Contracts against Public Policy: Contracts for Meretricious Sexual Services

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Abstract

The law has historically held that contracts for the provision of meretricious sexual services — providing sexual services for reward — are contrary to public policy and are therefore void and unenforceable. In *Ashton v Pratt* (No 2) [2012] NSWSC 3 (16 January 2012), Brereton J held that this was still the position in 2012. However, this article posits that Brereton J's holding was arguably incorrect, being premised upon: (a) a misapplication of the principles to be applied in determining whether a contract is contrary to public policy, and whether public policy requires that contract be unenforceable; and (b) an incorrect appreciation as to the present dictates of public policy in this area. Seismic changes to the legislative and social landscape in New South Wales ('NSW'), particularly over the past 30 years, have heralded a substantial departure from the 18th and 19th century position as to the relative immorality of providing sexual services for reward. As such, at least in some contexts, and at least in NSW, greater social harm now arises from maintaining the historical prohibition on the enforceability of such contracts, as opposed to permitting such contracts to be curially enforced.

I Introduction

In *Ashton v Pratt (No 2)*,[1] Ms Ashton brought a claim against the estate of the late Mr Richard Pratt, the successful businessman and chairman (until his death) of packaging and logistics giant Visy Industries. Ms Ashton's claim revolved around a central allegation that in November 2003, in consideration for her not returning to the escort industry but providing services (non-exclusively) to Mr Pratt as his mistress, Mr Pratt orally promised to Ms Ashton to: (a) settle $2.5 million on trust for each of her two sons; (b) pay her an annual allowance of $500 000; (c) pay her an annual allowance of up to $36 000 for the purposes of rent or, alternatively, buy her a house in the eastern suburbs of Sydney; and (d) pay her $30 000 annually for expenses, particularly travel expenses. Subsequent to these oral promises, Mr Pratt did pay to Ms Ashton not insubstantial sums of money, and partly purchased for her a car and other items. However, the promises alleged by Ms Ashton largely went unfulfilled.

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1 [2012] NSWSC 3 (16 January 2012) ('*Ashton (No 2)*').

Upon Mr Pratt's death in April 2009, he had not settled any money on trust for Ms Ashton's children, nor had he paid anything to Ms Ashton after early 2005.

At first instance, Brereton J held that Mr Pratt had made the above promises to Ms Ashton in November 2003.[2] Notwithstanding, his Honour dismissed Ms Ashton's claims. His Honour's primary reason for rejecting Ms Ashton's claim for breach of contract was that the parties had not, by their conduct, intended to give rise to legal relations.[3] However, Brereton J also held in obiter dicta that had any legally binding contract come into existence, such a contract, being one for the provision of meretricious sexual services, would have been contrary to public policy and, therefore, illegal and unenforceable.[4] This holding equally defeated (among other reasons) Ms Ashton's claim in estoppel, as that doctrine did not afford a means for circumventing the dictates of public policy.[5]

On appeal, Brereton J's orders were upheld.[6] Relevantly, the New South Wales ('NSW') Court of Appeal deliberately refrained from commenting on the holding that any contract between Ms Ashton and Mr Pratt on the terms alleged was contrary to public policy and unenforceable.[7] This reflected the fact that Mr Pratt's representatives did not place any reliance on appeal on Brereton J's holding in this regard, consistent with the approach taken at trial (where Mr Pratt's representatives did not plead that any contract was unenforceable for being contrary to public policy, nor was any such submission advanced by Mr Pratt's representatives, notwithstanding that Brereton J drew the matter to the parties' attention and invited submissions on the issue).[8]

Despite historical precedent in support of the conclusion reached by Brereton J, it is contended that his Honour's obiter dicta remarks as to the unenforceability of contracts for meretricious sexual services were arguably incorrect. Whatever may have been the position historically, in the 21st century, public policy does not appear to demand that contracts for the provision of sexual services for reward be ineluctably held to be unenforceable. This is true at least in NSW, and potentially is the same in other states and territories in Australia with a similar legislative landscape relating to prostitution and the operation of brothels (namely, the Australian Capital Territory ('ACT'), Queensland and Victoria).

This article posits that in *Ashton (No 2)*, Brereton J's conclusion was premised upon: (a) a misapplication of the principles that determine whether the enforcement of a contract is contrary to public policy, and when public policy can legitimately subordinate private rights in the name of the public interest; and (b) an incorrect determination, in the present day, and in light of the changes to the

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2 Ibid [28], [87].
3 Ibid [36], [88].
4 Ibid [52].
5 Ibid [58].
6 *Ashton v Pratt* (2015) 88 NSWLR 281 (Bathurst CJ, McColl and Meagher JJA).
7 Ibid 317 [218].
8 *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [37]. Evidently, the counsel appearing for the estate of Mr Pratt (Mr R Richter QC, Mr N J Clelland SC and Mr M S Henry at first instance and Mr M S Henry SC and Ms J L Roy on appeal) did not think that the head of public policy historically denouncing as unenforceable contracts for the provision of meretricious sexual services still prevailed.

legislative and social landscape that had occurred over the past 30 years, that public policy in NSW still demanded that contracts for the provision of sexual services for reward be held unenforceable. When these matters are accounted for, real doubt is cast over the conclusion reached by Brereton J.

Indeed, contrary to the conclusion arrived at by Brereton J, and at least in NSW, it is argued in this article that contracts for meretricious sexual services are not innately contrary to public policy. As such, courts in NSW should enforce and grant relief in respect of those contracts, at least so far as actions are brought on them by the service provider for breach of contract or to recover remuneration (and other benefits promised) for sexual services rendered. This position may also prevail in the ACT, Queensland and Victoria. However, it is beyond the scope of this article to examine closely each of these jurisdictions and their legal frameworks concerning the commercial supply of sexual services, which varies and includes, in some states, licensing regimes,[9] a point that may affect the reasoning that applies to the position as it exists in NSW.[10] Accordingly, this article focuses on the position in NSW, with only passing reference made to these other states.

Whether public policy prevents the enforceability of such contracts beyond the above circumstances is less clear, and is an issue further explored below. However, at a minimum, it is draconian to maintain the historical prohibition on the enforceability of such contracts in response to a suit brought by the service provider for breach of contract for services rendered. Maintaining the prohibition in such circumstances condones the exploitation of such persons and is a disproportionate and unjust response to any perceived immorality associated with the provision of sexual services for reward. As such, in light of the current legislative and social landscape in NSW, the maintenance of the historical prohibition sees greater social harm done than arises from a limited recognition of the enforceability of such a contract.

This article is divided into the following sections. Part II of this article traverses the law concerning the meaning of 'public policy', how that policy is to be ascertained, and the circumstances that need to exist so as to justify public policy rendering unenforceable an otherwise lawful contract. Part III then analyses the historical head of public policy regarding contracts that promote sexual immorality, either directly (for example, contracts for the provision of meretricious sexual services or prostitution) or indirectly (for example, contracts facilitating prostitution). Part IV examines the reasoning in *Ashton (No 2)* in light of the matters raised in Parts II and III. Part V concludes the article.

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9 See, eg, *Sex Work Act 1994* (Vic) pt 3.

10 For instance, the effect of such a regime may mean that only contracts involving a licensed sex worker can be curially enforced. This author expresses no view about this matter, the resolution of which is beyond the scope of this article.

II Contracts Contrary to Public Policy

A *The Notion of Public Policy and the Striking Down of Contracts as Contrary to Public Policy*

The notion of 'public policy' is inherently a mutable concept. As Dixon J stated in *Stevens v Keogh*, what is contrary to public policy is something that varies 'according to the state and development of society and conditions of life in a community'.[11] The most comprehensive explication of the concept is that offered by Jordan CJ in *Re Morris (deceased)*,[12] which has been judicially endorsed on numerous subsequent occasions.[13] In *Re Morris*, Jordan CJ came to consider the notion of 'public policy' in considering the validity of a deed by which a widower had, prior to marriage, purportedly promised not to make any claim on the deceased's estate pursuant to the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW). While that context required discerning the policy of the statute under consideration and, in particular, whether the powers of the Court to make orders for the proper maintenance of another out of a deceased's estate could be ousted by a private agreement, Jordan CJ's remarks about the notion of 'public policy' are nonetheless applicable to the present context, notwithstanding the different task under assessment in this article. On the topic of 'public policy', Jordan CJ stated:

> the phrase 'public policy' appears to mean *the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare*; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest. 'The 'public policy' which a court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce. The court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists': *Wilkinson v Osborne* [(1915) 21 CLR 89, 97]. … *Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of the time'* … New heads of public policy come into being, and old heads undergo modification. … *As a general rule, it*

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11 (1946) 72 CLR 1, 28.

12 (1943) 43 SR (NSW) 352 ('*Re Morris*').

13 See *Seidler v Schallhofer* [1982] 2 NSWLR 80, 87–8 (Hope JA) ('*Seidler*'), which usefully collects a number of other older authorities on the same point, including *Rodriguez v Speyer Brothers* [1919] AC 59, 79 (Viscount Haldane) and *Evanturel v Evanturel* (1874) LR 6 PC 1, 29 (Sir Colville); *A v Hayden (No 2)* (1984) 156 CLR 532, 558 (Mason J) ('*Hayden (No 2)*'); *R v Young* (1999) 46 NSWLR 681, 700 [95]–[96] (Spigelman CJ); *Taylor v Burgess* (2002) 29 Fam LR 167, 172 [19] (Barrett J); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 492–3 [90]–[92] (Campbell J); *Richards v Kadian* (2005) 64 NSWLR 204, 223–4 [80] (Beazley JA, Hodgson JA and Stein AJA agreeing); *Australian Securities and Investments Commission v Mercorella (No 3)* (2006) 58 ACSR 40, 57–8 [98] (Mansfield J); *Moyes v J & L Developments Pty Ltd (No 2)* [2007] SASC 261 (11 July 2007) [40] (Debelle J). See also *Maxim Nordenfelt Guns & Ammunition Co Ltd v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ) ('*Nordenfelt*'); *Andrews v Parker* [1973] Qd R 93, 102–4 (Stable J) ('*Andrews*').

