup> The first Islamic credit union, the Muslim Community Credit Union ('MCCU') commenced operations in 2000.<sup>133</sup> Another Islamic financial institution, Islamic Cooperative Finance Australia ('ICFA'), established in 1998, has also entered the domestic market, although, as neither holds a banking licence, neither operates as a bank as such.<sup>134</sup> Two further organisations, Iskan Finance Pty Ltd (established in 2001) and Al Salan Home Loans, also aim to meet the home financing needs of the Australian Muslim community.<sup>135</sup> It is therefore unlikely that any significant amendments will need to be implemented to facilitate Islamic finance institutions entering the market.

The third question to be asked is the extent to which the regulatory and legal regime should facilitate and accommodate Islamic finance products. This question is one which relates to the *consumer* of Islamic finance products and potentially aids in the ancillary goal of social inclusion. It is at this stage that small modifications are necessary to accommodate Islamic finance products. Whilst the second question addresses economic goals, supporting Islamic finance as a policy of social inclusion is a complementary goal, as parity of treatment at the consumer level is the ultimate objective. Parity of treatment from a regulatory perspective and one that removes barriers to entry is arguably an inclusive policy. An adoption of such a policy potentially addresses many of the core conflicts, which arise when the current regulatory regime is applied to Islamic finance products as contrasted with traditional finance products. Australian legislators are fortunate to be provided with guidance from foreign jurisdictions that have also adopted an approach which does not provide for a separate legislative regime for Islamic finance but rather adopts an approach which ensures a level playing field<sup>136</sup> within the existing legal framework.<sup>137</sup> For example, the United

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131 Australian Financial Centre Forum (Cth), above n 130, 70.

132 For a history of the MCCA see Saeed and Akbarzadeh, above n 6.

133 Abu Umar Ahmad and A B Rafique Ahmad, 'Islamic Microfinance: The Evidence from Australia' (2009) 25 *Humanomics* 217, 225. It was ultimately unsuccessful and ceased operations in 2002.

134 Ahmad, Osmani and Karim, above n 126, 220–1.

135 For a detailed history of these organisations see Ahmad and Ahmad, above n 133, 227–8.

136 The Johnson Report recommended 'the removal of any regulatory barriers to the development of Islamic financial products in Australia, guided by the principle that there should be a 'level playing field' for such products': Australian Financial Centre Forum (Cth), above n 130, 98.

Kingdom in 2003 undertook a series of legislative amendments to its taxation, legal and regulatory regimes to achieve parity of treatment between Islamic finance products and conventional finance products.<sup>138</sup> Ireland, South Korea, France and Singapore have adopted similar approaches.<sup>139</sup> This view also has academic support. Ahmad, Osmani and Karim state that Islamic finance should be viewed as complimenting conventional finance as 'there is potential for Islamic finance to co-exist, complement and contribute to conventional practice since Islamic models begin with the premise that the role of a financial institution is to promote the overall wellbeing of society'.<sup>140</sup> Many of the legislative problems arise because of the ban on *riba*. For example, Australia's pension regime and insurance regime also fail to offer Sharia compliant products<sup>141</sup> and from a consumer perspective, there are issues in relation to credit under the relevant State *Consumer Credit Codes* which generally assume that credit is advanced in return for an annual interest rate charge.<sup>142</sup> Currently in all states except Victoria, there is the potential for double stamp duty and, as evidenced by the current Board of Taxation's review of the treatment of Islamic finance products, other taxation issues may arise.<sup>143</sup> However, what is also evident from that Review is that with small modifications, such as the adoption of a substance over form approach when assessing transactions for taxation consequences, parity of treatment will be achieved resulting in the harmonisation of Islamic finance and conventional finance.

