Contemporary feminist scholarship seeks the development of transnational conversations between women in different geopolitical spaces in order to confront the problems of a global age. Yet, if these conversations are predicated on Eurocentric and ahistorical understandings of South/North, first/third world and metropole/colony, feminism risks replicating these dichotomies in the name of a universalised project for gendered rights and resistances. Recognising this, much critical feminist scholarship also argues for a specific and mediated politics of location through historical contextualisation (e.g., Mohanty, 2003; Kaplan, 2006). In this paper, I explore the tension between recognising location and conducting transnational feminist politics by considering the difficulties that Australian feminist praxis must confront, if it is genuinely to engage in transnational feminist conversation.

From my perspective as a legal historian, an important aspect of exploring those tensions is historical clarity about how national law is able to recognise or encompass women’s claims or critiques if expressed through a determinative language of rights. This language is often rightly criticised for its utopian and false universalism, yet in the age of legalism we currently inhabit, rights-based political language is an unavoidable consideration for feminist projects concerned with thinking critically about gendered exclusions and possibilities, within or across borders. As Sara Ahmed, like many others, has argued, rights are not intrinsic, they are historically produced and unpredictably practised, and as feminists we ‘need to make visible the boundaries which constitute “women’s rights” rather than assume their universality’ (Ahmed, 1998: 38).

I will attempt to make visible the Australian boundaries on this question, through a specific historical case: the making and reforming of modern Australian family law. Family law reform is used in this essay as an example because of the very specific role it plays within nation-states in contemporary history. The shift in ideas about regulation of the family and its premises collided in the late twentieth century with shifts in the juridification of the state more generally (Glendon, 1989; Fineman, 1991).
This coincided with the sustained debate about the definition of the family by feminists, because of those changing certainties (Smart and Neale, 1999; Brown, 2000; Cossman, 2002). Historically interrogating how law approaches the idea of gendered rights apropos ‘the family’ is, therefore, a key site through which to interrogate the tensions between national peculiarities and transnational feminist exchange.

I want to be clear at the outset however about the form of law which I am trying to bring to this conversation. I am not speaking here of precedent, of judgment as the outcome of litigation, or court procedure. Nor am I aspiring to speak specifically about the benefits or otherwise of international legal instruments or agencies; or to offer comparative insights with European or North American legal responses to feminist questions. Rather, my explicit focus is on domestic legislation as a statement of a nation’s authority, and of its intent toward those governed inside its compact. The making, and reforming, of legislation within a Westminster democracy like Australia also affords a place to consider cultural political expression of the contradictions or ambivalences toward ideas and politics that are often written out of that same sovereign compact. For many women, the lived experience of contest about social or economic exclusion, or about the denial of fundamental citizenship or economic rights, continues to take place in national contexts, enacted through a state’s domestic legislation. Although it is undeniable that when the state or its law fails to address the denial or abuse of such rights or protections there may be resort to external forms of recognition or arbitration, the simple point remains that national laws, as well as the ability to access and translate the possibilities that are offered for legal action or redress beyond state borders, are written in a legal script that is inseparable from the national historical identity. By centralising the making, and re-making, of a nation’s legislation, specifically its family law, as a historical question, it is possible to understand the ways in which jurisgenerative communities are capable of accommodation or resistance to gendered, and raced, claims for rights protections and recognitions in the present. This should be an important factor in enabling transnational feminist conversations that take local contingencies seriously and desire to work beyond the limits of Eurocentric understandings of location.

**globalisation, transnationalism, eurocentrism**

‘Globalisation’, as inexorable shorthand for the lived boundaries of oppression and connection in our own times, has changed the terms of engagement, and priorities, for projects that make demands of nation-states on behalf of those traditionally excluded by the state. This is the case in many countries for indigenous or First Nation’s political projects, but is, perhaps, particularly the case for intersecting feminist projects. This is because during the loosely
designated 'second wave' feminists experienced a modicum of success in engaging democratic states on questions of gendered rights recognitions or protections in domestic laws and polices. Although a fraught, unfinished, and challenged process within the constraints of law, a discourse and practice that can not easily recognise arguments based on difference, it is nevertheless possible to understand second-wave feminism as distinct, as an engagement possible for its time. A problem for feminism in the present moment is that those kinds of projects seem to have stalled; they no longer seem possible, or even desirable, in a time of hegemonic neo-liberalism. Furthermore, there are serious questions to be asked in staking feminist politics — even in order to speak beyond their borders — at the level of fraying nation-states, preoccupied with attempting to fathom how to deal with war, forced migration, environmental destruction and global financial crisis.