> *may be said that any type of contract is treated as opposed to public policy if the practical result of enforcing a contract of that type would generally be regarded as injurious to the public interest*: *Fender v St John-Mildmay* [[1938] AC 1, 13–14, 18].[14]

In applying notions of public policy to decide the enforceability of a contract, a court should only elect to refuse to enforce a contract on such a ground in the clearest of circumstances. As Mason J stated in *Hayden (No 2)*:

> The refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of *the subordination of private right to public interest*. The problem is one of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public interest amounting to public policy. *The difficulties in ascertaining the existence and strength of an identifiable public interest to which the courts should give effect by refusing to enforce a contract are so formidable as to require that they 'should use extreme reserve in holding such a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest'*, to use the words of Asquith LJ in *Monkland v Jack Barclay Ltd* [[1951] 2 KB 252, 265 ('*Monkland*')].[15]

The principle espoused by Asquith LJ in *Monkland* (cited by Mason J in *Hayden (No 2)*), and the extreme caution in approaching the question of what public policy demands, has been affirmed subsequently.[16] Indeed, the invocation of 'public policy' in order to invalidate the enforceability of a contract has not escaped judicial criticism. In *Richardson v Mellish*, Burrough J described reliance upon notions of public policy as 'a very unruly horse … [that] may lead you from the sound law'.[17] In *Nordenfelt*, Lord Watson stated that '[a] series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal'.[18] Equally in *Janson v Driefontein Consolidated Mines Ltd*, Lord Halsbury LC stated that the expression 'against public policy' was not one that explained itself.[19]

The above remarks have not ousted judicial invocation of the notion of public policy in deciding the enforceability of a contract. Nonetheless, such remarks add to

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14 *Re Morris* (1943) 43 SR (NSW) 352, 355–6 (emphasis added) (citations omitted).

15 (1984) 156 CLR 532, 559 (emphasis added). As noted by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121, it is in the interests of society, and not for the defendant's sake, that the law refuses to enforce an immoral or illegal contract.

16 *Edgley Mutual & General Investment Services Pty Ltd v Eeklo Pty Ltd* (1988) 13 ACLR 179, 181 (Rogers CJ Comm D) ('*Edgley*'); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 493 [92] (Campbell J); *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139, 154–5 [73]–[77] (Templeman J, Parker, Wheeler and Pullin JJ agreeing); *Richards v Kadian* (2005) 64 NSWLR 204, 223–4 [80] (Beazley JA, Hodgson JA and Stein AJA agreeing); *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193, 216 [80] (Blue J, Lovell and Hinton JJ agreeing). See also *Nelson v Nelson* (1995) 184 CLR 538, 595–6 (Toohey J).

17 (1824) 2 Bing 229, 252; 130 ER 294, 303.

18 [1894] AC 535, 553.

19 [1902] AC 484, 491.

the caution that a court should adopt in resorting to notions of public policy to determine the enforceability of a contract and, relatedly, in applying automatically, without assessment or consideration, previous decisions holding that certain contracts are contrary to public policy.

Indeed, in any assessment of whether a contract is contrary to public policy, due regard must also be had to the countervailing and long-established public policy that contracts freely entered into by consenting adults should be enforced.[20] While the sanctity of contract is not at the zenith it enjoyed in the 19th century,[21] it is still undeniably an important facet of the common law and lies at the heart of modern commerce.[22] Likewise, there is a well-recognised public policy of 'preventing injustice … [by] the enrichment of one party at the expense of [another]'.[23] As such, in invoking public policy to deny the enforceability of a contract, such a conclusion must reflect a balance between the public interest in refusing enforcement and the public interest in holding persons to their bargains and preventing the enrichment of one party at the expense of another. As Diplock LJ stated in *Hardy v Motor Insurers' Bureau*:

> courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting that right ... which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right …
>
> The court's refusal to assert a right, even against the person who has committed the anti-social act, will depend not only on the nature of the anti-social act but also on the nature of the right asserted. *The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced*.[24]

That dictum was cited with approval by Needham J in *Nichols v Nichols*,[25] as well as by Stable J in *Andrews*,[26] both being cases about whether potentially immoral contracts, pertaining to and regulating existing states of extramarital cohabitation, were enforceable.

Before leaving this topic, it should be noted that the invalidation of a contract by a court on the grounds of public policy is but one part of the broader defence of illegality. This article does not seek to rationalise the array of authorities regarding what it means for a contract to be characterised as illegal,[27] and the consequences of

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20 See, eg, *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 (Sir Jessel MR); *Cattanach v Melchior* (2003) 215 CLR 1, 86 [235] (Hayne J).

21 *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 (21 December 2011) [86] (Young JA, Beazley and Basten JJA agreeing).

22 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 275 [297] (Allsop CJ, Besanko and Middleton JJ agreeing).

23 *Nelson v Nelson* (1995) 184 CLR 538, 597 (Toohey J).

24 [1964] 2 QB 745, 767–8 (emphasis added) ('*Hardy*').

25 (1986) 4 BPR 97262, 9245 ('*Nichols*').

26 [1973] Qd R 93, 106. Diplock LJ's dictum in *Hardy* [1964] 2 QB 745, 767–8 has also been cited with approval in *Gollan v Nugent* (1988) 166 CLR 18, 34–5 (Brennan J) and *Kavurma v Karakurt* (Unreported, Supreme Court of New South Wales, Santow J, 7 November 1994) 20.

27 See, eg, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413 (Gibbs ACJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23] (French CJ, Crennan and

that conclusion. Given the ways in which a defence of illegality can arise, the law pertaining to the area is complex, with courts having historically struggled to identify a unifying rubric as to when a defence of illegality should be made out.[28] However, it is to be appreciated that in this article, the invalidation of the contracts under consideration is not because such contracts (either their formation, performance or otherwise) are expressly or impliedly contrary to statutory prohibitions or the public policy embodied in such provisions. Instead, such contracts are said to be contrary to a freestanding concept of public policy linked to notions of morality. As such, most of the authorities pertaining to the defence of illegality are not of direct assistance, since they concern the construction of statutory provisions and the attendant determination of whether the enforcement of the contract under scrutiny (or the grant of relief in respect of that contract) is consistent with those statutory provisions.

Nevertheless, it should be noted that two central themes have emerged from the recent jurisprudence on the defence of illegality and tie in with what has already been set out above. The first theme is the need for coherence in the law.[29] As Lord Toulson SCJ expressed the matter in the recent decision of *Patel v Mirza* (following earlier authority of the High Court of Australia): 'the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand'.[30] As such, and in the field of public policy under consideration in this article, it is necessary for the dictates of any head of public policy to keep pace with legislative developments, so as to maintain coherence in the law. This point will be revisited throughout the article in analysing whether legislative developments have impliedly effaced (in whole or in part) the historical prohibition against the enforcement of contracts for the provision of sexual services for reward. The second theme is the notion of proportionality. This, again, has already been touched upon above in discussing Diplock LJ's dictum in *Hardy*.[31] It will also be revisited throughout the article in analysing the correctness of a blanket ban on enforcing (or granting relief in respect of) contracts concerning the provision of sexual services for reward.

Kiefel JJ); *Patel v Mirza* [2017] AC 467, 474 [3] (Lord Toulson SCJ, with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJJ agreed).

28 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 231–2 (Kirby J); *Patel v Mirza* [2017] AC 467, 474–6 [3]–[8] (Lord Toulson SCJ, with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJJ agreed); A Burrows, 'Illegality as a Defence in Contract' in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters, 2016) 435.

29 See the recent decisions of *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23] (French CJ, Crennan and Kiefel JJ); *Gnych v Polish Club Ltd* (2015) 255 CLR 414, 434 [72] (Gageler J). See also *Nelson v Nelson* (1995) 184 CLR 538, 611 (McHugh J); *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 229–230 (McHugh and Gummow JJ).

30 *Patel v Mirza* [2017] AC 467, 499 [99] (with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJJ agreed).

31 [1964] 2 QB 745, 767–8 and quote accompanying above n 24. In addition to that dictum, see also *Nelson v Nelson* (1995) 184 CLR 538, 612–13 (McHugh J); *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 230 (McHugh and Gummow JJ), 250–1 (Kirby J); *Patel v Mirza* [2017] AC 467, 504–5 [120] (Lord Toulson SCJ, with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJJ agreed).

B *Determining What Public Policy Requires*

In light of the mutable nature of public policy, care must be taken in automatically applying previous decisions declaring certain contracts as being contrary to public policy. This is particularly so when regard is had to the extent to which what is considered contrary to public policy has changed over time, a point illustrated by the following four matters concerned with related areas of morality.

First, separation deeds between husband and wife were once regarded as contrary to public policy, however this is no longer the case.[32] In *Besant v Wood*, Jessel MR stated that historically it was supposed that a civilised country could no longer exist if the courts enforced separation deeds. However, as Jessel MR stated in that decision, judicial opinion changed 'and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court'.[33] Likewise, in the United Kingdom ('UK') Supreme Court decision of *Granatino v Redmacher*, the plurality stated: 'the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away'.[34]

In Australia, the existence of pt VIIIA of the *Family Law Act 1975* (Cth), concerning the making of financial agreements pertaining to the circumstances in which a marriage breaks down, and pt VIIIAB div 4 of the *Family Law Act 1975* (Cth) in relation to financial agreements between de facto couples, is the strongest evidence that this head of public policy no longer exists. Adopting the principle of coherence espoused in High Court authorities, this head of public policy can no longer stand in light of such statutory provisions, to say nothing about earlier authorities holding as much, as cited above.

Second, contracts between unmarried persons to cohabit were historically treated as unenforceable, being contrary to public policy by promoting immorality.[35] Thus, in *Fender v St John-Mildmay*, Lord Wright stated: 'The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married'.[36] However, such a head of public policy has withered and disappeared. Statutes now provide that unmarried persons may enter into a domestic relationship agreement or termination agreement, which is enforceable in accordance with the law of contract.[37] As Mahoney JA stated in *Wallace v Stanford*: 'There was a time when the law did not recognise cohabitation; it saw cohabitation

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32 *Re Morris* (1943) 43 SR (NSW) 352, 356 (Jordan CJ).