Following from the discussion above, the difficulties associated with the ban on *riba* can be used as an example of the type of small modifications this article is referring to, specifically in relation to the modification of taxation laws. It is possible to modify these laws to ensure parity of treatment between the conventional method of purchasing a home, a mortgage arrangement, and the traditional Islamic method of financing a home known as the 'cost plus profit sale' or *murabahah*. The conventional method of financing a home requires the purchaser (borrower) to take out a mortgage over the real property with that property acting as security to the lender. The property is purchased by the borrower out of funds advanced by the lender. The property is then transferred into the name of the borrower with the borrower making repayments of the loan plus an agreed rate of interest. A cost plus profit sale, whilst in substance is the same, introduces a different form to the transaction. Rather than the property being transferred immediately to the future homeowner, the financier purchases the property and then sells it to the client on a deferred basis. The client pays the financier the cost of the property plus a profit. Essentially, the profit component

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137 Although it should be noted that Malaysia, an Islamic financial hub in the Asia-Pacific region, has introduced a specific regulatory framework for Islamic financing as well as certain tax concessions specifically aimed at promoting growth of the sector. See Board of Taxation (Cth), above n 28, 66.

138 Ibid 63.

139 Ibid 64–6.

140 Ahmad, Osmani and Karim, above n 126, 232.

141 Ibid 227.

142 Ibid.

143 Board of Taxation (Cth), above n 28.

under the Islamic transaction is equivalent to the interest component under the traditional mortgage arrangement. However, several tax issues may arise. First, as the property is transferred twice, there is double stamp duty. This problem can be easily overcome by, as per the current Victorian position, providing an exemption on the second dutiable transaction. Second, the question arises as to whether the profit component is income or capital in the hands of the Financier. And, as a related issue if the house was a rental property rather than a main residence, the question arises as to whether the profit component becomes a deduction. Each of these issues is again easily overcome by adopting a substance-over-form approach and including in the *Income Tax Assessment Act 1997* (Cth) legislative provisions providing that the profit component in the hands of the financier is assessable income and the profit component in the hands of the client is an allowable deduction. This would avoid any capital gains tax implications that may otherwise arise. Similar amendments could be made for any GST implications. This results in parity of treatment via minor amendment.

### **B Islamic Family Law: The Challenge of Accommodation**

Sharia provides a coherent, complete and detailed regulatory system for marriage, divorce, maintenance, children and all aspects of family life. This sits as a component within a complete legal system with family law informed by, and informing, other laws, processes, legal institutions and legal culture. One of the difficulties is how this one part of Sharia can be transported into an alien legal system separated from the complementary laws, processes, institutions and culture that have sustained it. In the Australian loci, fundamental rights, due process, equal protections under the law and entitlements of all citizens will prevail over religious and cultural needs of a minority. This has two consequences. First, as Sharia family law cannot survive in its entirety in the milieu of Australia: it will inevitably be fragmented. Second, Sharia family law cannot be delegated exclusively to a religious tribunal, court or other body to apply and enforce as it is the right of all citizens to bring family matters to the courts of law for determination and have the general law of the land apply. The overriding jurisdiction of Australian courts limits how Sharia family law can operate and the inevitable fragmentation of Sharia means that any legal transplantation will at best be piecemeal. This is apparent when considering the consequences for *mahr* when a divorce occurs in Australia.

As noted earlier, *mahr* is a required component of a valid Islamic contract of marriage as it specifies the payment a wife will receive as a nuptial gift from her husband, which will be prompt (paid at the time of the marriage), or deferred (paid at the dissolution of the marriage by death or divorce), or a combination of both.<sup>144</sup> It is a payment designed to provide for a wife when she is no longer required under Sharia law to be financially maintained by her husband, and as such has been an important security net in Muslim societies. A husband's

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144 See above n 114. Note that *mahr* is distinguished from other customary gift giving practices.



unfettered right to pronounce divorce by *talaq*<sup>145</sup> requires him to pay any remaining *mahr* and maintain his wife for the three-month *iddah* period (the time in which reconciliation can occur). His financial obligations to her then cease. Without legal fault grounds<sup>146</sup> or without a contractual breach<sup>147</sup> a wife can only terminate an unhappy marriage by a Sharia authority<sup>148</sup> granting her a *khula* divorce. If granted, the husband is relieved of his obligation to pay *mahr*. This is a significant financial disincentive and a wife in a Muslim nation will take a *khula* divorce as her last resort. However, in Australia the *mahr* is not her only avenue for financial support post-divorce as she is entitled to take her case to the Family Court for spousal maintenance and property settlement. She also may be entitled to social security benefits.