The question of how to reframe feminist politics, because of these present conditions, is of urgency and relevance. The perspectives offered through the work of Gayatri Spivak, Caren Kaplan, Chandra Mohanty and others suggest one way to think about that reframing. But it is important to make very plain the continued assumptions of different positions: for representative example, the recent work of US political theorist Nancy Fraser (2005). Fraser shares the identified need to historicise current limits to feminist praxis in order to 'stimulate discussion as to how we might reinvent the project of feminism for a globalising world' (Fraser, 2005: 295). She argues, however, that feminist politics alive to the Zeitdiagnose (as she chooses to term the history of the present) must change scale, rather than shape. She argues that we can not 'adequately challenge gender injustice if [we] remain within the previously taken for granted frame of the modern territorial state'. As Fraser describes it, we need a 'transnational politics of representation' (Fraser, 2005: 304).

It is an argument that is seductive in many respects. It is palpably clear that provincialism, or refusal to take seriously the challenges to old projects and the demands of new ones, by remaining isolated and refusing dialogue 'systematically obscures transborder sources of gender injustice that structure transnational social relations' (Fraser, 2005: 304). Moreover, it seems logical that feminists, existing as we have as a minority rights politics in any 'epoch', stand to benefit from a reinvigorated focus on this kind of transnationalism committed to questions of justice, as it seeks to stake claims on what is shared or common across political value systems. It also, therefore, seems plausible to achieve these particular transformative ends by using the human rights language and instruments that are available as agreed global instruments, such as the UN Convention for the Elimination of Discrimination Against Women (CEDAW), which have been designed as much as possible to speak a language of 'culturally sensitive universalisms' (Engle, 2005). This is a framework underpinned by jurisprudential premises that, of course, have long historical antecedents within...
international feminist exchanges, in all documented ‘epochs’ (e.g., Lake, 2001; Otto, 2005). It promises that we will be able to imagine and try to reflect a shared past, and imagine a shared future, in order to demand justice in a more productive way.

Fraser’s argument is provocative, however, as her imagined future still has a normative perspective, both historical and geographical. Fraser firmly identifies her feminist solution – transnational representation – as having an actual geographical epicentre: Europe. 9/11 and 1989 are the events she identifies as emblematic ruptures to certainties of the twentieth century’s preoccupation with bordered states and cultures. These events Fraser argues signalled a loss of feminist traction within the US, accompanied by an increased emphasis on ‘third way’ politics throughout the European Union. In addition, she argues that transnational exchanges continue to circulate in juridical speech through UN agencies and their focus on human rights (Fraser, 2005: 301, 305). This locating of the need to further transnational feminist dialogue through the conduit and experience of Europe, accompanied by very specific framings of international law through the UN, is not to be underestimated as a dominant perspective for feminism committed to speak beyond borders. It is a perspective that also raises two major obstacles for genuine transnational exchange with, and from, a nation-state like Australia.

