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ORIENTALISM IN THE LAW: AUSTRALIA AND NEW ZEALAND'S APPROACH TO CHINESE IMMIGRATION

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Abstract

Chinese people in Australia and New Zealand have been subject to a number of legislative instruments aimed at restricting their immigration, beginning almost as soon as they entered Australasia in the mid-1800s. The measures employed show substantial parallels across both jurisdictions. While it may be tempting to dismiss these measures as being emblematic of a racist past, critical analysis of the attitudes of past legislators is able to forewarn society of any resurgences of discriminatory legislation. This paper seeks to analyse the reasoning given by politicians to justify the implementation of anti-Chinese legislation under the lens of Edward Said's orientalism. It argues that the reasoning demonstrates each of Said's four dogmas of orientalism, successfully characterising the Chinese as 'other' and thus is inherently orientalist in nature.

Although looking to similar jurisdictions can provide helpful insight into legislative solutions for policy problems, this paper finds that such comparison is not to be substituted for one's own critical analysis. The traces of orientalism appearing in modern political campaigns and in public opinion in Australia and New Zealand suggest that while orientalism has not yet returned to legislation, it would be prudent for both legislatures to bear in mind the risk of orientalism when developing new immigration policy.

Key words: "Chinese immigration", "orientalism", "immigration restriction", "anti-Chinese legislation", "Australia and New Zealand".

Table of Contents

I Introduction

In 2002, Helen Clark apologised to the Chinese community in New Zealand for the infamous 1881 Chinese poll tax law.[1] While the Chinese have been present in New Zealand since 1865, they are also a group that have been discriminated against in law for much of the time that they have been there – an experience that is also shared with Chinese in Australia. This paper compares the legislation of Australia and New Zealand to see the important similarities across the two country's regimes, and argues that the implementation of anti-Chinese legislation in both colonies is an example of Orientalism in the law.

Legislation is not created in a vacuum, and the reasons behind why a Bill becomes an Act are just as important as the legislation itself. In 1978, Professor Edward Said released what would become his most known work: *Orientalism.*[2] The book criticised the way in which the West viewed and engaged with the Orient, looking at the relationship as one of power and, above all, creating an 'other'. While the theory of orientalism has been applied in many contexts, it is interesting to examine its relationship with law. Law can be a crude but effective way to give force to orientalist viewpoints, as will be seen in the case of anti-Chinese legislation.

By analysing Australia and New Zealand's anti-Chinese immigration policies through a lens of orientalism, this paper seeks to identify the similar reasoning behind each country's approach to legislation, and further to investigate how that reasoning is innately orientalist in nature. In doing so, it will allow future legislatures to identify how their reasoning may subscribe to orientalist viewpoints and give guidance as to how to avoid doing so.

This paper is comprised of six parts. The first part sets out the background to the legislation and the major pieces of legislation that were enacted in both Australia and New Zealand. Part II defines Edward Said's orientalism. The third part discusses the

[1] George Hawkins "Poll tax apology marks a new beginning 2/8" (13 February 2001) Beehive.govt.nz <www.beehive.govt.nz >.

[2] Edward Said *Orientalism* (1st ed, Pantheon Books, New York, 1978).

reasoning behind this legislation, narrowing the reasons down to four key tenets: New Zealand and Australia as a 'Britain of the South', superiority, working conditions and the Chinese as "sojourners". It then discusses how those reasons are inherently orientalist in nature. The fourth part of the paper investigates the reasons for the repeal. Part V examines modern examples of orientalism in Australian and New Zealand policy and analyses whether either country still implicitly endorses orientalist perspectives in its law and policy. Finally, the implications for future lawmaking are considered.

II Anti-Chinese Legislation in Australia and New Zealand

Australia and New Zealand enacted a number of laws aimed at restricting Chinese immigration. These laws were often also backed by clear anti-Chinese policy. As will be examined, a range of strategies were employed to effect such a desire.

A Background to the Legislation

As colonies of Great Britain, Australia and New Zealand were subject to the restrictions imposed by the legislation passed and treaties entered into by the 'mother country's' Imperial Parliament. Despite treaties restricting the ability to enact anti-Chinese legislation, the legislative regimes still materialised. Of particular interest are the Treaty of Tientsin and the Convention of Peking.[3]

China and Great Britain signed the Treaty of Tientsin in 1858, following the second Opium War. While the Chinese at first refused to ratify the treaty, they eventually acceded to its contents in 1860 after signing the Convention of Peking. The Treaty of Tientsin increased the rights and opportunities of the British in China, opening ten more ports, providing rights to travel within China, allowing missionaries entry and legalising opium trade.[4] This allowed Great Britain a greater presence and opportunities in China.

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[3] Treaty of Peace, Friendship, and Commerce, between Great Britain and China, Great Britain–China [1858] UKTS 6978 (signed 26 June 1858); and Convention of Friendship, between Great Britain and China, Great Britain–China [1860] UKTS 6979 (24 October 1860).

[4] Nigel Murphy *The poll-tax in New Zealand* (Office of Ethnic Affairs, Department. of Internal Affairs, Wellington, 2002) at 10.

However, the Convention of Peking also provided the Chinese with rights, enabling them to emigrate to Great Britain to "take service in the British Colonies or other parts beyond sea".[5] This background, at least in theory, coloured any restriction of Chinese immigration. As colonies, both Australia and New Zealand relied on Great Britain to assent to their legislation.[6] Indeed, politicians in New Zealand noted that whether a poll tax law eventuated would depend on 'Home Government'.[7] Any "embarrassingly xenophobic" legislation risked not becoming law.[8]

It is therefore a testament to the determination of both legislatures that anti-Chinese legislation was passed. The international context provided no help, instead hindering any attempt to restrict immigration. Yet, for the respective legislatures, "the restrictions were very much a matter of degree, not of kind."[9] While Great Britain was acutely aware of the treaty, it also could not "shut [its] eyes to the exceptional nature of Chinese immigration and the vast moral evil that accompanie[d] it".[10] That being the case, Great Britain was amenable to *some level of immigration restriction*. Particular pieces of legislation, such as poll taxes, could allow for the restriction of Chinese immigration without enforcing an outright ban. This was a strategy that was acceptable to Great Britain. The scene, therefore, had been set for the implementation of anti-Chinese immigration legislation.

B Australia

[5] Convention of Friendship, above n 3, art V.

[6] It was not until New Zealand and Australia had adopted the Statute of Westminster 1931 (Imp), in 1947 and 1942 respectively, that each began to really gain legislative independence. All of Great Britain's powers to legislate concluded fully in 1986 for both countries. For further information, see: Peter C Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005).

[7] (9 August 1878) 28 NZPD 148.

[8] Robert A Huttenback *Racism and Empire: white settlers and colored immigrants in the British self-governing colonies, 1830-1910* (Cornell University Press, Ithaca, 1976) at 75.

[9] Murphy, above n 4, at 12.

[10] Charles Archibald Price *The Great White Walls are Built: Restrictive Immigration to North America and Australasia, 1836-1888* (Australian Institute of International Affairs in association with Australian National University Press, Canberra, 1974) at 87.

