

## ***What does parity in cultural diversity look like?***

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Seven years after William Ah Ket was called to the bar, the 1911 Census recorded 20,000 Chinese-born migrants in Australia.<sup>1</sup> At that time, Australia had a population of 4.5 million people, including 2,955 lawyers.<sup>2</sup> If we were to apply our current approach to measuring cultural diversity, Mr Ah Ket's inclusion would represent 0.03% of the diversity of lawyers of the day, well below the 0.44% potential pool of Chinese Australians.

However, applying this stark numerical analysis with our modern, multicultural outlook would miss a key point. The numbers, unsurprisingly, reflect that Australia's legal profession in 1911 was not diverse. What they do not reflect is how trailblazing Mr Ah Ket's career actually was, particularly given the political and social circumstances of the time.

Federation had occurred only 10 years earlier, and a motivating reason or 'motive power'<sup>3</sup> for combining the separate colonies into a sovereign nation was to guard against Chinese migration. One of the first pieces of legislation to be passed by the new Parliament was the *Immigration Restriction Act 1901* (Cth) (*IRA*),<sup>4</sup> the first plank of the White Australia policy that was to continue until the 1970s.<sup>5</sup> In the second reading speech introducing the *IRA*, the Attorney-General and future Prime Minister, Alfred Deakin, declared that ensuring the White Australia policy required both restricting immigration as well as the 'deportation or reduction' of non-European, 'coloured aliens', or those who could not be classed as 'white', who had already 'found their way into our midst'.<sup>6</sup> Indeed, the Constitution itself continues to recognise the power of the States to disqualify 'all persons of any race' from voting,<sup>7</sup>

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<sup>1</sup> Australian Bureau of Statistics, 'Census of Population and Housing: Australia Revealed' (Document 2024.0, 2017) ('*Australia Revealed*').

<sup>2</sup> David Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (1990-91) 2(1) *Legal Education Review* 219, Table 2.

<sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901 (Alfred Deakin, Attorney-General).

<sup>4</sup> Chad Cooper, 'The immigration debate in Australia: from Federation to World War One' (Background Note, Parliamentary Library, Parliament of Australia, 16 July 2012) 2.

<sup>5</sup> *Ibid* 1.

<sup>6</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901 (Alfred Deakin, Attorney-General).

<sup>7</sup> *Australian Constitution* s 25.

as well as providing the Federal Parliament the power to make special laws for the people of any race it deems necessary.<sup>8</sup>

In this ‘diversity climate’ of overt hostility and xenophobia,<sup>9</sup> it is remarkable that Mr Ah Ket was able to forge a career as a barrister at all. In this light, 0.03% diversity appears to be an extraordinary achievement.

Arguably, things have changed. The White Australia policy is a distant memory and Australia has become a culturally diverse nation.<sup>10</sup> Indeed, since 2013, a large majority of Australians (83-86%) agree that our multicultural heritage has been good for Australia.<sup>11</sup> However, recent reports into the cultural makeup of Australia’s leadership in business, politics, academia and the law,<sup>12</sup> beg the question of how much things have really changed since Mr Ah Ket’s time.

In this essay honouring Mr Ah Ket’s legacy, we address the issue of cultural diversity within Australia, particularly focusing on Asian Australians in the legal industry. We first discuss the need and the business case for cultural diversity, before focusing on how cultural diversity is measured. In particular, we consider the approach adopted in the *Cultural Diversity Initiative* affirmed by the managing partners from 11 of Australia’s leading law firms in March 2017 (*Initiative*).<sup>13</sup> Ultimately, we seek to answer the question of what parity might look like in the context of cultural diversity.

### ***Why we need cultural diversity***

Recently, the *Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited* report found that 76% of Australia’s top two tiers of leadership have an ‘Anglo-Celtic’ background.<sup>14</sup> This proportion increases to 95% if the background is broadened to ‘European’. If only the top tier of leadership is

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<sup>8</sup> Ibid s 51(xxvi).

<sup>9</sup> John Fitzgerald, *Big White Lie: Chinese Australians in White Australia* (UNSW Press, 2012).

<sup>10</sup> Australian Bureau of Statistics, *2016 Census*, above n 1.