In the context of Australia, the Muslim wife wishing to divorce has options. If her husband refuses to pronounce *talaq* she can still keep within the Islamic paradigm: find an Imam to endorse a fault ground (such as impotency) or a breach of a condition and be divorced obtaining any deferred *mahr* or have a *khula* divorce and forsake her *mahr*. If she takes the secular route, she encounters a no fault model in which the *khula/fasakh/ta'liq* distinction is irrelevant. What then is the status of her *mahr*? As fault will not impact a secular determination under section 79 of the *Family Law Act 1975* (Cth), the outcome in any property settlement proceeding will be the same. Given that *mahr* is a key component of Islamic marriage and divorce, the question is - should there be a difference? When there are Muslim parties, should there be deference to Islamic law, so that different determinations for property settlement result based on how an Australian judge determines divorce would be categorised under Sharia and then its *mahr* consequences? If so, how would the Family Court categorise *mahr* - a contractual term, a pre-nuptial financial agreement, a religious obligation, a customary gift, and how would the court deal with conflicting expert evidence on the Islamic law provisions which could arise as Fournier notes each side will 'advocate or oppose the judicial enforcement of *mahr* depending on how their interests would be affected by its recognition'.<sup>149</sup> In Australia all assets and contributions are taken into account in order to produce an outcome which addresses the future needs of both parties. *Mahr*, prompt and deferred, would be taken into account in this overall assessment of what is a fair division given the couple's income and capital resources and their future needs. Australian legal doctrine would produce a quite different outcome from what would have occurred in a Muslim country if the issue was judicially determined in Sharia court. This point is highlighted by Fournier who shows through case analysis that

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145 There are different forms of *talaq* divorce including *talaq al sunnah*, *talaq al hasan*, *talaq al bidah*: see John L Esposito, *Women in Muslim Family Law* (Syracuse Press, 1982) 31-3.

146 Fault is required for *fasakh* divorce, annulment. There is wide variation between the schools of law as to the fault grounds, see generally *ibid*, 33-5.

147 *Ta'liq* or *talaq-i-tafwid*.

148 A Sharia court in a Muslim country, a Sharia tribunal in Great Britain or person with Islamic credentials in Australia.

149 Pascale Fournier, 'Flirting with God in Western Secular Courts: Mahr in the West' (2010) 24 *International Journal of Law, Policy and the Family* 67, 79.

in a Western liberal context of no-fault divorce and equitable division of family assets, *mahr* loses its coherence.<sup>150</sup> In light of this, it can be argued that whilst *mahr* should be retained as an essential part of a valid Islamic marriage,<sup>151</sup> its role could be more symbolic, given that in Australia a wife's financial security will not hinge on her *mahr* when a marriage determinates.

In the process of negotiating a role for Sharia family law there has to be give and take on both sides. When legal concepts can be broadened to better incorporate Islamic principles or Muslim practice then these should be embraced. When considering parenting outcomes for the children in a divorce situation, the primacy of 'best interests' of the child will not give way to Sharia rules on custody and guardianship (as identified earlier). When making such determinations, the court however is required to consider amongst other things the 'lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant'.<sup>152</sup> For a Muslim child this would include their culture and traditions arising from Islam. Section 60 CC(h) of the *Family Law Act 1975* (Cth) further specifies that if the child is Aboriginal or Torres Strait Islander he or she has a right 'to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture)'. The court also must consider 'the likely impact any proposed parenting order' will have on that right. This section could be broadened to give a similar direction to the Court when determining parenting arrangements for Muslim children.

