

## THE SEXUAL LEGAL GEOGRAPHY IN *COMCARE V PVYW*

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### I INTRODUCTION

In October 2013 the High Court, by a 4:2 majority, allowed an appeal by the federal government's workplace insurer, Comcare, denying the Commonwealth government employee respondent, known by the gender neutral identifier 'PVYW' but widely known as being a woman, workers compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('*SR&C Act*').<sup>1</sup> In November 2007, PVYW had been sent to visit a regional coastal urban office, and was required to stay overnight at a motel booked and paid by for the employer.<sup>2</sup> While staying overnight at the motel, PVYW was struck in the face by a glass light fitting on the bed when it was pulled off the wall of the motel during sexual intercourse with a local acquaintance.<sup>3</sup> Following the incident, PVYW claimed compensation for physical and subsequent psychological injuries under the *SR&C Act*.<sup>4</sup> Comcare originally accepted the claim and for two years

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1 Although the *SR&C Act* only applies to Commonwealth government employees, the decision will be relevant to all Australian employees subject to workers compensation schemes because each scheme limits insurance recovery in a similar (though in some cases more restrictive) way. See Transcript of Proceedings, *Comcare v PVYW* [2013] HCATrans 114 (10 May 2013).

2 Comcare, 'Appellant's Chronology', Submission in *Comcare v PVYW*, S98/2013, 17 June 2013, 1 [5] ('*Appellant's Chronology*').

3 *Comcare v PVYW* (2013) 250 CLR 246, 251–2 [1] (French CJ, Hayne, Crennan and Kiefel JJ); *ibid*.

4 *Comcare v PVYW* (2013) 250 CLR 246, 252 [2] (French CJ, Hayne, Crennan and Kiefel JJ).

PVYW was compensated for the injuries that had been sustained.<sup>5</sup> It was the decision of the workplace insurer to revoke PVYW's claim in 2010 that set in motion a series of cases through the Australian court hierarchy that split evenly in favour of, and against, PVYW.<sup>6</sup>

Overturning the judgments of the Federal Court and Full Court of the Federal Court,<sup>7</sup> the majority of the High Court held that the injury suffered by PVYW was not suffered 'in the course of' employment.<sup>8</sup> The majority reached this conclusion because in its view the injury was not caused through an activity encouraged or induced by the employer, or was not considered 'referable' to a hotel stay.<sup>9</sup> This last conclusion is perhaps surprising given the mythology of work trips and sex in hotel stays<sup>10</sup> and, as argued by counsel for PVYW, because sex is a 'universal incident of human life'.<sup>11</sup> It is this conclusion in particular, grounded in a legally constructed view about the division of human private and public personas, that lends the case to a critical feminist and legal geography analysis.<sup>12</sup>

Over recent decades there has developed a broad scholarship on sex, gender and sexuality and geography.<sup>13</sup> However, this article is selectively and deliberately situated within a narrower literature on the legal geographies of sex,

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5 *Appellant's Chronology*, above n 2, 1 [7]–[8].

6 *Ibid* [8].

7 *PVYW v Comcare* [No 2] (2012) 291 ALR 302; *Comcare v PVYW* (2012) 207 FCR 150. For a discussion of all the judgments made in respect of PVYW's claim, see Eric L Windholz, 'Case Note – *Comcare v PVYW*: Are Injuries Sustained while Having Sex on a Business Trip Compensable?' (2014) 36 *Sydney Law Review* 345.

8 *Comcare v PVYW* (2013) 250 CLR 246, 268 [61]–[62] (French CJ, Hayne, Crennan and Kiefel JJ).

9 *Ibid* 262 [40].

10 For a discussion on the 'allure of sex in hotels' where the noise of sex is 'less likely to offend', see Craig M Gurney, 'Transgressing Private–Public Boundaries in the Home: A Sociological Analysis of the Coital Noise Taboo' (2000) 13 *Venereology* 39. Justice Nicholas in the Federal Court was not inclined to the view that sex in hotels on work stays is out of the ordinary. He noted that:

if the tribunal's finding is understood as meaning that an employer would have no reason to expect that an employee might engage in lawful sexual activity during the course of such a stay because it rarely occurs or is somehow 'out of the ordinary' then I have real doubt as to whether such a finding was open to the tribunal.

*PVYW v Comcare* [No 2] (2012) 291 ALR 302, 308 [29]. There is a volume of literature on casual sex during travel with a focus on health risk, including on business travel. See generally R Vivancos, I Abubakar and P R Hunter, 'Foreign Travel, Casual Sex, and Sexually Transmitted Infections: Systematic Review and Meta-analysis' (2010) 14 *International Journal of Infectious Diseases* 842.

11 See Transcript of Proceedings, *Comcare v PVYW* [2013] HCATrans 169 (7 August 2013) 2989–90 (L T Grey) ('*Transcript* [2013] HCATrans 169').

12 Saptarshi Mandal, "'Right to Privacy" in *Naz Foundation: A Counter-heteronormative Critique*' (2009) 2 *National University of Juridical Sciences Law Review* 525, 526.

13 See Philip Hubbard, 'Desire/Disgust: Mapping the Moral Contours of Heterosexuality' (2000) 24 *Progress in Human Geography* 191. Hubbard notes that 'recent research by geographers has begun to demonstrate that space is inevitably sexed in a variety of complex ways, placing issues of sex and sexuality firmly on the geographical agenda': at 191. See also attempts to integrate this somewhat disparate research, together with research on families and young people into a notion of intimacy geographies: Gill Valentine, 'The Ties That Bind: Towards Geographies of Intimacy' (2008) 2 *Geography Compass* 2097.

and in particular the otherness of sex in place,<sup>14</sup> the stigma of sex,<sup>15</sup> and of sex being out of view,<sup>16</sup> and especially the work of Hubbard, who has been an important figure in bringing together a trans-disciplinary grouping of Australian legal geography scholars.<sup>17</sup> This focus is not to suggest that other scholars are not leaders in this area. Cooper<sup>18</sup> and Valverde<sup>19</sup> in particular have contributed significantly to discussion about gendered, sexual and legal spaces, including – of relevance to this piece on workers compensation – places of ‘danger’ and workplaces as places of male domination. The purpose of this article is to introduce a different legal context for a sexual geographies analysis – that of workplace insurance laws – to Hubbard’s preferred municipal law as the body of law for critique. It contributes to the broadening of the scholarship of the intersection of sex, law and geography.<sup>20</sup> Moreover, this article adds to the literature that is being self-identified as within the field of legal geography by Australian scholars: work that seeks to analyse the law in its social and spatial contexts.<sup>21</sup> Braverman et al explain that: ‘Legal geographers note that nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference’.<sup>22</sup> It was the finding of the majority of the High Court that conduct or activities could be particularly ‘referable’ to a place and that casual sex was not referable to a work hotel stay that triggered our legal geography interest in this case. Moreover, the temporality aspects central to the case – particularly around the questions of the interval when PVYW’s injury was sustained – reinforce the relevance of a geographic lens being applied to analyse this case.

In this article we do not argue about the legal correctness of the decision of the High Court; rather we comment on its efficacy to produce clarity in the law. We use conventional legal analysis of the four judgments involved in the case to offer this commentary. Moreover – and situating this article within the field of legal geography – we provide a disciplinary blended analysis of the case that we trace to the academic work around sexual geography and the law. The article

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14 Terry S Kogan, ‘Transsexuals in Public Restrooms: Law, Cultural Geography and *Etsitty v Utah Transit Authority*’ (2009) 18 *Temple Political & Civil Rights Law Review* 673, 679.

15 For a discussion on sexual entertainment venues creating ‘stigma nuisance’, see Philip Hubbard, ‘Law, Sex and the City: Regulating Sexual Entertainment Venues in England and Wales’ (2015) 7 *International Journal of Law in the Built Environment* 5.

16 Jason Prior, Penny Crofts and Phil Hubbard, ‘Planning, Law, and Sexuality: Hiding Immorality in Plain View’ (2013) 51 *Geographical Research* 354; Phil Hubbard and Rachela Colosi, ‘Sex, Crime and the City: Municipal Law and the Regulation of Sexual Entertainment’ (2012) 22 *Social & Legal Studies* 67.