33 (1879) 12 Ch D 605, 620.

34 [2011] 1 AC 534, 558 [52] (Lord Phillips P, Lord Hope DP, and Lords Rodger, Walker, Brown, Collins and Kerr SCJJ). See also at 574 [125] (Lord Mance SCJ); *Mohamed v Mohamed* (2012) 47 Fam LR 683, 693 [50] (Harrison AsJ).

35 *Benyon v Nettlefold* (1850) 3 Mac & G 94; 42 ER 196; *Ayerst v Jenkins* (1873) LR 16 Eq 275.

36 [1938] AC 1, 42.

37 See *Family Law Act 1975* (Cth) pt VIIIAB div 4; *Domestic Relationship Act 1994* (ACT) pt 4; *Property (Relationships) Act 1984* (NSW) ss 45–46; *De Facto Relationships Act 1991* (NT) ss 44–5; *Property Law Act 1974* (Qld) s 270; *Domestic Partners Property Act 1996* (SA) pt 2; *Relationships Act 2006* (Tas) pt 6; *Relationships Act 2008* (Vic) ss 35A–36; *Family Court Act 1997* (WA) pt 5A div 3.

as involving illegality or irregularity and refused to provide for the incidents of it. This is no longer the law'.[38] Equally, the editors of *Chitty on Contracts* state: 'Extra-marital cohabitation is obviously an area where values change and the older authorities clearly reflect a marriage morality which is out of tune with contemporary mores'.[39]

Third, the enforceability of marriage brokerage contracts has wavered over time. Until the 18th century, a contract by which a person procured the marriage of another in return for consideration was enforceable at law.[40] However, equity developed to prevent the enforcement of these contracts. Thus, a contract by which a marriage bureau undertook to make efforts to find a spouse for a client was held in *Hermann v Charlesworth* to be invalid because it involved 'the introduction of the consideration of a money payment into that which should be free from any such taint'.[41]

However, the continuing validity of this principle must be doubted. Atiyah stated in 1995 in *An Introduction to the Law of Contract*: 'it is hard to see what is wrong with [these contracts] in modern times'.[42] That passage is cited with approval in *Chitty on Contracts*.[43] Equally, Peel in *Treitel on the Law of Contract* states: 'The harmful tendencies of such contracts seem to be no greater than those of contracts between "computer dating" agencies and their clients; and it has not been suggested that such contracts are contrary to public policy'.[44] Indeed, today's society not only has dating agencies for unmarried people, there are agencies promoting and arranging extramarital affairs (for example, Ashley Madison). To suggest that the contracts between the clients of those agencies and the agencies themselves are unenforceable would be a highly surprising proposition, and incongruent with the present-day commercial world (noting that the provision of such services is perfectly legal and the common law's longstanding policy of upholding contracts freely entered into).[45]

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38 (1995) 37 NSWLR 1, 7 (citations omitted). See also *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [42]. This followed the doubts about the unenforceability of agreements to cohabit expressed in *Seidler* [1982] 2 NSWLR 80, 99 (Hutley JA, with whom Hope and Reynolds JJA agreed); *Re Field and the Conveyancing Act* [1968] 1 NSWR 210, 214 (Street J).

39 H Beale et al (eds), *Chitty on Contracts* (Sweet & Maxwell, 33rd ed, 2018) vol 1, 1302 [16-099]. See also R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 4th ed, 2017) 105–6 [6.22]; I J Hardingham, 'The Non-Marital Partner as Contractual Licensee' (1980) 12(3) *Melbourne University Law Review* 356, 368, quoting *Marvin v Marvin*, 18 Cal 3d 660, 683–4 (1976) ('*Marvin*'); S H Hosseini, *Restrictions on Contractual Liberty: A Comparative Study of Islamic (Shi'a) Jurisprudence and Anglo-Australian Common Law, with some References to the Civil Code of Iran* (PhD Thesis, University of New South Wales, 1997) 259–61 [6.53]–[6.56]; J L Dwyer, 'Immoral Contracts' (1977) 93(3) *Law Quarterly Review* 386.

40 See, eg, *Goldsmith v Bruning* (1700) 1 Eq Ca Abr 89; 21 ER 901.

41 [1905] 2 KB 123, 130.

42 P S Atiyah, *An Introduction to the Law of Contract* (Oxford University Press, 5th ed, 1995) 323.

43 Beale et al (eds), above n 39, 1304 [16-102].

44 E Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 14th ed, 2015) 553–4 [11-042]. See also Buckley, above n 39, 104–5 [6.19]–[6.20].

45 Although noted is the possible argument raised by Buckley that the principle in *Hermann v Charlesworth* [1905] 2 KB 123 may be distinguishable from application to modern dating agencies on the basis that such agencies arrange introductions to friendships and associations as opposed to marriage: Buckley, above n 39, 105 [6.20]. However, Buckley opines that the preferable argument is that *Hermann v Charlesworth* does not reflect contemporary public policy.

Fourth, contracts prejudicial to the status of marriage have historically been held to be contrary to public policy and unenforceable. However, as the authors of the Australian edition of *Cheshire and Fifoot's Law of Contract* state, the passage of the *Family Law Act 1975* (Cth) (introducing no-fault divorce) and s 111A of the *Marriage Act 1961* (Cth) (abolishing the action of breach of promise to marry) reflect a shift in public opinion that 'raises the question of whether this head of public policy should be considered moribund and extinct'.[46]

In addition to the above, and on the topic of social vices or immoral conduct, gambling contracts were, historically, unenforceable.[47] Nowadays, gambling is not illegal. It is, instead, regulated,[48] and while unlawful gambling contracts are unenforceable, lawful gambling contracts are enforceable.[49] While this change in the law has occurred not because of curial intervention, the change in legislative backdrop undeniably reflects an evolution and relaxation in social mores and contemporary values throughout the 20th century and into the 21st century. It is evidence of the change that has occurred in society as to what is, and is no longer, considered to be contrary to the welfare of the state.

Discovering at any given moment the status of any public policy may not be an easy task. This does not, however, absolve the courts from undertaking the task. As Sir Percy Winfield wrote in his 1928 article in the *Harvard Law Review*:

> the better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so. The judges are bound to take notice of it and of the changes which it undergoes, and it is immaterial that the question may be one of ethics rather than of law. The basis for their decision is 'the opinions of men of the world, as distinguished from opinions based on legal learning'. Of course it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is the judges themselves, assisted by the bar, who here represent the highest common factor of public sentiment and intelligence.[50]

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46 N C Seddon and R A Bigwood, *Cheshire and Fifoot's Law of Contract* (LexisNexis, 11th Australian ed, 2017) 1014 [18.26] (citations omitted). See also J W Carter, *Contract Law in Australia* (LexisNexis, 7th ed, 2018) 568 [25.33].

47 See *Gaming Act 1892* (Imp) c 9, s 1; *Gaming and Betting Act 1912* (NSW) s 16.

48 See, eg, in the ACT: *Unlawful Gambling Act 2009* (ACT); *Casino Control Act 2006* (ACT); in NSW: *Unlawful Gambling Act 1998* (NSW); *Totalizator Act 1997* (NSW); *Casino Control Act 1992* (NSW); in the Northern Territory: *Gaming Control Act 2005* (NT); *Unlawful Betting Act 1989* (NT); in Queensland: *Casino Control Act 1982* (Qld); *Wagering Act 1998* (Qld); in South Australia: *Casino Act 1997* (SA); *Lottery and Gaming Act 1936* (SA); in Tasmania: *Gaming Control Act 1993* (Tas); *TT-Line Gaming Act 1993* (Tas); in Victoria: *Casino Control Act 1991* (Vic); *Gambling Regulation Act 2003* (Vic); in Western Australia: *Betting Control Act 1954* (WA); *Casino Control Act 1984* (WA).

49 See, eg, in the ACT: *Unlawful Gambling Act 2009* (ACT) s 47; *Casino Control Act 2006* (ACT) s 116; in NSW: *Unlawful Gambling Act 1998* (NSW) s 56; *Casino Control Act 1992* (NSW) s 4(4); *Totalizator Act 1997* (NSW) s 8; in the Northern Territory: *Unlawful Betting Act 1989* (NT) s 4; in Queensland: *Casino Control Act 1982* (Qld) s 117; in South Australia: *Lottery and Gaming Act 1936* (SA) s 50; in Tasmania: *Gaming Control Act 1993* (Tas) s 8.

50 P H Winfield, 'Public Policy in the English Common Law' (1928) 42(1) *Harvard Law Review* 76, 97 (citations omitted).

In *Seidler*, Hope JA set out the sources a judge can have regard to in order to inform himself or herself as to the current status of public policy, which includes: (a) statues, both of the Commonwealth and the State Parliaments; (b) other decisions of judges; and (c) publicly available information, including Law Reform Commission reports (and the like), statements in Parliaments, literature, and publications in newspapers.[51] In *Hickin v Carroll (No 2)*, Kunc J included treaties and international agreements as material able to be drawn upon in order to determine the present status of a head of public policy, although such sources were said to be of lesser influence than legislative and common law developments.[52]

The determination as to the content of public policy is to be made at the time the court[53] is asked to enforce the contract.[54] That is to occur using the above sources and materials. Importantly, the term 'public policy' is not to be equated with the court being invested with a roving commission to declare contracts bad as being against idiosyncratic precepts of what is expedient for, or what would be beneficial or conducive to, the welfare of the state.[55]

III Contracts Promoting Sexual 'Immorality'

The law has, historically, held unenforceable contracts that promote sexual 'immorality' either directly or indirectly.[56] This distinction between direct and indirect promotion of sexual immorality will be used to divide the discussion in this Part — setting aside the difficulty of defining sexual 'immorality', which is addressed further below in Part IIID.

