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ISSUES PAPER

# CULTURALLY AND LINGUISTICALLY DIVERSE PARTIES IN AUSTRALIAN COURTS – INSIGHTS FROM NEW ZEALAND

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*with the support of*

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# TABLE OF CONTENTS

# INTRODUCTION

The purpose of this Issues Paper is:

1. to outline for readers in Australia the key findings and recommendations of the CALD Report of the Superdiversity Institute in New Zealand entitled 'Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study' (the '**CALD Report**')[1], published November 2019;
2. to outline the changes to the legal landscape elicited by the CALD Report;
3. to reflect on the insights that the recommendations of the CALD Report offers to Australia;
4. to propose an action plan for related initiatives to meet the challenges arising out of increasing superdiversity in Australian courts; and
5. to contribute to public discourse.

## Background to the CALD Report

Authored by Mai Chen, the CALD Report was launched in New Zealand in November 2019. The CALD Report applies a superdiversity framework in determining the issues and challenges faced by culturally, ethnically and linguistically diverse (**CALD**) parties in getting equal access to justice in New Zealand courts.[2] Chinese parties were selected as the case study for the CALD Report on the basis of research showing that Chinese from Mainland China were 'one of the groups facing the greatest barriers when they appear before the New Zealand courts'.[3] Superdiversity is particularly relevant in New Zealand, where it has been projected that by 2038, Asian peoples will comprise 35 per cent of Auckland's population.[4] Superdiversity is also increasing in Australian cities.[5]

[1] The CALD Report is available at link.

[2] The CALD Report, above n 1, 12 cites a Superdiversity Stocktake undertaken by the Superdiversity Institute (see link), which defines superdiversity as being 'the substantial increase in the diversity of ethnic, minority and immigrant groups in a city or country, "especially arising from shifts in global mobility"'. The concept of superdiversity captures not only diversity between ethnic, minority and immigrant groups, but also diversity within those groups.

[3] The CALD Report, above n 1 , 12 at [5].

[4] The CALD Report, above n 1, 19 at [28].

[5] The 2016 Census in Australia reported a 28% Asian population in Sydney and a 24.4% Asian population in Melbourne.

According to the New Zealand Bar Association:

> *The report importantly recognises there is a significant amount of work needing to be done to ensure New Zealand's superdiversity does not undermine the ability of our court system to ensure equal access to justice for all.*[6]

The CALD Report was acknowledged as groundbreaking and received media attention in New Zealand.[7] Following its launch, on 17 February 2020, New Zealand Asian Lawyers (a membership organisation under the umbrella of the Superdiversity Institute) and the New Zealand Law Society's Auckland branch co-hosted a seminar on judges' perspectives on representing CALD parties in court, with High Court and Court of Appeal judges speaking. This was followed by seminars presented to the Institute of Judicial Studies, to Auckland High Court judges and to Members of the Employment Relations Authority (**ERA**) in Auckland.

The Court of Appeal of New Zealand cited the CALD Report in *Zheng v Deng*,[8] a case which concerned the existence (or lack thereof) of a business partnership without formal documentation. In its judgment, the Court referred to an extract in the CALD Report that Chinese parties are less likely to conduct business using a formal contract due to *guanxi*, the Chinese concept that refers to Chinese relationships and connections.[9]

The case was subsequently appealed to the New Zealand Supreme Court,[10] which invited the New Zealand Law Society (**NZLS**) to consider intervening after consultation with New Zealand Asian Lawyers, due to the complex matrix of linguistic, social and cultural issues involved in the situation.[11] In their submissions on behalf of the NZLS, Jane Anderson QC, Mai Chen and Yvonne Mortimer-Wang referred extensively to the CALD Report's findings.

In its judgment dismissing the appeal, the Supreme Court included extracts from the decision of the Court of Appeal that cited, and contained paragraphs from, the CALD Report. The Supreme Court provided some comments on how the relevant information on the social and cultural framework could be brought to the attention of

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[6] New Zealand Bar Association, 'Accommodating Superdiversity in our Legal System' (20 November 2019), available at link.

[7] Radio New Zealand, 'Crisis facing courts as Chinese people seek justice in NZ' (interview with Mai Chen) (17 November 2019) <www.rnz.co.nz>; and New Zealand Law Foundation, 'Ground breaking report into Superdiverse parties in the courts says change is needed' (November 2019) <www.lawfoundation.org.nz>.

[8] *Zheng v Deng* [2020] NZCA 614.

[9] *Zheng v Deng* (NZCA), above n 9, at [88].

[10] *Donglin Deng v Lu Zheng* [2022] NZSC 76.

[11] See *Donglin Deng v Lu Zheng* [2021] NZSC 43 in which the Supreme Court granted leave to appeal.

the Court in relevant cases, saying '[t]hese comments are influenced and in part derived from the very helpful submissions made to us by the Law Society.'[12]

The CALD Report is already influencing New Zealand's legal landscape in significant ways, and the long-term impacts of the discourse it sparks will undoubtedly continue to unfold. These developments provide valuable insight for Australia, with its substantially similar legal system.

## About the Authors

### *Mai Chen*

Mai Chen was born in Taiwan and immigrated to NZ when she was a young girl speaking only Mandarin. She has a First-Class Law Honours degree from Otago University, a Master of Laws degree from Harvard Law School.

Mai is the President of New Zealand Asian Lawyers and is Senior Partner of Chen Palmer, with over 30 years of experience in Public and Administrative Law. She also chairs the Superdiversity Institute of Law, Policy and Business and is Chair of NZ Asian Leaders.

Mai has served on several Boards, including as an independent non-executive Director on the Bank of New Zealand Board for 7 years and the Trade for All Advisory Board appointed by the Minister for Trade in 2019- 2020. She was a director on the Advisory Board of AMP Life Limited, and a member of the New Zealand Securities Commission for two terms. She was Adjunct Professor in both the School of Business and the Law Faculty at the University of Auckland and previously taught at Victoria University of Wellington's Law School.

Mai was also an inaugural Chair of New Zealand Global Women and is the inaugural Chair of SUPERdiverse WOMEN. Mai was placed on the Global Diversity List Top 50 Diversity Figures in Public Life, in the Global Diversity List 2016 (affiliated with the Global Diversity Awards, supported by The Economist). She was twice a finalist in New Zealander of the Year.