17 For a compilation of Hubbard’s scholarship, see Phil Hubbard, *Cities and Sexualities* (Routledge, 2012).

18 Davina Cooper, *Sexing the City: Lesbian and Gay Politics within the Activist State* (Rivers Oram Press, 1994).

19 Mariana Valverde, ‘Beyond Gender Dangers and Private Pleasures: Theory and Ethics in the Sex Debates’ (1989) 15 *Feminist Studies* 237.

20 For a sexual legal geographies analysis in refugee law, see Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2015) 128–49. We thank an anonymous referee for alerting us to Keenan’s work.

21 Robyn Bartel et al, ‘Legal Geography: An Australian Perspective’ (2013) 51 *Geographical Research* 339, 340.

22 Irus Braverman et al, ‘Introduction: Expanding the Spaces of Law’ in Irus Braverman et al (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014) 1, 1.

begins with a selective review of this scholarship, before offering a mostly chronological analysis of the case. We will begin our analysis with the tribunal decision, when the private and recreational conception of sex was prioritised, then move to discuss the judgments of the Federal Courts with their attempts to make the sexual conduct irrelevant to the insurance claim. Most of our critical analysis is reserved for the judgments of the judges of the High Court where Bell J, dissenting, reiterated the Federal Courts' views, based on precedent, that the conduct of an employee is irrelevant to an insurance claim when the employee was at the place its employer had directed it to be.<sup>23</sup> Justice Gageler, also dissenting, confronted the sexual conduct involved in the case, acknowledging that sex is very much a part of human life. His view challenged the prevailing sexual geography of the case.<sup>24</sup> Meanwhile, the majority attempted to make invisible the sexual activities through its modification of the prevailing legal rule, rendering sex out of place.<sup>25</sup> In the aftermath of the case, amid federal government manoeuvres to reform workplace insurance laws, PVYW – stigmatised for bringing the original claim – has been returned into the public gaze, offering us a further basis for critique.

## II (MORAL AND) SEXUAL GEOGRAPHIES AND THE LAW

Early legal literature on the intersection between sex and the law was not all geographic. It began focussed on the law as a means to prohibit and enforce sex,<sup>26</sup> to demonstrate the breadth of regulation and crimes that speak to sex,<sup>27</sup> and to use sex within the law to offer critiques of morality within the law.<sup>28</sup> However, the writings of legal philosopher, Feinberg<sup>29</sup> notably his work around 'offence' and control, can be seen as one starting point for a legally influenced notion of sexual geography. It was through the legal species of nuisance – a doctrine of law that is intrinsically geographic, with concern about interference across space<sup>30</sup> – that Feinberg explored the role of law to control offence, including profound offence, and the unsettling aspects of life that constitute an affront to sensibilities.<sup>31</sup> Feinberg applied his offence principle to sexual conduct and land uses, noting

23 *Comcare v PVYW* (2013) 250 CLR 246, 269 [67] ff.

24 Ibid 295 [136], 299 [151], 301 [157].

25 Ibid 262 [40] (French CJ, Hayne, Crennan and Kiefel JJ).

26 Robert C Bensing, *Comparative Study of Sex Law Enforcement* (JSD Thesis, Yale University, 1950), later published in part in Robert C Bensing, 'A Comparative Study of American Sex Statutes' (1951) 42 *Journal of Criminal Law, Criminology, and Police Science* 57.

27 Morris Ploscowe, *Sex and the Law* (Prentice-Hall, 1951). In reviewing the book, Slough writes of the 'rush of legislation' in this area: M C Slough, 'Review of "Sex and the Law" by Morris Ploscowe' [1952] *Washington University Law Quarterly* 160, 161.

28 H L A Hart, *Law, Liberty, and Morality* (Stanford University Press, 1963).

29 Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (Oxford University Press, 1985) vol 2.

30 Chief Justice Preston details the tort of private nuisance in the context of a tree dispute between neighbours: *Robson v Leischke* (2008) 72 NSWLR 98.

31 Feinberg, above n 29, 9.

particularly the role of place-based regulations in the form of land use zoning as a way to control morality.<sup>32</sup> Across areas of the law – including media and family law – Johnson and Longhurst have made a similar point: that sexualities are ‘disciplined’ through morality as well as the law.<sup>33</sup>

Writing in the American setting in the 1980s, Rubin also traces a consciousness of the connection between morality, sexuality and the criminal law.<sup>34</sup> Her starting point is the enactment in the United States (‘US’) in the late 1800s of anti-obscenity laws – laws she claimed were an expression of the religious and moral crusades of their time but, insofar as they continued to prohibit pornography, were resilient to legal challenge in the US Supreme Court.<sup>35</sup> Rubin writes of the anti-obscenity and anti-pornography laws as an expression of moral panic with the consequences and implications – particularly of stigma – rarely considered.<sup>36</sup> The laws viewed sex as a ‘dangerous, destructive, negative force’, enacted by a ‘culture’ that ‘treats sex with suspicion’.<sup>37</sup> For Valverde, these laws and socio-political contexts operated to stymie women’s sexual liberation.<sup>38</sup> Spatially, the view of sex as dangerous or negative confined the spaces for women’s expression of their sexuality to the home.

Picking up on the work of Rubin and her peers, Hubbard, a geographer, has been prominent in exploring related law and morality issues around sex geographically. He has argued that sexual legal geographies exist and they do so beyond the criminal law. In recent work he has situated public concerns about sex venues in planning, licensing and tort law, arguing that the objections to sex venues in the city are objections of immorality and in the self-interest. They are claimed to lessen the reputation of the area and can be understood as creating a perceived ‘stigma nuisance’.<sup>39</sup>

For Hubbard, issues of law and sex can be found within municipal law, a body of law that seeks to normalise (rather than criminalise) conduct and to shape public morality.<sup>40</sup> Since the 1990s, Hubbard has been among the leading scholars who have been drawing connections between law, place and sex/sexualities.<sup>41</sup> His focus has primarily been on sex-related land uses that are

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32 Ibid 43.

33 Lynda Johnston and Robyn Longhurst, *Space, Place, and Sex: Geographies of Sexualities* (Rowman & Littlefield, 2010) 31. The authors analysed the work of Robyn Longhurst, ‘A Pornography of Birth: Crossing Moral Boundaries’ (2006) 5 *ACME: An International E-Journal for Critical Geographies* 209 <<http://acme-journal.org/index.php/acme/article/view/757>>.

34 Gayle Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge & Kegan Paul, 1984) 267.

35 Ibid 268.

36 Ibid 272.

37 Ibid 278.

38 Valverde, ‘Beyond Gender Dangers and Private Pleasures’, above n 19, 237.

39 Hubbard, ‘Law, Sex and the City’, above n 15, 10.

40 Phil Hubbard, ‘Kissing Is Not a Universal Right: Sexuality, Law and the Scales of Citizenship’ (2013) 49 *Geoforum* 224, 230; Hubbard and Colosi, above n 16, 68.

41 Philip Hubbard, *Sex and the City: Geographies of Prostitution in the Urban West* (Ashgate, 1999).

subject to community opposition<sup>42</sup> and on the spaces and geographies of sexual citizenship, particularly the rights of sexuality.<sup>43</sup> He has argued that localised laws have the effect of ‘creating boundaries between public and private space’<sup>44</sup> in the context of sex and sexuality.<sup>45</sup> They vest control over space and of sex to legal administrators,<sup>46</sup> leading to ‘spatial marginalisation’ (and invisibilisation) of ‘non-normative sex’.<sup>47</sup> Where non-normal sex is visible, for instance in the red-light district of Amsterdam, it is dehumanised and the object of disgust. The district is a den of immorality, a counterpoint to what is ‘good, pure and proper’.<sup>48</sup>

Feminist legal scholars have also critiqued law through its private and public divisions and through what is seen or hidden from view. Owens notes that the deployment of the law to divide work and home between public and private realms is one of the ‘ideological foundations of the patriarchal state’ that invariably renders the workplace a male sexualised place and the home a female sexualised place.<sup>49</sup> Thornton has argued that legality belongs in the public sphere, as distinct from the private, asserting that ‘we live in an age of statutory regulation’ imposed upon our public personas.<sup>50</sup> The devastating story of Pamela George has led Razack to identify public ‘spaces beyond universal justice’ where harms to women’s bodies are not recognised by law or social norms.<sup>51</sup> Writing in the same collection as Thornton, Morgan offers another nuanced view. Acknowledging that historically the family home has been the private world to which we all retreat out of the public gaze, and work the place where laws regulate our conduct, Morgan identifies through anti-discrimination and sexual

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42 See, eg, Phil Hubbard, Roger Matthews and Jane Scoular, ‘Legal Geographies – Controlling Sexually Oriented Businesses: Law, Licensing, and the Geographies of a Controversial Land Use’ (2009) 30 *Urban Geography* 185.