A *Contracts Indirectly Promoting Sexual Immorality*

Dealing with those cases concerning the indirect promotion of sexual immorality, the seminal case is *Pearce v Brooks*, where the plaintiff knowingly hired a brougham (a horse-drawn carriage) to a prostitute for the use by her professionally — to meet and provide services to clients in the brougham.[57] A suit to recover the hire fees was refused. Chief Baron Pollock stated: 'any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied'.[58] Chief Baron Pollock held that no distinction could be drawn between an illegal and immoral purpose. There are other similar historical cases:

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51 [1982] 2 NSWLR 80, 89–90.

52 [2014] NSWSC 1059 (6 August 2014) [119].

53 In *Coral Leisure Group Ltd v Barnett* [1981] ICR 503, 507, Browne-Wilkinson J (Messrs Clement-Jones and Hughes agreeing) stated that changes to public policy were to be undertaken by either the Parliament or the higher courts, as opposed to statutory tribunals.

54 *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 745 [359] (Campbell JA, Giles and Whealy JJA agreeing).

55 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 491 (Lord Halsbury LC); *Wilkinson v Osborne* (1915) 21 CLR 89, 96 (Isaacs J); *Giles v Thompson* [1993] 3 All ER 321, 335 (Steyn LJ).

56 Peel, above n 44, 554–5 [11-043]–[11-044].

57 (1866) LR 1 Ex 213.

58 Ibid 217.

(i) In *Girardy v Richardson*, a landlord let a room knowing it would be used for prostitution.[59] An action for the rent was refused by Lord Kenyon: 'the contract upon which it was attempted to be sustained was *contra bonos mores* [against good morals] and therefore could not support an action'.[60]

(ii) In *Bowry v Bennett*, a vendor was refused relief in a suit for the price of clothes supplied to a prostitute to enable her to perform her trade, with the seller expecting to receive his price from the profit resulting from that trade.[61]

(iii) In *Appleton v Campbell*, Abbott CJ stated: '[i]f a person lets a lodging to a woman, to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied. … [I]f this place was used for immoral purposes, the plaintiff cannot recover'.[62]

(iv) In *Smith v White*, a lessor sued for outstanding rent payable by a brothel operator.[63] Vice-Chancellor Kindersley stated, in refusing the action, that 'it appears to me that this claim arises just as much out of the immoral contract, and is just as much affected by the taint of immorality as a claim for rent'.[64]

(v) In *Upfill v Wright*, the plaintiff let a flat to a woman whom he knew was the mistress of a man and therein assumed that the rent would come through her being a kept woman.[65] Justice Darling, in refusing the claim for rent, stated that the flat was let to the defendant for the purposes of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there.[66] Justice Darling reasoned that since fornication was clearly a sin and immoral (and still an offence in ecclesiastical courts),[67] and the landlord had participated in this illegal or immoral act, no action for the rent could lie. Justice Bucknill concurred in a separate judgment.[68]

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59 (1793) 1 Esp 13; 170 ER 265.
60 Ibid 13; 265.
61 (1808) 1 Camp 348; 170 ER 981. Although compare to that case the decision in *Lloyd v Johnson* (1798) 1 Bos & Pul 340; 126 ER 939, where the plaintiff sued to recover from the defendant amounts owed for washing done for the defendant. The items washed by the plaintiff included dresses used by the defendant to allure men to sleep with her and nightcaps for her clients. Notwithstanding the 'immoral' use to which some of the items had been put, the claim for unpaid washing was upheld. Buller J remarked: 'This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the Defendant to an improper purpose and which were not'.
62 (1826) 2 C & P 347, 347–8; 172 ER 157, 157.
63 (1866) LR 1 Eq 626.
64 Ibid 630–1.
65 [1911] 1 KB 506.
66 Ibid 510.
67 Ibid 511.
68 Ibid 512–3.

B *The Present Day Status of the Law Pertaining to Contracts Indirectly Promoting Sexual Immorality*

Each of the cases referred to in Part IIIA above cannot be considered good law today, at least not in NSW. This is because the public policy in those cases is outdated. Analysing the types of sources referred to in *Seidler*, this conclusion is supported and illustrated by the following three points.

First, since 1995 brothels have been legal in NSW. This was facilitated by the passage of the *Disorderly Houses Amendment Act 1995* (NSW). This Act inserted s 580C into the *Crimes Act 1900* (NSW),[69] which abolished the common law offence of keeping a common bawdy house or brothel.[70] Equally, the Act amended s 15 of the *Summary Offences Act 1988* (NSW),[71] to make it no longer an offence for owners and managers of brothels to live off the earnings of an employed prostitute.

However, critically, the *Disorderly Houses Amendment Act 1995* (NSW) amended the *Disorderly Houses Act 1943* (NSW)[72] to permit the operation of brothels, as well as inserting ss 16 and 17 which pertain to regulating the operation of brothels. In particular, s 16 provides that a declaration under s 3 of the *Restricted Premises Act 1943* (NSW) can no longer be made solely on the basis that a premise is a brothel. Likewise, s 17 permits local councils to make applications to the NSW Land and Environment Court to compel an owner/occupier of a brothel to cease operating a brothel, but such an application can only be brought if the local council has received sufficient complaints from residents and it is of the opinion the brothel should cease for one or more reasons set out in the Act, which do not include the fact that the premises is a brothel.

Accordingly, post-1995, the operation of a brothel[73] has been legal and regulated in NSW. The same position, incidentally, also prevails in the ACT,[74] Queensland[75] and Victoria.[76] As such, despite the decisions in *Girardy v Richardson*,

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69 *Disorderly Houses Amendment Act 1995* (NSW) sch 2 item 2.1.

70 In *Sibuse Pty Ltd v Shaw*, McHugh JA accepted that while no person in living memory had been charged with the common law offence of keeping a bawdy house (a brothel), legislative enactments to that date had not abolished the offence: (1988) 13 NSWLR 98, 122. See also *R v Rahme* (1993) 70 A Crim R 357.

71 *Disorderly Houses Amendment Act 1995* (NSW) sch 2 item 2.3.

72 Now known as the *Restricted Premises Act 1943* (NSW).

73 Defined in the *Restricted Premises Act 1943* (NSW) as premises used for prostitution: ibid s 2.

74 Section 18 of the *Sex Work Act 1992* (ACT) proscribes the operation of a brothel other than from a 'prescribed location'. Regulation 2 of the *Sex Work Regulation 2018* (ACT) stipulates the division of Fyshwick in the Central Canberra district and the division of Mitchell in the Gungahlin district as prescribed locations.

75 Part 3 of the *Prostitution Act 1999* (Qld) establishes a licensing system for the operation of brothels. Part 5 of the Act allows for unlicensed brothels and brothels operated in a manner contrary to the *Planning Act 2016* (Qld) to be declared as 'prohibited brothels'. Part 6 of the *Prostitution Act 1999* (Qld) sets out offences in relation to operating a licensed brothel. Operating an unlicensed brothel is still an offence: see *Criminal Code Act 1899* (Qld) sch 1 ss 229K(2), (3A), which proscribe a person having an interest in premises knowingly used for the purposes of prostitution by two or more prostitutes, except for an interest in premises in relation to a licensed brothel.

76 Part 4 of the *Sex Work Act 1994* (Vic) provides for a licensing system in respect of brothels. This Act operates in tandem with the *Planning and Environment Act 1987* (Vic). Like in NSW, the operation of brothels is largely a planning issue.

Appleton v Campbell, *Smith v White* and *Upfill v Wright*, a landlord has been successful in NSW in suing to recover outstanding rent owed by a lessee of a premises knowingly being used for the purposes of prostitution.[77] Equally, consistent with brothels now being regulated businesses, the NSW Land and Environment Court hears and determines applications to permit a premise to be used as a brothel (as well as applications to prohibit the ongoing use of premises for such a purpose).[78]

Second, the criminalisation and regulation of prostitution and solicitation in NSW has also relaxed over recent years. The act of prostitution in NSW is not, per se, illegal — although certain public acts of prostitution are illegal, namely, engaging in sexual activity for money in, or within view from, a school, church, hospital or public place, or within view from a dwelling.[79] Nor is solicitation, either of or by a prostitute, illegal in NSW, except in certain areas; namely, within a 'road or road related area' that is 'near or within view from a dwelling, school, church or hospital', or actually within a 'school, church or hospital'.[80] Likewise, only certain premises cannot be used for acts of prostitution,[81] although premises cannot be advertised as being used, or available for use, for the purposes of prostitution.[82]

Importantly, the current text of ss 19 and 19A of the *Summary Offences Act 1988* (NSW), which prohibits solicitation in certain public places in NSW, is a relaxation of what appeared in s 28 of the *Summary Offences Act 1970* (NSW), which proscribed a person from soliciting another, for the purposes of prostitution, in or near *any* public place. The *Summary Offences Act 1970* (NSW) was replaced by the *Prostitution Act 1979* (NSW), with s 8A of that latter Act in a similar form to s 19 of the *Summary Offences Act 1988* (NSW).[83] Likewise, abolished from the statute books is the crime committed by a 'reputed prostitute' of being present at premises habitually used for prostitution or solicitation.[84] Similarly, and as noted above, the common law offence of keeping a common bawdy house or brothel has also been abolished.[85] All these matters reflect a relaxation in the law and by society in relation to the commercial supply of sexual services.

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77 *Pike v Mangrove District Services Pty Ltd* [2000] NSWSC 914 (15 September 2000) (Bergin J).

78 See, eg, *Yang v Blacktown City Council* [2005] NSWLEC 282 (19 May 2005); *City of Sydney Council v De Cue Pty Ltd* [2006] NSWLEC 763 (6 December 2006); *Alphatex Australia v Hills Shire Council (No 2)* [2009] NSWLEC 1126 (29 April 2009).

79 *Summary Offences Act 1988* (NSW) s 20.

80 Ibid ss 19–19A. The position is slightly stricter in the ACT, Queensland and Victoria, which proscribes solicitation in public places: *Sex Work Act 1992* (ACT) s 19; *Prostitution Act 1999* (Qld) s 73; *Sex Work Act 1994* (Vic) ss 12–13.

81 *Summary Offences Act 1988* (NSW) s 17 (namely, any premises held out as being available: (a) for the provision of massage, sauna baths, steam baths or facilities for physical exercise, or (b) for the taking of photographs, or (c) as a photographic studio).