Mai co-founded Chen Palmer, one of NZ's first boutique law firms and Australasia's first 'Washington-style' law firm specialising in legislation and public policy. She is a thought leader, a direction setter and a future thinker. Mai is one of NZ's top constitutional and administrative law experts, specialising in central and local Government policy and legislation, especially as it applies to business, and litigating

[12] *Deng v Zheng* (NZSC), above n 11 at [77].

public law cases. Mai is also a judicial review specialist and on Te Tiriti o Waitangi cases in the courts and the Waitangi Tribunal.

Mai has appeared before the Supreme Court, the Court of Appeal, the High Court and District Court, in the Māori Land Court, the Waitangi Tribunal, the Human Rights Tribunal, the Alcohol Regulatory and Licensing Authority, the Employment Relations Authority, the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants and the Immigration and Protection Tribunal. She has authored many books, reports, and papers and commentates in the media on public and administrative, regulatory and diversity/superdiversity issues.

### *Andrew Godwin*

Dr Andrew Godwin is a Principal Fellow at Melbourne Law School and an Honorary Associate Director of the Asian Law Centre. He is also Special Counsel at the Australian Law Reform Commission, assisting its inquiry into the simplification of corporations and financial services regulation. He previously spent 15 years as an academic at Melbourne Law School (2006 – 2021) and 15 years in practice, 10 of which were spent as a foreign lawyer in Shanghai (1996 – 2006).

Andrew's research interests include financial services law, finance and insolvency law, financial regulation, property law and the regulation of the legal profession. Andrew is one of Australia's leading experts on Chinese commercial law and is the author of a critically acclaimed book called *China Lexicon* (Vantage Asia, 2014), which examines Chinese and English legal terminology and concepts and was sponsored by the Beijing Arbitration Commission. Other books that Andrew has published as an author and co-editor include *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021), *Technology and Corporate Law: How Innovation Shapes Corporate Activity* (Edward Elgar Publishing, 2021), *Sackville & Neave Australian Property Law* (11th edition, LexisNexis, 2021), and *Research Handbook on Asian Financial Law* (Edward Elgar, 2020).

Andrew has been extensively involved in judicial engagement in Australia and overseas. In 2016, Andrew worked with the Judicial College of Victoria to design a day-long workshop on the impact of culture in the courtroom. The workshop was delivered to the judges of the Commercial Court of the Supreme Court of Victoria and the County Court of Victoria, and members of the Victorian Civil and Administrative Tribunal. In 2017, Andrew delivered a session on 'Chinese Perspectives on the Law' to judges of the Federal Court of Australia. In 2018 and 2019 respectively, Andrew designed and convened a series of workshops for judges from Sri Lanka and Thailand in a range of areas, including intellectual property law, international trade law, and insolvency law.

Andrew has acted as a consultant to a broad range of organisations, including the World Bank and regulators and governments in Australia and abroad. Andrew is a fellow of the Australian Academy of Law and a member of the Advisory Board of the Asian Business Law Institute in Singapore.

*The authors are grateful to the following members of the Asian Australian Lawyers Association for their assistance in reviewing and commenting on this Issues Paper: Molina Asthana; Edwin Fah; Matt Floro; Pavithra Jaidev; Ahalya Kamineni; James Morgan; Kelvin Ng; Johnny Nguyen; Stephanie Ou-Young; Sining Wang; and Gillian Wu.*

# THE CALD REPORT – METHODOLOGY AND FINDINGS

## Methodology

The research methodology for the CALD Report comprised three main components:

(a) interviews with stakeholders, including judges, lawyers, interpreters, academics and experts;
(b) review and analysis of reported cases;[13] and
(c) review of literature and data.[14]

## Findings

The CALD Report contains numerous findings arising out of the above research. Some of the key findings from the CALD Report are extracted below.

### *Judges' perspectives – cultural assistance for judges*

> *A key finding from interviews is that judges require cultural assistance, but that there are few mechanisms to enable them to access this.*[15]

The CALD Report discusses the requirement for judges to have access to cultural assistance in relation to both sentencing decisions and also civil disputes 'when [judges] consider it necessary for the proper administration of justice.'[16]

### *Judges' perspectives – enhanced pre-trial process*

> *A key finding from interviews with judges was the real need for an enhanced pre-trial process... greater proactivity by lawyers of CALD parties is also needed to ensure effective communication with judges/juries.*[17]

The enhanced pre-trial process as recommended by the CALD Report (explained further below) would involve a process 'to determine as early in the process as possible, if parties to a proceeding require interpreters' and would 'provide CALD litigants with early additional assistance to understand the New Zealand court

[13] The CALD Report, above n 1, 20: 'The Institute has reviewed approximately 2,000 reported cases from New Zealand courts, mostly from the High Court, Court of Appeal and Supreme Court, where issues and challenges have arisen due to the parties or witnesses being Chinese. The specific methodology for this part of the research is found in the introduction to the Case Review section.'

[14] The CALD Report, above n 1, 23: 'The Institute has also analysed data sourced from the Ministry of Justice as well as publicly available data, such as Census data, migration statistics and data from the New Zealand Law Society.'

[15] The CALD Report, above n 1, 22 at [52].

[16] The CALD Report, above n 1, 22 at [53].

[17] The CALD Report, above n 1, 21 at [47].

system and process in their own language, via the interpreter who [would] be present.'[18] The need to assist litigants and witnesses to understand the legal system and for lawyers to play a role in that regard has been identified by judicial officers in Australia.[19]

### *Lawyers' perspectives - upskilling*

> *A key finding was that both Chinese and New Zealand European lawyers need upskilling to be able to better understand the motivations of their Chinese clients, and to be able to fairly represent their client in civil disputes (in particular, understanding that Chinese clients may be more resistant to mediation as a form of dispute resolution compared to other clients). New Zealand European lawyers need more "China capability" and some Chinese lawyers not born in New Zealand need a greater understanding of how the New Zealand rule of law differs from that in their country of birth.*[20]

### *Interpreters' perspectives – matching interpreters with witnesses*

> *Interviews with judges, lawyers and interpreters demonstrated the importance of properly matching interpreters with witnesses. For example, while an interpreter from Singapore will speak Mandarin, they are unlikely to be able to pick up on the nuances and accent of a witness from rural PRC, and this will affect the quality of the interpretation. There is a need to implement a system to properly match interpreters in both the civil and criminal jurisdictions with witnesses to ensure quality interpretation to the standard required by the court.*[21]

### *Case review – no documentation and self-represented litigants*

> *The Case Review confirmed a number of the key findings referred to above, and especially the "perfect storm" of no/little contemporaneous documentary evidence and parties who do not speak English, but who nevertheless decide to represent themselves.*[22]

[18] The CALD Report, above n 1, 34 at [122].