43 Hubbard, ‘Kissing Is Not a Universal Right’, above n 40; Phil Hubbard, ‘Sex Zones: Intimacy, Citizenship and Public Space’ (2001) 4 *Sexualities* 51.

44 Hubbard and Colosi, above n 16, 71.

45 Critical queer scholars have also explored this divide: see, eg, Andrew Gorman-Murray, ‘Queer Politics at Home: Gay Men’s Management of the Public/Private Boundary’ (2012) 68 *New Zealand Geographer* 111.

46 Hubbard and Colosi, above n 16, 79. In Prior, Crofts and Hubbard, above n 16, 358, these administrators are presented as being ‘nomospheric technicians’: adopting terminology developed by Delaney. See David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Routledge, 2010).

47 Prior, Crofts and Hubbard, above n 16, 354.

48 Phil Hubbard, ‘Afterword: Exiting Amsterdam’s Red Light District’ (2012) 16 *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* 195, 196.

49 Rosemary J Owens, ‘Women, “Atypical” Work Relationships and the Law’ (1993) 19 *Melbourne University Law Review* 399, 404.

50 Margaret Thornton, ‘The Cartography of Public and Private’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2, 12.

51 Sherene H Razack, ‘Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George’ (2000) 15 *Canadian Journal of Law & Society* 91, 123. We thank an anonymous referee for alerting us to this work.

harassment laws the blurring of this divide.<sup>52</sup> Similarly through PVYW's case the divide is necessarily blurred for workers compensation laws when employees are away from their homes.

Hubbard and his co-authors argue that the norm protected through laws largely regulating the public sphere and leading to a moral geography is 'coupled, monogamous, loving heterosexuality'.<sup>53</sup> Sexual conduct, including heterosexual sex, occurring beyond this 'norm' – the so-called 'non-normative' – challenges the public and legal view about where sex happens and where it is sanctioned. Studies have indicated, moreover, that the next most 'normalised' sexual initiations are those casual, and travelling, encounters performed by men.<sup>54</sup> Like Hubbard, Rubin distils from western culture a hierarchical relational geography<sup>55</sup> with '[m]arital, reproductive heterosexuals ... alone at the top of the erotic pyramid'.<sup>56</sup> Within that pyramid:

Individuals whose behavior stands high in this hierarchy are rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits. As sexual behaviors or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions.<sup>57</sup>

Similarly, it has been argued that sex in the home is treated as a private matter by the state and therefore occurs beyond the reach of the law to the detriment overwhelmingly of women at risk in the home.<sup>58</sup> Moreover, Hubbard, Mathews and Scoular posit that sex 'not safely ensconced in the (marital) home ... provokes anxiety and controversy'.<sup>59</sup> The same theme is explored by Pendleton and Serisier. They extract, from recent Australian political discourse, a narrative of 'cultural anxiety around sex'<sup>60</sup> and the 'idea that sex and sexuality constitute "private" realms, separate from the public domain of politics and governance'.<sup>61</sup> With Prior, Hubbard has argued that home sex work, clothed by anonymity and privacy, avoids the law and much community stigma or worry about amenity impact.<sup>62</sup> However, the slippage between the private sphere of the

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52 Jenny Morgan, 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 89, 96 ff.

53 Prior, Crofts and Hubbard, above n 16, 355.

54 Liza Berdychevsky, Yaniv Poria and Natan Uriely, 'Sexual Behavior in Women's Tourist Experiences: Motivations, Behaviors, and Meanings' (2013) 35 *Tourism Management* 144, 146.

55 For a discussion on the pyramid metaphor for geographical scale, see Richard Howitt, 'Scale as Relation: Musical Metaphors of Geographical Scale' (1998) 30 *Area* 49, 51–2.

56 Rubin, above n 34, 279.

57 Ibid.

58 Mandal, above n 12, 528.

59 Hubbard, Matthews and Scoular, above n 42, 185.

60 Mark Pendleton and Tanya Serisier, 'Beyond the Desire for Law: Sex and Crisis in Australian Feminist and Queer Politics' (2009) 31 *Australian Feminist Law Journal* 77, 79.

61 Ibid 81.

62 Phil Hubbard and Jason Prior, 'Out of Sight, Out of Mind? Prostitution Policy and the Health, Well-Being and Safety of Home-Based Sex Workers' (2013) 33 *Critical Social Policy* 140.

home and the typically regulated conduct of sex work presents particular dilemmas to regulate for the safety of the worker.

Hubbard has also been a contributor to discussions about the meaning and creation of space, especially in the city.<sup>63</sup> He has endorsed the conception of space as being manifold, liminal and reproducible, and connected with notions of justice and law.<sup>64</sup> Hence, geographies are cast and recast as boundaries – for instance between work and non-work spaces or private and public spaces – shift. So too can geographies shift with temporal changes – across an elongated time scale or simply between night and day.<sup>65</sup> These theoretical perspectives are relevant here as PVYW's harm became legalised and as the legal controversy shifted from courtroom to courtroom across a lineal chronology, from motel room to the office of the workplace insurer, and from periods of work time to 'interval' time.

Finally, on the concept of citizenship, Hubbard has argued that it is 'contingent on the scalar legal geographies which combine, sometimes in contradictory manners, to shape the rights we possess in particular spaces'.<sup>66</sup> It is through citizenship that ideas on spaces, sexual conduct and the law can be presented in a way most comprehensible to legal scholars: the primary intended audience of this article. Through Hubbard's work it is shown that rights can be secured then taken away. Particularly widespread rights can be removed at the localised scale, confining the citizenship of the rights-bearer and generating a contradiction in the law. Godden, writing in a similar context to Hubbard on the regulation of places for prostitution, has argued that the regulation of places operate to discipline, enclose and control individuals as well as to invest them with or deprive them of particular rights of being.<sup>67</sup> Hubbard's empirical examples include an instance of a patron being removed from a pub in the Soho district of London following a same-sex kiss, with the publican relying on liquor licensing laws that provide discretion – a legal right – to evict patrons for disorderly conduct. Within this literature and elsewhere, disorder, 'disgust' and 'immorality' have been discursive frames that Hubbard has pursued when engaged in legal and sexual geography analysis: each being employed by communities, administrators and jurists to colour the conduct that does not meet

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63 Phil Hubbard, 'Thinking Spaces, Differently?' (2012) 2 *Dialogues in Human Geography* 23.

64 Ibid 24. See also Marcus Doel and Phil Hubbard 'Taking World Cities Literally: Marketing the City in a Global Space of Flows' (2002) 6 *City* 351. The idea of manifold, liminal and reproducible space is explored in Andreas Philippopoulos-Mihalopoulos, 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2011) 7 *Law, Culture and the Humanities* 187 and in Braverman et al, above n 22.

65 Gordon Waitt, Loretta Jessop and Andrew Gorman-Murray, "'The Guys in There Just Expect To Be Laid'": Embodied and Gendered Socio-Spatial Practices of a "Night Out" in Wollongong, Australia' (2011) 18 *Gender, Place and Culture: A Journal of Feminist Geography* 255.