82 *Summary Offences Act 1988* (NSW) s 18. Advertisements for employment as a prostitute are also illegal: *Summary Offences Act 1988* (NSW) s 18A. This, however, does not prohibit a prostitute advertising his or her services.

83 Although, at the time the *Prostitution Act 1979* (NSW) was originally enacted, it contained no prohibition on soliciting in public places. Section 8A was inserted pursuant to the *Prostitution (Amendment) Act 1983* (NSW) sch 1 items 2–3. It, therefore, must be conceded that the direction of reform has not be unidirectional over the past 40 years; however, the overwhelmingly trend has been one of relaxation of prohibitions.

84 *Summary Offences Act 1970* (NSW) s 29.

85 See above nn 69–70 and accompanying text.

Third, the judicial receptiveness of the stringent policy that underpinned each of the historical cases set out in Part IIIA has waned, as demonstrated below:

(i) In *Armhouse Lee Ltd v Chappell*, the defendants were engaged in the business of renting and operating telephone sex lines at premium rates.[86] The defendants entered into a contract with the plaintiff for the latter to advertise the former's telephone sex lines. The defendants began to fail to pay the plaintiff, prompting the plaintiff to bring an action to recover the money owed to it by the defendants. The Court of Appeal of England and Wales dismissed the argument that the contract was not enforceable because it was contrary to public morality. Lord Justice Brown held that there was no generally accepted moral code that condemned these telephone sex lines; rather, on the contrary, society appeared not merely to have accepted their existence, but to have placed them under the express control of an independent body.

(ii) In *Barac v Farnell*, the plaintiff, who was a receptionist at a brothel, brought a claim for workers' compensation.[87] The Court considered whether the receptionist was aiding or abetting persons to commit either the statutory or common law offence of keeping a brothel (which illegality was said to have impugned her contract of employment and, therefore, her entitlement to workers' compensation) or whether her contract of employment was tainted by the immorality of her employer's line of work (and therefore equally denied her a right to worker's compensation). Justice Beaumont held that 'if there is a rule of public policy to be applied in this area, it should be used to defeat claims made by the principals in the affair, rather than claims made against the principals'.[88] It is submitted the position is even clearer in the present day given that brothels are now legal in NSW.

(iii) Similarly, in *Phillipa v Carmel*, a claim by a prostitute against the brothel owner for unfair dismissal was not held to be barred by the suggested immorality of the employment.[89]

(iv) In *Westpac Banking Corporation v Bower*, the plaintiff had lent funds to the defendant to allow the purchase of two properties that the defendant intended to operate as a brothel.[90] At the relevant time, brothels were illegal in the ACT. There was a default by the defendant and Westpac sought to enforce its mortgage and obtain possession. The defendant resisted on the basis that the contract of borrowing was illegal — the money knowingly having been lent to

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86 (Unreported, Court of Appeal, Brown, Aldous and Schiemann LJJ, 23 July 1996).
87 (1994) 53 FCR 193.
88 Ibid 207. Justices Higgins and Carr gave separate judgments, both holding that neither statute nor public policy rendered the receptionist's contract of employment illegal.
89 [1996] IRCA 451 (10 September 1996).
90 [1996] ACTSC 21 (4 April 1996).

further 'immoral' purposes. Master Connolly rejected this argument and, citing both *Hayden (No 2)* and *Barac v Farnell*, stated:

> I do not see how justice would be done if a party to a commercial loan agreement is able to simply refuse to repay the loan by pleading that they themselves engaged in unlawful or immoral conduct. A prospective purchaser of a high performance motor vehicle could well enquire of its ability to travel in excess of 110 kph on the motorway, and yet they surely could not defeat a claim for the balance of the purchase price by pleading illegality.[91]

In these circumstances, the historical cases holding contracts that indirectly promote sexual immorality on grounds of public policy no longer have legal weight in NSW. Given the progression over the past 30 years, it is difficult to conceive, at least in NSW, of any case where public policy could legitimately be invoked to strike down a contract that indirectly promoted 'sexual immorality' or 'immorality' (putting aside the difficulty in defining such expressions). Only in those cases where the contract concerned the commission of a criminal offence would there be a justification for not enforcing that contract and, in those circumstances, the striking down of the contract would not be pursuant to the notion of 'public policy' as discussed in this article.[92]

C *Contracts Directly Promoting Sexual Immorality*

This then turns attention to cases dealing with the unenforceability, on public policy grounds, of contracts that directly promote sexual immorality. In *Treitel on the Law of Contract*, Peel states that the law now draws a distinction between contracts that have 'purely meretricious purposes and those which are intended to regulate stable extra-marital relationships',[93] with the former unenforceable, but the latter not. This statement reflects, as has been noted above, the established effacement of the perceived immorality of extramarital cohabitation and relationships, a change that has not been recognised as having occurred with respect to contracts for meretricious sexual services.

The above passage from *Treitel on the Law of Contracts* was quoted with approval by Young J in *Markulin v Drew*.[94] It is apposite to begin discussion about the historical unenforceability of contracts for meretricious sexual services with this case, as it is one of the few cases that has directly considered the point, and not merely stated as much in passing.

In *Markulin*, decided in 1993, Young J interpreted the distinction that *Treitel on the Law of Contracts* was making as:

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91 Ibid [14]. The analogy adopted by Master Connolly may not have been entirely apposite; however, the conclusion was certainly correct.

92 To give an example, a contract whereby a person (a pimp), outside the operation of a brothel, retained another to provide sexual services to third parties, with the former party taking a portion of the earnings of the latter. An action by the pimp for his or her share of the prostitute's earnings would rightly not be countenanced by a court in NSW in light of s 15(1) of the *Summary Offences Act 1988* (NSW), which prohibits a person (not operating a brothel) living off the earnings of a prostitute.

93 Peel, above n 44, 554 [11-043].

94 (1993) DFC ¶95-140, 76,723 ('*Markulin*'), quoting *Treitel on the Law of Contracts* (8th ed).

> between a man and woman who are sharing a life together though not married including sexual relations … and a man and a woman who are living independent lives but the man is rewarding the woman for sexual services which she provides from time to time.[95]

In determining the meaning of 'meretricious', his Honour drew a distinction between: (a) contracts of cohabitation; (b) a contract by a man with a woman to provide occasional sexual services; and (c) an agreement with a 'common prostitute'.[96]

Justice Young held that 'meretricious' probably meant not a contract with a prostitute, but rather a contract treating a woman as if she were a prostitute.[97] By comparison, Young J stated:

> Cases such as *Bainham v Manning* (1691) 23 ER 756 suggest that while relief would not be given to a man against a bond he had given to a common strumpet or prostitute, equity would not countenance a transaction whereby a man had given a bond to a housekeeper to secure a sum of money to her if she provided 'secret services', presumably attending on her master for sex if required.[98]

The correctness of this statement is returned to below in discussing further the case of *Bainham v Manning*, among others. On one view, it appears Young J was suggesting that the law may grant certain relief in respect of a contract with a prostitute, but not in respect of a contract with meretricious purposes, which contention is equally returned to below.

Ultimately, in *Markulin* Young J held that the contract in that case (where the plaintiff was to receive $40 000 per year for visiting the deceased four times a year and telephoning him) was a contract with purely meretricious purposes and, therefore, unenforceable: the sum of money involved and the scant services admitted to be provided indicated that sex was contemplated as part of the services to be rendered, and not as an optional extra.[99]

The validity of the distinction drawn by Young J between a contract to provide meretricious sexual services and a contract with a 'common prostitute' is highly questionable for two reasons. First, it is unclear what is the difference between a contract of prostitution and a contract to treat a person as if he or she were a prostitute. Related is the difficulty in identifying the dividing line between a person fitting the characterisation of a 'common strumpet or prostitute' (whatever that expression exactly means) and a person who merely provides meretricious sexual services. Second, the relevance of the distinction is also unclear. The authorities do not bear out an accepted principle that contracts of prostitution are (or ever were) enforceable or that courts might assist prostitutes, in contradistinction to others, in recovering or retaining their remuneration (or gifts) in certain circumstances.

On this latter point, there are historical references to distinctions being drawn between prostitutes and mistresses (discussed in the sub-paragraphs below), but it is not a distinction that has, on the whole, been embraced, explained or rationalised.

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95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid 76,723–76,724.

What appears from the cases below is that there was, at least in the 17th and 18th centuries, a general aversion to 'common prostitutes, strumpets or harlots' (the terminology used in the cases) retaining property given to them (even voluntarily), as opposed to property or money voluntarily given to a mistress. The law appeared to reason that the former women preyed on men, thereby warranting the granting of relief, even in relation to property voluntarily conveyed to such persons, as opposed to property voluntarily conveyed to mistresses (notwithstanding any taint of immorality). Thus:

(i) In the decision of *Bainham v Manning*, which was cited by Young J in *Markulin*, the headnote reads: 'Bond to a housekeeper for secret services. Equity will not relieve: otherwise if the bond was given to a common strumpet'.[100] The brief summary of the judgment refers to the decision of *Matthew v Hanbury*,[101] and states that in that case 'there relieved against such a bond, because the woman appeared to have been a common strumpet, and by her insinuation prevailed upon the old man'.[102] This summary of *Bainham v Manning* should be compared to that appearing in *Markulin*,[103] where Young J appears to have reversed the ratio decidendi of the case.