[19] Based on informal discussions with judicial officers in Australia.

[20] The CALD Report, above n 1, 24 at [68].

[21] The CALD Report, above n 1, 27 at [84].

[22] The CALD Report, above n 1, 28 at [97].

Anecdotal evidence supported by references in cases concerning CALD parties suggests that the problem in civil disputes of either a lack of contemporaneous documentation or arguments that the legal documents do not reflect the true position between the parties is particularly prevalent among litigants of Chinese background.[23]


[23] Based on informal discussions with judicial officers and lawyers in Australia.

# IMPACTS OF THE CALD REPORT ON THE LEGAL LANDSCAPE

## Enhanced case management and changing rules of evidence

The CALD Report recommended the introduction of an enhanced pre-trial and case management process in cases involving CALD parties, especially when interpreters are required.[24]

It was also noted in the NZ Law Society's submissions to the Supreme Court in *Deng v Zheng* (the '**NZLS Submissions**') that:

> *Access to justice by CALD parties would be improved by early identification of cultural and/or linguistic issues through pro-active case management (identifying what evidence can be agreed upon, any issues where expert evidence is needed, and the dialect and cultural expertise needed by any translator or interpreter). A Court-appointed expert (which may include an independent interpreter or translator) may also be considered appropriate.*[25]

In May 2021, the Rules Committee[26] published its report 'Improving Access to Civil Justice' (the '**Rules Committee Report**') which made recommendations identifying reforms proposals that might help in addressing barriers to civil justice. These proposed reforms were reflective of many of the recommendations made in the CALD Report, particularly the following two proposals:

- First, the proposal for an expanded Issues Conference in the form of an 'initial issues conference held with a Judge, counsel and party representative for each party.' At the Conference the Judge would participate in identifying the key issues and any means which may assist the parties in resolving the claim without further litigation. Other matters, including requirements for trial, any further interlocutory steps, and the potential for resolution by alternative dispute resolution would also be discussed.[27]

As the CALD Report identified, an enhanced pre-trial process would provide CALD litigants with early additional assistance to understand the New Zealand court

[24] The CALD Report, above n 1, 34, at [120].

[25] *Legal Submissions on behalf of the New Zealand Law Society As Intervener, 9 August 2021* [**NZLS Submissions**], at [37].

[26] This is a statutory body prescribed by s 155 of the Senior Courts Act 2016 which has responsibility for procedural rules in the Supreme Court, the Court of Appeal, the High Court, and the District Court. The purpose of the rules is to facilitate 'the just, speedy, and inexpensive dispatch of the business' of the High Court, Court of Appeal, and Supreme Court as well as the administration of justice.

[27] The Rules Committee *Improving Access to Civil Justice* (14 May 2021) at [70].

system and process,[28] as well as assist judges to better assess the cultural factors which may influence the behaviour and actions of the parties before them and their true English comprehension abilities.[29] This may also mitigate the comparative unwillingness of CALD parties to settle disputes outside of court.[30]

- Secondly, proposed changes to current evidential rules and certain practices for trial, in particular that documents in the common bundle would be admissible to the truth of their content subject to a challenge being advanced, and that evidence at trial would be given by way of affidavit, with additional *viva voce* evidence-in-chief only on areas of significant factual contest.[31]

The CALD Report made extensive findings that reliance on *viva voce* evidence presents additional challenges for CALD litigants and counsel who often do not have English as their first language and whose cultural backgrounds can make assessments of demeanour more difficult.[32] A reduced reliance on the adversarial nature of *viva voce* evidence would help mitigate these challenges.

However, some proposals in the Rules Committee Report still have implications for CALD litigants in getting access to justice. For instance, the proposal that 'greater emphasis be placed on the documentary record to establish facts, with the documents admissible as to the truth of their content' may be challenging, as often there are no documents for CALD parties due to *guanxi*, or an oral tradition for Maori. In such circumstances, there is a need for direct evidence of the parties to prove their own cultural values and beliefs. Expert evidence may therefore be needed to understand what the parties did and said (adjudicative facts as opposed to legislative or social facts).[33] Consideration should also be given to judicial notice of facts and reliable published documents; the relevance of context and the matrix of relevant facts when the reasonable person test applies;[34] as well as the application of judicial common sense.

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[28] For comments by an Australian judge, writing extra-curially, on the challenges for persons from culturally diverse backgrounds in understanding the legal system, see The Honourable Justice H Wood, 'Cultural diversity: reflections on the role of the judge in ensuring a fair', available at link (originally published in (2016) 28 JOB 35 and updated 2021, based on a paper presented at the Judicial Council on Cultural Diversity Conference, 13–14 March 2015, Sydney).

[29] The CALD Report, above n 1, 34 at [122].

[30] The CALD Report, above n 1, 84-85 at [378] – [382].

[31] The Rules Committee Report at [75].

[32] See the CALD Report, above n 1, 21 at [43] – [46].

[33] K C Davis 'Judicial Notice' (1955) 55 Col L Rev 945 at 948, cited in DM Paciocco 'Judicial Notice in Criminal Cases: Potential and Pitfalls' (2005) 40(1) *Criminal Law Quarterly* 35.

[34] See Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 – 913 on the reasonable person test in contract.

Another example is the Rules Committee Report's proposal to impose greater controls on court evidence, which includes 'making greater use of single Court appointed experts paid for by both parties (the appointment of which would be addressed at the issues conference or conferences)'.[35]

Using the mechanism of a court appointed expert to assist the judge is not a silver bullet. Judges may not have enough information to select the right expert, if the parties are unable to agree,[36] even if an expert with the requisite expertise was available. Often very little factual detail about the parties' backgrounds, culture and dialects is provided by the parties' counsel, or the parties themselves, if self-represented. It is for those reasons that the NZLS suggested a more relaxed approach to judicial notice and to social facts in its submissions to the Supreme Court in *Deng v Zheng*.[37]

## Developing cultural capability of the judiciary

The CALD Report stressed the importance of judicial leadership to equalise access to justice for CALD parties in courts.