66 Hubbard, 'Kissing Is Not a Universal Right', above n 40, 224.

67 Lee Godden, 'The Bounding of Vice: Prostitution and Planning Law' (2001) 10(1) *Griffith Law Review* 77, 79.



asserted majoritarian standards of morality. The goal or effect has been to stigmatise.<sup>68</sup>

### III AN INJURY SUFFERED DURING AN INTERVAL IN THE COURSE OF EMPLOYMENT

The cases between Comcare and PVYW concerned an area of law at the intersection of insurance law, labour law, and health and safety law commonly referred to as workers compensation law. Workers compensation laws are statutory laws, developed by parliaments for the benefit of workers, to facilitate quickly and cheaply secured compensation for prescribed losses associated with workplace injuries. In this respect they acknowledge the value of labour and the body of the worker. They are an acknowledgement that workplaces are a common site of personal injury<sup>69</sup> and that there exists between employers and employees imbalances in power and capacities to access the law. As they are no-fault laws there are reduced evidentiary burdens, with compensation accruing upon establishment of the required nexus between the injury suffered and the work of the employee. Adopting a universal insurance model, workers compensation laws operate to spread risk for workplace injuries and are administered by a central agency. Hence, PVYW's direct employer was not involved in the cases analysed in this article. The laws are administered alongside and interconnected with health and safety laws,<sup>70</sup> which impose on employers a duty to ensure the health and safety of their workers,<sup>71</sup> and collectively operate to regulate, govern and condition worker behaviour. In this sense there are parallels with the licensing and planning laws that feature in the work of Hubbard. As noted by Godden, all of these laws are concerned with conditioning conduct or activity.<sup>72</sup> They are about surveilling human conduct under the banner of health, safety and amenity. Adopting the language of Smart, these workplace safety and compensation laws can be viewed as a benevolent intrusion into the life of workers.<sup>73</sup> They are an example of law rendering human conduct in the interest of the public. The geographies they create are therefore typically public ones – for instance locations<sup>74</sup> or industries of risk.<sup>75</sup>

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68 Hubbard, 'Kissing Is Not a Universal Right', above n 40, 229.

69 Reg Graycar, 'Teaching Torts as if the World Really Existed: Reflections on Harold Luntz's Contribution to Australian Law School Classrooms' (2003) 27 *Melbourne University Law Review* 677, 679, citing the research of Harold Luntz published in various editions of his co-authored casebooks.

70 At the Commonwealth level since 2012: *Work Health and Safety Act 2011* (Cth).

71 *Work Health and Safety Act 2011* (Cth) s 19.

72 Godden, above n 67; see especially: at 90.

73 Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 97.

74 For a discussion on the purported cancer cluster in ABC studios in Toowong, Queensland, see Jo Goodie, 'Toxic Tort and the Articulation of Environmental Risk' (2008) 12 *Law Text Culture* 69.

75 See, eg, Tore J Larsson and Brian Field, 'The Distribution of Occupational Injury Risks in the Victorian Construction Industry' (2002) 40 *Safety Science* 439.

Workplace safety laws and workers compensation laws are very much laws of the everyday experience of life.<sup>76</sup> They are concerned with the ‘everyday interactions’ of work; they create ‘regulatory mechanisms in daily life’<sup>77</sup> like the traffic regulations and building permits that Valverde explores in her scholarship on the law of everyday places. They create grand legal principles that operate over vast geographies. In the case of the Comcare regime, those geographies extend across the work in office buildings, the work in police cars and the work in remote locations of scientific interest. They cover a diversity of workers in different places and they regulate the mundane work to the spontaneous work:<sup>78</sup> all labour generated for the benefit of the employer. What they do not regulate nor protect are the private moments of the worker. While Owens illustrates the loss of worker protections for outworkers by virtue of their location of work being dislocated from the place of business,<sup>79</sup> workers compensation laws are not limited to the principal place of work activity of the employer. Workers carry these protections, these intrusions, with them outside of that place as far as their conduct or activity is characterised as ‘work’. In fact these protections follow workers wherever their employer directs or encourages them to be, irrespective of the morality or productivity of the workers’ conduct. This includes work outings to strip clubs, which is a seemingly all too commonplace work activity judging by the spate of sexual discrimination claims this employer-endorsed conduct has led to in the US and the United Kingdom.<sup>80</sup>

When PVYW drove the two to three hours to the motel in Nowra booked by PVYW’s employer, PVYW was acting as a worker and protected by the *SR&C Act* – the relevant workers compensation law. When PVYW entered onto the motel grounds, presumably one of the ubiquitous motor inns that are dotted along Australia’s busy interstate highway, PVYW was acting as a worker and protected by the *SR&C Act*. When PVYW was reading agenda documents, resting after the drive atop the bed covered with the faded floral comforter in advance of the afternoon meeting, PVYW was acting as a worker and protected by the *SR&C Act*. The question in the case, however, was whether PVYW had slipped out of coverage and transitioned from a regulated ‘public’ realm into a ‘private’ realm when having sex in a place presumed to be safe rather than one exposed to danger. PVYW had not spent a night out in nearby Wollongong;<sup>81</sup> rather PVYW had been re-acquainted with an old friend before returning to the motel. The

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76 Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press, 2012) 6.

77 Ibid 7.

78 Ibid 11.

79 Rosemary J Owens, ‘The Peripheral Worker: Women and the Legal Regulation of Outwork’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 40, 47.

80 See Ari Sharp, ‘PM’s Strip-Club Mate Sued for Sex, Race Discrimination’, *The Sydney Morning Herald* (online), 13 November 2009 <<http://www.smh.com.au/world/pms-stripclub-mate-sued-for-sex-race-discrimination-20091113-idng.html>>; Deborah Hargreaves, ‘Lap Dance Ethos at Heart of City Sexism, Say Campaigners’, *The Guardian* (London), 31 March 2008, 25.

81 Waitt, Jessop and Gorman-Murray, above n 65.

conduct, though spontaneous, was nothing but ordinary and commonplace, particularly in anonymous hotel rooms.<sup>82</sup>

However, to claim compensation under the *SR&C Act* (similarly to other workplace insurance schemes), PVYW's injuries sustained during sex had to meet the relevant definition of 'injury'. Section 5A(1)(b) of the *SR&C Act* says that, in the Act, 'injury' means 'an injury ... suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment'.

An injury that meets this definition will be compensable under the *SR&C Act* unless the employer is able to show that the employee's injuries were intentionally self-inflicted or caused by the employee's misconduct.<sup>83</sup> There was never any suggestion that PVYW's actions could be classified in either of these ways,<sup>84</sup> though implicit in the High Court's finding is a conclusion that some activities not endorsed by an employer undertaken while on a break from work activities, will now be exempt from recovery of compensation. One of those activities is sex in a hotel or motel during an overnight work stay.

As Mr Grey, counsel for PVYW explains, the legal question was a dry and straightforward one with discussions and evidence focussing little on sex or the events in the motel room.<sup>85</sup> It was the phrase 'in the course of' that provided the basis of contention in this case. It was that phrase that transported the moment of hurt in the privacy of a Nowra motel room into the courtroom: a place where PVYW's wellbeing and integrity would be debated and determined under the law.

An injury sustained by an employee after an ordinary working day would normally be considered outside 'the course of' employment. However, where an injury is sustained by an employee, not whilst actually working, but during an interval of time within an overall period of work, the question arises whether the circumstances warrant the conclusion that the injury was suffered in the course of employment. Because the motel was both a workplace and a private space – a 'contradictory space'<sup>86</sup> where the private/public dichotomy was blurred<sup>87</sup> – it was necessary to determine the status of the conduct and space at the moment of injury. PVYW was injured during an 'interval':<sup>88</sup> a legally created fiction when a worker is deprived of their private time with no expectation that they provide

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82 Hotels are places 'where customers can expect to engage in private enjoyments, including sexual relations' as opposed to guesthouses, where home owners view sex as inappropriate: MariaLaura Di Domenico and Peter Fleming, "'It's a Guesthouse Not a Brothel': Policing Sex in the Home-Workplace' (2009) 62 *Human Relations* 245, 246.

83 *SR&C Act* ss 14(2)–(3).

84 *Comcare v PVYW* (2013) 250 CLR 246, 252 [3] (French CJ, Hayne, Crennan and Kiefel JJ); *Comcare v PVYW* (2012) 207 FCR 150, 165 [55] (The Court).

85 Leo Grey, 'Abetz Guilty of Cynical Ploy on Comcare Reforms', *The Sydney Morning Herald* (online), 31 March 2015 <<http://www.smh.com.au/comment/abetz-guilty-of-cynical-ploy-on-comcare-reforms-20150331-1mawr9.html>>.