<sup>11</sup> Andrew Markus, ‘Mapping Social Cohesion – The Scanlon Foundation surveys 2017’ (Report, Scanlon Foundation, November 2017) 64.

<sup>12</sup> Australian Human Rights Commission (‘AHRC’), ‘Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited’ (Report, AHRC, April 2018) (*Leading for Change 2018*); AHRC, ‘Leading for Change: A blueprint for cultural diversity and inclusive leadership’ (Report, AHRC, July 2016) (*Leading for Change 2016*); Nana Oishi, ‘Workforce Diversity in Higher Education – The Experience of Asian Academics in Australian Universities’ (Report, Asia Institute, University of Melbourne, November 2017); Asian Australian Lawyers Association (‘AALA’), *The Australian Legal Profession: A snapshot of Asian Australian diversity in 2015* (April 2015) AALA <<http://aala.org.au/Resources/Documents/aala-cultural-diversity-analysis-2015-infographic-final.pdf>>; Vivian Hunt et al, *Delivering through Diversity* (Report, McKinsey&Company, January 2018).

<sup>13</sup> Managing Partners’ Diversity Forum (‘MPDF’), ‘Law Firm Managing Partners Commit to Cultural Diversity Initiative’ (Press Release, MPDF, March 2017).

<sup>14</sup> AHRC, *Leading for Change 2018*, above n 12, 8.

considered, the diversity of leadership is 97% 'European', with 2.7% as 'non-European' and 0.3% as 'Indigenous'.<sup>15</sup> These numbers were not significantly different from the first report published in 2016 (together, the *Leading for Change Reports*).<sup>16</sup>

The problem intensifies if gender is considered. A Diversity Council of Australia report, *Cracking the Glass-Cultural Ceiling* found that only 2% of directors of ASX-listed companies are 'culturally diverse women', compared to 28% of 'culturally diverse men'.<sup>17</sup>

This lack of diversity is reflected in different sectors of Australia's workforce. In academia, the *Workforce Diversity in Higher Education* report found that, although there were 25.1% Asian-born academics within the entry Level A ranks, this percentage drops progressively to 10.6% at the Level E rank. Only 3.4% of Deputy Vice Chancellors were Asian-born, and no Vice Chancellors were Asian-born. In contrast, representation of other overseas-born academics remains above 30% of academics from Level A through to Deputy Vice Chancellors, and is 25% for Vice Chancellors.<sup>18</sup> Similar analysis was not possible for Asian Australian academics because of a lack of data.<sup>19</sup> However, a majority (54.3%) of Asian Australian academics perceived that their 'ethnic/cultural background' was a disadvantage, compared to 42.1% saying their background had no impact and 30.4% reporting an advantage.<sup>20</sup>

Again, the situation is worse for women. Female Asian-born academics are represented at consistently lower numbers than male academics in all Group of Eight universities, at all levels of academia,<sup>21</sup> and more female Asian Australian academics felt disadvantaged by their ethnicity than their male colleagues.<sup>22</sup>

Within the legal profession, the Asian Australian Lawyers Association reported similarly low levels of Asian representation (*ALA Report*). The *ALA Report* found that 3.6% of partners in law firms, 1.6% of barristers and 0.8% of the judiciary, have

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<sup>15</sup> Ibid 9.

<sup>16</sup> AHRC, *Leading for Change 2016*, above n 12, 7.

<sup>17</sup> Jane O'Leary, Dimitria Groutsis and Rose D'Almada-Remedios, 'Cracking the Glass-Cultural Ceiling' (Report, Diversity Council of Australia ('DCA'), 7 September 2017) 7.

<sup>18</sup> Oishi, above n 12, 30.

<sup>19</sup> Ibid 49.

<sup>20</sup> Ibid 35.

<sup>21</sup> Ibid 25, 30.