(ii) Consistently, in *Whaley v Norton & Al*, a voluntary bond was given to a mistress, with Trevor MR stating: 'But if it had been charged in the bill, that the defendant was a common strumpet, and she commonly dealt and practised after that sort, and used to draw in young gentlemen, in such case … the Court should relieve'.[104]

(iii) However, in *Hill v Spencer*, a common prostitute was successful in resisting an action to recover a bond that the plaintiff's deceased brother had voluntarily given to her.[105] Lord Camden stated that given there was no evidence of fraud, and the bond was given voluntarily (and not for consideration), there was no room for equity to intervene, notwithstanding the defendant's status as a 'common prostitute'.[106] The previous cases that had

> determined against securities given to common prostitutes went upon the circumstances of the securities being given previous to the cohabitation; a consideration which being *turpis* in its nature, the Court has relieved against them.[107]

However, as noted above, the distinction between 'common prostitutes, strumpets or harlots', and other persons who engaged in sexual intercourse outside of marriage, does not appear to have continued through the 19th and 20th centuries and into the 21st century. For instance, in the 1910 decision of *Upfill v Wright*,

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100 (1691) 2 Vern 242; 23 ER 756.
101 (1690) 2 Vern 187; 23 ER 723 (where the woman was a 'common harlot').
102 *Bainham v Manning* (1691) 2 Vern 242, 242; 23 ER 756, 756.
103 *Markulin* (1993) DFC ¶95-140, 76,723.
104 (1687) 1 Vern 483, 484; 23 ER 608, 608 (citations omitted).
105 (1767) Amb 641; 27 ER 416.
106 Ibid 643; 416–17.
107 Ibid (emphasis altered) (citations omitted).

Darling J stated that it made no difference whether the defendant was a common prostitute or a mistress: 'the house is let to her for the purpose of committing the sin of fornication … [which] is sinful and immoral'.[108]

Curious, and by contrast to the above, is what Barton wrote in a case note in the *Law Quarterly Review* on the decision of *Tanner v Tanner* (a case concerning cohabitation between unmarried persons and the keeping of a mistress):[109]

> It is characteristic that the majority of the old canonists allowed the prostitute an action for her remuneration. They allowed it on the ground that she might follow an immoral profession, but that since she did follow it, it was not immoral for her to take fees.[110]

No authority is cited in support of this statement. The above cases would appear to be against such a proposition as representing any state of the civil law.[111] Moreover, if Barton's statement did, in fact, represent the law historically, it is a view that has not subsisted.

Moving on from the decision of *Markulin*, the unenforceability of a contract for meretricious sexual services was also discussed by Hope JA in the 1982 decision of *Seidler* — a case where the point did not rise for direct consideration:

> Going then to the area of sexual morality, there is no doubt that a contract to provide meretricious sexual services is and has long been regarded as contrary to public policy and illegal. The Supreme Court of California, in a decision which has had far reaching consequences in the United States, has held that this is as far as the law goes in this regard: *Marvin v Marvin* (1976) 18 Cal 3d 660; 134 Cal Rptr 815. However the present agreement did not involve meretricious sexual services, but a sexual relationship as part only of a wider relationship.[112]

Justice of Appeal Hope did not define what was meant by 'meretricious sexual services', and did not employ the same distinction as was later adopted by Young J in *Markulin* between such contracts and those with a 'common prostitute'. The only decision cited in support was the Supreme Court of California decision in *Marvin*.[113] That case concerned a contract between non-marital partners as to how they were to split the assets they had acquired during their relationship on its dissolution. Judge Tobriner stated:

> In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. *Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason.*
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> …

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108 [1911] 1 KB 506, 510.
109 [1975] 1 WLR 1346.
110 J L Barton, 'Notes' (1976) 92(2) *Law Quarterly Review* 168, 170.
111 As opposed to canon law, which may (although doubtful) have provided otherwise, but this is beyond the scope of this article.
112 [1982] 2 NSWLR 80, 88–9.
113 18 Cal 3d 660 (1976).

> As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution.[114]

Caution, however, must be adopted in placing too much reliance on the decision of *Marvin* in an Australian context. In understanding that decision, it must be appreciated that in California, unlike in NSW, the act of prostitution is illegal. At the time of *Marvin*, s 647(b) of the *California Penal Code* (1971) prohibited (as it still does) a person from not only soliciting a prostitute, but also engaging in any act of prostitution. This context is relevant to understanding the dictum in *Marvin* regarding why a person cannot lawfully contract to pay for the performance of sexual services. It is expressly forbidden by statute.

These points aside, the historical position as to the unenforceability of contracts for the provision of meretricious sexual services on the grounds of public policy has never been doubted.[115] Of course, as demonstrated above, few cases have needed (or raised the opportunity) to address the point directly. The facts of *Markulin* raised the issue; however, as revealed above, Young J's reasoning is not free from confusion, and that decision is 25 years old and pre-dates a number of important legislative and social changes in NSW, particularly the decriminalisation of brothels. Other cases have stated the principle, but either not part of the strict ratio decidendi of the case (for example, Hope JA in *Seidler*, which decision is even older than *Markulin*) or citing authority regarding the indirect promotion of sexual immorality, the continuing worth of which authorities has been addressed above. Nevertheless, the principle is historically entrenched. The question is whether it is still justified and maintainable.

D *The Present Day Status of the Law Pertaining to Contracts Directly Promoting Sexual Immorality*

Notwithstanding the weight of the above authorities, and the duration of the historical prohibition, it is contended that the position is different today, at least in NSW.[116] In light of both changes to the legislative landscape and social mores, it is submitted that it is no longer correct to state absolutely that contracts for meretricious sexual services are contrary to public policy in NSW and are, therefore, unenforceable. This is for a number of reasons.

First, as already stated above, the act of prostitution is legal in NSW, as compared to California (whose law governed the decision in *Marvin*), with the criminalisation of prostitution having relaxed over time as noted above. Operating a brothel in NSW is currently legal and the decriminalisation of such an activity can

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114 Ibid 674, 683 (Wright CJ, McComb, Mosk, Sullivan and Richardson JJ concurring) (emphasis added).

115 In addition to those cases cited above are: *Coral Leisure Group Ltd v Barnett* [1981] ICR 503, 506 (Browne-Wilkinson J, Messrs Clement-Jones and Hughes agreeing); *Hagenfelds v Saffron* (Unreported, Supreme Court of New South Wales, Powell J, 26 March 1986).

116 Perhaps in the ACT, Queensland and Victoria too. However, as has been noted at the outset, it is beyond the scope of this article to examine each of those jurisdictions in a satisfactory manner so as to be able to state the same position prevails with the same confidence as is contended with respect to NSW.

only be seen as a tacit acceptance by society of the provision of sexual services for reward. Accordingly, in striving for coherence in the law, it seems difficult to justify maintaining the historical prohibition on the enforcement of contracts for the provision of meretricious sexual services. For instance, given the regulated nature of brothels in NSW, it would be surprising if the owner or operator of a lawful establishment could not sue a customer for unpaid sexual services rendered. If such an action were permitted, being one for the recovery of fees for sexual services, it is difficult to see why the law would deny the same action brought directly by a service provider (for example, a sex worker).

It is to be appreciated at this juncture that the contention proffered in this article is not merely that because prostitution is legal, courts should enforce such contracts. The law does not merely render void or unenforceable only those contracts that expressly or impliedly violate a statutory provision or rule of the common law. For instance, the law on restraint of trade — though voiding only unreasonable restraints — stands in contrast. Instead, the argument is more nuanced. It proceeds on the basis that public policy in this area must take account of legislative developments concerning the commercial provision of sexual services. Those developments are such that the law would be discordant in permitting, for instance, the lawful operation of brothels, yet the wholesale denial of the right of a sex worker to sue for sexual services rendered. This is particularly so in light of the limited and restrained role that a freestanding notion of public policy has to play in the enforceability of contracts. The argument is also premised on the notion of proportionality, which does not appear to justify a blanket prohibition on the enforcement of contracts for the provision of meretricious sexual services (or denying relief in respect of such contracts).

Second, as highlighted above, many of the old heads of public policy, many of which concerned immorality, have withered and fallen away. The same has happened to the old case law concerning contracts that indirectly promoted sexual immorality, which are no longer good law, at least in NSW. Society has dramatically changed since the 18th and 19th centuries in which the public policy denouncing contracts for meretricious sexual services was formulated and cemented. Many practices that were considered unparalleled vices and intolerable in those times are now mainstream and regulated. Along with prostitution and the operation of brothels is, for example, gambling, which is now prolific. To borrow the language of Stable J in the 1973 decision of *Andrews* (which language only rings truer in 2018): what was regarded as a 'pious horror' when decisions such as *Pearce v Brooke* were decided would 'today hardly draw a raised eyebrow or a gentle "tut-tut"'.[117] Indeed:

> [the] cases discussing what was then by community standards sexual immorality appear to have been decided in the days when for the sake of decency the legs of tables wore drapes, and women (if they simply had to do it) never referred to men's legs as such, but called them their 'understandings'.[118]

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[117] [1973] Qd R 93, 104.

[118] Ibid 102. See also Stable J's comments as to changing social attitudes at 104:

> George Bernard Shaw's Eliza Doolittle (circa 1912) thought the suggestion that she have a bath in private with her clothes off was indecent, so she hung a towel over the bathroom mirror. One

Third, society has experienced a dramatic sexual revolution, particularly in the last 30 years, but also over the entirety of the 20th century.[119] This has largely effaced the former bright line between moral and immoral sexual practices. As Browne-Wilkinson V-C recognised in 1988 in the decision of *Stephens v Avery*, while in 1915 there was a code of sexual mores accepted by the overwhelming majority of society, in 1988 there was no such general code.[120] The position is even more pronounced in 2018, some 30 years after *Stephens v Avery* was decided.

Thus, extramarital cohabitation and sexual intercourse is perfectly legal and nowadays widespread and socially accepted. In England, the law has long departed from permitting, in ecclesiastical courts, prosecutions for the 'deadly sin' of 'fornication'.[121] The aforementioned practices, previously seen as immoral (along with divorce), no longer carry such stigma. As Lord Browne-Wilkinson stated in *Barclays Bank plc v O'Brien*: 'Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this'.[122] The same ethos must be adopted in relation to commercial providers of sexual services. It is a prevalent industry and practice that, as at almost 15 years ago, was generating estimated annual revenue Australia-wide of approximately $1.8bn.[123]

The sexual revolution that has occurred over the 20th century is evidenced no higher than the volte-face that has transpired in relation to society's perception of (and hostility towards) homosexuality. In *Blackstone's Commentaries on the Laws of England*, homosexuality was referred to as '*peccatum illud horribile, inter christianos non nominandum*': that horrible crime not to be named among Christians.[124] Blackstone said that the very mention of the crime (it being 'the infamous crime against nature') was a disgrace to human nature and that it was a crime of 'deeper malignity' than rape.[125] This hostility persisted into the 20th century, with statutes criminalising homosexual conduct.[126] However, those provisions have now been repealed, with NSW repealing ss 79 and 80 of the *Crimes Act 1900* (NSW) (criminalising the 'abominable crime of buggery') in 1984 pursuant to the *Crimes*

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wonders what she would have thought and said to a suggestion that she wear in public one of today's minuscule and socially accepted bikinis, held miraculously in place apparently with the aid of providence, and, possibly, glue.