86 Di Domenico and Fleming, above n 82, 249.

87 Morgan, above n 52.

88 *Comcare v PVYW* (2013) 250 CLR 246, 279 [94] (Bell J).

labour to their employer. It is a moment where the private and the public spheres of the worker slip. In PVYW's case, the employee was staying at the motel at the employer's direction between an overall period of work. It was not disputed that this was an interval. What was disputed at each stage of this case was the proper interpretation and application of the principles to be applied in determining when an injury suffered during an 'interval' will be in the course of employment. More specifically, it was the principles discussed in the High Court case of *Hatzimanolis v ANI Corporation Ltd*<sup>89</sup> that were the focal point of the Australian Administrative Appeals Tribunal ('AAT') and the courts' disagreement.<sup>90</sup>

In *Hatzimanolis* an employee from New South Wales was sent by his employer to work in Western Australia for three months, where he was accommodated at a camp. On a day when the employees were not required to work, the employer organised an excursion and provided the necessary vehicles for the trip off-site. The employee was seriously injured when the vehicle he was in overturned. The High Court said it should

be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way.<sup>91</sup>

The essence of this statement has been referred to as the '*Hatzimanolis* principle'.<sup>92</sup> The proposition this principle provides is that for an injury suffered during an 'interval' to be considered to have occurred in the course of employment, the circumstance in which the employee was injured must be connected to the inducement or encouragement of the employer. The word 'circumstance' has been taken to be a reference to either the *activity* the employee was engaged in while they were injured, or the *place* at which the employee was present at the time they were injured. This principle may appear reasonably straightforward, but as the AAT and courts' discussions show, it is deceptively so.

It is worth noting at this preliminary point that PVYW did have a choice, and may have ultimately exercised that choice, to make a negligence claim against the motel owner or operator. However, to make that claim PVYW would undoubtedly have foregone anonymity, have been required to prove a failure to take reasonable care on the part of the motel, and most certainly have confronted claims of significant contribution.<sup>93</sup> Moreover, rather than having a claim determined under a no-fault statutory regime, PVYW would have confronted a modern tort of negligence compromised by exclusions and limits to recovery.<sup>94</sup> Because PVYW's injury was sustained on a work trip, the logical and well-advised course of action would have been for PVYW to argue that the injury was

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89 (1992) 173 CLR 473 ('*Hatzimanolis*').

90 *Comcare v PVYW* (2013) 250 CLR 246, 285 [112]–[113] (Gageler J).

91 *Hatzimanolis* (1992) 173 CLR 473, 484 (Mason CJ, Deane, Dawson and McHugh JJ).

92 See, eg, *Comcare v PVYW* (2013) 250 CLR 246, 262 [37] ff (French CJ, Hayne, Crennan, and Kiefel JJ).

93 *Zanner v Zanner* (2010) 79 NSWLR 702.

94 *Civil Liability Act 2002* (NSW).

sustained ‘in the course of employment’ consistent with the *Hatzimanolis* principle.

#### IV SEX AS A PRIVATE RECREATIONAL ACTIVITY

The AAT denied PVYW’s compensation claim. The Tribunal held that it will be insufficient if the employee suffered their injuries during an interval at a *place* the employer induced or encouraged them to be present at. The *activity* engaged in, here the sexual conduct, must have been induced or encouraged by the employer.

Critically the AAT member, Professor Creyke, formed the view:

The employer had not expressly or impliedly induced or encouraged the applicant’s sexual conduct that evening. Nor did the employer know or could reasonably expect that such an activity was contemplated ... The activity was not an ordinary incident of an overnight stay like showering, sleeping, eating, or returning to the place of residence from a social occasion elsewhere in the vicinity. Rather [PVYW] was involved in a recreational activity which [the] employer had not induced, encouraged or countenanced.<sup>95</sup>

In her Honour’s judgment in the High Court, Bell J noted that for Professor Creyke, the sexual activities constituted an “‘interrupt[ion]” to the employment relationship.<sup>96</sup> The sexual activities were of ‘a private nature’ that, relative to PVYW’s employment, ‘took place in ... leisure time’.<sup>97</sup> For Professor Creyke, the initiation of sex converted the motel room from workplace to a private place unregulated by workplace safety and compensation laws. Professor Creyke’s conclusion resembled the theoretical analysis of feminist legal scholars and the research findings of Hubbard et al that in the imagination of municipal planners ‘sex is thought to belong properly in residential spaces where it is safely *domesticated* in the context of reproductive, monogamous relations’ and certainly out of view of the employment relationship.<sup>98</sup> Because PVYW had not acted according to the orderly or proper way of being – that is to keep separate the sexual from the public – PVYW was denied benefits and support.<sup>99</sup>

In its submissions to the High Court, Comcare further argued that PVYW’s hotel stay was ‘a mere background fact or condition against which the employee makes a wholly private choice to engage in an “activity” which falls outside the ambit of the employer’s requirement that the employee be away from the usual “place” of work’,<sup>100</sup> creating boundaries of what is private and

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95 *Comcare and PVYW* (Unreported, Administrative Appeals Tribunal, Prof Creyke, 26 November 2010) [50], quoted in *Comcare v PVYW* (2012) 207 FCR 150, 152 [6] (The Court).

96 *Comcare v PVYW* (2013) 250 CLR 246, 277 [87].

97 *Ibid.*

98 Phil Hubbard et al, ‘Noxious Neighbours? Interrogating the Impacts of Sex Premises in Residential Areas’ (2013) 45 *Environmental and Planning A* 126, 136, citing Hubbard, *Cities and Sexualities*, above n 17 (emphasis in original).

99 Rubin, above n 34, 279.

100 Comcare, ‘Appellant’s Submissions’, Submission in *Comcare v PVYW*, S98/2013, 14 June 2013, 18 [97] (*‘Appellant’s Submissions’*).

not.<sup>101</sup> Just as the employee's sexual activities should be 'none of the employer's business' so should the injuries suffered by the employee.<sup>102</sup>

Braverman has written about 'the hidden stuff' of the law in a very different legal geography context to this;<sup>103</sup> though that concept is pertinent here. The AAT's judgment has been suppressed, the applicant's identity disguised. Though essentially the finding of the High Court and of Professor Creyke is that sex not only ought to be out of view of workplace insurance law but is in fact out of view, taken outside of the law because of its private and personal nature;<sup>104</sup> invisibilised.<sup>105</sup>

The Federal Court noted that Professor Creyke's view about what are 'ordinary incident[s]' of hotel stays was not supported by evidence.<sup>106</sup> It was a fact assumed, reflecting a particular normative view of Australian society.<sup>107</sup> It is a view that Windholz nevertheless says meets the standard of 'common sense and community acceptance'.<sup>108</sup> This view was not explicitly reached by the majority of the High Court, who devised a more awkward process in reaching their outcome. Theirs was a moral geography<sup>109</sup> based on a view that reflected the position described by Dalton that

[i]n practice, the line encircling private sex is drawn tightly around the bedroom, thus providing little protection to the many who by choice or necessity engage in sex in hotels, bathhouse cubicles, parkway rest areas, lovers' lanes, and other roads less travelled.<sup>110</sup>

## V THE IRRELEVANCY OF SEXUAL ACTIVITY TO QUESTIONS OF EMPLOYMENT

Justice Nicholas in the Federal Court disagreed with the reasons and conclusion of the AAT and allowed PVYW's appeal.<sup>111</sup> Justice Nicholas said that there was nothing before the AAT to indicate whether PVYW's employer approved or disapproved of its employees entertaining other people in their motel rooms with whom they might engage in lawful sexual activity during an overnight stay arranged by the employer, and nothing before the Tribunal to

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101 Hubbard and Colosi, above n 16.

102 *Appellant's Submissions*, above n 100, 18 [97].

103 Irus Braverman, 'Hidden in Plain View: Legal Geography from a Visual Perspective' (2011) 7 *Law, Culture and the Humanities* 173, 175.

104 Lawyers for the appellant, *Comcare*, returned to the theme that PVYW's sexual activities constituted a 'personal choice': *Transcript [2013] HCATrans 169*, above n 11, 2781–880 (L T Grey).

105 Prior, Crofts and Hubbard, above n 16.

106 *PVYW v Comcare [No 2]* (2012) 291 ALR 302, 308 [29] (Nicholas J).

107 For a discussion of 'social facts' in the negligence context, see Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21 *Torts Law Journal* 73.

108 Windholz, above n 7, 363.

109 Prior, Crofts and Hubbard, above n 16.

110 Harlon L Dalton, 'Book Review: "Disgust" and Punishment – J Feinberg, *Offense to Others: The Moral of the Criminal Law* vol 2' (1987) 96 *Yale Law Journal* 881, 891 n 51.