The first obstacle is that Fraser seems less concerned with what a feminist politics of reframing gendered rights may mean in nation-states that exist in a different relationship to the EU than that of North America, or the developing world. International relations scholar Kimberley Hutchings has in fact responded specifically to how Fraser elides the effect of Westphalian sovereignty as an epochal norm for most societies (either as coloniser, or colonised), a norm which undermines any assumption of an ease of dialogue about rights and justice, or a shared experience of a Zeitdiagnose. As Hutchings puts it, in Fraser’s transnational feminism there is a threat of ‘repeating the mistakes of earlier critical theories of the public sphere which presumed, without acknowledging, the form of the nation-state’ (Hutchings, 2007: 60, 63). Feminist scholars have explored this problem for law (Orford, 2002). In an example pertinent to the questions raised in this essay, legal anthropologist Sally Merry has argued that to understand the cultural dimensions of what might be legally possible for women through a political language of rights, it is necessary to resist the normative assumptions of ‘human rights’ that emerge from European or North American experience, and to attempt to think in a more mediated way about how to define the socio-legal concepts that are experienced in ‘international, national and local settings’, Merry, 2006: 2). This approach is important, she stresses, not just to and try to map the cultural meanings that emerge between those settings, but to focus attention on thinking through how to use protocols like CEDAW (Merry, 2003), which although developed across national contexts, are applied in specific
local legal contests and frameworks. It is important, I would also add, to identify if the national contexts into which those agreed global terms are thought to resonate are in fact ambivalent, or even hostile, to claims for substantive equality or justice delivered through a rights paradigm in the first place.

The other, interrelated obstacle concerns historical practice. I share Fraser’s methodological premise – the need to pay particular attention to historicising our experience of the present, to understand better what can be put into conversation. That said, I do not think it is as easy as she suggests reading a transnational history of modernity that has led to the current crises posed by globalisation as a world narrative. Transnational practices, as already noted, emerge because of the collisions between global and local contexts and languages. Transnational histories have been particularly alive to these issues. One of the strengths of transnational historical practice has been its potential to illuminate the interactions across national borders of minority rights struggles, specifically of Indigenous peoples struggles (Curthoys and Lake, 2006: 15), and of women’s rights struggles also. Often historians choose to work transnationally in order to expose the connections and dissonances between those two politics (e.g., Burton, 1999). History that desires to interrogate political problems or phenomena (such as sovereignty, imperialism, or ‘rights’ post-1945) as ‘transnational’ is therefore wary about a return to the metropole as an organising frame. Such transnational historical practice, however, is invested in understanding the various local operationalisations of, or resistances to, Western constructs and languages, including those of rights. This is a genealogical imperative that Fraser’s re-imagined Foucauldian project potentially forgets (Fraser, 2003).

These normative assumptions indisputably affect how feminism in a settler-colonial nation-state like Australia, with quite different historical contingencies to the US, can be heard or acknowledged outside its own borders. Specifically, Australia remains in thrall to our Commonwealth heritage, yet at the same time is excluded from contemporary British alliances in Europe. Australia is a ‘first world’, resource rich democracy, yet Indigenous Australians’ rights and cultural recognitions are too often derogated. Australia is a nation of the South, yet our geo-political desire gravitates toward the North, often with unregarded implications for our law (Black et al., 2007). Despite these ambivalences and tensions, our history and experience is commonly considered by non-Australians as ‘esoteric, familiar and unnecessary’ (Curthoys, 2006: 70). Transnational feminist practices then that reiterate a normative and geographical North have an effect of replicating the boundaries they aim to critique, but they also inadvertently leave the assumed familiar out of the conversation. The fraught histories important to a mediated politics of location that underpin critical transnational feminist praxis in a nation-state like Australia are easily missed elsewhere. The specificities of Australian feminist struggles, with each other
over questions of race (Moreton-Robinson, 2006), and through the specific ambivalences of our state and law on questions about minority rights, are however an essential aspect of our own feminist praxis. They are also essential to communicate with wider audiences in order for transnational dialogue to occur in a way that resolutely practices a critique of the Eurocentrism present in a position like Fraser’s; as well as enabling Australian women the opportunity to access rights protections traditionally excluded at home, if they so choose.

‘the containers that nation-states offer’: national law and the colonisation of ideas

What I am advocating, therefore, is a transnational perspective that aims to minimise the traditional experience of Australian ambivalence and isolation, while at the same time draws attention to its legal complexities. The aim of such perspectives, historically speaking, is as Ann Curthoys puts it: ‘to reconfigure the meanings of Australian culture and contribute to the creation of a transnational [conversation] that does not forget the power of the local, the specific, and indeed the nation’ (Curthoys, 2006: 86). This is not, of course, a position limited to Australia, and has broad implications in directing feminist scholars to consider sites through which the mediated historical work essential for transnational dialogue can take place. Although we should, and must, take seriously the fact that bright-line legal boundaries of nation-states are waning, it is unlikely that local struggles and national identities that emerge historically, politically and culturally from those struggles will evaporate in the call for global activism. US political theorist Wendy Brown describes this tension between the national and the post-national, as an ‘interregnum ... where power still traverses both circuits’ (Brown, 2006: 30–31). As such she stresses how it is important to still focus attention on ‘the containers that nation-states offer’, and the sense of loss that mires feminist politics in a precarious and vulnerable position at the level of the nation, which must inevitably affect the possibilities of transnational dialogue also.