Australian colonies were the first to introduce anti-Chinese legislation, beginning with An Act to Make Provision for Certain Immigrants 1855 in Victoria. The Act created a poll tax, limiting "the number of Chinese passengers on a vessel to one for every 10 tons".[11] 10 pounds was to be paid for each Chinese person.[12] If more Chinese passengers were aboard a vessel, the owner, charterer or master would be subject to "a penalty not exceeding 10 [pounds] for each passenger so carried in excess."[13] The Governor was also empowered to collect a sum from immigrants to pay those carrying out the tax, up to 20 shillings per immigrant per 12 months.[14] Similar legislation followed in South Australia and New South Wales,[15] although the statutes were repealed by each state in 1861 and 1867 respectively.[16] Interestingly, this was caused by dwindling anti-Chinese sentiments in each state.[17]

The effect of the Victorian legislation was later strengthened, with further legislation introducing requirements of residential licences,[18] residence fees,[19] and an entrance fee of four pounds for Chinese who arrived other than by ship, to capture Chinese who came from other colonies.[20] The Act was replaced in 1865 by the Chinese Immigrants Statute, which put much of the power to regulate the Chinese in the governor.[21] Queensland however enacted the Chinese Immigrants Regulation Act in 1877 which resembled Victoria's 1855 Act.

Following the Inter-colonial Conference in January 1881, it was agreed by the Australasian colonies that uniform anti-Chinese legislation would be adopted in the

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[11] "Chinese Immigration Act 1855 (Vic)" Documenting a Democracy <www.foundingdocs.gov.au/>.

[12] An Act to Make Provision for Certain Immigrants 1855 (Vic) (repealed), s IV.

[13] Section III.

[14] Section VIII.

[15] An Act to Make Provision for Levying a Charge on Chinese Arriving in South Australia 1857 (SA) (repealed); and Chinese Immigrants Regulation and Restriction Act 1861 (NSW) (repealed).

[16] An Act to repeal An Act, No. 3 of 1857-8, intitled "An Act to Make Provision for Levying a Charge on Chinese Arriving in South Australia" 1861 (SA) ; and Chinese Immigration Act Repeal Act of 1857 (NSW).

[17] Murphy, above n 4, at 14; and Huttenback, above n 8, at 68-69.

[18] An Act to Regulate the Residence of the Chinese Population in Victoria 1857 (Vic) (repealed), s I.

[19] An Act to Consolidate and Amend the Laws Affecting the Chinese Emigrating to or Resident in Victoria 1859 (Vic) (repealed), s X.

[20] Section V; and Victoria, *Parliamentary Debates,* Legislative Council, 20 January 1859, 666 (John O'Shanassy).

[21] Chinese Immigrants Statute 1865 (Vic) (repealed), s 5.

Australian colonies (including New Zealand).[22] Throughout 1881, this began being enacted. This paper will discuss the Chinese Act 1881 (Vic) in detail, as the other colonies "passed acts very much like it," in line with the uniform approach.[23] The Act limited the number of Chinese passengers on a vessel to one for every 100 tons, and increased the penalty to 100 pounds for any owner master or charterer who carried Chinese passengers in excess.[24] Further, "ten pounds [was] to be paid for each Chinese immigrant arriving by vessel."[25] Failure by the master to pay the tax would result in a 50 pound penalty for each immigrant that arrived, as well as the tax itself.[26] This provision was backed by heavy penalties. Any immigrant who entered or attempted to enter the colony by sea who neglected to pay the poll tax in accordance with s 3 would be liable for a 10 pound penalty and 12 months' imprisonment.[27] While certain classes of people were exempted from the legislation,[28] it had wide ranging application to Chinese who wished to immigrate to Victoria.

Queensland,[29] South Australia,[30] New South Wales,[31] Western Australia,[32] Tasmania[33] and New Zealand adopted similar legislation.[34] However, following the second Inter-colonial Conference in 1888, it was agreed that the poll tax should be abandoned in favour of a sole tonnage restriction. This was adopted by Western Australia,[35] Queensland,[36] South Australia[37] and Victoria.[38] The poll tax was increased to 100 pounds in New South

[22] "Intercolonial Conference held at Sydney, Minutes of Proceedings of The, With Subsequent Memoranda" [1881] I AJHR A-03 at 6.
[23] Joseph Lee "Anti-Chinese Legislation in Australasia" (1889) 3 Q. J. Econ. 218 at 219.
[24] The Chinese Act 1881 (Vic) (repealed), s 2.
[25] Section 3.
[26] Section 3.
[27] Section 4.
[28] Sections 5–7.
[29] Chinese Immigrants Regulation Act 1877 (Qld) (repealed); and Chinese Immigrants Regulation Act Amendment Act 1884 (Qld) (repealed).
[30] Chinese Immigrants Regulation Act 1881 (SA) (repealed).
[31] Influx of Chinese Restriction Act of 1881 (NSW) (repealed).
[32] Chinese Immigration Restriction Act 1886 (WA) (repealed).
[33] Chinese Immigration Act 1887 (Tas) (repealed).
[34] Chinese Immigrants Act 1881 (repealed).
[35] Chinese Immigration Restriction Act 1889 (WA) (repealed).
[36] Chinese Immigration Restriction Act 1889 (Qld) (repealed).
[37] An Act for the Restriction of Chinese Immigration 1888 (SA) (repealed).
[38] Chinese Immigration Restriction Act 1888 (Vic) (repealed).

Wales, with a limit of one Chinese person for each three hundred tons of tonnage on a vessel.[39] The 1896 Inter-colonial Conference then inspired a new strategy of immigration restriction, with an attempt being made by New South Wales,[40] South Australia[41] and Tasmania[42] to exclude from migration "all coloured persons, British subjects or not."[43] However, these Acts were not assented to by Great Britain.[44]

Following the Federation of Australia in 1901, the Immigration Restriction Act 1901 was implemented, modelled after the Natal Immigration Restriction Act 1897 in South Africa.[45] This period of immigration restriction falls under what is known as the White Australia policy.[46] While nothing in the Act references nationality or race,[47] "there is no point in glossing over the fact that the purpose was to ensure a non-coloured or "white" Australia,"[48] due to the dictation test. Immigrants had to "write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer" in order to enter.[49] The European language was changed to 'any prescribed language' in 1905 following criticism by the Japanese that the former suggested "European superiority."[50] Therefore, Chinese immigration remained restricted, but the scope had widened to include all non-White immigrants.

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[39] Chinese Restriction and Regulation Act of 1888 (NSW) (repealed), ss 5-6.
[40] Coloured Races Restriction and Regulation Act 1896 (NSW).
[41] Coloured Immigration Restriction Act 1896 (SA).
[42] Coloured Races Immigration Act 1896 (Tas).
[43] Muphy, above n 4, at 16.
[44] At 16.
[45] Natal Immigration Restriction Act 1897 (ZA) (repealed). The aim of the Act was to restrict Indian immigration to South Africa. While the Act had no reference to nationality or race, under Section 3 of the Act persons who could not write out and sign an application in any European language were prohibited from immigrating to Natal. For more information, see: Iqbal Narain "Anti-Indian Legislation in Natal (since the imposition of the £3 tax to the close of indenture)" (1956) 17 The IJPS 135; and Jeremy Martins "A transnational history of immigration restriction: Natal and New South Wales, 1896-97" (2007) 34 The Journal of Imperial and Commonwealth History 323.
[46] James Jupp *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, New York, 2002) at 6.
[47] A H Charteris "Australian Immigration Laws and their Working" in Norman MacKenzie (ed) *The Legal Status of Aliens in Pacific Countries: an international survey of law and practice concerning immigration, naturalization and deportation of aliens and their legal rights and disabilities* (Oxford University Press, Oxford, 1937) 16 at 17.
[48] A P Elkin "Re-Thinking the White Australia Policy" (1945) 17 Aust. Q. 6 at 17.
[49] Immigration Restriction Act 1901 (Aus), s 3(a).
[50] Alexander T Yarwood "The Dictation Test – Historical Survey" (1958) 30 Aust. Q. 19 at 26.