111 *PVYW v Comcare [No 2]* (2012) 291 ALR 302, 313 [55]–[56].

suggest that PVYW's sexual activity was in any respect incompatible with the nature or terms of employment. While the employer had not expressly or impliedly induced or encouraged PVYW's sexual activity, it did not follow that the interval was interrupted, as the AAT had found. Rather, Nicholas J said the underlying question that the AAT should have determined was simply whether there was a sufficient connection between PVYW's injuries and employment, and that it was the temporal relationship, as distinct from a physical or place-based relationship, between them that was of utmost importance.<sup>112</sup>

For Nicholas J it followed that because the employee's injuries had occurred while at a particular *place* where the employer induced or encouraged PVYW to be during an 'interval', the requisite temporal relationship or nexus between PVYW's injuries and employment was established.<sup>113</sup> In Justice Nicholas's view, it was not necessary for PVYW to show that the particular *activity* that led to PVYW's injury was one that had been expressly or impliedly induced or encouraged by the employer.<sup>114</sup> At the Federal Court the geography of workers compensation law was cast especially widely. Regulatory protection for all employee conduct would exist wherever workers are directed to be.

On appeal, the Full Federal Court (Keane CJ, Buchanan and Bromberg JJ) upheld the decision of Nicholas J, agreeing that it is sufficient to find an injury sustained during an interval compensable if the employee suffered their injury at a *place* they were induced or encouraged to be by their employer.<sup>115</sup> The Full Court agreed it is not also necessary for the employee to show that their employer induced or encouraged them to engage in the particular *activity* they were engaged in at the time of injury.<sup>116</sup>

The Full Court said that in their view it was not the High Court's intention to superimpose an 'activity test' on a 'place test', and that no combined or two-stage test arose from *Hatzimanolis*. Following *Hatzimanolis*, provided that one of the qualifying conditions is met (place or activity), the onus is on the employer to show that an employee's conduct qualified as 'gross misconduct', thereby taking it outside the course of employment.<sup>117</sup>

Justices Bell and Gageler separately agreed with the Full Court's judgment and its interpretation of the *Hatzimanolis* principle. Justice Bell seemingly sought clarity from the law – much as Professor Creyke had in the AAT. However, contrary to the position taken at first instance at the AAT, Bell J found

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112 Ibid 312 [50].

113 Ibid 312–13 [50]–[53].

114 Ibid 313 [55]. Justice Nicholas gave the example that if PVYW had been playing a game of cards in the motel room any ensuing injury would be entitled to compensation even though it could not be said that their employer induced or encouraged that activity: at 313 [55].

115 *Comcare v PVYW* (2012) 207 FCR 150.

116 Ibid 162–3 [40].

117 Ibid 163 [44]–[45].

authority<sup>118</sup> that an employer will be responsible for all injuries arising from activities during an interval at work when directed or encouraged by the employer to be at a *place* unless the activity is a form of misconduct.<sup>119</sup> Her Honour argued that ‘the employer’s inducement or encouragement to spend that interval at a particular place or in a particular way provides the nexus with the employment. Absent gross misconduct ... an injury ... is said to be compensable’.<sup>120</sup>

Whereas the reasoning of Bell J was largely confined to the precedential development of the law and her search for legal clarity, Gageler J was more willing to pass comment on the broader implications of a judgment in favour of the government insurer. Endorsing the view of the earlier decision of Tamberlin J in *Kennedy v Telstra Corporation*, Gageler J asserted that the legal principle in the case before him ‘should be applied in a commonsense and practical manner to accord with the realities of human behaviour’.<sup>121</sup> Accepting *Comcare*’s submission would constitute ‘a return to the outmoded, artificial and intrusive form of analysis’<sup>122</sup> that the High Court had tried to avoid over the prior two decades.

For Gageler J, his view, and that of Bell J and the Federal Courts beneath them

accords with a contemporary understanding of the employment relationship, which respects the privacy and autonomy of an employee as consistent with continuation of employment. ... Gone also is the intrusive inquiry ... into personal choices made by an employee, hour-by-hour or minute-by-minute, during an interval or interlude.<sup>123</sup>

Instead, he said, to make out a compensation claim for an injury sustained in an interval between work ‘it is sufficient [that] ... the employee is where the employee would not be but for his or her employment, and is doing what a man or woman so employed might do without gross impropriety’.<sup>124</sup> Justice Gageler framed *PVYW*’s sexual conduct within a realm of normalised behaviour cast more widely than is typical.<sup>125</sup>

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118 Justice Bell noted that in *Baudoef v Department of Main Roads* (1968) 68 SR (NSW) 406 an employee’s injury suffered from slipping in the shower at a hotel was compensable and in *Comcare v McCallum* (1994) 49 FCR 199 showering was a part of the employer’s encouragement of an overnight stay: *Comcare v PVYW* (2013) 250 CLR 246, 280–1 [98]–[99].

119 *Comcare v PVYW* (2013) 250 CLR 246, 279 [94], 281 [100].

120 *Ibid* 279 [94].

121 (1995) 61 FCR 160, 169, quoted in *ibid* 295 [136].

122 *Comcare v PVYW* (2013) 250 CLR 246, 299 [152] (Gageler J).

123 *Ibid* 299 [151].

124 *Ibid*.

125 Prior, Crofts and Hubbard, above n 16.



## VI THE HIGH COURT'S SEXUAL GEOGRAPHY AND ACTIVITIES REFERABLE TO A PLACE

A majority of the High Court, comprising French CJ, Hayne, Crennan and Keifel JJ, allowed Comcare's appeal, overturning the decisions of the courts below and reaffirming and reinstating the decision of the AAT.<sup>126</sup> The majority was firm in its interpretation of the *Hatzimanolis* principle, holding that the requisite connection that must be shown to exist between the employee's injuries and employment depends on the employer's encouragement or inducement. They said that because the basis of the employer's liability is its inducement or encouragement, 'the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do'.<sup>127</sup> Simply put, if the employer induced or encouraged the employee to be present at a particular place and the employee was injured whilst at that particular place, the injury will be suffered in the course of employment; and if the employer induced or encouraged the employee to engage in a particular activity and the employee was injured whilst engaging in that activity, the injury will be suffered in the course of employment.

It followed for the majority, in contrast to the conclusion of the courts below it, that an injury suffered during an 'interval' will not be considered to have occurred in the course of employment if the employee was injured whilst engaging in an activity they were not encouraged or induced to do by their employer, *even if* they were present at a place the employer induced or encouraged them to be at the time the injury occurred. The majority said that *Hatzimanolis* did not seek to extend the employer's liability beyond such circumstances. In doing so, the High Court raised a novel and vague,<sup>128</sup> deeply value-laden,<sup>129</sup> basis for rejecting the causal connection between injury and work. It followed that because PVYW's employer did not (according to the High Court majority) induce or encourage the sexual activity that led to injury, PVYW was not injured in the course of employment under the definition of 'injury' in the *SR&C Act*. In this respect the majority's decision largely replicated the view of Professor Creyke at the Tribunal.

In further rejecting PVYW's arguments, however, the majority said that PVYW was not injured at a place in the sense in which 'that expression' is to be understood in the joint reasons in *Hatzimanolis*. They said that an injury occurs at

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126 As noted above, Bell J and Gageler J wrote separate dissenting judgments. Justice Keane did not sit, having found for PVYW when a member of the Full Federal Court.

127 *Comcare v PVYW* (2013) 250 CLR 246, 261 [35].

128 In the aftermath of the High Court decision it was reported that the federal government claimed that '[t]his decision protects the currency of work place safety which was in serious danger of being trivialised by this claim' and that '[t]his decision also means that the definition of "work-related injury" is more clearly defined' (it is more accurate to say that the effect of the judgment is that the definition of a work injury is now confined – it is not clear): 'High Court Rules Out Compensation for Public Servant Injured during Work Trip Sex', *ABC News* (online), 30 October 2013 <<http://www.abc.net.au/news/2013-10-30/sex-compensation-high-court/5057348>>.