At the 17 February 2020 seminar held by NZ Asian Lawyers and the NZLS, Justices Gordon, Muir, Palmer, Venning, Courtney, Powell and Fitzgerald shared their views on the CALD Report's recommendations. These were collated and summarised by Mai Chen in an article published in LawTalk, the NZLS's official magazine, on 3 April 2020.[38] Some particularly salient insights include:

- The judges thought there was merit in the CALD Report recommendation to move the responsibility for arranging interpreters from the Ministry of Justice to the court registry, and for interpretation in civil cases to be funded by the Ministry of Justice to avoid the risk of perception of bias.

- Justice Venning said the two principal ways the court and judges can equip themselves to deal effectively with issues arising from cultural differences are by hearing expert evidence on cultural issues, and ongoing education. He also stated that 'mediators and judges in settlement conferences need to be aware of the importance of "face" and cultural differences in the approach to negotiations and should address the issue at the outset of the conference.'

[35] The Rules Committee Report at [76].

[36] High Court Rules 2016, Rule 9.36.

[37] See the NZLS Submissions, above n 26 at [24] and also footnotes 36-37.

[38] Mai Chen 'Judicial leadership on equal access to justice for culturally and linguistically diverse parties in courts' *Lawtalk* (online ed, 3 April 2020).

- Justice Powell: 'Cases involving CALD parties, particularly when an interpreter is required, need more time to be heard and considered. Counsel need to be realistic when providing time estimates, instead of trying to hurry a hearing through.'

- Justice Courtney: 'It might be that if cultural misunderstanding is likely to give rise to a specific issue in a trial, consideration might be given to a tailored direction dealing with it. That would be a matter for counsel to identify and raise with the judge.'

- Both Justices Fitzgerald and Powell reiterated the benefits of expert evidence in appropriate cases and noted that the extent to which judges can take 'general training' on cultural factors into account in a particular case is limited. This makes it crucial that, where appropriate, relevant and admissible cultural information is led as expert evidence.

Arising out of the above is the importance of lawyers turning their minds to the potential need for expert evidence on cultural factors as early as possible, and obtaining appropriate training to grow their cultural capability and ongoing education for this purpose. This is particularly important given the need for lawyers to discharge their duty as officers of the Court.

A similar seminar was conducted with Members of the Employment Relations Authority (ERA) in Auckland in May 2020 and discussed in a second LawTalk article.[39] The session highlighted that challenges to CALD parties are not limited to the adversarial court system; these issues are as significant in the ERA jurisdiction, which is an investigative one, as in the senior courts. ERA members reported that a high proportion of cases before it in Auckland involve employees and employers from CALD communities. Many are recent migrants with limited English fluency and understanding of New Zealand employment law.

The key issues arising from CALD parties before the ERA, as discussed during the session and confirmed by cases, include: high rates of self-representation among CALD parties; high rates of non-engagement, for instance by failing to attend investigation meeting; cultural concepts such as 'face' acting as a barrier to settling matters; little contemporaneous documentary evidence available; and a lack of understanding by CALD employers of their employment obligations. These are remarkably similar to the challenges arising from CALD parties in courts.

Some recommendations made by Mai Chen to ERA members included making the consequences of non-participation in the process more explicit in communications

[39] Mai Chen 'CALD parties in the Employment Relations Authority' *LawTalk* (online ed, 13 May 2020).

from the ERA, ensuring all parties coming into contact with the ERA have sufficient information in their first language to ensure their understanding of the process, and being mindful of the impact of cultural factors on parties' demeanour before the ERA and how this is assessed in making credibility findings. There are many subtle ways in which cultural factors may inhibit parties from presenting evidence in a way which assists them – for example young Chinese employees may struggle to articulate their grievances against older Chinese due to the cultural custom of showing respect to their elders.

ERA Members, like senior court judges, were keenly aware that cultural factors, experience and knowledge of New Zealand law, and fluency in English are all factors that affect the ability of CALD parties to participate effectively and equitably in the ERA processes.

### Use of the CALD Report in *Zheng v Deng (NZCA)*

The CALD Report is one of two non-case texts cited in *Zheng v Deng*. The significance of the questions raised in relation to linguistic and cultural issues was self-evident in the Supreme Court's invitation for the NZLS and NZ Asian Lawyers to intervene. The threshold for granting leave to intervene is high – it is only likely to be granted where the proceeding is likely to result in the development of the law, and involves broad questions of policy.[40]

In its judgment, the Court of Appeal noted that it is 'conscious that language is used in a broader linguistic and cultural setting, by reference to background assumptions…that the Court may not be aware of or understand.'[41] It then referenced two paragraphs from the CALD Report about the Chinese cultural reluctance to use written contracts in their conduct of business, including a published article referenced in the CALD Report:[42]

> 307 *Guanxi* often governs the Chinese way of doing business, and is in part the reason why Chinese people are less likely to conduct business by using a formal contract and more likely to do so via a "handshake." As Dr Ruiping Ye notes:
>
> > As written contracts are perceived as evidence for transactions, and requiring evidence for agreements with one's family or friends would appear to be distrusting, many harmony-loving Chinese will find it difficult to ask for a written contract with family, friends or

[40] *Mohamed v Guardians of New Zealand Superannuation* [2020] NZHC 1324, [2021] 2 NZLR 603, at [8].

[41] *Zheng v Deng* (NZCA), above n 9, at [88].

[42] *Zheng v* Deng (NZCA), above n 9, at [88].

> close acquaintances. In cases of close relationship, it is honour that binds the parties, rather than the written contract. Nevertheless, each party would believe that a binding contract exists between them if the terms of the agreement have been discussed and words of confirmation have been spoken unequivocally.

> 308 Dr Ye notes that where contracts are drafted, they are generally brief. Dr Ye says that this was "sufficient when the society operated on the basis of mutual trust and was governed by social pressure" but that it is "increasingly becoming insufficient as modern life becomes more complicated" and that "parties who are not assisted by competent lawyers do not necessarily turn their minds towards complex or ambiguous matters." This concern, and the challenge that this creates in ensuring the courts are adequately equipped to provide Chinese parties with equal access to justice, is reflected in some of the cases in our case review, and also in our interviews with judges and lawyers.