<sup>22</sup> Ibid 36.

an 'Asian' background.<sup>23</sup> When the report was released in 2015, six large firms (those with more than 40 partners), and 44 medium-sized firms (between 10 and 40), had no Asian partners at all.<sup>24</sup>

This lack of diversity is further compounded by a general lack of skills and capability to understand and interact with Asia within the Australian workforce.<sup>25</sup>

This under-representation of Asians and low Asia-competency rate is in stark contrast to the number of Asians in Australia. In the 2016 Census, 26% of Australians were born overseas, of which almost 40% were from South-East Asia, North-East Asia or Southern and Central Asia.<sup>26</sup>

These reports emphatically suggest that there is a lack of cultural diversity within Australia's leadership and workplaces, including the legal industry. This issue is sufficiently stark to have prompted managing partners from 11 of Australia's leading law firms to affirm the *Initiative*, agreeing to establish baseline data and share experiences and strategies to 'overcome barriers encountered by employees from culturally diverse backgrounds in progression to leadership positions'.<sup>27</sup>

### ***Increasing cultural diversity is good for business and the community***

A strong business case exists for increasing cultural diversity in the workforce, aligning the interests of businesses and culturally diverse groups. A report from McKinsey & Company (***McKinsey Report***) found that companies in the top quartile for ethnic diversity had a 59% chance of achieving above-average profitability, whereas companies in the bottom quartile for ethnic diversity only had a 44% chance.<sup>28</sup>

Employers are legally obliged to avoid discriminating on the basis of race or culture.<sup>29</sup> Dealing with allegations of discrimination, whether internally or judicially, is a costly and time-consuming affair. The NSW Anti-Discrimination Tribunal estimated that the average cost of resolving a serious or complex in-house complaint was \$35,000,

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<sup>23</sup> AALA, above n 12.

<sup>24</sup> Ibid.

<sup>25</sup> Jane O'Leary, 'Leading in the Asian Century: A National Scorecard of Australia's Workforce Asia Capability' (Report, DCA, 14 September 2015) 7.

<sup>26</sup> ABS, 'Census of Population and Housing: Reflecting Australia – Stories from the Census' (Document 2071.0, 2017) ('*Reflecting Australia*'); ABS, *Australia Revealed*, above n 1, 3.

<sup>27</sup> MPDF, above n 13.

<sup>28</sup> Hunt et al, above n 12, 8.

<sup>29</sup> *Racial Discrimination Act 1975* (Cth) ss 9, 18C.

while the average cost of a serious external grievance was \$125,000.<sup>30</sup> Further, being involved in discrimination litigation can cause irreversible reputational harm.

Diverse teams increase innovation by incorporating a broader range of perspectives, ideas and skills.<sup>31</sup> For example, employees who identify as Asian are significantly more likely to be able to engage with Asia than other non-Asian workers.<sup>32</sup> This is particularly important in the Australian context, being situated in the Asia-Pacific region with close economic and diplomatic ties with many Asian countries, which comprised 11 of Australia's top 15 trading partners in 2016.<sup>33</sup> These countries have experienced and continue to experience tremendous economic growth, with emerging Asian economies averaging 7.7% GDP growth from 2000-2017, compared to the global average of 3.8%,<sup>34</sup> providing a clear incentive for increasing workforce and leadership diversity in Australia.

Globalisation has revolutionised the legal industry within Australia. International law firms are now key players within the industry, and there are increasing volumes of cross-border transactions.<sup>35</sup> Law firms are also likely to benefit from the enhanced financial performance correlated with increased cultural diversity.<sup>36</sup>

Further, as reflected in the Census data, culturally diverse groups also comprise a substantial proportion of Australia's population,<sup>37</sup> and hence, the domestic market for Australian businesses. Within the legal system, the Judicial Council for Cultural Diversity (**JCCD**) has recognised the importance of ensuring that culturally diverse segments of the community have equal access to justice and the law. The JCCD has provided a comprehensive list of policies, procedures and resources available in each jurisdiction for magistrates, judges and judicial officers to 'positively respond to

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<sup>30</sup> The Law Society of New South Wales ('LSNSW'), 'Diversity and Inclusion in the Legal Profession: The Business Case' (Report, LSNSW, June 2017) 6.

<sup>31</sup> Sylvia Ann Hewlett, Melinda Marshall and Laura Sherbin, 'How Diversity Can Drive Innovation' (2013) *Harvard Business Review*.