The remaining poll tax laws were repealed by 1903, as they were "offensive and ineffectual" in light of the Immigration Restriction Act 1901.[51] The White Australia policy, however, began to be dismantled in the late 1950s. A change in policy in 1957 meant that non-Europeans were eligible for permanent residency if they had lived in Australia for 15 years, something that had been previously denied under the Naturalization Act 1920.[52] The Migration Act 1958 abolished the dictation test of the Immigration Restriction Act 1901.[53] The end of the White Australia policy, however, was not to be seen for a few decades yet.

The final piece of the White Australia puzzle was removed in 1973 with the Australian Citizenship Act 1973. The Act allowed all migrants the ability to become citizens following three years of permanent residence, instead of allowing those from Commonwealth countries to have an advantage.[54] The Racial Discrimination Act 1975 made this clear, providing that no discrimination was to be made on the basis of race, colour, descent or national or ethnic origin.[55]

C New Zealand

New Zealand's anti-Chinese legislation began with the Chinese Immigrants Act 1881, stemming from the 1881 Inter-colonial Conference like those of the Australian colonies. It stated that a vessel was only to hold one Chinese person for every ten tons of tonnage, or the owner, charter or master of a vessel could be subject to a penalty not exceeding ten pounds for each Chinese person "so carried in excess."[56] A poll-tax of 10 pounds was to be paid for each Chinese arriving by vessel,[57] with a penalty of 20 pounds if not complied

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[51] Murphy, above n 4, at 17.

[52] Rayner Thwaites *Report on Citizenship Law: Australia* (European University Institute, RSCAS/GLOBALCIT-CR 2017/11, May 2017) at 10.

[53] Migration Act 1958 (Aus) (repealed), s 3.

[54] Under s 12 of the Nationality and Citizenship Act 1948 (Aus) (repealed), those from Commonwealth countries could become Australian citizens by registration. This was a simpler process than applying for naturalization under s 15.

[55] Racial Discrimination Act 1975 (Aus), s 9(1).

[56] Chinese Immigrants Act 1881 (repealed), s 3.

[57] Section 5.

with.[58] Finally, the Governor was able to make regulations as necessary to give effect to the Act.[59]

These restrictions were later bolstered, following the trend of the Australian colonies. Like New South Wales, New Zealand amended the 1881 Act through the Chinese Immigrants Act Amendment Act 1888, altering the proportion of Chinese persons allowed on a vessel to one for every one hundred tons of tonnage, with the penalty also increasing to one hundred pounds.[60] The penalty for non-compliance was also increased to fifty pounds.[61] The poll-tax itself however remained at 10 pounds. In 1896, the poll-tax was increased to one hundred pounds,[62] matching that of New South Wales, and the proportion of Chinese persons to tonnage on a vessel was upped to one for every two hundred tons.[63] In 1898, the Chinese became ineligible for the old-age pension.[64]

New Zealand also attempted to pass the Asiatic Restriction Act in 1896, which would have extended the poll tax to all migrants of Asian descent, and outlawed the naturalization of Chinese.[65] This Act mirrored the efforts made by New South Wales, South Australia and Tasmania in the same year. It received the same response from Great Britain – the legislation did not receive royal assent. This was due to the imperial government's relationship with Japan; the Japanese were offended by legislation that insinuated they were "on the same level of morality and civilization as the Chinese or other less-advanced populations as Asia."[66]

The Immigration Restriction Act 1899, however, allowed for further immigration restriction. While the legislation was not targeted at a particular race, the terms meant that in effect the legislation was targeted at Asian people. It provided that any person other than British who failed "to himself write out and sign, in the presence of an officer, in

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[58] Section 6.
[59] Section 15.
[60] Chinese Immigrants Act Amendment Act 1888 (repealed), s 4.
[61] Section 5.
[62] Chinese Immigrants Act Amendment Act 1896 (repealed), s 2.
[63] Section 4.
[64] Old-age Pensions Act 1898 (repealed), s 64(4).
[65] Asiatic Restriction Act 1896, ss 3–16 and 18.
[66] P S O'Connor "Keeping New Zealand White, 1908-1920" (1968) 2 NZJH 41 at 43.

any European language an application form" would be prohibited from landing in New Zealand.[67] In practice, the European language was English.[68]

It is important to note that this Act, however, explicitly excluded the Chinese from its scope.[69] This decision effectively singled out Chinese people as a separate category of persons to regulate. As the legislature opted not to include the Chinese, Chinese immigrants were not subject to the written assessment. This meant they were subject to different restrictions, and thus different levels of discrimination were established. The Chinese remained subject to previously discussed legislation, placed squarely in the bottom level.

The Chinese Immigrants Act Amendment Act 1901 then "placed the Chinese crews of vessels in a better position and tightened the control of customs over them."[70] This was practical; it clarified that Chinese crew members were able to go ashore to perform their duties in relation to the ship,[71] and if they did would not be subject to the Chinese Immigrants Act 1881.

The Chinese Immigrants Amendment Act 1907 instituted a reading test, which required the Chinese to read a printed passage of not less than one hundred words in English to a Collector or principle officer of Customs.[72] While not the same, the change in some ways echoes the Australian dictation test. The law was consolidated to include the Chinese in the Immigration Restriction Act 1908. However, the Chinese continued to be singled out. An amendment in 1908 instituted a system where Chinese persons had to mark their certificate of registration with a thumbprint, to ensure they could get a re-entry permit.[73] This was grounded in the idea that all Chinese looked the same, and thus a photograph

[67] Immigration Restriction Act 1899 (repealed), s 3(1).
[68] O'Connor, above n 66, at 44.
[69] Immigration Restriction Act 1899 (repealed), s 21.
[70] G H Scholefield and T D H Hall "Asiatic Immigration in New Zealand: Its History and Legislation" in Norman MacKenzie (ed) *The Legal Status of Aliens in Pacific Countries: an international survey of law and practice concerning immigration, naturalization and deportation of aliens and their legal rights and disabilities* (Oxford University Press, 1937) 262 at 273.
[71] Chinese Immigrants Act Amendment Act 1901 (repealed), s 5.
[72] Chinese Immigrants Amendment Act 1907 (repealed), s 3.
[73] Immigration Restriction Amendment Act 1908 (repealed), s 2.

would be useless to Customs authorities.[74] Chinese people were also prevented from becoming naturalised in the same year.[75]