The Court of Appeal noted the importance of being 'sensitive to the importance of social and cultural context and, in particular, to be cautious about drawing inferences based on our preconceptions about "normal" or "appropriate" ways of structuring and recording business dealings.'[43]

## Use of the CALD Report in Deng v Zheng in the Supreme Court

In its judgment, the Supreme Court noted that the Court of Appeal had referred to cultural considerations and included extracts from the decision of the Court of Appeal containing the above paragraphs from the CALD Report. The Supreme Court was satisfied that the case turned on inferences to be drawn from contemporaneous written material and that the cultural issues were not determinative.[44] However, the Supreme Court noted the significance of *guanxi*[45] and provided some comments – 'influenced and in part derived from the very helpful submissions made to us by the Law Society'[46] – on how information concerning the social and cultural framework (where relevant) could be brought to the attention of the court.[47] The guidance

[43] *Zheng v* Deng (NZCA), above n 9, at [89].

[44] *Deng v Zheng* (NZSC), above n 11, at [5].

[45] *Deng v Zheng* (NZSC), above n 11, at [75] – [77].

[46] *Deng v Zheng* (NZSC), above n 11, at [77].

[47] *Deng v Zheng* (NZSC), above n 11, at [77]. See Mai Chen, 'Supreme Court decision in *Deng v Zheng*: Guidance on bringing relevant social and cultural information to the Court's attention' (2022) 4(1) *Amicus* Curiae Forthcoming October 2022.

included recognition of the following:

- the role of expert evidence, especially when seeking to explain the conduct of another party;[48]
- the ability of judges 'to have regard to sources of information of unquestionable accuracy and to admit reliable published documents in relation to matters of public history, literature, science or art';[49]
- the ability of courts to appoint experts as 'a mechanism which may, in some circumstances, be helpful in relation to cultural context';[50]
- the need for judges 'to take care to employ general evidence about social and cultural framework to assist in, rather than to replace, a careful assessment of the case specific evidence';[51]
- '[the] more generalised the evidence or information, and the less it is tied to the details of what happened, the greater the risk of stereotyping';[52]
- the need to avoid treating people who share a particularly ethnic or cultural background as a homogenous group;[53]
- the ability of judges to 'inquire of the parties if they consider that they would be assisted by additional information as to social and cultural context;'[54]
- The ability for witnesses 'to explain their own conduct by reference to their own social and cultural background.'[55]

To summarise, the above case reflects an important development in judicial recognition of the fact that linguistic evidence is not the simple interpretation of foreign words, but assistance with determining the meaning of the words as they would be understood in context. The phrase 'the social and cultural framework' or 'context' is used many times in the 'Cultural considerations' section of the judgment.[56] Shortly after the Supreme Court granted leave to appeal, Mai Chen authored an article, published in LawTalk on 25 June 2021, noting that:

> The Supreme Court's move is emblematic of the growing awareness that in an increasingly culturally and linguistically diverse New Zealand an understanding of the intersection between law and culture is essential for

[48] *Deng v Zheng* (NZSC), above n 11, at [79].

[49] *Deng v Zheng* (NZSC), above n 11, at [79(c)].

[50] *Deng v Zheng* (NZSC), above n 11, at [83].

[51] *Deng v Zheng* (NZSC), above n 11, at [80].

[52] *Deng v Zheng* (NZSC), above n 11, at [81(a)].

[53] *Deng v Zheng* (NZSC), above n 11, at [81(a)] and [82].

[54] *Deng v Zheng* (NZSC), above n 11, at [84].

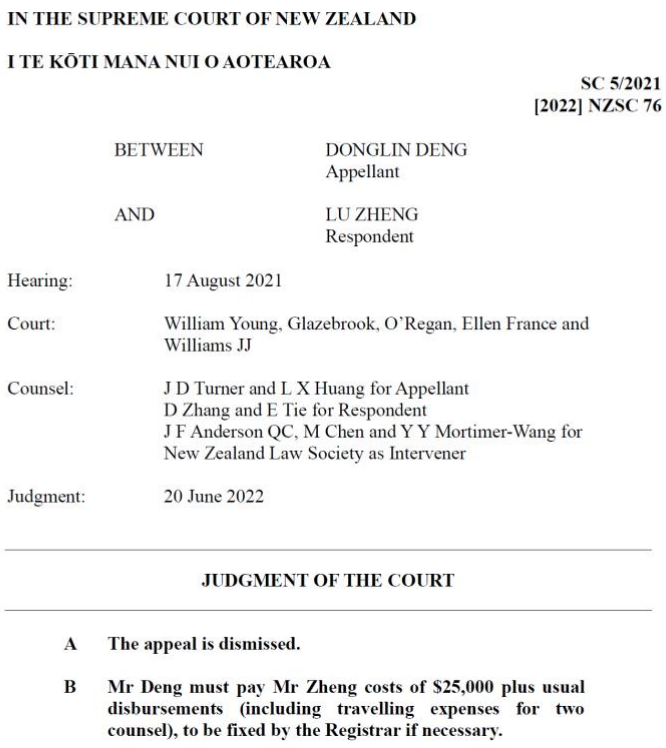
[55] *Deng v Zheng* (NZSC), above n 11, at [79(a)].

[56] For example, at [77], [79], [83] and [84].

judges and practitioners.[57]

The Supreme Court specifically observed that:

> A key to dealing with such cases successfully is for the judge to recognise that some of the usual rules of thumb they use for assessing credibility may have no or limited utility. For instance, assessing credibility and plausibility on the basis of judicial assumptions as to normal practice will be unsafe, if that practice is specific to a culture that is not shared by the parties.[58]



**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 5/2021**
**[2022] NZSC 76**

| | | |
|---|---|---|
| BETWEEN | DONGLIN DENG<br>Appellant |
| AND | LU ZHENG<br>Respondent |

| | |
|---|---|
| Hearing: | 17 August 2021 |
| Court: | William Young, Glazebrook, O'Regan, Ellen France and Williams JJ |
| Counsel: | J D Turner and L X Huang for Appellant<br>D Zhang and E Tie for Respondent<br>J F Anderson QC, M Chen and Y Y Mortimer-Wang for New Zealand Law Society as Intervener |
| Judgment: | 20 June 2022 |

**JUDGMENT OF THE COURT**

**A** **The appeal is dismissed.**

**B** **Mr Deng must pay Mr Zheng costs of $25,000 plus usual disbursements (including travelling expenses for two counsel), to be fixed by the Registrar if necessary.**

[57] Mai Chen 'The Supreme Court, Confucianism and Western values and the impact on the law' *LawTalk* (online ed, 25 June 2021).