<sup>32</sup> O'Leary, above n 25, 12.

<sup>33</sup> Department of Foreign Affairs and Trade, *Australia's Trade in Goods and Services by Top 15 Partners* (2016) <<http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Documents/cy2016/cy2016-goods-services-top-15-partners.pdf>>.

<sup>34</sup> International Monetary Fund, *World Economic Outlook Database April 2018* (2018) <<https://www.imf.org/external/pubs/ft/weo/2018/01/weodata/weoselagr.aspx>>.

<sup>35</sup> Sandra Gibson, *An Overview of the State of the Legal Profession in Australia and Across the Asia Pacific Region in 2016* (2016) 26(1) *The Australian Corporate Lawyer* 36.

<sup>36</sup> O'Leary, above n 25, 5.

<sup>37</sup> ABS, *Reflecting Australia*, above n 26.

evolving community needs arising from Australia's cultural diversity'.<sup>38</sup> Increasing cultural diversity within the judicial system itself would clearly also be beneficial.

Thus, businesses, including law firms, should look to increase the cultural diversity of their workforce and leadership to realise the benefits, both at home and abroad.

### ***Cultural diversity is multi-faceted***

The quantitative lack of cultural diversity within Australia's leadership, combined with the social, business and financial benefits of increasing cultural diversity, provides a clear incentive for change. However, what does it really mean to be culturally diverse? Closer analysis of the approaches taken by recent studies provides an insight into the complexity and difficulties of this issue.

The Diversity Council of Australia defines cultural diversity as '*the variation between people in terms of how they identify on a range of dimensions, including ancestry, ethnicity, ethno-religiosity, language, national origin, race and/or religion*'.<sup>39</sup>

This multi-faceted concept is further expanded in the *McKinsey Report*, which considered the distinction between inherent diversity, such as a person's ethnicity, age or gender, and acquired diversity, including a person's education, international work experience or socio-economic status.<sup>40</sup> The report suggests that companies succeeding with their diversity and inclusion agenda are able to demonstrate a focus on, and an understanding of, both types of diversity.<sup>41</sup>

However, despite the recognition that diversity is complex and consists of both inherited and acquired characteristics, the analysis in the *McKinsey Report* of ethnic diversity and financial performance depends entirely upon a single dimension: the definition of 'ethnic group identity'.<sup>42</sup> Although the Report utilises a sophisticated economic modelling tool, the Herfindahl-Hirschman Index, to quantify and build upon this data, the underlying information is based on discretely defined 'ethnicity'. Only six countries reliably collect this information: the US, the UK, Singapore, Mexico, Brazil and South Africa. The ethnic groups in the US are defined as 'white/European

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<sup>38</sup> Judicial Council on Cultural Diversity ('JCCD'), 'Cultural Diversity Within the Judicial Context: Existing Court Resources' (Report, JCCD, 15 February 2016).

<sup>39</sup> DCA, *How DCA Defines 'Cultural Diversity'* (2018) <<https://www.dca.org.au/topics/culture-religion/how-dca-defines-cultural-diversity>>.

<sup>40</sup> Hunt et al, above n 12, 5, 22.

<sup>41</sup> Ibid 22, 27.

<sup>42</sup> Ibid 37.

ancestry', 'black/African ancestry', 'Latino Hispanic of any race', 'Asian/Asian ancestry (including South Asian)', or 'other (including mixed race)'. In Brazil, the groups are 'black', 'brown (including mixed race)', 'white', 'yellow (Asian)', and 'other'. In Singapore, the groups are 'Chinese', 'Malay', 'Indian', or 'other (including white European)'. In the UK, the groups are 'white/white British', 'black/Afro-Caribbean', 'Asian (including South Asian)', or 'other (including mixed race)'. Without these definitions of race, the *McKinsey Report* would not have a basis for quantifying ethnic diversity.<sup>43</sup>

This data on a person's categorical 'ethnicity' is not available from Australian Census data. In contrast to these limited, and arguably culturally loaded, definitions of race, the Australian Census collects information on a person's 'ancestry'. A person can self-identify two cultural and ethnic groups from over 277 potential ancestries.<sup>44</sup> The purpose of asking the ancestry question is 'not intended to classify people, but rather to classify all claims of association with a cultural or ethnic group.'<sup>45</sup> Combined with the person's country of birth, the country of birth of their parents, and the language they speak at home, this information builds a complex picture of a person's cultural heritage.<sup>46</sup>