129 Windholz, above n 7, 365.

a place only when the circumstance of the injury is *referable* to that place: 'The place where an employee is required to be assumes particular importance when it is the cause of an injury or death'.<sup>130</sup> They conflated what had been previously understood as two categorical tests in the field – the activity test and the place test – to confect what might now be understood as a third limb to the *Hatzimanolis* test.<sup>131</sup> It is likely they did so for their own purposes: primarily in order to navigate the facts in PVYW's case to an outcome of non-recovery of compensation. The confected nature of the 'place referable' test can be seen in the explanation and justification offered by the majority. They gave the example that if the light fitting that caused the injury to PVYW had been insecurely fastened to the wall and had simply fallen onto PVYW, then the injuries would have arisen 'by reference to the motel': there being a defect in the motel, which would provide the necessary connection between the employer's inducement or encouragement for them to be at that place, and the injuries.<sup>132</sup> The majority said compensation in this hypothetical circumstance would have been justifiable, but employer responsibility for everything that occurs whilst the employee is present at that place is not necessarily justifiable under the 'referable to place' test. In its submissions, Comcare argued that activities referable to a motel would be those incidental activities an employee would reasonably be expected to partake in 'such as eating, sleeping and attending to one's personal hygiene'.<sup>133</sup> Sex would not. One exception, acknowledged by the lawyers for Comcare, would be sex between a 'married couple' situated in 'married quarters'.<sup>134</sup>

The approach of the majority does give rise to serious questions related to the correct interpretation of the *SR&C Act*, a matter we will leave for others. Moreover and problematically, it seems likely that there will be cases where it may be difficult to apply the majority's interpretation of the *Hatzimanolis* principle, which one would think after this case, is of critical importance to the determination of employer responsibility for injury in the context of an 'interval'. It is not hard to think of a situation where an employee might suffer an injury in

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130 *Comcare v PVYW* (2013) 250 CLR 246, 263 [44] (French CJ, Hayne, Crennan and Kiefel JJ).

131 Mariana Valverde, 'Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games' (2005) 39 *Law & Society Review* 419. Valverde notes: 'That ordinary people often take law's categories more seriously than judges, and that judges often resort to nonlegal reasoning, are well-known facts': at 452.

132 In a subsequent case, the Federal Court applied the principle to conclude that an employee's injury sustained when slipping in a roadhouse while on a toilet-stop on his journey between places of employment was compensable. Justice Siopis reasoned that

the employer encouraged or induced Mr Lee to undertake the road trip to Port Hedland, that the employer encouraged or induced Mr Lee to be at the Auski Roadhouse for the purpose of taking a toilet break, as an incident of undertaking that long road trip. On the facts found by the tribunal, the injury occurred by reason of the presence of a liquid on the forecourt at the place at which Mr Lee was encouraged or induced by his employer to be. The injury, thus, occurred by 'reference to the place', namely, the slippery surface of the forecourt of the Auski Roadhouse, at which his employer had encouraged or induced him to be.

*Lee v Transpacific Industries Pty Ltd* (2013) 136 ALD 652, 660 [49].

133 *Appellant's Submissions*, above n 100, 18 [96].

134 *Transcript [2013] HCATrans* 169, above n 11, 918–29 (French CJ and J T Gleeson SC).

circumstances where it is difficult to separate the contributions of the ‘activity’ and the ‘place’ to the injury. For example, if an employee was injured while exercising using gym facilities at a hotel booked by their employer,<sup>135</sup> or while masturbating while showering. In cases like these, employer encouragement or inducement, if it exists at all, is likely to be of little assistance in determining whether the injury was suffered in the course of employment. The first published commentary on the case endorsed the approach of the High Court. Windholz acclaimed:

By narrowing the ‘place’ test only to allow compensation for injuries incurred at and by reference to the place at which the employer has induced or encouraged the employee to be, the majority inject a level of certainty and pragmatism into the *Hatzimanolis* organising principle that avoids some of the more extreme results likely to be seen to be at odds with common sense and community acceptance.<sup>136</sup>

The alternative, says Windholz, would have

made the employer financially responsible for private conduct of the employee, unrelated to the employment relationship and with respect to which an employer has no right to direct or control. Imagine the privacy and industrial concerns that would arise if an employer issued a directive forbidding employees from engaging in sexual activities on a business trip...<sup>137</sup>

Within Windholz’s analysis, and the concession about married couples by the Comcare lawyers, a view of the morality of PVYW’s sexual conduct becomes plain. It was not normal, it belonged in private, it was disruptive and vulgar,<sup>138</sup> and it ought to be invisible to places connected with work – even if the connection with work is only temporal. Adopting Hubbard’s recent frame of analysis, they sought to ‘purify’ the space of the workplace and in doing so stigmatised the conduct of PVYW.<sup>139</sup> The ‘moral geography’ evident in the case corresponds with Hubbard’s findings that ‘an increasing body of geographical research has investigated the judgements people make on an everyday basis about what type of peoples, behaviours and embodied practices are acceptable in

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135 See especially:

An example given by Comcare, of the application of the test for compensation it proposes, illustrates the fine distinctions that test would entail and in so doing highlights its flaws. According to Comcare, an employee who was required by his or her employer to stay overnight in a hotel booked and paid for by the employer would be in the course of employment if and when the employee slipped in the shower (presumably on the basis that the employer encouraged or required the employee to be clean) and also would be in the course of employment if and when the employee slipped at breakfast or dinner in the hotel restaurant (presumably on the basis that the employer encouraged or required the employee to be fed). But, says Comcare, the employee would not be in the course of employment if and when the employee slipped in the hotel gymnasium unless the conditions of the employment were such that the employer expressly or impliedly encouraged or required the employee to be fit. Thus, the single overnight stay at the hotel would, on Comcare’s mode of analysis, be broken up into a series of discrete events each to be parsed separately. The event of an employee slipping in the shower after using the hotel gymnasium would appear to be one of especial difficulty.

*Comcare v PVYW* (2013) 250 CLR 246, 299–300 [153] (Gageler J).

136 Windholz, above n 7, 363.

137 Ibid 363 n 94.

138 Hubbard, ‘Sex Zones’, above n 43; Hubbard, *Cities and Sexualities*, above n 17, 64–5.

139 Hubbard, ‘Law, Sex and the City’, above n 15, 12–13.

which settings'.<sup>140</sup> Something only became offensive about PVYW's conduct because it was not done in private (conversely it could be understood as private conduct done at work). Feinberg argued that the workplace is a form of 'territory' that belongs to the employer: where offensive disruptions without consent are treated as violations warranting control.<sup>141</sup> That philosophical position appears to be essential to the reasoning of the majority of the High Court. It created a novel, layered space in a small motel room. At times the space was one of work and at other instances – momentarily or elongated when conduct does not accord with the interests of the employer<sup>142</sup> – the space was converted to a different realm.

If sex is not referable to a motel or hotel stay then it can be safely presumed that the court saw and thought of the home as the place for sex: the home being the private counterpoint-space. Hubbard has argued, however, that there is a 'mismatch between the imagery of domestic, privatized sex and its lived existence'.<sup>143</sup> Justice Gageler implicitly acknowledged this in his reasoning.<sup>144</sup> Indeed the scholarship of Hubbard and colleagues shows that there is no universal sexual space: rather there are the accepted and the 'inappropriate' spaces of and for sex.<sup>145</sup> Finally, the effect of this case is that PVYW's sexual citizenship is confined in space.<sup>146</sup> Embedded in the controversy are also questions of PVYW's rights to work and of safe work, matters we have not deeply explored. The case is, however, an example of PVYW, disguised and hidden through an identifier, being told that PVYW's sexual behaviour is contested and does not accord with the 'moral values underpinning the construction of the nation-state' and its notion of citizenship.<sup>147</sup>

## VII PVYW AND FEMINIST GEOGRAPHIES

While the focus of this article is on geographies of sex, it would be remiss not to draw out more explicitly the feminist geography also evident in this case, in its reporting, and particularly so in its aftermath. Aside from a notation in the introduction we have deliberately withheld the gender of PVYW, just as the gender of PVYW is not highlighted nor emphasised in any of the judgments we have analysed. Nevertheless it was well known that PVYW is a woman, and her lawyer now refers to her as 'Ms PVYW' in the news media.<sup>148</sup> Any reader only casually familiar with the case will know that PVYW is a woman because her

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140 Hubbard, 'Desire/Disgust', above n 13, 198.