However, the Immigration Restriction Amendment Act 1920 "brought to a successful end the long search for an instrument of policy which would both keep New Zealand white and be acceptable to the imperial government."[76] The previous 39 years had been a period of trial and error for the New Zealand legislature. The Chinese had been successfully restricted through the poll tax, and other immigrants through the Immigration Restriction Act 1899. However, the Asiatic Restriction Bill had been a failure. Further, neither of the provisions matched the flexibility and ease with which immigration could now be managed.[77]

While thumbprint requirement was abandoned, the Act effectively created a White New Zealand policy.[78] Immigrants were required to obtain a permit before they could enter New Zealand,[79] which would be granted at the discretion of the Minister of Customs.[80] This meant that "annual cabinet decisions… replaced direct legislation."[81] While the legislation was no longer solely targeted at the Chinese, they remained in the minds of politicians; for example, Cabinet Minister Downie Stewart "got his way" and allowed only a hundred permits per year for Chinese in the early 1920s.[82] Further, in 1926, only the wives and fiancées of New Zealand-born Chinese were to be allowed entry.[83]

The 1881 poll tax law was not repealed by this development, but was essentially rendered ineffective from 1926 due to the decision to not grant permits to Chinese persons. From

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[74] O'Connor, above n 66, at 45.

[75] "Chinese – General question of naturalisation" Archives New Zealand IA1/1, 116/7.

[76] O'Connor, above n 66, at 41.

[77] At 64.

[78] O'Connor, above n 66, at 41.

[79] Immigration Restriction Amendment Act 1920 (repealed), s 5.

[80] Section 9(3).

[81] Francis Arthur Ponton "Immigration Restriction in New Zealand: A Study of Policy from 1908 to 1939" (MA, Victoria University of Wellington, 1946) at 58.

[82] O'Connor, above n 66, at 64.

[83] At 64.

1934, the requirement to pay the poll tax was waived,[84] and was repealed in 1944.[85] Chinese people became eligible for the old age pension in 1936,[86] and were able to become naturalised once more in 1952.[87]

Change really began in the 1960s. The Immigration Restriction Amendment Act 1961 meant that British and Irish migrants had to obtain permits before entering New Zealand like other non-New Zealand citizens.[88] Other measures were brought in to dismantle the discrimination in immigration law, the most significant being the Immigration Act 1987. This followed the 1986 Immigration Policy Review which stated that immigrants were to be selected based on a "criteria of personal merit without discrimination on the ground of race, national or ethnic origin".[89] The selection of immigrants was now based on different categories instead of race or nationality. Immigrants were selected for their skills or for business reasons, for family reasons, or due to humanitarian reasons.[90]

III Orientalism

This paper proposes that the legislative approach to Chinese people in both jurisdictions is a form of orientalism in the law. It is first necessary to examine the original idea of orientalism put forth by Edward Said through his book, *Orientalism*. While this paper cannot do justice to its complexity in such a brief account, an attempt will be made to summarise the core ideas.

Said deployed post-structuralist concepts to examine Western cultural representations of "the Orient," and the role of power in constructing these representations. He argued that the relationship between the West and the Orient is not "an inert fact of nature," nor

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[84] Ponton, above n 81, at 70.

[85] Finance (No 3) Act 1944, s 10.

[86] Pensions Amendment Act 1936 (repealed), s 34.

[87] David Ng "Ninety Years of Chinese Settlement in New Zealand, 1866 to 1956" (MA and Hons Thesis, University of Canterbury, 1962) at 99.

[88] Immigration Restriction Amendment Act 1961, s 2.

[89] "Review of Immigration Policy (Kerry Burke, August 1986)" Archives New Zealand, R18491309 at 11.

[90] New Zealand Productivity Commission *International Migration to New Zealand: Historical themes & trends* (Working paper 2021/04, November 2021) at 21.

"merely there".[91] Instead, it is "man-made": a construction, an idea that has been shaped by a "tradition of thought, imagery and vocabulary that have given it reality and presence in and for the West".[92] This allows for the recognition of the power dynamic between the West and the Orient. There is an inherent power imbalance; "the relationship between the Occident and the Orient is a relationship of power, of domination, of varying degrees of a complex hegemony."[93]

The very ideal of "the Orient" can therefore be seen as the product of the knowledge that is gained and twisted to fit a particular narrative – "[it] is knowledge of the Orient that places things Oriental in class, court, prison or manual for scrutiny, study, judgment, discipline, or governing."[94] Knowledge of the Orient, or of Orientals, means that they become the subject of discussion and scrutiny, rather than being on equal footing with the West. The result is such that it further "polarise[s] the distinction – the Oriental becomes more Oriental, the Westerner more Western – and limit[s] the human encounter between different cultures, traditions and societies."[95]

Orientalism is a way of thinking that creates and perpetuates a usually false idea of a certain culture, which Orients cannot escape as they are not presented as equal to those creating the narrative. Because "this tendency is [central to] Orientalist theory, practice and values found in the West, the sense of Western power over the Orient" is seen as scientifically true.[96] Therefore, Orientalism is not just the catalyst for incorrect cultural understanding, but also an unconscious tool for entrenching Western superiority.

Said has offered four dogmas of Orientalism to describe the Western view of the Orient. These will be used as an evaluative tool in the following part to examine Orientalism in the reasoning behind anti-Chinese legislation. First, there is an "absolute and systematic difference between the West (which is rational, developed, humane and superior) and the

[91] Said, above n 2, at 12.
[92] At 13.
[93] At 13.
[94] At 49.
[95] At 54.
[96] At 54.

Orient (which is aberrant, undeveloped, inferior)."[97] Secondly, generalisations and abstractions of the Orient, rather than tangible evidence of modern Oriental society, are to be accepted.[98] Thirdly, the Orient is "eternal, uniform, incapable of defining itself" - and therefore how the West describes it is "inevitable and even scientifically 'objective'."[99] Finally, the Orient is something to be feared or controlled.[100]

IV Reasons for the Legislation

This part will examine the reasons that were given for the discriminatory legislation beneath the lens of orientalism, because "explaining away antipathy toward Chinese simply as racism disguises the much more problematic character of our past and the visions upon which the nation was constructed."[101]

A Britain of the South

New Zealand and Australia both being colonies is relevant to why Chinese discrimination eventuated. Emeritus Professor Manying Ip posits that "for over a century they had the same vision of preserving their lands for the exclusive use of immigrants from the United Kingdom."[102] Indeed, over 90 per cent of New Zealand immigration at that time was British.[103] Similarly, 81 per cent of those who migrated to Australia between 1851 and 1860 were from the United Kingdom.[104]

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[97] Edward Said "Arabs, Islam and the Dogmas of the West" *The New York Times Book Review* (New York, 31 October 1976) at 4.

[98] At 4.

[99] At 4.

[100] At 4.

[101] Brian Moloughney and John Stenhouse "'Drug-besotten, sin-begotten fiends of filth': New Zealanders and the Oriental Other, 1850-1920" (1999) 33 NZJH 43 at 64.

[102] Manying Ip "Chinese immigration to Australia and New Zealand: Government policies and race relations" in Chee-Beng Tan (ed) *Routledge Handbook of the Chinese Diaspora* (Taylor & Francis, USA and Canada, 2013) 156 at 157.