### ***Who determines identity?***

The distinction between self-assessed identity and assignment of identity by others is a subtle but critical distinction in the determination of cultural diversity. How a person identifies can be a complex, deeply personal, question. Jared Field, in a recent article,<sup>47</sup> describes the complexity of being assigned the identity of 'Aboriginal' – a 'label' for a multitude of people for which the only commonality is a shared 'oppressor'. On one hand, the label provides connection, a camaraderie, and sense of family with other Aboriginal people. On the other, it is a term of denigration, one which 'still erases our rich and beautiful diversity'. In this context, Field's declaration that he is 'Gomerioi from the Kamilaroi nation' is both an act of defiance and reclamation of sovereignty.

To diminish a claim to identity such as Field's with a label of 'black', 'white', or 'other' seems like an oversimplification apt to mislead. Indeed, in certain contexts, doing so

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<sup>43</sup> Ibid 12, 37.

<sup>44</sup> ABS, 'Australian Standard Classification of Cultural and Ethnic Groups' (Document 1249.0, ABS, 18 July 2016).

<sup>45</sup> Ibid.

<sup>46</sup> ABS, *Reflecting Australia*, above n 26.

<sup>47</sup> Jared Field, 'I am and I am not Aboriginal', *The Guardian* (Australia), 4 July 2018.

can be a breach of the *Racial Discrimination Act 1975 (Cth) (RDA)*.<sup>48</sup> In *Eatock v Bolt*, Andrew Bolt was found to have breached section 18C of the *RDA* by seeking to delegitimise ‘fair skinned Aboriginal persons’ from claiming their Aboriginal heritage.<sup>49</sup>

The *Leading for Change Reports* recognise that ‘there is no one simple way of capturing Australia’s cultural diversity’.<sup>50</sup> Nevertheless, in order to highlight the lack of cultural diversity at the top of Australia’s leadership, the authors distinguished between a person’s self-assessed ‘cultural identity’ – which may differ from how others might perceive them – and their ‘cultural background’.<sup>51</sup> The authors identified a person’s background by analysing various objectively ascertained criteria such as a person’s name, place of birth, photograph or parents’ ethnicity.<sup>52</sup> This approach enabled the authors to obtain data for ‘Anglo-Celtic’, ‘European’, ‘Non-European’ and ‘Indigenous’ cultural backgrounds, in order to highlight the underrepresentation of non-European and Indigenous Australians in leadership, when compared to the Census data. Importantly, a person’s subjective cultural identity, including whether they would identify as ‘Australian’, was not analysed.<sup>53</sup>

A similar approach was taken with the *AALA Report*, which determined if partners, barristers and judges were Asian based on publicly available information such as photographs and names.<sup>54</sup> The result of this observational study leads to the impression that the legal profession is not ethnically diverse in relation to Asian lawyers.

On the other hand, a cultural diversity survey of the Victorian Bar recently concluded that ‘the Bar is culturally diverse’ (*VicBar Report*).<sup>55</sup> This survey measured various indicators, such as a respondent’s country of birth, whether a parent was born overseas, and what languages were spoken at home.<sup>56</sup> These factors are reflected in the questions of the Census.<sup>57</sup> Amongst other findings, this report found that 15%

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<sup>48</sup> *Eatock v Bolt* (2011) 197 FCR 261; Adrienne Stone, ‘The Ironic Aftermath of *Eatock v Bolt*’ [2015] 38 *Melbourne University Law Review* 926.

<sup>49</sup> Stone, above n 48.

<sup>50</sup> AHRC, *Leading for Change 2016*, above n 12, 5.

<sup>51</sup> *Ibid* 30.

<sup>52</sup> *Ibid* 7.

<sup>53</sup> *Ibid* 30.

<sup>54</sup> Tuanh Nguyen and Reynah Tang, ‘Gender, Culture and the Legal Profession: A Traffic Jam at the Intersection’ (2017) *Griffith Journal of Law & Human Dignity* 91, 101.