Another area in which Australian law continues to be quite accommodating is polygamy. Although the generic term 'polygamy' is widely used, it is probably more accurate to use polygyny as it is an option only available to husbands. The *Qur'an* at 4:3 does allow a husband to marry more than one wife (maximum of four) subject to certain conditions including that he must be able to treat each wife equitably and be financially able to do so. A later revelation, *Qur'an* 4:129, states that he is 'never be able to be fair and just between women [wives]', which has been adopted by some Islamic jurists and Muslim governments as a ground for making the practice unlawful, notably Tunisia and Turkey, or to limit and supervise its operation, as in Indonesia and Brunei. The result is that most Muslim countries today allow the practice but increasingly subject it to conditions<sup>153</sup> and oversight, often requiring Sharia court approval. This reform direction within Muslim societies is bringing this aspect of marriage into greater

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150 Ibid.

151 *Qur'an* 4:4: 'And give the women (on marriage) their dower (*mahr*) as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer'.

152 *Family Law Act 1975* (Cth) s 60CC(g).

153 Grounds include why the marriage is just and necessary, income and financial position, and whether the consent of existing wives has been sought and/or obtained.

alignment with western notions of monogamy.<sup>154</sup> The convergence is reflected in Australia. Research by Ghena Krayem on Islamic marriage found that 90 per cent of Muslims she interviewed did not want a change to Australian law<sup>155</sup>, and the Australian National Imams Council declared no change was necessary to Australia's *Marriage Act 1961* (Cth).<sup>156</sup> Of course, the converse view on polygyny is also present in Australia. Imam Taj Din al-Hilali immediately rejected the Australian National Imams Council ('ANIC') statement as contradictory to 'the wisdom and teachings of God'<sup>157</sup> and Keysar Trad, President of the Muslim Friendship League, made a spirited defence for its legalisation.<sup>158</sup> Given polygamy's unlawful status<sup>159</sup> it is difficult to know how widespread polygyny is amongst Australia's Muslims although there seems to be consensus that it is quite low, again in contrast to British Muslim communities where reports indicate it is 'flourishing'.<sup>160</sup> The Attorney-General Robert McClelland was in 'sync' with the Muslim community with his affirmation that 'polygamous relationships are entirely inconsistent with that [Australian] culture and indeed with the law'.<sup>161</sup> Yet, Australian law does accommodate polygyny. Whilst it remains illegal to enter a polygamous marriage, valid Muslim polygynist marriages lawfully entered into overseas are recognised,<sup>162</sup> with second or third wives and their children able to claim welfare and other benefits. In addition, any polygamist marriages now entered in Australia could be recognised as de facto marriages pursuant to the 2008 amendments to the *Family Law Act*<sup>163</sup> as a 'de facto relationship can exist even if one of the persons is

154 Many scholars have written on the socioeconomic conditions that prevailed when the revelation permitting polygyny was given just after the battle of Uhud, which left many widows and orphans in need of protection. This remains the context for polygyny. See Hussain, above n 6, 87; Javaid Rehmen, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining The Theory and Practice of Polygamy and Talaq' (2007) 21 *International Journal of Law, Policy and the Family* 108; Melanie P Mejia, 'Gender Jihad: Muslim Women, Islamic Jurisprudence and Women's Rights' (2007) 1(1) *Kritike* 1.

155 Reported in Sian Powell and Natalie O'Brien, 'Polygamy Fights for an Aussie Home', *The Australian* (online), 26 June 2008 <<http://www.theaustralian.com.au/business/legal-affairs/big-love-fights-for-an-aussie-home/story-e6frg97x-1111116737891>>.

156 ANIC, 'Polygamy' (Press Release, 26 June 2008) <<http://www.anic.org.au/media%20release/ANIC%20Press%20Release%20on%20Polygamy.pdf>>.

157 Natalie O'Brien, 'Muslim Leaders Split on Polygamy', *The Australian* (online), 1 July 2008 <<http://www.theaustralian.com.au/news/nation/muslim-leaders-split-on-polygamy/story-e6frg6nf-1111116783413>>.

158 Keysar Trad, 'Polygamy and Other Islamic Values are Good for Australia' (Speech delivered at the Festival of Dangerous Ideas, Sydney, October 2009); Keysar Trad, 'Why Should Polygamy be a Crime?', *The Age* (online), 2 October 2009 <<http://www.theage.com.au/opinion/society-and-culture/why-should-polygamy-be-a-crime-20091002-gfdg.html>>.