[103] Murphy, above n 4, at 7.

[104] Victoria Mence, Simone Gangell and Ryan Tebb *A History of the Department of Immigration: Managing Migration to Australia* (Department of Immigration and Border Protection, June 2017 (revised ed)) at 5.

As the Chinese "were the first group of non-white migrants to arrive," they "therefore bore the brunt of the prejudice."[105] Their arrival derailed the colonists' vision of a 'Britain of the South', as they came from the East rather than the West. Chinese immigration, of course, brought Chinese culture—one very different to British culture. Thus, their arrival was naturally jarring to those harbouring a different vision of the futures of Australia and New Zealand, and "the presence of so many Chinese intensified debate on the potential character of Australian society," as well as of New Zealand society.[106] A key reason why the legislatures therefore sought to restrict Chinese immigration was to preserve the lands for British migrants.

It may be argued that this is not an example of Orientalism. Reserving resources and land for your own country-men may be discriminatory, but it is not necessarily caused by Orientalism in that the Chinese are not being defined negatively through a Western lens. Perhaps the Chinese were simply an unfortunate by-product of British expansion, or perceived as a threat to the colonial enterprise. Even if that is the case, the legislation is at least something which reinforces aspects of Said's first dogma through its effects on the Chinese.

The exclusion of the Chinese in favour of British immigrants implies that the innate character of the Chinese (and the culture that they brought with them) were not compatible with the "Britain of the South" that the settlers intended to build. In this way, the Chinese can be seen as *inherently different*. This reflects Said's first dogma of orientalism, that there is an absolute and systematic difference between the West and the Orient. Whether that difference then manifested into superiority will be examined in the next part of this paper. However, the fact that "Australians and New Zealanders [were] proud of being the inhabitants of the outposts of the white races, but more specifically of the British race," at the very least made it clear that being 'British' was a fixed identity, not to be upset by the immigration of the Chinese.[107] Thus, the decision to restrict Chinese immigration in favour of preserving the colonies for Great Britain and in that way marking the Chinese as threatening, shows the beginnings of orientalism.

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[105] Ip, above n 102, at 158.

[106] David Walker "One hundred work as one" in *Anxious Nation: Australia and the rise of Asia 1850-1939* (UWA Publishing, Crawley, 1999) 36 at 36.

[107] Ponton, above n 81, at 11.

Through this mechanism, the Orient is also marked as something to be feared and controlled - Said's fourth dogma of orientalism. Walker notes that Chinese immigration was characterised as tidal; "if the Chinese were a flood… the future of the British race in the Australian colonies was clearly under direct threat."[108] The connection between Orientalism and the desire to preserve Australia and New Zealand for British settlers is therefore clearly articulated, because it is suggested that uncontrolled Chinese immigration was a 'threat' to the original colonists' vision for the future. The British immigrants were innately fearful of such a possibility, and therefore those from the Orient needed to be controlled. Thus, Said's fourth dogma of Orientalism is also demonstrated in this reasoning.

Said's second and third dogmas of orientalism are not necessarily satisfied through this reasoning alone. However, the fact that the reasoning demonstrates the first and fourth dogmas works in tandem with further reasons to suggest that orientalism influenced the decision to restrict Chinese immigration.

B Superiority

Flowing from the above reasoning, a further reason why anti-Chinese immigration legislation was implemented was due to the feeling of superiority. The primary belief held at that time was that those who were white were superior to other races, due to "their technological and scientific skills, their physical strength, and their supposedly superior level of civilisation".[109] This viewpoint was reflected in the New Zealand Parliament, stating that "no doubt the Europeans had reached a higher moral level than the Chinese,"[110] and Premier Richard Seddon going further to argue "the Chinaman was inferior in every way, shape, and form; and he hoped that such an inferiority would never be tolerated here."[111] This sentiment extended to Australia, it being noted that the Chinese were not a "desirable class of colonists" with bad moral habits.[112] Even the state

[108] Walker, above n 106, at 37.
[109] Ip, above n 102, at 158-159.
[110] (8 July 1880) 36 NZPD 93.
[111] At 98.
[112] Victoria, *Parliamentary Debates,* Legislative Assembly, 4 October 1881, 220 (Robert Clark).

of China itself was used to frame Chinese people as having little independent thought; "the Chinaman… was unfitted to take any part in the government of a free country the institutions of which rested upon the suffrages of the people."[113]

This superiority manifested itself into stereotypes of Chinese people, regarding them as having a vile way of living, introducing "loathsome" diseases, and being "immoral barbarians" that used young girls for their "depraved sexual appetites".[114] Even those who did not think badly of the Chinese reduced them to "harmless but innately cunning dolts, who were capable only of 'jabbering' in pidgin English."[115] Indeed, 19th century Australia vilified the Chinese as they were "'the' source of various diseases of which smallpox and leprosy were the most commonly mentioned."[116] In New Zealand too, these views were represented, with politicians often being wary of the risk of leprosy and being largely against intermarriage.[117]

The reason of superiority in regards to Chinese immigrants is perhaps the most obvious way in which orientalism is demonstrated, displaying all four dogmas at once. It implies that there is an absolute and systematic difference. The evidence put forth by legislators, that "the Chinaman was inferior in every way, shape, and form,"[118] shows that the law clearly represented a view that the West were rational, developed, humane and superior, while the Chinese were aberrant, underdeveloped and inferior.

Further, generalisations and abstractions of the Orient were at play when it came to the development of anti-Chinese legislation. The fears of disease, sexual depravity and lack of intelligence were widespread rumours that had no basis - and that were *known* to have no basis. For example, an 1871 parliamentary report conducted in New Zealand stated that the Chinese were as orderly citizens as Europeans, that there was no special risk to the morality or security of the colony, and that they were not likely to introduce any

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113 (8 July 1880) 36 NZPD 92.

114 James Ng *Windows on a Chinese Past* (Otago Heritage Books, Dunedin, 1993) at 105.

115 At 105.

116 Ian Welch "Alien Son: The Life and Times of Cheok Hong CHEONG, (Zhang Zhuoxiong) 1851-1928" (PhD Thesis, Australian National University, 2003) at 194.

117 (22 August 1978) 28 NZPD 417-418.

118 (8 July 1880) 36 NZPD 98.

special infectious diseases.[119] This would seem to indicate a deliberate decision to ignore the evidence given, and to instead revert to generalisations and abstractions of the Chinese.

The nature of the lawmaking itself, too, lends itself to the third dogma of orientalism - that the Orient is incapable of describing itself, and thus how the West describes it is "inevitable and even scientifically objective."[120] In the parliamentary debates, no consultation was made with the Chinese to see if any statements were accurate. Arguments were largely based on the Western experience with Chinese people. Even for those who argued against the legislation, the Chinese became the subject of discussion instead of having a voice; James Francis MP in Victoria noted that "many of the Chinese here were of use, particularly on the gold-fields, in the interests of health and comfort."[121] Chinese people were therefore deemed as 'other', as the subject of legislation, with no say in how they were perceived or what their motives for immigration were.