A nation’s domestic law, its legislation, as identified earlier, is a key ‘container’ for the present of how intellectual ideas develop and shift, and how they in fact create what legal theorist Robert Cover called jurisgenerative communities, with certain interpretative commitment (Cover, 1983). This includes the making and exercise of law as a state’s commitment (or resistance) to minority rights, gendered and otherwise. In the contemporary moment this is particularly important because law is the central site for engagement on women’s political exclusions, as well as for feminist arguments and claims against that exclusion. Feminist politics, in the current epoch, more often than not occurs ‘irretrievably in the field of [legal] rights claims and counter claims’ (Brown, 2000: 230). Taking legislation seriously is a site of historical struggle, which often constructs
the parameters of those claims and is therefore not only a peremptory step for transnational historical and feminist exchange, but also a necessary one. As Marilyn Lake has argued: 'It would seem to be self evidently progressive to document the interconnections of countries and the historical processes and relationships that have joined peoples around the world ... yet, as activists and historians, it is important to remember that nation-states are still the jurisdictions that enact legislation to determine peoples’ rights as asylum seekers and refugees, Aboriginal access to land rights, citizens levels of welfare and well being, and working conditions and wage rates’ (Lake, 2007: 184).

In Australia’s case, there is a central ambivalence able to be revealed through the legislative acts of our jurisdiction. Our experience of colonisation has predetermined how Australian governance and jurisprudence has developed as both conservative and positivist, with a resistance to the recognition of legal protections informed by transnational debate on rights. This is particularly obvious when the nation-state has been confronted with legal claims about indigenous sovereignty, and has been forced to respond legislatively, on questions of native title for one example. These claims have in part been predicated on languages of rights, with recourse to external legal ideas and frameworks. The Australian state has resisted, or ameliorated such claims; and has, many times over the past 40 years, balked when legislating domestically the 'progressive values' identified for minority rights groups at the level of the international (Charlesworth, 2002). This is more than a series of missed opportunities. As Hilary Charlesworth et al. have argued 'Australia remains officially committed to upholding human rights at an international level, but is hesitant to transform that commitment into domestic law' (Charlesworth et al., 2003: 7). The ambivalence about how we relate to, or can translate, rights that emerge though different 'national containers' – or other nations' experiences of global events – creates profound difficulties for groups or individuals considered external to the primary citizenship of the state. It means that in Australia, as reflected historically and culturally in our law, there are entrenched ideas about minority rights and their expression that affect all collectively identified politics – indigenous politics especially, but feminist politics also.

How did this occur? For a nation like Australia, it is essential to consider this resistance or ambivalence in the context of our intellectual relationship to 'the metropole'. The invasion, and subsequent settlement of Australia, occurred in the brief 13-year period between the American and French Revolutions. This meant that from 1788 onwards, the movement from English colony to self-governing nation was marked by a transposition of Enlightenment thought that was at that time in currency. The revolutionary ideas that emerged from England had particular importance for settlers in relation to mastering a vast continent through dispossession of land, and constructing a civil order. In his history of Enlightenment traditions in Australia, John Gascoigne notes that
Enlightenment thought, be it from Locke, or Paine 'carried with it the spirit of improvement and inherent progress, a rejection of oligarchy and tradition, and a commitment to foundation of society on principles through reason' (Gascoigne, 2002: xi). These principles, and ideas, had fertile ground to take hold, literally and metaphorically, in Australia as a 'new society' (Hancock, 1961 [1930]), with violent dispossession accompanying that spirit of improvement. That said, the traditions of radical rights, and romanticism about liberty and freedom that also emerged in those traditions in Europe throughout the nineteenth century, had less traction in the nascent Australian nation than they might have done either at the metropole, or, differently, through revolutionary impulses in the US. In Australia, the traditions of thinking about the relationship of a people to its government, and through its laws, followed more closely than is arguable in other settler colonial societies, and with particular valence, the principles established by Bentham and the Utilitarians (Collins, 1985; Gascoigne, 2002).