<sup>55</sup> Nous Group, ‘The State of the Victorian Bar – Performance, challenges and opportunities’ (Presentation, Victorian Bar, March 2018) 14.

<sup>56</sup> *Ibid* 15.

<sup>57</sup> ABS, *Australia Revealed*, above n 1; ABS, *Reflecting Australia*, above n 26.

of 627 respondents were born overseas, and 37% had at least one parent born overseas.<sup>58</sup>

Whether the *AALA Report* and *VicBar Report* contradict each other is unclear, since the reports focus on different questions and use different methodologies. However, by comparing these different approaches, it is clear that answering the question of whether an organisation is culturally diverse requires a very clear definition of what cultural diversity actually means, and an understanding of how that diversity will be measured. Further, a key aspect to this issue will be identifying whether a person's identity is self-assessed, or assigned.

### ***Diversity is a relative concept***

In her book, *Why I'm no longer talking to white people about race*, Reni Eddo-Lodge discusses structural racism and the need to overcome 'the collective effect of bias'.<sup>59</sup> She describes the odds stacked against a black man of obtaining an education, a job, and access to healthcare, but also the disproportionate likelihood of being targeted by police.<sup>60</sup> Eddo-Lodge notes that in the UK in 2015, only 7% of judges were black or from an ethnic minority background.<sup>61</sup> She doubts that, if advancement were truly meritocratic, whether so many leadership positions would be 'occupied by white middle-aged men'.<sup>62</sup> Her solution? To build in positive discrimination initiatives to 'level the playing field', along the lines of gender diversity initiatives – including the use of targets and quotas. Without them, Eddo-Lodge argues that initiatives would be 'in danger of looking like they are doing something without actually achieving much'.<sup>63</sup>

However, in the context of gender diversity, a call for parity is conceptually recognisable as one of equal opportunity for men and women, even though this framework may also be an oversimplification.<sup>64</sup> What parity looks like in the context of cultural diversity is not as clear.<sup>65</sup>

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<sup>58</sup> Nous Group, above n 55.

<sup>59</sup> Reni Eddo-Lodge, *Why I'm No Longer Talking to White People About Race* (Bloomsbury Publishing, 2017) 65.

<sup>60</sup> *Ibid* 65-72.

<sup>61</sup> *Ibid* 77.

<sup>62</sup> *Ibid* 79.

<sup>63</sup> *Ibid* 78.

<sup>64</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490.

<sup>65</sup> Edmund Tadros, 'Deloitte uses big data to show its Asian face', *Australian Financial Review* (Australia), 25 July 2017.

As discussed above, cultural diversity is multi-faceted, consisting of a range of acquired and innate characteristics. Further, the concept of diversity is necessarily a relative, comparative concept. It is intrinsically dependent on context and circumstance. For example, in analysing the 'local context with respect to ethnicity', the *McKinsey Report* categorises 'black' South Africans as a minority because of the 'impact of South Africa's complex social history'. This is despite South Africa's population being 79% 'black'.<sup>66</sup> Whilst this approach is arguably justified to highlight the disadvantaged position of the black population of South Africa in corporate leadership,<sup>67</sup> it is also possible to argue that this categorisation removes a key advantage from a historically persecuted population – their majority. Further, in this context, would parity only be achieved when black South Africans reach levels of 79% in corporate leadership roles?

Another consequence of the relativity of cultural diversity is the possibility that a definition of parity may fail to distinguish diversity between people. For example, a crude diversity measure of 'Asian' in the Australian context could group together a recently arrived first generation migrant from China, a second generation Asian Australian, or indeed, a descendent of Mr Ah Ket, in the same group. Merely recognising a shared 'Asian' ancestry without more fails to sufficiently identify the potential for diversity within this disparate group of people. On the other hand, simplified analysis based on a person's name may fail to identify a person's Asian heritage altogether.<sup>68</sup>

Eddo-Lodge argues against such oversimplifications. She believes that focusing on numerical, 'mathematical' equivalence to racial demographics, is the 'true tokenism'.<sup>69</sup> However, it is unclear what form of quota or target she would implement.