Finally, the Orient was something that needed to be feared and controlled. Fear was inherently part of the reason why they sought to restrict the immigration, as much of the politicians and public alike feared being infected with diseases, feared being subject to sexual depravity and feared intermarriage.

Therefore, the reasoning of superiority is a clear example of orientalism in the law.

C Working Conditions

Early Chinese immigrants moved to Australia and New Zealand largely with one goal: to find gold. The discovery of gold in Victoria and New South Wales in the 1850s caused the first influx of Chinese Immigration into Australia,[122] with New Zealand to follow in

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[119] William Jukes Steward "Final Report of the Chinese Immigration Committee, with Minutes of Proceedings" [1871] AJHR H-05B at 4.
[120] Said, above n 2, at 4.
[121] Victoria, *Parliamentary Debates,* Legislative Assembly, 4 October 1881, 219 (James Francis).
[122] Walker, above n 106, at 36.

1865.[123] Therefore, a third reason why New Zealand and Australian politicians opposed such immigration was because of the supposed threat to labour and working conditions.

Historian Nigel Murphy notes that the working class and gold miners in New Zealand largely held anti-Chinese views, due to a "fear of Chinese competition in the trades combined with a fanatical race hatred."[124] The fear was largely economic - if the Chinese were to immigrate, they would be happy to work for low wages and therefore take jobs away from those already working. The same was true in Australia, as the Chinese used complex modes of organisation, cooperated well, and were prepared to work hard, which lead to high levels of success.[125] This coordination led to resentment of the Chinese. This was reflected in Parliament, John Hall MP stating that "[the Chinese] caused an unfair competition with the European working classes, whose claims had a right to be considered."[126]

The Chinese were also known for their work ethic. Coming from a country with one of the lowest standards of living in the world, the Chinese were frugal and hardworking.[127] Therefore, "as a result it was… feared that they would drag the New Zealand standard down to their own level."[128] If immigration continued, European settlers were concerned that the standard of living would drop to that of China, and that they would lose the life they were used to.

The labour and living standards argument is also an example of orientalism in the law, in the way that it uses generalisations and fear to justify change. It was feared that the Chinese would bring the living standards of the colony down, because of where they came from. However, no tangible evidence was raised that this would eventuate, and in fact it

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[123] Helena Huang, Joanna Fountain and Harvey Perkins "New Zealand's Chinese Gold-Mining Heritage: (Re) Telling their Stories" (speech to Dragon Tails: Re-interpreting Chinese-Australian Heritage Conference, Ballarat, 2009).

[124] Murphy, above n 4, at 7.

[125] Barry McGowan "The Economics and Organisation of Chinese Mining in Colonial Australia" (2005) 45 Australian Economic History Review 119 at 136.

[126] Victoria, *Parliamentary Debates,* Legislative Assembly, 4 October 1881, 222 (John Hall).

[127] Ponton, above n 81, at 10.

[128] At 10.

could be argued that the work ethic of the Chinese could conversely increase the work ethic and thus the prosperity.

However, the parliamentary discussions largely chose to frame the immigration in terms of fear. The Chinese were a group that were to be feared, as they threatened working conditions and were to be controlled, thus demonstrating Said's fourth dogma and the pervasiveness of orientalism in the law.

D The Chinese as Sojourners

Emeritus Professor Miles Fairburn argues that the role of the Chinese should also be acknowledged in why they were discriminated against.[129] To focus solely on the Europeans "ignores the effect of the peculiar nature of Chinese agency on relations between the Chinese and Europeans."[130] While the British may have seen Australia and New Zealand as a potential "Britain of the South", it was not only characterised in terms of race and nationality, but also in terms of longevity. British colonists had arrived in Australia and New Zealand to stay. However:[131]

> the Chinese were not really settlers in any fit sense of the term, because they invariably came unaccompanied, and such immigration as that he held to be fraught with evil.

To hold the Chinese immigrants as 'fraught with evil' demonstrates the sense of superiority the settlers felt over the Chinese. Similar views were held in Australia, calling the Chinese "useless".[132] However, it is correct that the Chinese, at least at the beginning of immigration, did not intend to stay; "the first Chinese who came to New Zealand were indeed sojourners."[133] Therefore, Fairburn argues that Chinese people experienced such

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[129] Miles Fairburn "What Best Explains the Discrimination against the Chinese in New Zealand, 1860s-1950s?" 2 JNZS 65 at 75.
[130] At 75.
[131] (8 July 1880) 36 NZPD 91.
[132] "The Parliament" *The Armidale Express and New England General Advertiser* (New South Wales, 23 June 1860) at 4.
[133] Moloughney and Stenhouse, above n 101, at 55.

exceptional discrimination in immigration legislation is partially because they were *"the most separatist and transitory of all the non-European immigrant categories."*[134]

He cites factors such as the Chinese rate of out-marriage being extremely low, their massive gender imbalance, and their high return rate. While the high return rate must also consider that anti-Chinese legislation was also being put in place, it was higher in comparison to the rates in the USA, who also had anti-Chinese legislation.[135] Further, the Chinese understandably had a low rate of English literacy, and thus tended to create relationships among themselves, but less so with Europeans. These factors point to a conclusion that the Chinese were separatist and transitory immigrants, at least to begin with.

While this is true, it also neglects to address the role of Chinese culture in migration. Chinese culture stresses the importance of staying connected to one's ancestral land, as exemplified in the Confucian teaching: 父母在, 不远游 (while the parents are alive, the child should not go far away). The actions of the Chinese immigrants in Australia and New Zealand are reflective of that culture.

By ignoring this cultural context, and indeed characterising the Chinese as 'fraught with evil' for their approach to immigration, the policy makers reveal their ignorance, which reflects Said's third dogma of orientalism: that the Orient is incapable of defining itself and that how the West describes the Orient is inevitable. Because the legislature does not have an appreciation of this cultural context, they therefore do not allow the Chinese to define themselves and instead decide that to not settle is to be evil. Further, that manifests itself into being understood as scientifically objective, because the actions of the Chinese are only evaluated through a Western understanding of what constitutes acceptable immigration.

The Chinese therefore did play a role in why the anti-Chinese legislation was enacted in New Zealand and Australia. However, it also denotes the importance of cultural understanding, and how a lack thereof can result in an orientalist point of view.

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[134] Fairburn, above n 129, at 76.
[135] At 77.

E Conclusions on Orientalism in the Reasoning

While orientalism in the law is displayed through the 'superiority' reasoning, it is less apparent, although still inherent, in the 'Britain of the South' and 'working conditions' arguments run to justify the imposition of anti-Chinese legislation, as well as to a certain extent in the 'Chinese as sojourners' argument. While disappointing, it is interesting as it allows for the consideration of how ignorance and a lack of analysis can lead to discriminatory laws being enacted. Without acknowledging orientalism, both Australia and New Zealand enacted decades of anti-Chinese legislation.

However, it should be noted that this analysis is being made with the benefit of hindsight. Those in the 1800s and 1900s did not have the benefit of Said's theory to use as a lens to examine their laws and legislative process. The best that can be hoped for is for such analysis to be conducted in the present day to ensure that unconscious biases which may mask orientalist assumptions are properly brought to the surface and examined.