141 Feinberg, above n 29, 24.

142 When characterised this way it is impossible not to recall *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

143 Hubbard, *Cities and Sexualities*, above n 17, 64.

144 *Comcare v PVYW* (2013) 250 CLR 246, 299 [151].

145 See, eg, Hubbard and Colosi, above n 16, 82; Hubbard, Matthews and Scoular, above n 42, 192.

146 Hubbard, 'Sex Zones', above n 43.

147 Ibid 53.

148 Grey, above n 85.

gender is highlighted, even trivialised, in the reporting of the case.<sup>149</sup> Perhaps it was because the respondent was de-identified, her identity kept private, that caused the Federal Government Minister Eric Abetz to claim that PVYW was a ‘libidinous claimant’ with a ‘spurious claim’<sup>150</sup> – accusations not borne out by the facts,<sup>151</sup> that deny the harm that the parties to the proceeding recognised that PVYW had suffered. They are claims that resemble the archaic and sexist views about the non-compensability, hysterical and doubted claims of mental harm: views that the High Court in the last decade confirmed as being outmoded.<sup>152</sup> Abetz’s claim also mirrors the critique highlighted by Munro that harm and deviancy are often treated as opposites.<sup>153</sup> On this view, by denying the legitimacy of PVYW’s claim Abetz stigmatises her actions as deviant, offensive or indecent.

Sexual historian, Dabhoiwala, who has charted the changes in attitudes to sex over a temporal scale of centuries, concludes that modern women are desexualised, and that what is most valued in women is ‘sexual ignorance and passivity ... respectable femininity’.<sup>154</sup> The expectation of women is that they are demure; certainly not with sexual desire. Vines, San Roque and Rumble make a broader point in the context of mental harm cases that women’s ‘emotional issues’, for instance the harm suffered by PVYW, be kept private and not enter the public domain, a domain where women still struggle to be believed.<sup>155</sup> When foisted into the public, however, including through the law, women are seen as unpredictable rather than rational,<sup>156</sup> and their affairs treated as objects of public attention.<sup>157</sup> For PVYW, implicit in the High Court judgment was that her sexual experience in the Nowra motel room was a private affair not subject to workers compensation laws, but the effect of the judgment, of the judging *in camera* and in the media, was to make the event a topic for widespread comment. Insofar as the controversy caused by the case brought sex to the fore as a basis for denial of

149 See, eg, Tony Wright, ‘Sex Injury Compo Bid Rebuffed by High Court over “Lack of Inducements”’, *The Sydney Morning Herald* (online), 30 October 2013 <<http://www.smh.com.au/federal-politics/political-news/sex-injury-compo-bid-rebuffed-by-high-court-over-lack-of-inducements-20131030-2wfju.html>>.

150 Eric Abetz, ‘Comcare Reform: Recognising the Health Benefits of Work’, *The Sydney Morning Herald* (online), 25 March 2015 <<http://www.smh.com.au/comment/comcare-reform-recognising-the-health-benefits-of-work-20150325-1m6n2p.html>>.

151 Grey, above n 85.

152 For a discussion of the state of the feminist critique on nervous shock particularly in light of the reasoning of the majority of judges in *Tame v New South Wales* (2002) 211 CLR 317, see Prue Vines, Mehera San Roque and Emily Rumble, ‘Is “Nervous Shock” Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia’ (2010) 18 *Tort Law Review* 9.

153 Vanessa E Munro, ‘Dev’l-in Disguise? Harm, Privacy and the *Sexual Offences Act 2003*’ in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, 2007) 1, 2.

154 Faramarz Dabhoiwala, *The Origins of Sex: A History of the First Sexual Revolution* (Oxford University Press, 2012) 354.

155 Vines, San Roque and Rumble, above n 152, 28.

156 Smart, above n 73, 91.

157 Morgan, above n 52, 98.

harm, it reflected the public/private dilemma of the political elite Henderson identified, who see the need to both moralise and disappear sex.<sup>158</sup>

On reflection, the consequences of PVYW's claim for compensation from her employer's insurance scheme, a scheme established for the purpose of protecting the safety of workers – the low cost and anonymous alternative to bringing a claim in tort – are that she is maligned in the media for making a claim that she was entitled to make and for which she was initially awarded, her harms are doubted, and her ordinary sexual conduct is presented as anything but ordinary, and rather as a subject of public fascination and controversy.<sup>159</sup> The legacy of the case for women is that their sexual desires are risky, their decisions about sex unpredictable, and the role of the law is to pass judgment on them.

## VIII CONCLUSION

The facts of this case provided a legally complex challenge to the application of the principles surrounding workers compensation in the 'interval' context, as evidenced by the opposing views and conclusions reached at each stage of the case. The AAT and the High Court majority's response to this challenge was to create a distinctly two-limbed, and potentially three-limbed, test based on the *Hatzimanolis* principle. Future employee claimants will be required to show: if their injury was caused through an activity, that the employer induced or encouraged them to engage in that activity; or if their injury was caused at a particular place, that their employer induced or encouraged them to be at that place, and that the injury is referable to the place. One can appreciate that the AAT and the High Court majority felt the need to bring clarity to the law, and that their revision of the *Hatzimanolis* principle, on its face, seemingly does bring clarity to the law. But as this case and our analysis shows, it may in fact be that the High Court has attempted to draw a bright line where one cannot be drawn. As we have discussed, it may be very difficult in future cases to separate out the contributions of the relevant 'activity' and 'place' to the injury, and further, to connect the activity and/or place with the employer's inducement or encouragement.

Whilst the law may be in a position less clear than the AAT and the High Court majority intended or believed, the motivation behind their conclusions is quite plain: casual sex during a hotel stay should not (in their view) overlap with any obligations an employer owes to their employees. The clear moral judgment made of PVYW's sexual conduct results in its 'invisibilisation' and the removal of PVYW's injuries from the sphere of what is compensable when sustained by an employee during an 'interval' within an overall period of work. Conversely, the approaches of the Federal Court judges and of Bell and Gageler JJ in the

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158 Emma Henderson, 'Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalisation Debates' (1996) 20 *Melbourne University Law Review* 1023, 1031 ff. We thank an anonymous referee for alerting us to this work.

159 Hubbard, Matthews and Scoular, above n 42, 185.

High Court was to attempt to put to one side any moral judging, and to render the nature of the activity PVYW engaged in irrelevant to their reasoning.

The modified *Hatzimanolis* principle may be difficult to apply in future ‘interval’ cases; however, the express intention of the court to narrow the types of injuries that are compensable may be effective to act as a signal to employee claimants against bringing claims in the first place. Furthermore, the socio-political aftermath of the case has seen calls for reform to workplace compensation to further confine entitlements so that cases like PVYW’s never make it to court in the first instance.<sup>160</sup> The media response has been to ridicule what is a disbelieved case that has reached levels of infamy, while the government further stigmatised PVYW by referring to the claim as an example of ‘rorting’ and ‘malingering’.<sup>161</sup>

The legal effect of the High Court judgment has been to create a complication in the law, where the borders between places and activities of work lie, are resolved case-by-case. Undoubtedly the test will be refined particularly when more sedate factual scenarios are presented to the court for resolution. Until that refinement comes, we are left with moral and sexual legal geography around and within the work-funded motel room, where ‘normal’ activities do not include sex. The space is either simultaneously asexual or a danger. In Hubbard’s words it is a place where ‘sexual dissidents are ... condemned to a life which oscillates wildly between pleasure/danger as they move between public/private’.<sup>162</sup>

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160 Noel Towell, ‘Public Service Compo Culture in Government’s Sights’, *The Canberra Times* (online), 29 September 2014 <<http://www.canberratimes.com.au/national/public-service/public-service-compo-culture-in-governments-sights-20140929-10ncyf.html>>; see Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 sch 1, which proposes changes to eligibility requirements but is not particularly concerned with the events of this case.

161 Noel Towell, ‘Public Servants Stripped of Compo Rights in Comcare Crackdown’, *The Canberra Times* (online), 25 March 2015 <<http://www.canberratimes.com.au/national/public-service/public-servants-stripped-of-compo-rights-in-comcare-crackdown-20150325-1m7exn.html>>.

162 Hubbard, ‘Sex Zones’, above n 43, 66.