This was not just a case of currency of ideas between England and its colonies: (although important in that respect too). Bentham had a particular and specific role in the formation of Australian principles of responsible government, and theories of reform through legislative practice. Early colonial debate about the nature and form of government, and sources of legal sovereignty, provided fertile ground for the rationalist basis for utilitarian thought, in particular, on questions of how legislatures should operate, on what principles and for whom. Bentham in fact intervened in these debates personally, on issues of self-governance, and on the principles on which that movement toward national identification should take place (Castles, 1982: 36). A persistent problem, however, was that philosophical precepts about governance were accompanied by an antipathy to ideas about rights. Benthamite utilitarianism as a political theory is, of course, about the reconciliation of the pursuit of individual interest with the achievement of the sovereign interest, which must bring the greatest happiness. As such, political institutions and legislative actions must be assessed in terms of the impact of their operation upon the majority. In Benthamite theory, which in Australia acted more as a blueprint, legislative action could not be conceived of in relation to groups, or classes, with particular shared claims against the state, only as the sum of individual interests. As such, as Hugh Collins puts it, 'The Benthamite tradition is anti-collectivist' (Collins, 1985: 149).

This posed a problem however when considering the legalism of utilitarian theory. Bentham's ideas as jurisprudence, as theories of law making, in turn help create a legal community of ideas and expression. Legislation is at the 'heart of his theory of government'. His rationalist ideas about law and its relationship to society were hostile to ideas of a social contract that emerged particularly in France, and dominated the experience of the United States national jurisgenerative character. As Elie Halevy noted Bentham's position was that
'Governments were instituted not because man has rights, but because he has none' (quoted in Collins, 1985: 149). The possibilities for genuine transformative thinking then about rights based claims made through law, and expressed internationally, although not closed in a modern democracy like Australia, are framed by this resistance and ambivalence, this deep premise in legal culture, and legislative practice.

**Australian ambivalence, equal rights, family law: a short illustrative modern history**

This jurisgenerative ambivalence has long affected feminist projects. For example, Australian feminists have led and participated for over 100 years in international feminist campaigns and struggles, from early campaigns for suffrage to arguments waged at both the League of Nations and later the United Nations, and beyond, about the content and trajectory of women’s rights in a global sense (Lake, 2001; Otto, 2005). But feminist political projects are often stymied, or compromised, at home if they wish to contest or reform the operation of domestic law using rights-based languages (e.g., Thornton, 2006). This is amply clear in legislation that regulates families and private relationships, and through which feminists have long argued for a recognition of equal rights.

Therefore, to my short history of family law, a small sliver of a much larger narrative, the illustrative example offered in this paper begins in 1960s. This is not to deny the importance of feminist and other political interventions in family law reform before this time (see generally, Golder and Kirkby, 1995). But the early 1960s are an appropriate entry point for histories of law in later modernity, as they are in a way another ‘interregnum’, between the national and the international. It was a time before Paris 1968, before the massive changes in thought and political activisms, about liberation that occurred through the longer 1960s that shaped ‘second-wave’ feminism.² It was also a time when ‘new societies’ (Hancock, 1961 [1930]), made bold attempts to define themselves aggressively against the metropole. In Australia, this occasioned a desire by writers, artists, historians and the lawyers who made and contested legislation, to articulate more clearly, in intersecting ways, the nationally determined bases on which the Australian state governed its people, as well as culturally represented itself. There was, for example, an emergent desire in Australia in the 1960s, especially among the intellectual elite, to give content and operation to previously ‘abstract’ political concepts like equality, especially as such concepts started to be used by minority political communities as a basis for legal campaigns for change. (This can clearly be seen in the equal pay debates of the 1960s, and also in the campaigns for inclusion of Indigenous Australians under Federal law in 1967.) The Australian legal and political community saw itself in this period as open to change, and also open to a more cosmopolitan