159 *Marriage Act 1961* (Cth) s 91.

160 Dominic Kennedy, '1000 Men Living Legally with Multiple Wives Despite Fears of Exploitation', *The Times* (online) 28 May 2007 <[http://women.timesonline.co.uk/tol/life\\_and\\_style/women/families/article1848488.ece](http://women.timesonline.co.uk/tol/life_and_style/women/families/article1848488.ece)>.

161 Natalie O'Brien, 'Probing Polygamy', *The Australian* (online), 26 June 2008 <<http://www.theaustralian.com.au/news/probing-polygamy/story-e6frg8go-1111116736076>>.

162 *Family Law Act 1975* (Cth) s 6.

163 *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

legally married to someone else or in another de facto relationship'.<sup>164</sup> It means a second wife can be validly married under Islamic law (providing compliance with form) and be a de facto wife under Australian law with the same legal entitlements as any other de facto relationship.<sup>165</sup>

The convergence of views on polygamy also reflects the evolving nature of Islamic law. Like the common law method, the *fiqh* methodology in Islamic jurisprudence enables Sharia to respond to changing conditions and new challenges. This methodology provides an incentive and means by which Muslim diaspora can make adjustments in western contexts. The issue of limping marriages, which arise when a husband will not pronounce *talaq*<sup>166</sup> nor delegate this power to her under *talaq al tafwid*,<sup>167</sup> could be resolved by giving Muslim wives the same unilateral right to pronounce *talaq*. A clause in an Islamic marriage contract could state, for example, that the wife has the right to divorce her husband in the presence of two witnesses without need to establish fault on his part or requiring his delegation. British scholar Yilmaz draws on the work of Karaman to propose gender equality reform for *talaq* as a valid means to address limping marriages in western nations. It is justified as in keeping with the Sharia principle that the marriage contract is for protection and benefit of the wife.<sup>168</sup> *Neo-ijtihad*<sup>169</sup> of this type goes to harmonisation of laws. It can be seen in some of the model Islamic marriage contracts devised by Muslim organisations in Canada and Britain,<sup>170</sup> and in some mosques in Australia.

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164 *Family Law Act 1975* (Cth) s 4AA (5)(b).

165 Including the right to property settlement: see *Family Law Act 1975* (Cth) s 79.

166 He may not wish to divorce or does not want to pay remaining *mahr* so pushes his wife towards a *khula* option.

167 The husband delegates the power of divorce to his wife by words such as 'choose for herself' or to 'divorce herself'. This delegation can be made at the time the marriage is contracted, or upon the occurrence of certain circumstances, or at any time during the marriage. See Esposito, above n 145, 33.

168 Yilmaz, above n 8, 170.

169 Term given when using the method of *ijtihad* (reasoning employing Islamic methodology) to address issues arising in the modern socio-legal settings in Western nations. Yilmaz describes it the 'activity, a struggle, and a process to discover the law from the texts and to apply it to the set of facts awaiting decision': Ihsan Yilmaz 'Muslim Alternative Dispute Resolution and Neo-ijtihad in England' (2003) 2(1) *Alternatives: Turkish Journal of International Relations* <<http://www.alternativesjournal.net/volume2/number1/yilmaz.htm>>.

170 See, eg. Canadian Council of Muslim Women, *Sample Marriage Contract* <[http://www.ccmw.com/documents/MuslimMarriageKit/contract\\_english.pdf](http://www.ccmw.com/documents/MuslimMarriageKit/contract_english.pdf)>; The Muslim Institute, *Muslim Marriage Contract* (August 2008) <<http://muslimmarriagecontract.org/documents/MuslimMarriageContract.pdf>>.