V Reasons for the Repeal

While the anti-Chinese legislation was grounded in orientalist reasoning, it was eventually repealed in both New Zealand and Australia. This part of the paper will investigate the reasoning for those repeals and whether they show a change in attitudes.

In New Zealand, the Finance (No 3) Act 1944 repealed the Chinese Immigrants Act 1881.[136] It was suggested that this was due to a desire to avoid discriminating against the Chinese, stating that "we have no more right to ask the Chinese to pay a poll-tax than we have to ask the Japanese, the Germans, the Spaniards, or the Norwegians."[137] This was bolstered in enunciating that the "Chinese are as good as any other race," and that the repeal was to remove "a blot on our legislation."[138]

[136] Finance (No 3) Act, s 10.
[137] (13 December 1944) 267 NZPD 724.
[138] At 725.

However, to see this as an attitude change would be overly optimistic. While the law was repealed, the Chinese remained subject to other laws like the Immigration Restriction Act 1899, that aimed to restrict non-white immigration. Therefore, it would be more accurate to see the repeal as a changing of attitudes towards the Chinese, but it did not mean that the legislature saw the Chinese as equal to themselves – it simply saw them as to be as equally discriminated against as other non-white groups, likely in line with more races being present in New Zealand.

A 1953 Department of External Affairs memorandum confirmed this approach, reading:[139]

> Our immigration is based firmly on the principle that we are and intend to remain a country of European development. It is inevitably discriminatory against Asians – indeed against all persons who are not wholly of European race and colour. Whereas we have done much to encourage immigration from Europe, we do everything to discourage it from Asia.

Change really began after the 1986 Immigration Policy Review implemented a non-discriminatory approach to immigration. The Immigration Act 1987 was then passed. In the first reading, it was made clear that the reform aimed to move away from race-based discrimination. It was described as "an enlightened and modern immigration policy that sets aside the discrimination inherent in the previous Government's policy, and develops equal opportunity for all."[140] While this Act was not specifically aimed at the Chinese, it is still important in showing that attitudes towards non-white immigrants, including the Chinese, had changed and were no longer grounded in an orientalist point of view.

Similarly in Australia, the passing of the Australian Citizenship Act 1973 successfully brought an end to the White Australia policy. As with New Zealand, the focus in the debates surrounded excising discrimination:[141]

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[139] Tom Brooking and Roberto Rabel "Neither British nor Polynesian : a brief history of New Zealand's other immigrants" in Stuart William Greif (ed) *Immigration and national identity in New Zealand: one people, two peoples, many peoples?* (Dunmore Press, Palmerston North, 1995) at 39.

[140] (14 August 1986) 473 NZPD 3942.

[141] Commonwealth, Parliamentary Debates, House of Representatives, 11 April 1973, 1312 (Al Grassby).

> After [three years] in Australia substantial numbers of fine migrants have come to know Australia, feel settled here, want to identify themselves as members of our community and are in fact living as such without friction or problems. They should not have to wait for a longer time.

This indicates a shift in attitudes, identifying that non-Commonwealth migrants have not only come to know Australia and deserve to stay, but also that they are 'fine' and thus enhance Australia as a country. This, in turn, shows a shift from orientalist attitudes, as migrants are accepted as members of the community, rather than being 'othered'. Again, these repeals were aimed at all non-white migrants, rather than specifically targeting the Chinese, but still demonstrate that change in attitude and a reduction in orientalism had occurred.

It should be caveated that these repeals were also coloured by the need for economic growth. Palat states that the "eventual removal of the more discriminatory provisions… can be traced to the gradual undermining of the privileged position New Zealand had occupied under the political and economic arrangements of the British Empire."[142] Likewise, Ang argues that the Australian change was made as it was "simply more likely to enhance Australia's economic wellbeing than xenophobia."[143] This context, therefore, questions the authenticity of parliamentary comments. However, even if the comments are in part brought on by economic wishes, they nonetheless still represent a change in attitudes and a decline in orientalism.

VI Orientalism in Modern Immigration Law

Despite the obvious issues with orientalism in the law, both New Zealand and Australia have, arguably, seen some of the same attitudes arise in a modern context. This part will discuss selected examples from 1990s Australia and New Zealand.

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[142] Ravi Arvind Palat "Curries, Chopsticks and Kiwis: Asian Migration to Aotearoa/New Zealand" in Paul Spoonley, David Pearson and Cluny Macpherson (eds) *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996) 35 at 46.

[143] Ien Ang "Asians in Australia: A Contradiction in Terms?" in Gerhard Fischer and John Docker (eds) *Race, Colour and Identity in Australia and New Zealand* (UNSW Press, Sydney, 2000) at 120.

A New Zealand

The liberalisation of New Zealand's immigration policies in the 1980s led to a period of high Asian migration; "the largest-ever Asian immigration to New Zealand".[144] This was bolstered by the introduction of the Immigration Amendment Act 1991, which created a merit-based points system in place of the priority list. These changes sought to attract Asians to help business in New Zealand.

This influx brought a mixture of attitudes. While some supported the migration, negative responses from those who feared an 'Asian Invasion' were more prevalent.[145] For example, Ip and Murphy discuss a feature article titled 'The Inv-Asian,' part of which discussed the behaviour of a 'typical' Asian, reducing Asian people to a list of stereotypes – that they are absentee parents, spoil their kids, buy up property and drive up house prices and bring relatives who behave in 'un-Kiwi-like' ways.[146] As such, "stigma and stereotypes [were] generated in the media in response to the large number of Chinese migrants arriving in New Zealand," just as they were in the 1800s.[147] This 'othering' of Asians represents Said's second dogma of orientalism, as Asian people were reduced to a generalisation, rather than the authors offering tangible evidence about modern Asian society. This reflects the same orientalism that was seen in regards to the Chinese.

This attitude also extended to politics. Winston Peters campaigned in 1996 on an anti-immigration platform, "attacking rows of ostentatious homes" and those owners who have 'no ties to New Zealand.'[148] It was clear he was talking about Asians, as while the language was not "racially or ethnically specific," it employed "well-rehearsed boundary-marking exercises that drew upon specific exclusionary Pakeha discourses of

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[144] Wardlow Friesen "New Asian Migrants in Auckland: Issues of Employment and Status" (1992) Labour, Employment and Work in New Zealand 148 at 148.
[145] Shee-Jeong Park "Political Participation of "Asian" New Zealanders: A Case Study of Ethnic Chinese and Korean New Zealanders" (PhD Thesis, University of Auckland, 2006).
[146] Manying Ip and Nigel Murphy *Aliens at my Table: Asians as New Zealanders See Them* (Penguin Books, Auckland, 2005) at 31.
[147] Raymond C. F. Chui *Transnationalism and Migration: Chinese Migrants in New Zealand* (Center for Qualitative Social Research and Center for East Asian Studies, Occasional Paper No. 4, July 2008) at 32.
[148] Ip and Murphy, above n 146, at 35.

'community' and the abstract spaces that they inhabit."[149] He questioned their commitment to New Zealand and suggested that they would bring their families to New Zealand, enjoy benefits at the expense of New Zealanders, and return to Asia.[150] In doing so, Peters demonstrated two dogmas of orientalism, only offering generalisations of Asian people and depicting Asians as a group that was in need of control. It can be assumed that Peters was attempting to appeal to voters who may also accept those dogmas for political gain.