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conversation on legally defined benchmarks for doing so, including human rights. That said, the ‘alien tradition’ of rights-based arguments did not evaporate, and there remained a resistance in legislative acts to anything but a formalist expression of what rights, if demanded, might entail. This was clearly expressed through debates about Australia’s need for a human rights bill that reflected international conventions into the 1970s, a bill which still has not transpired (e.g., Charlesworth, 2002; Kildea, 2003). And it was increasingly present in politico-legal debates about how to reform legislation that regulated divorce.

Internationally, by the late 1960s, the trend in family law reform discourse was about the need for a streamlined and simplified code that removed all fault. The discussion among legislators in Australia, the UK (notable in the draft English Divorce Law Reform Bill in 1967) and in jurisdictions such as California, which enacted no fault legislation in 1970, was about reforming law so as to provide a sole ground of divorce, a standard based on factual breakdown (Glendon, 1989). This was to rectify the charade of law preserving ecclesiastical standards for marriage, which ran counter to the worldwide societal reality of new ideas about sexual freedom. It was also about the opening up of law as discipline to influences outside it: counselling, specific courts with trained professionals, new regulated legal spaces that were designed to address the immediate and individual impact in men’s and women’s lives that they experienced at marriage’s end. It was these internationally exchanged ideas about the regulation of families, and absence of fault in legislation, that opened a gap for a different kind of legal conversation about women’s experiences, and their rights, within and without the marriage compact.

One such conversation took place in Singapore in 1962, and provides a good example of how Australian legal ideas about rights for women operated. A regional conference was held by the United Nations on the status of women in family as part of a programme of advisory services on human rights. Australia was represented at the seminar by [later South Australian Supreme Court Judge and Governor] Roma Mitchell, and Molly Kingston, two of the very few senior women in law in Australia at that time. Their specific commission by the Department of External Affairs was to discuss the rights of women in family law; and their report was telling. Mitchell noted: ‘The seminar agreed that it was essential that women have economic equality which was a prerequisite for full equality of status …’ (This meant: equal pay, access to public service, access to childcare, access to education, training and work.) At the same time, she recommended to the Australian Government that if legislative change were to occur, mothers and father should be treated the same, as ‘the welfare of children were the concern of society as a whole and that any discrimination [between the parents] was harmful to the interests of the child, of the family, and of society’ (Mitchell and Kingston, 1962: 171). This was not then a recommendation to

3 For a representative overview of this period it is useful to review the texts, monographs and publications, produced at the time that represented these ideas and revealed these connections: for example, Donald Horne’s A Lucky Country (1966); Craig McGregor’s Profile of Australia (1966); Geoffrey Sawer’s The Australian and the Law (1968); and Nation, a fortnightly paper produced between 1958 and 1972.

4 Particularly in the US (see Kay, 1987). The other trend was for the disparate disciplinary arms of those involved in regulating and governing families after divorce to begin speaking to each other (see Elkin, 1957).
legally consider women’s right to differential or substantive equality. Rather, Mitchell and Kinston’s report assumed that if women are treated identically to other members of the majority for whom law’s ‘common good’ is intended, their equal public, and private, participation evolves as a matter of course. This perhaps reflects the significance of that other utilitarian thinker, John Stuart Mill, and his deep influence on earlier generations of Australian feminist claims to a rational liberal state (Sawer, 1993), or the general reluctance of earlier generations of feminists worldwide to speak through a language of gendered difference on private law issues (Auchmuty, 2008). But it does not suggest, despite engaging with the rights assumptions of a UN forum, an openness to what offering rights to individual women (as opposed to an aggregated community that included women) would mean in practice. The report reflects then the dominance of a deeply engrained utilitarian attitude in Australian approaches to law making, as to how the state should encompass a concept like equality. Women’s rights could matter, but only against a formalist standard for the benefit of the common good. The role of government remained to improve a country’s average welfare through the legislative code, a process determined by ‘summing all individual interests, and acting according to the interest of the majority’, which was unlikely to be in the specific interests of most women.5