### ***How have targets been approached in Australia?***

The difficulties surrounding the idea of targets are reflected in the range of initiatives undertaken by professional and financial services organisations in Australia.<sup>70</sup>

Deloitte have applied an analytical approach, cross-referencing the names of their staff and partners against a database to assign a cultural background to each

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<sup>66</sup> Hunt et al, above n 12, 21.

<sup>67</sup> Ibid 21.

<sup>68</sup> Tadros, above n 65.

<sup>69</sup> Eddo-Lodge, above n 59, 79.

<sup>70</sup> Edmund Tadros, 'PwC splits with Deloitte, EY and KPMG on diversity targets' *Australian Financial Review* (Australia), 1 August 2017.

person.<sup>71</sup> This approach, estimated to be 86.5% accurate, was used to highlight the scale of the diversity problem but not to set a target.<sup>72</sup> In contrast, Ernst & Young, Price Waterhouse Coopers (**PwC**) and KPMG collect data based on staff surveys and internal census approaches. Of these, only PwC has set a cultural diversity target of 30% of partners being from non-Anglo-Celtic backgrounds.<sup>73</sup> The Commonwealth Bank of Australia (**CBA**) collects ethnic diversity data of its staff and applies the Herfindahl-Hirschman Index to derive a cultural diversity index.<sup>74</sup> The CBA has set a moving target for its leadership to be as diverse as the Australian population (as measured by the Census) and the CBA workforce.<sup>75</sup>

### ***The call for a target for cultural diversity in the Australian legal industry***

Recently, Adelyn Koh, deputy general counsel at Ernst & Young, called for a cultural target because, despite the complexity of measuring diversity, 'doing something is better than doing nothing, even if you don't get it right'.<sup>76</sup>

We agree that something needs to be done. There is both quantitative and anecdotal evidence of structural discrimination in law firms in Australia.<sup>77</sup> However, we would caution against the 'anything is better than nothing' approach, as there may be limited bandwidth for diversity-related initiatives, meaning that it needs to be spent wisely.<sup>78</sup> Missteps and errors are often judged harshly by critics.<sup>79</sup> For example, the treatment of Catherine Brenner, the former chairman of AMP, suggests that some commentators are quick to ascribe the actions of some individuals to all women, and to use this false argument as a reason against furthering gender equality.<sup>80</sup> It is likely that similar arguments will be raised if cultural diversity initiatives are poorly implemented and appear to lack legitimacy.

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<sup>71</sup> Tadros, above n 65.

<sup>72</sup> Ibid.

<sup>73</sup> Edmund Tadros and Agnes King, 'Big four accounting firms push for more non-Anglo partners', *Australian Financial Review* (Australia), 26 July 2016.

<sup>74</sup> Commonwealth Bank of Australia ('CBA'), 'Diversity and Inclusion Annual Report 2017' (Report, CBA, 2017).

<sup>75</sup> Ibid.

<sup>76</sup> Emma Ryan, 'Profession urged to use cultural targets', *Lawyers Weekly* (Australia), 6 July 2018.

<sup>77</sup> Nguyen and Tang, above n 54, 101.

<sup>78</sup> AHRC, *Leading for Change 2018*, above n 12, 29.

<sup>79</sup> Tim Soutphommasanne (Speech delivered at the National Forum on Racial Tolerance and Community Harmony, 12 June 2018).

<sup>80</sup> Jennifer Hewett, 'AMP debacle brings boardroom gender wars out in the open', *Australian Financial Review* (Australia), 3 May 2018.

### ***Next steps for the legal industry***

Data and metrics will be essential in determining the extent of the problem and measuring progress.<sup>81</sup> The importance of this has been recognised in the *Initiative*, which proposes to establish baseline data through a survey regarding the level of cultural diversity within each signatory firm on a voluntary and self-identification basis.<sup>82</sup>

How should this important information be collected? Information regarding a person's racial or ethnic origin is considered sensitive under the Australian Privacy Principles.<sup>83</sup> Generally, the collection of sensitive information is prohibited unless individuals to whom it relates consent and the information is reasonably necessary for collecting entities' functions or activities. Clearly, consent and purpose are critical elements for any future survey.