The attitudes were focused on Asians, rather than other races. One reason for this may be fear due to the high rate of immigration, with 52.3 per cent of the total net gain of non-New Zealand citizens between April 1986 and March 1998 being Asian – although in no way would this constitute an invasion.[151] It is also important to note that the discrimination targets Asians, rather than the Chinese. This may be because while Chinese immigration was still high in the 1990s, it was coupled with immigration from several Asian countries, unlike that of the nineteenth century. Thus, the scope may have been widened to encompass that fact. It also may stem from the common stereotype that all Asians "are alike".[152]

However, while there is clear evidence of discrimination, and potential orientalism, in public opinion and politics, it is less obvious whether those attitudes extended to the lawmakers. 1995 saw a tightening of immigration policy, in particular introducing English test requirements that could result in the forfeiture of a $20,000 bond if failed within 12 months.[153] These measures were dropped in 1998, but in 2002 the English test requirement for skilled migrants was raised, requiring an International English Language Testing System (IELTS) score of 6.5.[154] Both of these changes have been discussed being

[149] Paul Spoonley and Lawrence D. Berg "Refashioning Racism: Immigration, Multiculturalism and an Election Year" (1997) 53 New Zealand Geographer 46 at 47. See also Ip and Murphy, above n 146, at 35.
[150] Ip and Murphy, above n 146, at 35.
[151] Richard Bedford, Elsie Ho and Jacqueline Lidgard *International Migration in New Zealand: Context, Components and Policy Issues* (Migration Research Group and Population Studies Centre, Discussion Papers No 37, October 2000) at 23.
[152] For further information on Asian stereotypes and microaggressions, see: Derald Wing Sue *Microaggressions and Marginality: Manifestation, Dynamics and Impact* (Wiley, Hoboken (NJ), 2010) at 90.
[153] New Zealand Immigration Service *New Zealand's Targeted Immigration Policies: Summary of October 1995 Policy Changes* (1995) at 10.
[154] Immigration New Zealand *Operational Manual (Archived)* (24 March 2003) at G6.5.

derived from the public reaction to Asian immigration, desiring to stem the flow of subsequent future immigration.[155] It is largely common sense that the English language requirements were discriminatory in the way that they make immigration more difficult for foreign language speakers. However, it should also be acknowledged that other factors would have played into any decision made. Business did not flourish as had been hoped due to the New Zealand business environment, and many Asians were unemployed despite being highly skilled.[156] A lack of concrete reasoning from the Government as to why these measures were implemented means that it is not possible to discern whether the actions were a result of orientalism.

B Australia

Australia, like New Zealand, operates a skills-based immigration regime. It was first rolled out in 1979 creating what was known as the Numerical Multi-factor Assessment System for migrant selection, "which gave weight to factors such as family ties, occupation and language skills."[157]

As with New Zealand, these reforms did not come unopposed. Australia also experienced a political reaction through the form of Pauline Hanson's One Nation party. Their 1998 immigration policy sought to return to a more restrictive regime, specifically singling out Asian migration as an issue and stating that "most of the media and government concern has been for the migrant, not for the other side of the equation."[158] The reasoning given echoed that of the gold rush era, and contained orientalist undertones. For instance, it enunciated the importance of British culture in Australia, and argued that increased Asian immigration would negatively change the Australian identity.[159]

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[155] Ip and Murphy, above n 146, at 163; Anne Henderson "Untapped Talents: The Employment and Settlement Experiences of Skilled Chinese in New Zealand" in Manying Ip (ed) *Unfolding History, Evolving Identity: The Chinese in New Zealand* (Auckland University Press, Wellington, 2003) 141 at 145; and Liangni Sally Liu "New Chinese Immigration to New Zealand: Policies, Immigration Patterns, Mobility and Perception" in Min Zhou (ed) *Contemporary Chinese Diasporas* (Palgrave, Singapore, 2017) 233 at 239.

[156] Ip and Murphy, above n 146, at 33.

[157] Mence, Gangell and Tebb, above n 104, at 66.

[158] Australianpolitics.com "One Nation Immigration, Population and Social Cohesion Policy" (1 July 1998) <www.australianpolitics.com>.

[159] Australianpolitics.com, above n 158; and Michael Millet "A poor vision of the future" *Sydney Morning Herald* (Sydney, 3 July 1998).

The support that the party garnered in the 1998 Queensland state election, as well as in the federal election also speaks to at least a segment of the public sharing this opinion.[160] However, unlike New Zealand, no legislative changes were made that correlate to the attitudes expressed. It is therefore arguable that orientalism was absent from the law in Australia – while immigration policy has been far from perfect, nothing suggests oriental attitudes influenced any legislation.

C A Return?

It is not clear whether orientalism influenced modern legislative changes in New Zealand, and it seems that orientalism was not present in Australian law. This is an improvement from historic legislation, and thus does not necessarily signal a return of orientalism in legislation. However, what is clear is that orientalist attitudes do still exist in politics and public opinion. What is important is to stay aware of these attitudes in order to prevent orientalism from manifesting itself in future laws.

VII Implications for Future Lawmaking

In examining historical and modern immigration laws, it is clear that orientalism is present in the attitudes of politicians. There has been a significant improvement from the orientalism present in historic immigration legislation to the present day. Yet, the fact that traces of orientalism continue to crop up in Australia and New Zealand should serve as a warning to future legislatures. Both countries should continue to analyse their proposed legislation in light of orientalism, and consider whether such legislation would continue to subjugate Chinese people and the wider Asian community as 'other'.

The fact that New Zealand and Australia enacted such similar legislation, and used similar reasoning, also shows the danger of looking to other jurisdictions for policy reasoning. Both countries have a history of settler-colonialism from Great Britain, historically had a formal legal system dominated by those of British descent, and use the common law

[160] Antony Green "Historic vote with bitter seed of Coalition disaster; One Nation: What Lies Ahead" *Sydney Morning Herald* (Sydney, 15 June 1998); and "Winning Isn't Everything" *The Canberra Times* (Canberra, 17 October 1998).

system. In the modern context, New Zealand and Australia are often seen as "natural allies".[161] Thus, the reasoning can seem readily applicable across borders. However, while this reliance can result in good law-making, conversely the approach can reduce the amount of critical analysis that goes into justifying the reasoning for the legislation. This risk should also be borne in mind by future legislatures.

VIII Conclusion

The key finding of this research is that orientalism has had a clear presence in the anti-Chinese immigration laws of both New Zealand and Australia; obvious in the historic legislation, but flying under the radar when it comes to modern immigration policy. The reasoning used to justify such anti-Chinese legislation, namely the desire for a 'Britain of the South', superiority, working conditions and the Chinese being sojourners were not merely discriminatory, but analysed through the ideas of Said show an unmistakeable gleam of Orientalism. While such attitudes were eventually erased from the lawbooks, a review of modern attitudes suggest that orientalism is still something to be aware of going forward.

The time has come for us to learn from the mistakes of our past. While it is not possible to erase the discrimination that has been faced by the Chinese in New Zealand and Australia, what both countries can do is recognise those errors and bear them in mind in the way that each moves forward.

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