Later, of course, ‘second-wave’ feminism would argue that the legislative code was itself as part of the problem. Political debate and critique about gendered rights and protections in relation to the family increasingly took place through the medium of legislative reform after the no fault legislation, the Family Law Act was passed in 1975. The provisions concerning property redistribution, and the general operation of the Act in practice, met with sustained critique by the growing numbers of feminist lawyers (e.g., Scutt and Graham, 1984). Throughout the 1980s, the development of feminist legal praxis regarding how women’s differential gendered experience could be written into or protected through law enabled equality as a gendered right began to emerge in the Australian legislative compact in different ways than it had in the past (e.g., Graycar, 2000). That said, despite a commitment to think through the operation of forms of equality, legal reform processes remained committed to formalism, with little regard for the ideas of differential experience that feminism began to claim law needed to see (e.g., Thornton, 1990). This meant that despite the greater openness to feminist claims in the high water mark of a social democratic state, in the 1980s, the changes to the legislation were fraught and too often subject to the fluctuating majority sentiments of an electorate that was increasingly resistant to feminism as a politics more generally (Sawer, 2004).

Why does this resistance matter for current feminist politics within Australia? In recent reforms to the Family Law Act, it has been the burgeoning fathers’ rights

5 As Hilary Charlesworth has argued in regard to the Bills of Rights questions, this meant there was no room for notions of rights as attaching to individuals: the idea that individuals possessed rights suggested that the will of the majority could on occasion be superseded by individual or majority interests (Charlesworth, 2002: 38).
movement that has utilised equality rights discourses, framed unashamedly in these formalist terms, to gain unprecedented access to the family law reform agenda. In 2006, the Family Law Act was amended to introduce ‘friendly parent criterion’ with new provisions creating a presumption for courts when deciding child residence matters of equal shared parental responsibility: a 50/50 split. These latest reforms build on previous amendments to the Act in 1995, which favoured explicit referencing of individual rights (ostensibly attached to children, but manifesting in parental competition). The rights of the child have become about the rights of the parents to the child, which has eclipsed the responsibilities that fall to them as a consequence. The legislative and Committee context that debated and produced the reforms contains not so subtle intentions of dismantling any assumptions about primary carer (materially, maternal) responsibility. The recent reform legislation does take account of histories of violence to protect children and their mothers from continued exposure to that violence, by creating a ground of exception to the presumptions of formal equality. But the idea that such provisions are even necessary is publicly resisted as a disproportionate feminist idea that undermines the shared parenting principle, running roughshod over majority sentiment, and forcing an ‘elitist’ minority rights agenda in legislative terms. As Michael Green QC, president of the Shared Parenting Council of Australia and a father rights advocate put it bluntly ‘... feminism has done a disservice to women. It has sought to portray them as poor, suffering creatures that need protection from men and from paternalistic institutions ... Such thinking is a grave insult to the majority of women ... The government is to be congratulated on having the courage and energy to affect a new system’.

**conclusion**

This short modern history, if left without reflection, suggests an intractable position for Australian feminists. Substantive equality, as much contemporary feminist legal scholarship points out, is not an elixir (e.g., Hunter, 2008). Rights in general are never a straightforward answer to alleviating women’s oppressions or exclusions; nor are they intrinsic. They are as Sara Ahmed argues ‘at once historically produced and defined ... and the legitimate subject of rights ... is always already the subject of a demarcated, stratified social group which is exclusive of others’ (Ahmed, 1998: 38). But my point is that if Australian women wish to engage in dialogue at the national level, or across boundaries with other feminists, on ways of contesting neo-liberal practices enacted through law, they must critically engage with the rhetorical and practised effects of rights discourses. And for Australian feminists this means that we must articulate and confront the deep-seated juridical inability to think about rights as a minority form of argument. This is an essential precondition to thinking through how global political problems, if
expressed or offered in rights languages inimical to our experience, can be grappled with or translated at the local level.\(^9\)