[58] *Deng v Zheng* (NZSC), above n 11, at [78(c)].

# THE CALD REPORT – RECOMMENDATIONS AND INSIGHTS FOR AUSTRALIA

The CALD Report makes 36 recommendations, all of which reinforce the need to take a holistic approach to reducing the challenges faced by CALD litigants. Set out below is a selection of key recommendations:

## Judges

### *Recommendation 1: Comprehensive pre-trial process*

*We recommend the introduction of an enhanced pre-trial and case management process in cases with CALD parties, where interpreters are required, with the same judge and registrar throughout, where possible.*[59]

As noted above, this recommendation would 'provide CALD litigants with early additional assistance to understand the New Zealand court system and process in their own language, via the interpreter who [would] be present.'[60]

The Courts can also proactively undertake early and comprehensive engagement through issues or case management conferences, which was a recommendation of the Rules Committee Report. This would enable relevant cultural and linguistic issues to be identified as soon as possible, and for appropriate interlocutory orders (or modifications to standard interlocutory orders) to be made that deal with the unique issues arising in cases involving CALD parties.

### *Recommendation 2: Greater willingness to admit evidence*

*It is the judge's role to ensure that all relevant evidence is adduced in a trial. The unique set of circumstances – lack of contemporaneous documentary evidence, reliance on viva voce evidence, often through an interpreter, and approaches by parties to doing business which differ from New Zealand European approaches judges may be used to – mean that judges may need to be more willing to admit relevant evidence when it is presented in less traditional formats, and to decide the particular issues being raised by the parties. Judges may require training on how best to do this in presiding over cases with CALD litigants and also on less typical evidence that may be presented or be relevant.*[61]

[59] The CALD Report, above n 1, 34 at [120].

[60] The CALD Report, above n 1, 34 at [122].

[61] The CALD Report, above n 1, 35 at [127].

As stated above, while no special rules of evidence or standards of proof apply to CALD litigants, enquiries into the relevant cultural and social factors may result in judicial notice of facts, reliance on reliable published documents, the application of judicial common sense and regard to the relevance of context and the matrix of relevant facts when the reasonable person test applies.[62] Legislative and social facts (as compared with adjudicative facts) may also fall outside of the requirements for admissible evidence under the Evidence Act.

Cultural reports under section 27 of the Sentencing Act 2000 can also be taken into account by judges. For example, the CALD Report refers to a case in which 'the wife of the "mastermind" of a large scale mortgage fraud scheme, successfully argued that cultural factors meant that her culpability was lower than her co-defendants and that she should therefore receive a lower sentence.'[63]

> ***Recommendation 5: Cultural training***
>
> *[The Institute of Judicial Studies] already runs cross-cultural seminars including on cross-cultural bias and self-represented litigants and these should continue to develop the cultural capability of the judiciary, and focus on those ethnicities, cultures and religions that are growing the most in New Zealand. Such cultural training will help the judiciary to develop a "mental red-flag cultural alert system, which gives [them] a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it."*[64]

With the support of the relevant judicial colleges and organisations, courts in Australia have conducted cultural training seminars and workshops for the judiciary. This in turn helps equip judges to identify and engage with cultural issues as set out in Recommendation 1. For example, the Judicial College of Victoria organised a cultural awareness workshop for the Commercial Court of the Supreme Court of Victoria in April 2016.[65]

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[62] See Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 on the reasonable person test in contract.

[63] *R v Xu* [2018] NZHC 1971 at [44]. The CALD Report, above n 1, 31 at [111] notes that 'Katz J gave "significant weight" to a section 27 [of the Sentencing Act 2002] cultural report provided by Ms Xu, that noted that Chinese cultural norms meant that Ms Xu was subservient to her husband, and that it would have been "extremely difficult" for Ms Xu not to follow her husband's instructions, even if she knew that his activities were illegal.'

[64] The CALD Report, above n 1, 40 at [156], citing The Hon Justice Emilios Kyrou, 'Judging in a multicultural society' (2015) 24 *Journal of Judicial Administration* 223 at 226.

[65] See Blake Connell, 'Workshop aims to bring Asian cultural awareness into the courtroom' (Melbourne Law School News, 19 April 2016), available at link.

### *Recommendation 6: Bench book guide for judges*

*[The Institute of Judicial Studies] is currently developing an Equity/Diversity Handbook for judges. Its purpose is to guide judges in addressing the issues which arise when presiding over cases involving CALD parties. We are pleased to hear that this is underway; however, we note that benchbooks can only go so far, and that it is important that there is active and ongoing discussion to build cultural capability through the other recommendations made in this report.*[66]

Some jurisdictions around Australia have developed Equal Treatment Benchbooks and various other publications that are designed to assist judges in cases involving CALD parties.[67] A recent example is the *Handbook for Judicial Officers*, published by the Judicial Commission of New South Wales in October 2021.[68] This handbook includes a section on cultural diversity.[69]

### *Recommendation 7: Legal implications of increased superdiversity – demographic transformation of the reasonable person on the Lambton Quay bus*

*The current legal system provides for a number of "tests" based on the behaviour of a hypothetical "ordinary reasonable person." However, in light of the section on demographic data and projections below (under Chinese People in New Zealand and its Courts), it is reasonable to question who the ordinary reasonable person is and will be in New Zealand in even 10, 15 or 20 years' time.*[70]

The CALD Report states that '[s]ome thought has been given by courts and academics around the world to the need to apply a different reasonable standard for cases involving minorities.' It further notes that '[t]here has understandably been more thinking done on how to accommodate indigenous people's rights and legal concepts.'[71]

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[66] The CALD Report, above n 1, 41 at [160], citing the Hon Chief Justice Robert French AC, "Equal Justice and Cultural Diversity – the General Meets the Particular" (2015) 24 *Journal of Judicial Administration* 199.