## V CONCLUSION

Despite the diversities and differences in the perception of Islam, their Islamic background remains a common identity symbol for Muslims, differentiating them from the society surrounding them.<sup>171</sup>

Despite the diversity and differences, Muslims in common law countries have not abandoned Sharia and its principles. Although some aspects conform to key tenets of Australian law, others diverge. Life can be lived in accordance with Islam and the official bounds of state law not transgressed. Adaptation along these lines commenced in the early days of settlement but because Sharia operates in the unofficial realm, the wider Australian community has been oblivious to the legal pluralism that abounds in this country. Operating in the shadow of the Australian legal system comes with benefits and costs. The main benefit for Muslims is self-determination, what An-Nai'am describes as 'the right to define and express their Islamic identity as they deem fit'.<sup>172</sup> In addition, when disputes arise unofficial law can take effect quickly and without the formality of state processes. It keeps disputes and differences out of the public gaze,<sup>173</sup> away from the scrutiny of media and the oversight of official law. However, this autonomy is matched by the absence of protections such as due process, legal representation, appellate procedures, and decision-makers who are accountable and transparent in outcomes and process.

Responding to community wariness of anything Sharia, Australian governments on both sides of politics have been unmoved by arguments for greater accommodation of Islamic law. That was the consistent position until Islamic finance and banking emerged on the international stage as a viable, lucrative alternative in a post-credit crisis world. In the last decade, the financial benefits from engaging with Sharia compliant investments and banking have been lauded so that this component of Sharia received a tick of approval. A by-product was that it could also assist Muslims in Australia and thereby aid social inclusion. Few expressed objections when a proposal to review ways to facilitate Sharia financing through modifications to existing taxation and other laws was introduced.<sup>174</sup> Chair of the Board of Taxation Dick Warburton argued 'some tweaking can be done to our existing laws to meet the substance of the Sharia law' but also that there should be 'no incentives and no new laws'.<sup>175</sup> As for

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171 Ishan Yilmaz, 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into English Law' (2001) 21 *Journal of Muslim Minority Affairs* 1, 2.

172 Abdullahi Aan-Na'im, 'Shari'a and Positive Legislation: Is an Islamic State Possible or Viable?' (1998–1999) 5 *Yearbook of Islamic and Middle Eastern Law* 29, 30.

173 In some Muslim communities the concept of honour (*izzat*) can be important and Yilmaz notes that this is part of the reason Muslims in Britain 'do not want to wash their dirty linen in public'. See Yilmaz, above n 171, 2.

174 One vocal opponent has been Senator Cory Bernardi. See AAP, 'Liberal Party Cory Bernardi's Bid to stop Shari'a Banking Dealt Blow by Colleague George Brandis', *The Australian* (online) 2 November 2010 <<http://www.theaustralian.com.au/national-affairs/politics-news/liberal-senator-cory-bernardis-bid-to-curb-sharia-banking-dealt-blow-by-colleague-george-brandis/story-fn59nqld-1225946697055>>.

175 Alexandra Kirk, 'Islamic Banking Debate Playing on Emotion', *ABC News* (online), 3 November 2010 <<http://www.abc.net.au/news/stories/2010/11/02/3055378.htm>>.

other parts of Sharia, there was far less enthusiasm. In his February 2011 speech on the virtues of Australian multiculturalism, the Minister for Immigration and Citizenship, the Hon Chris Bowen noted that, ‘if anyone who comes here – or indeed if anyone born here – promotes values such as Sharia Law or religious intolerance or violence, they do not do so in the name of multiculturalism’.<sup>176</sup> Sharia in this context had decidedly negative connotations. Yet, if minor concessions can be made to one area, it seems consistent to think about similar concessions or ‘tweaking’ in other areas, particularly family and inheritance law. Incremental change rather than quantum leaps to British style Sharia tribunals, on which there are strong arguments for and against,<sup>177</sup> could resonate as the right option at the right time. It would also be in consonance with the Islamic principle of gradualism<sup>178</sup> and result in harmonisation rather than separation and segregation.

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176 Chris Bowen, ‘The Genius of Australian Multiculturalism’ (Speech delivered at the Sydney Institute, Sydney, 17 February 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb159251.htm>>.

177 Black and Hosen, above n 13, 214; Saeed, above n 100, 223–38.

178 Mejia advocates abrupt changes can worsen situations whereas gradual change on the path to empower is more effective. See Mejia, above n 154, 1–24.