It is important to note, however, there has been a slow shift in recent times in the national debates regarding legal claims to, and recognition of, rights in Australia. This is in no small part because of a changing of the guard in the jurisgenerative community of lawyers, that includes feminists, and who have agitated and pushed for human rights available outside the nation-state to be recognised in Australian law, as well as arguing for a reconsideration of the nation-state’s internal commitment to the rights of those excluded traditionally from the federal compact. There is, for example, now a Charter of Human Rights in Victoria, and in the Australian Capital Territory. Many continue to work in internationally defined legal spaces to argue for the translation between local and global, particularly around refugee and immigration law. There is also, importantly for the example offered in this paper, current federally funded research into the 2006 family law reforms, with early results indicating that the formal rights approach to equal parenting is detrimental in families with a history of domestic violence (Kaspiew \textit{et al.}, 2009). There is still however a strong resistance to rights being written in law by the administrative state; and it is salutary to note that we still have no instrument by which to argue for rights nationally. This absence continues to have implications for many minority groups.\(^{10}\)

But probably a more important challenge in recent years to the rights ambivalence of Australian politico-legal culture has come through community importance given to, and anguish expressed in, confronting the legacy of indigenous dispossession. A defining motivation for our turn to transnational practices has been, as already posited in this essay, to deal with decolonisation and its continuing effects. We have begun to understand as a community, and own up, finally, to how law understood minority rights in the past. Important aspects of this national discussion include the 1997 Human Rights and Equal Opportunity Commission inquiry into Indigenous child removal (or ‘stolen generations’), and in 2008 in Prime Minister Rudd’s apology to that stolen generation for the derogation of their cultural and legal rights. This journey is far from over, and is traumatic, as the state through its legislative acts has been slower and still resistant to the ways in which it can come to terms with the ongoing experience of the settler colonial project. This has been starkly experienced by indigenous women in particular. Since 2007, the Federal Government, in the name of protecting women and children in remote communities from violence and sexual abuse, has, for example, authorised what has been known as the Intervention, an incursion of state control over indigenous economic and housing rights, made possible through the suspension of the \textit{Racial Discrimination Act} 1975, legislation that was designed to guard against such rights abuse.

\(^9\) Reg Graycar and Jenny Morgan argue, however, there remain possibilities for discussions of substantive equality rights in individual contexts without constitutional guarantees, or in spite of lack of legislative cognizance of the need for such provisions, but it is ‘limited’ (Morgan and Graycar, 2008: 112). This essay seeks to contribute to their rhetorical questions about why those limits exist.

\(^{10}\) CEDAW, however, was acceded to by the Australian Government in March 2009, although it is unclear how this will yet translate into genuine law reform: Cusack (2009).
Nevertheless, how Australia as a broader jurisgenerative community reconciles its values of rights in relation to recognition of indigenous Australians is indicative of much more about the nation-state itself, what it can bear, how it can reconcile its past, and how it also looks forward, and outward, in maintaining a critique against such domestic legislative practise. Indigenous legal academic Larissa Behrendt has argued, ‘Far from being the special and separate sector of the Australian community, we are its benchmark’ (Behrendt, 2005: 253). The engagement with the notion of rights through consideration of Indigenous politics holds then an ambivalent promise for feminist politics also, despite the lingering mythologies of what those politics symbolise, and their persistent misrepresentation in national debate. The particularity of the context for Australian public discourse on rights suggests much about the complexity of demands on Australian feminist thinking about how to reconfigure possibilities for women through the national political conversation. It also reiterates that feminists in any national locale should resist the seductive promise of Fraser’s ‘transnational representativeness’ — a frame for thinking that speaks from and to a language of rights read through geographically centred European experiences of liberalism, or the promised universalism of international law. Discussions of domestic law, and how it carries a nation’s past and values, must be prominent empirical sites in transnational historical and feminist practices, even as the role of ‘the nation-state’ expires. Without understanding how 'the nation', any nation, is capable of interpreting, resisting, transforming, or mourning its own past, and copes with the practices of globalisation and decolonisation in the way it legislates in the present, we run the risk of obscuring genuine transnational engagement about the meaning of feminist politics in our time.

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biography

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references