[67] For a list of resources that are available in the area of cultural diversity, see the Judicial Council on Cultural Diversity, 'Cultural Diversity Within the Judicial Context: Existing Court Resources' (15 February 2016), available at link.

[68] Available at link.

[69] *Handbook for Judicial Officers*, 71 – 104.

[70] The CALD Report, above n 1, 43 at [172].

[71] The CALD Report, above n 1, 20-21 at [38].

In oral submissions to the Supreme Court in *Deng v Zheng*, Mai Chen cited Professor Stephen Hall's description of a number of Hong Kong contractual interpretation cases where English authorities were inapplicable as local customs (language and culture) differed:[72]

(a) *Wong Wai-chun v The China Navigation Co Ltd* [1969] HKLR 471 (FCSC) [9-24]:

*I think it must be accepted that all the English courts save the House of Lords are now bound to enforce [the rule governing the incorporation of terms into a contract]. Whether the courts of Hong Kong are so bound is a very different matter and I wish to reserve that question for consideration should occasion arise. Anyone who thinks that in the Far East the majority of persons who enter into these types of contract know that conditions are likely to be imposed and that such conditions will be set out in a ticket is living in a dream world of his own.*

(b) *Lau* Yeong *Wood v The Standard Oil Co of New York* (1908) 3 HKLR 53 (SC) [1-154]:

*In drawing up a contract where one of the parties is a Chinese, they must try and ascertain the real intention of the parties: "parties" in the plural. I cannot help thinking, from cases which have come before me, that a [Chinese person's] intention is very often assumed to be that which is in the mind of the European with whom [they are] contracting. Take the simple facts connected with the entering into [of] this contract. The agreement between the parties was come to on the strength of a certain document: the contract is signed afterwards. The contract contains a number of clauses, some of which are unintelligible even in English, and must be meaningless jargon when translated into Chinese. How it is possible to bind the contractor rigidly by the terms of that contract, and moreover to these terms as expounded and expanded by the English decisions? It seems to me impossible. This does not mean*

[72] Stephen Hall, *Foundations of Contract Law in Hong Kong*, 7th ed, 2021, see chapters 1, 9, 13 and 16 for discussion of these cases. Section 3 of the Application of English Law Ordinance (Cap 88), which was in force until the last day of British sovereignty over Hong Kong, provided the English common law was not to apply to Hong Kong where it was not applicable to the circumstances of Hong Kong people (section 3(1)(a)), and the common law in Hong Kong was to be modified when local circumstances required (section 3(1)(b)). Thus the English common law was imported into Hong Kong, but express warrant existed for the emergence of a Hong Kong common law on an English foundation (or for the application of Chinese customary law instead of the common law in appropriate cases). It is this common law which was maintained and adopted in Hong Kong on 1 July 1997. See also *Bank of China* (*Hong Kong*) *Ltd v China Hong Kong Textile Co Ltd & Ors* [2011] 4 HKLRD 457 (CA) on Chinese cultural attitudes to family relations relevant to the existence of undue influence. [16-64].

> *that the contract is to be torn up, only that we must be a little more careful in endeavouring to ascertain the real intention of the parties.*

The relevance of culture in setting the benchmark of the reasonable person is consistent with the common law 'emerg[ing] from the lives of the communities themselves' – 'render[ing] it a highly adaptive flexible and dynamic legal system.'[73]

Bringing these issues to the attention of the bench may accelerate the development of the law in appropriate cases.

### Interpreters

> ***Recommendation 8: Professionalisation***
> *We recommend that court interpreting be recognised as a profession and that this sits within a system of regulation, accreditation and professional pay rates. This is vital to ensure that there are adequate numbers of qualified and experienced court interpreters practising in New Zealand. Similarly, translation of documents into English, which requires different skills to interpreting, needs to be regarded as a profession, with a proper recognition of the unique skills required to perform this task.*[74]

In Australia, the Judicial Council on Cultural Diversity has issued *Recommended National Standards for Working with Interpreters*.[75] In addition, various courts in Australia have issued policies on interpreters.[76] Courts should also be mindful to identify cases where the proper translation or interpretation of foreign language evidence is in dispute; in those cases, consideration should be given to the possibility of engaging translators as expert witnesses, either by the parties themselves or by the Court itself (in appropriate circumstances).

### Ministry of Justice

> ***Recommendation 22: CALD witnesses***
>
> *We recommend that the Ministry of Justice develop a briefing on the New Zealand legal system, and the role of witnesses giving evidence, to be available in both traditional full form and simplified Chinese characters to help CALD witnesses, including those traveling to New Zealand from PRC to give*

[73] Stephen Hall, *Foundations of Contract Law in Hong Kong*, 7th ed, 2021, see chapter 1, 4.3 at 1-145 and 1-146.

[74] The CALD Report, above n 1, 46 at [194].

[75] See link.

[76] See, for example, the Federal Circuit and Family Court of Australia, Interpreter policy and guidelines, available at link.

*evidence in court.*[77]

### *Recommendation 28: Cross-cultural communication training for lawyers*

*We recommend that the Law Society run Continuing Professional Development (CPD) Seminars on cross-cultural communication, similar to seminars run by the [Institute of Judicial Studies], to build cultural capability throughout the profession. Growing cultural capability and Asia capability is essential if lawyers are to properly understand their clients' behaviours and their instructions. In particular, it is important that lawyers receive training on the Chinese rule of law, business culture and the concepts of guanxi and mianzi,*[78] *so that they can adequately take account of these cultural differences in advising their clients. If lawyers properly understand their clients' cultural background, assumptions and understandings of law, they will be better placed to understand their client's instructions and advise their client about the differences between their birth country and New Zealand's legal system. Cultural training will help lawyers to encourage their clients to settle disputes where this is in their best interests, as they will better understand the reasons why Chinese parties are reluctant to settle disputes. NZAL Lawyers and the Auckland branch of the Law Society held such a CPD session in September 2019 on "Chinese rule of law and how it differs to that found in New Zealand."*[79]

## Cross-agency recommendations

### *Recommendation 35: Judiciary to reflect New Zealand's superdiversity*

*We recommend that the New Zealand Law Society, the Ministry of Justice and the Criminal Bar Association consider and implement steps to ensure that there are sufficient numbers of Chinese and Asian lawyers in the pipeline to become judges. As noted in the Judicial Appointments Protocol for senior court judges, "it is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness." These groups all have a shared interest in ensuring that the New Zealand judiciary is representative of our*

[77] The CALD Report, above n 1, 54 at [239]. The CALD Report notes that 'Chinese rule of law is very different to that in New Zealand' (19 at [29]) and discusses the Court of Appeal's findings in *Kim v Minister of Justice* [2019] NZCA 209.