119 On this point, see Hosseini, above n 39, 256–8 [6.48]–[6.51]; Frank Bongiorno, 'Sexuality: An Australian Historian's Perspective' (2013) 54 *Australian Humanities Review* 21; Frank Bongiorno, *The Sex Lives of Australians: A History* (Black Inc, 2012).

120 [1988] Ch 449, 453.

121 *Statute of Circumspecte Agatis 1285*, 13 Edw 1, c 1. See also *Upfill v Wright* [1911] 1 KB 506, 510–11. The criminal jurisdiction of ecclesiastical courts was abolished by the *Ecclesiastical Jurisdiction Measure 1963* (UK) s 69. See also N Cox, 'The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England' (2001–2) 3(1) *Rutgers Journal of Law and Religion* 1.

122 [1994] 1 AC 180, 198.

123 See Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (2005) Coalition against Trafficking in Women Australia, 5–6 <https://www.catwa.org.au/wp-content/uploads/2016/10/What-happens-when-prostitution-becomes-work.pdf>.

124 W Morrison (ed), *Blackstone's Commentaries on the Laws of England* (Cavendish Publishing, 2001) vol 4, 168.

125 Ibid.

126 *Offences against the Person Act 1861* (Imp) ss 61–2; *Crimes Act 1900* ss 79–80. Both of these Acts criminalised the 'abominable Crime of Buggery'.

(Amendment) Act 1984 (NSW).[127] Further, it is now generally illegal to discriminate on the grounds of homosexuality[128] and same-sex marriage has attained legal status.[129]

Fourth, it is to be noted that s 20 of the *Restricted Premises Act 1943* (NSW) states:

> The enactment of the *Disorderly Houses Amendment Act 1995* should not be taken to indicate that Parliament endorses or encourages the practice of prostitution, which often involves the exploitation and sexual abuse of vulnerable women in our society.

On one view, that provision stands against any modification of the historical prohibition (on public policy grounds) against the enforceability of contracts for the provision of meretricious sexual services. However, the better view is this is not correct. Rather, the provision can be accommodated within the thesis posited in this article. Whilst expressly stating that Parliament does not endorse or encourage prostitution, the provision can also legitimately be seen as a recognition by Parliament as to the potential exploitation of persons involved in prostitution, a concern for those persons' welfare, and a desire to eliminate such exploitation (and hence why it is still a crime in NSW to encourage or lead a person into prostitution).[130]

In this light, maintenance by the courts of a blanket refusal to enforce contracts for meretricious sexual services only serves to compound this potential exploitation as recognised in s 20 of the *Restricted Premises Act 1943* (NSW). To borrow the language of Diplock LJ in *Hardy* set out above,[131] greater social harm is caused by refusing to enforce (for instance) an action by a sex worker for services rendered than from recognising the enforceability of such contracts. Indeed, in the present legal and social environment, it would be callous by any standard to refuse a sex worker's claim for unpaid fees for sexual services rendered. Any such refusal by the courts would be to condone unabashed exploitation of such persons, some of whom, as noted by s 20 of the *Restricted Premises Act 1943* (NSW), may already be the subject of exploitation.

Fifth, while some academics, such as Buckley (although writing from a UK perspective), confidently assert that the law would not entertain enforcing a contract for the provision of sexual services for reward,[132] this view is not universal. The authors of the 11th Australian edition of *Cheshire and Fifoot's Law of Contract* doubt the ongoing existence of the head of public policy denouncing contracts involving sexual immorality, stating that it is 'based on old decisions that now appear

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127 A position that has been replicated in all other States.

128 *Anti-Discrimination Act 1977* (NSW) pt 4C; *Sex Discrimination Act 1984* (Cth) s 5A. There are exceptions or exemptions: see respectively *Anti-Discrimination Act 1977* (NSW) pt 6; *Sex Discrimination Act 1984* (Cth) pt II div 4. It is noted, however, that at the time of this article going to print, the Australian Parliament is considering the Discrimination Free Schools Bill 2018 (Cth), which (broadly speaking) seeks to remove the ability of an educational institution established for religious purposes to discriminate against an employee, contract worker or student on the grounds of sexual orientation.

129 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

130 *Crimes Act 1900* (NSW) ss 91A–91B; *Summary Offences Act 1988* (NSW) s 15A.

131 See above n 24 and accompanying quote.

132 Buckley, above n 39, 107 [6.24].

anachronistic'.[133] Equally, Burrows has written in passing: 'I have long found it surprising, for example, that the courts should ever in this context [illegality as a defence to contract] be concerned with what is described as "sexual immorality" unless criminal offences are being committed'.[134] That remark has much to commend it in light of the foregoing.

Further, recognising, at least in limited circumstances, the enforceability of contracts for meretricious sexual services would not be entirely unheralded. Since 2002, the Federal Republic of Germany has permitted a prostitute (and only a prostitute) to maintain an action for unpaid fees.[135] That step has not instigated a moral decline in that State or ushered in social catastrophe. Indeed, practical realities (including the likely embarrassment of suffering a public suit in relation to unpaid fees for sexual services rendered) will undoubtedly keep suits on meretricious contracts to a minimum. It will, however, ensure that persons who have provided valuable and lawful consideration (sexual services for reward) are not shut out from recovering from a promisee after providing said services.

In Germany the step advocated for in this article was taken by the German Parliament,[136] being necessary given it is a civil law country. However, parliamentary intervention is not necessary to achieve the same outcome in NSW. The current prohibition on enforcing contracts for meretricious sexual services is a judicially imposed one, predicated upon a doctrine conceived and enforced by the courts. The modification of the historical position only represents the application of existing legal doctrine, the acceptance of prevailing contemporary standards and mores, and the rejection of 'moral myopia', to borrow the language of Rogers CJ in Comm Div in *Edgley*.[137]

Sixth, to modify this inflexible head of public policy would bring greater clarity to the law. It is presently convoluted, with artificial distinctions being drawn between:

(i) Contracts that regulate existing immorality and those that promote immorality, with the former enforceable but the latter not;[138]

(ii) On the one hand, a contract to provide occasional sexual services and, on the other hand, an agreement with a 'common strumpet or prostitute' (and noting what is said above about the unsatisfactory nature of this distinction and what it imports);[139] and

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133 Seddon and Bigwood, above n 46, 1014 [18.27] (citations omitted).

134 Burrows, above n 28, 456.

135 *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten* [*Act for the Regulation of the Legal Relations of Prostitutes*] (Germany) 27 December 2001, BGBI, 2002, 3983, art 1. See also T Crofts, 'Prostitution Law Reform' (2002) 27(4) *Alternative Law Journal* 184, 185.

136 Also noted is New Zealand, where s 7 of the *Illegal Contracts Act 1970* (NZ) would appear, at least textually, capable of permitting a court to award relief on an action on a contract concerning the provision of sexual services for reward. However, arguably against this interpretation is B Coote, 'Validation under the Illegal Contracts Act' in J W Carter and J Ren (eds), *Coote on the New Zealand Contract Statutes* (Thomson Reuters, 2017) 28, 35.

137 (1988) 13 ACLR 179, 181.

138 See Peel, above n 44, 554–5 [11-043]–[11-044].

139 *Markulin* (1993) DFC ¶95-140, 76,723.

(iii) Contracts for meretricious sexual services as opposed to contracts involving 'a sexual relationship as part … of a wider relationship that included cohabitation and aspects of mutual support'.[140]

Each of these distinctions has arisen as the law has attempted to process the changes to contemporary mores that has left almost all of the heads of public policy concerned with immorality by the wayside. This piecemeal approach has left the head of public policy denouncing (without exception) contracts for the provision of meretricious sexual services a lone survivor and jurisprudentially difficult to sustain, in light of the fact that: (a) many of the authorities that historically underpinned the prohibition are no longer good law (for example, all of the cases concerning the indirect promotion of sexual immorality); and (b) the developments in related areas of the law (for example, the law concerning extramarital cohabitation) have left opaque (if not impervious) the meaning of the word 'immoral' in this area.

For the above reasons, at least in NSW, public policy no longer supports the conclusion that contracts for the provision of meretricious sexual services (or contracts of prostitution, if there is any difference) are necessarily void or unenforceable. It cannot be said that all such contracts are 'incontestably and on any view inimical to the public interest', to borrow the language of Asquith LJ in *Monkland*, as endorsed by Mason J in *Hayden (No 2)*.[141] Nor does such conduct meet the high threshold of what constitutes 'immorality' according to legal standards, as that term was explained in *Orloff v Los Angeles Turf Club*, namely,

> that which is hostile to the welfare of the general public and contrary to good morals. Immorality … includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.[142]

Moreover, holding such contracts as necessarily unenforceable or void does not cohere with the other aspects of the law pertaining to the regulation of the provision of sexual services for reward. Even if the commercial provision of sexual services still carries with it some stigma of immorality, it cannot be said that the gravity of the act of providing sexual services for reward, and any encouragement of that practice that may arise from enforcing contracts for meretricious sexual services, always outweighs the social harm caused by refusing to enforce such contracts.[143] At least in respect of actions brought by the service provider for his or her remuneration for having provided the requested sexual services, public policy weighs in favour of granting relief.

In reaching the above conclusion, I leave open the possibility that public policy may vary between the several states of the Commonwealth. It may be thought strange that such an outcome is possible, given the existence of a single common

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140 See *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [49].
141 (1984) 156 CLR 532, 559.
142 36 Cal 2d 734, 740 (1951) (citations omitted).
143 See above n 24 and accompanying quote.

law throughout Australia.[144] However, no incongruity exists between these two propositions. The same common law principles are applied in each state to determine the status and content of public policy in that state. Any divergence in the dictates of public policy between the states reflects the federalist nature of Australian government, with due regard being paid (as it should) to the differing aspects of each state's legislative landscape and social fabric.