We agree that the information collected should seek to understand how a person would self-identify, culturally, socially and linguistically. Rather than externally assigning a racial or ethnic group to that person, a self-assessed nomination of cultural affiliation would be more reflective of the potential diversity that the person represents. Seeking a person's own description of their identity would allow any future survey to collect sensitive, nuanced, but quantifiable information on cultural diversity within a population.

This is not to exclude the importance of objective information, such as a person's place of birth, the place of birth of their parents, or the language they speak at home. Such information can be powerful demonstration of the success of Australia as a multicultural nation. For instance, objective data has been used to show that 18-20 year olds from households where another language is spoken at home are far more likely to be studying at university than those from homes where only English is spoken.<sup>84</sup>

Finally, the *Initiative* recognises the need for transparency by pledging to share any experience in relation to programmes to promote cultural diversity between each of

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<sup>81</sup> AHRC, *Leading for Change 2018*, above n 12, 18.

<sup>82</sup> MPDF, above n 13.

<sup>83</sup> *Privacy Act 1988* (Cth) Sch 1 Ch 3.

<sup>84</sup> Andrew Norton, 'Revised statistics on university participation rates by language spoken at home' (Chart, Grattan Institute, 9 July 2018).

the signatory firms. This knowledge sharing will be beneficial for each participant and the legal industry in general.

We believe that this transparent survey approach creates a firm pathway to increasing cultural diversity in the future by establishing a clearer picture of where the legal profession currently stands, without simplifying or masking the complexities inherent with this issue. Recognising that there is an issue is required before any solutions can be proposed.

### ***What does parity look like?***

The jury is in. There is clearly a problematic lack of diversity at the top in Australia's boards, universities and legal industry. There is also a clear business case that everybody, from businesses, to employees and society generally, will benefit from increasing cultural diversity.

However, simple definitions of identity, diversity, or parity, are unlikely to be sufficient to resolve these issues. A person's cultural identity is complex. How diversity is measured should be equally complex. To isolate some characteristics, while ignoring others, can appear arbitrary or artificial, and runs the risk of masking significant diversity. Achieving parity in this context will require a capacity to deal with such complexity. Ultimately, what parity looks like in a cultural diversity context will depend on what a person, a company, or indeed, a nation, defines as cultural diversity and when that diversity achieves fair representation. Identifying a single demographic number as the target for 'parity' is as relevant today as it was in Mr Ah Ket's time.

Mr Ah Ket was more than 0.03% of the cultural diversity in the law in 1911. He was a dutiful son, a brother,<sup>85</sup> a grandfather to a world-renowned classical guitarist.<sup>86</sup> He was an activist advocating for the rights of his people, both in Australian and beyond. He was a Supreme Court Prize winner, and a mentor to those coming behind him.<sup>87</sup> He was an avid, if not terribly successful, punter, and a golfer, as well as a lover of music and theatre. He was a canny advocate, the Chinese "Rumpole" of the

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<sup>85</sup> John Lack, 'Ah Ket, William (1876-1936)' in Bede Nairn and Geoffrey Serle (eds), *Australian dictionary of biography. Volume 7, 1891-1939* (Melbourne University Press, 1979) 19.

<sup>86</sup> Toylaan Ah Ket, 'William Ah Ket – Building Bridges between Occident and Orient in Australia, 1900-1936' (Paper presented at the Conference of the Chinese Studies Association in Australia, Macquarie University, 5 July 1995).

<sup>87</sup> Barry McGowan, 'Liu, William Joseph (1893-1983)' in Melanie Nolan (ed), *Australian dictionary of biography. Volume 18 1981-1900 L-Z*, (Melbourne University Press, 2012).

Victorian Supreme Court, overcoming adversity from the Bench with quotes from Shakespeare or Gilbert & Sullivan.<sup>88</sup> A simplistic focus on numbers alone fails to tell the whole story.

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<sup>88</sup> Ah Ket, above n 86; see also Bendigo Advertiser, 'Bench and Bar' *Bendigo Advertiser* (Bendigo), 24 May 1907.