[78] The Chinese concept of 'face'.

[79] The CALD Report, above n 1, 56 at [249].

> *increasingly superdiverse population.*[80]

In June 2021, the Law Council of Australia released its *Policy on the Process of Judicial Appointments*.[81] Expressed to be 'designed to ensure transparency in Federal judicial appointments and diversity in Australia's judicial officers,'[82] the policy states that 'consideration should be given as to proactively appointing members who are reflective of the diversity of each jurisdiction' and that '[t]his may involve identification and consideration of the proportion of members belonging to a particular dominant social, cultural or other group, whether in a specific jurisdiction or nationwide.'[83]

### Law schools and continuing legal education

> ***Recommendation 36: Education at Law Schools and Professionals courses***
>
> *We recommend that the New Zealand Law Society, in conjunction with the Council of Legal Education and the College of Law work to provide additional practical training for those completing legal professionals courses. Such practical guidance in the day to day tasks lawyers are required to do would assist all law graduates and students and especially those who are CALD to develop the necessary knowledge and skills required to practise law in New Zealand.*[84]

The CALD Report notes the importance 'for legal academics teaching at law schools to consider the impact of superdiversity on the content of courses they teach.'[85] The role of legal education and training was emphasised in the Foreword by the Hon Chris Finlayson QC (Attorney-General of New Zealand from 2008 to 2017) as follows:

> *As I read this excellent work, one question remained unanswered. What are the law schools doing to prepare the next generation of lawyers for practice in this new world? Every law school teaches a subject called Law in Society but is enough attention paid to the legal consequences of demographic change? When Evidence is taught, are students told about the challenges of representing non English speaking New Zealanders? Continuing legal*

[80] The CALD Report, above n 1, 60 at [267].

[81] Policy Statement (26 June 2021), available at link.

[82] Ibid, 3.

[83] Ibid, 4 at [6].

[84] The CALD Report, above n 1, 61 at [270].

[85] The CALD Report, above n 1, 61 at [272].

*education courses need to be offered to teach older practitioners about the consequences of diversity. That is the responsibility of the NZLS.*

# AN ACTION PLAN FOR AUSTRALIA

In general, the difficulties facing CALD parties in Australian courts are very similar to those in New Zealand. They arise in an equally broad range of areas, including communication barriers (language and interpreters), cultural barriers, and barriers in access to legal knowledge and legal representation for non-English speakers. The challenges in ensuring that CALD parties get equal access to justice in Australian courts are similar to the challenges in New Zealand.

The following is a list of actions that might be considered to strengthen Australia's response to the challenges outlined above:

- ***Research***
    - securing funding to undertake research and case studies along similar lines to the CALD Report,[86] and compiling a database of relevant materials;
- ***Judges and courts***
    - developing benchbooks that provide guidance on specific aspects of cultural diversity for judges, and practice notes that provide guidance for lawyers;
    - designing and strengthening judicial training in cultural awareness;
    - strengthening pre-trial management and education, including materials to assist CALD witnesses to give evidence in court;
    - giving judges access to cultural evidence for the purpose of assessing evidence and sentencing;
    - adopting policies to achieve greater diversity in judicial appointments;
    - encouraging more proactive case management by judges in cases involving CALD litigants and foreign language evidence;
- ***Interpreters and translators***
    - strengthening the professionalisation of court interpreting;
    - providing guidance to the profession on the efficient and effective use of translators and interpreters, particularly at trial;
- ***Lawyers and professional education***
    - introducing cross-cultural communication training for lawyers;
    - incorporating an understanding of the nature and impact of superdiversity into courses required to qualify for admission to practice;
    - building the cultural capabilities of the legal profession, including by proactively promoting cultural diversity amongst the senior ranks of the profession;

[86] The research for the CALD Report in New Zealand was co-funded by a Borrin Foundation and New Zealand Law Foundation grant with support from the Ministry of Justice.

- ***Engagement***
    - strengthening and broadening national, Trans-Tasman, regional and global engagement in the area of superdiversity in the courts;
    - facilitating access for CALD litigants to lawyers who speak their native language;
    - engagement with CALD legal associations in the process of legislative change;
- **Policy and law reform**
    - examining areas for policy and law reform.

## Feedback

You are invited to provide feedback on the issues examined in this Issues Paper and the possible action plan by submitting your comments and suggestions to span@aala.org.au. Feedback is invited by **31 October 2022.**

### Information about the supporting organisations

The **Asian Australian Lawyers Association** (AALA) is the first peak body representing Asian Australian lawyers and lawyers with an interest in Asia regardless of background. A national, non-for-profit organisation with branches in all States and Territories, AALA is a leading voice for cultural diversity in the legal profession, working with peak bodies and organisations to promote intersectional diversity in the law and equitable access to the law.

The **Superdiversity Institute for Law, Policy and Business** is a multidisciplinary institute specialising in analysing the law, policy and business implications of New Zealand's superdiversity and superdiversity globally. Its vision is to enable Government, business and NGOs to maximise the benefits of the 'diversity dividend' arising from New Zealand's transition to a superdiverse society and ensure gaps are made visible to ensure equal treatment and access regardless of culture and language.

The **Asian Law Centre** (ALC) at Melbourne Law School, the University of Melbourne, commenced activities in 1985 and is the first and largest Australian centre devoted to the development of our understanding of Asian law and legal systems. The ALC has pioneered extensive programs of teaching and research on the laws and legal systems of a wide range of countries and jurisdictions in the Asian region.

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*Special thanks to*

ASIAN AUSTRALIAN LAWYERS ASSOCIATION INC
PROMOTING CULTURAL DIVERSITY IN THE LAW

THE UNIVERSITY OF MELBOURNE
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