It remains unresolved how far the above conclusion regarding public policy in NSW extends and whether all actions concerning a contract for the provision of sexual services for reward can be maintained. It is contended that, on the basis of the foregoing, in NSW the following is the state of public policy with respect to actions on contracts for the provision of sexual services for reward:

(i) An action by a service provider to recover his or her remuneration for services rendered, or to sue for breach of contract — at least where, again, services have been rendered — should be allowed. To refuse such a cause of action is to condone the exploitation of the service provider, who will have found himself or herself having provided such services for no reward, contrary to the bargain struck;

(ii) In such an action by the service provider, it would prima facie not appear fair to deny the recipient an entitlement to plead or claim a breach of contract in defence — although this point is subject to the considerations that appear below in (iii). There is a reasonable argument to be made that a recipient of the services should be able, in such an action by the service provider, to defray any liability by raising a countervailing claim for breach of contract; and

(iii) Beyond this, greater difficulty arises. For instance, public policy may well refuse to permit a person to sue a service provider for breach of contract to provide sexual services. Obviously specific performance could not be sought of such a contract. However, questions remain whether a person should, for instance, be able to sue a service provider for failing to provide the requested services, or failing to provide them to a requisite standard. Unlike more common commercial contracts, the provision of sexual services for reward raises considerations pertaining to personal autonomy in relation to the most intimate of interactions. There are, therefore, cogent reasons against permitting a person to sue a service provider for failing to provide the requested services, or failing to provide them to a requisite standard. The satisfactory resolution of these matters will most likely need to occur on a case-by-case basis, with the court undertaking a delicate and considered balance of all relevant factors.

[144] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563; *Farah Constructions Pty Ltd v Say-Dee Ltd* (2007) 230 CLR 89, 152 [135].

IV Analysis of the Reasoning in *Ashton (No 2)*

In light of the above analysis, it is now appropriate to turn to the decision of *Ashton (No 2)*. Before dissecting the reasoning, it is to be noted again that in *Ashton (No 2)* the defendant did not plead, nor make any submission, that the agreement was unenforceable because it was contrary to public policy.[145] Accordingly, in writing his judgment, Brereton J did not have the advantage of detailed submissions on the topic of whether contracts for meretricious sexual services were still unenforceable.

In relation to the issue of immorality and public policy, His Honour's judgment commenced by acknowledging the traditional head of public policy treating as void and illegal contracts promoting sexual immorality and/or prejudicial to the status of marriage.[146] Cited in the judgment were the decisions of *Girardy v Richardson*, *Pearce v Brooks* and *Uphill v Wright* for the historical position as to contracts promoting sexual immorality.[147] As noted above, each of those cases (concerning contracts indirectly promoting sexual immorality) could not be considered good law today in NSW.

Following this, the judgment discussed the case law surrounding the historical prohibition on extramarital cohabitation and found that public policy surrounding these contracts had waned with changing social mores.[148] This is undoubtedly correct, for the reasons given above.

From this proposition, Brereton J then considered the decisions of *Marvin*,[149] *Seidler*,[150] *Nichols*,[151] and *Markulin*[152] with part of what Young J said in *Markulin* endorsed.[153] Except for *Nichols*, each of the previous cases has been discussed above. *Nichols* was not a case about a contract directly (or indirectly) promoting sexual immorality. Instead, it was a case about extramarital cohabitation, and a claim by a plaintiff to an interest in a property owned by the defendant (his mistress) to which he had contributed financially. Justice Needham in that case rejected the defendant's argument that any agreement or right asserted by the plaintiff was one for, or which came about from, 'immoral purposes',[154] which should have prevented relief being granted. Accordingly, the direct application of this case to the question at hand in *Ashton (No 2)* was limited, given it concerned extramarital cohabitation and not the provision of sexual services for reward — although relevant, as noted above, was the fact that Needham J endorsed the balancing test set out in Diplock LJ's judgment in *Hardy*.

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145 *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [37].
146 Ibid [38].
147 Ibid.
148 Ibid [39]–[44], [48].
149 18 Cal 3d 660 (1976).
150 [1982] 2 NSWLR 80.
151 (1986) 4 BPR 97262, 9245.
152 (1993) DFC ¶95-140.
153 *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [45]–[47], [50]–[51].
154 Presumably referencing the fact that it promoted/concerned extramarital cohabitation and provided for the maintenance of the defendant as the plaintiff's mistress.

In light of the foregoing, Brereton J stated in *Ashton (No 2)* that there were two notable features deriving from the analysed cases that prevented a contract from being unenforceable on the ground of immorality:[155] (a) the contract did not bring about a state of extramarital cohabitation, but made provision for one that already existed — being a distinction recognised in *Fender v St John-Mildmay*,[156] *Andrews*,[157] and *Seidler*[158];[159] and (b) the contract did not involve meretricious sexual services, 'but a sexual relationship as part only of a wider relationship that included cohabitation and aspects of mutual support'.[160]

The judgment concluded that because no case had stood contrary to the proposition that contracts for the provision of meretricious sexual services were unenforceable, that position still prevailed. This was despite acknowledging that 'social mores' had continued to change since when the decisions premising that proposition had been handed down.[161]

As is to be appreciated from the above, and from the foregoing analysis set out in this article, the judgment did not include:

(i) An analysis of the changes in the legislative landscape since the decisions in *Seidler* and *Markulin* and, in particular, the change effected by the enactment of the *Disorderly Houses Amendment Act 1995* (NSW) (see above). Nor was there a thorough examination of the changes in social mores since the decisions of *Seidler* and *Markulin*;

(ii) An examination of other sources informative of the current state of public policy, including authoritative legal textbooks. For instance, the view expressed in the 11th Australian edition of *Cheshire and Fifoot's Law of Contract* as to the ongoing existence of the head of public policy denouncing contracts involving sexual immorality (it is 'based on old decisions that now appear anachronistic') was equally present in the 9th edition, which was available when *Ashton (No 2)* was decided;[162]

(iii) An inquiry, despite citing *Nichols* and *Andrews*, as to whether the gravity of the 'anti-social' act of providing sexual services for reward (and enforcing the contract) was outweighed by the social harm that would be caused if relief was refused. No examination was undertaken as to whether it would be more harmful to refuse to enforce contracts for meretricious sexual services in light of the

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155 *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [49].
156 [1938] AC 1, 42, 49 (Lord Wright).
157 [1973] Qd R 93, 101–2 (Stable J).
158 [1982] 2 NSWLR 80, 87, 89–90 (Hope JA), 95 (Reynolds JA).
159 This distinction is nowadays without significance given that contracts concerning or providing for extramarital cohabitation are no longer contrary to public policy or unenforceable, as outlined above: see, eg, above nn 35–9 and accompanying text.
160 *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [49].
161 Ibid [50].
162 N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis, 9th Australian ed, 2008) 926 [18.27] (citations omitted).

recognition by Parliament (codified in s 20 of the *Restricted Premises Act 1943* (NSW)) that prostitution often involves the exploitation of vulnerable women and that the refusal of any relief would compound such exploitation; and

(iv) An undertaking of the cautious process espoused by Mason J in *Hayden (No 2)*, or an acknowledgement of the high threshold imposed by Asquith LJ's dictum in *Monkland* (as cited with approval by Mason J in *Hayden (No 2)*) as to when public policy can be resorted to in order to render a contract unenforceable.

When regard is had to these matters, it is contended that Brereton J arguably ought not have refused Ms Ashton's claim on the basis that contracts for meretricious sexual services are contrary to public policy and unenforceable.

Finally, it is to be noted that Boddice J in *Leighton Contractors Pty Ltd v O'Carrigan* followed the conclusion reached by Brereton J in *Ashton (No 2)*.[163] That case concerned property said to have been promised to the fourth defendant by the first defendant in return for the former providing to the latter sexual services. Justice Boddice held in that case that no agreement had come into existence and in obiter dictum stated in passing (in a single paragraph) that even if the alleged agreement had been proved, its enforcement would be contrary to public policy — citing Brereton J in *Ashton (No 2)*.[164] Given Boddice J's prior reasoning, the passing nature of the reference to *Ashton (No 2)* is readily understandable, as is the fact that Boddice J did not grapple with any of the points raised in this article, which, therefore, renders the decision of limited assistance.

However, before leaving this point, and while noting that this article has focused on the position in NSW, it is worth mentioning that in Queensland not only are brothels legal, Parliament has decreed that lawfully employed sex workers are not to be discriminated against because of their chosen employment.[165] That point would appear to be relevant in assessing whether, in that State, public policy still demands, or allows, a wholesale prohibition on the enforceability of contracts for the provision of meretricious sexual services.

V Conclusion

It is contended that, at least in NSW in 2018, it is incorrect to state that contracts for meretricious sexual services are necessarily contrary to public policy and unenforceable. When proper regard is had both to the limited role that public policy occupies in judicial decision-making, and to the contemporary dictates of that head of public policy, as informed by the present-day legislative and social landscape, it is difficult to justify a blanket prohibition on the enforcement of all contracts

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163 [2016] QSC 223 (30 September 2016) [161].

164 Ibid.

165 *Anti-Discrimination Act 1991* (Qld) s 7(l). This provision prohibits discrimination on the basis of the attribute of 'lawful sexual activity', which is defined in the Dictionary to the Act as: 'a person's status as a lawfully employed sex worker, whether or not self-employed'. See also, incidentally, in the ACT, the *Discrimination Act 1991* (ACT) s 7(1)(q), which includes 'profession, trade, occupation or calling' as a potential ground of discrimination.

concerning the provision of sexual services for reward. The act of providing sexual services for reward is no longer so morally repugnant that to permit, in any circumstances, the enforcement of such contracts will necessarily do substantial injury to society. Rather, at least so far as an action is brought by a service provider for services rendered, greater social harm arises from refusing to grant relief in respect of such a contract than from granting relief.