The concept of diversity signifies the postmodern ‘turn’ in the way that it suggests inclusiveness, adaptability and tolerance. But the legal profession is also a paradigmatically modernist institution that embodies exclusivity, uniformity and conservatism. This presentation focuses on the contradictions that inhere within the social justice imperative to render the legal profession more diverse. Each time that there has been an attempt to do so, there have been counter moves to rein back and neutralise the effects of diversification. The point is clearly illustrated by the entry of women into the profession in large numbers, which has occurred since the 1970s. Technologies of resistance include the domination of the profession by corporate lawyering, the long hours culture and the maintenance of the ‘glass ceiling’.

Diversity should not be understood as an unqualified good; nor should progress be understood as a linear thread running from uniformity to diversity. Sometimes diversity is the desirable state, sometimes uniformity. Furthermore, each pole contains the seeds of its antinomy. There cannot be one without the other so that each time there is a propulsion in one direction, it is corroded by its opposite.

The development of a single regime for the Australian legal profession illustrates the point. The move towards a national regime, unification, rationalisation, consistency and homogeneity, and a single identity is viewed as a good against the diversity of multiple State regimes. Thus, in 2001, Daryl Williams, the former Attorney-General, with some prodding from the market, advocated uniformity in the fundamentals of legal practice to facilitate the free movement of lawyers between the States, which led to the development of a Draft Model Bill in 2003.

Nevertheless, despite the pressure within an emerging global legal economy to
develop a single identity, legal practice has become increasingly heterogeneous. Multi-disciplinary practices, mega-firms, transnational firms, as well as numerous small specialist firms, have challenged the moves to homogenise Australian legal practice.

Hence, we see that whenever there is pressure to create uniformity, the imperative in favour of diversity threatens to disrupt it in the same way as homogeneity resists moves towards diversity.

The most notable contest between diversity and homogeneity within the legal profession is played out in respect of the identity of lawyers themselves. Historically, the legal profession has been renowned for the extraordinary degree of homogeneity it has been able to maintain for centuries. Benchmark Men – who are white, Anglo-Celtic, heterosexual, able-bodied, middle class and male – have dominated the legal profession and shaped its culture. They have been able to establish themselves as the norm against which Others are measured and found wanting.

Women, indigenous people, NESB people, working class people, gays and lesbians have been viewed as non-normative within the legal culture. As a result, they have had to struggle to be let in. Women represent the most dramatic example of Otherness and were still subjected to absolute exclusion from practice and from university a century ago. The intersection of gender with other variables cannot be gainsaid. However, as my co-panellists are addressing issues of race and sexuality, I will not address them.

The relationship between the legal profession and women as agents of legality has been historically fraught in Australia as elsewhere. A brief overview of this uncomfortable liaison highlights the residual distrust of women in positions of authority and helps to explain the resistance to women as members of the jurisprudential community. In the late 19th and early 20th centuries, women struggled to enter the legal profession but met with resistance from the judiciary and the practising profession, as well as from universities and Attorneys-General. Reasoned argument and demonstrated ability counted for nought within a supposed sphere of rationality where masculinity was considered to be a primary indicium of worth. Australian courts, like those in the northern hemisphere, even determined that women were not persons for the purpose of being admitted to legal practice.

Women were eventually admitted to legal practice, as they were to universities and other professions, although each State constituted a separate site of struggle so far as the legal profession was concerned. What may be less well known is that every single facet of legal practice also constituted a further site of contestation as women sought to be ‘let in’. The case of Mary Kitson (Tenison Woods) is exemplary. Despite having been admitted to practice and partnership in a law firm, she was deemed unworthy of recognition as a notary public, a minor qualification that would have enabled her to administer oaths. Although by then recognised as a person for the purposes of legal practice, she did not qualify as a ‘person’ for the purposes of the Public Notaries Act according to the sage judges of the South Australian Supreme Court. It did not matter how well qualified a woman was or how much experience she had, she was still deemed not good enough.
The handful of trailblazing women who were admitted to legal practice in the first half of the 20th century were made less than welcome. Initially, they tended to be kept in back rooms as researchers, rather than being permitted to see clients. They also faced discrimination in respect of areas of practice. Routine work, such as probate, was deemed to be most suitable for women. Subsequently, family law came to be marked as an appropriate niche because it accorded with the caring and affective dimension of private life, with which the feminine was conventionally associated.

Economic growth and a demand for lawyers, particularly from the early 1970s, resulted in a relaxation of the sex-typing of legal work. Second Wave Feminism also played a role in giving women the confidence to persevere in non-traditional areas.

<table>
<thead>
<tr>
<th>Year</th>
<th>Law Students</th>
<th>Practitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>20%</td>
<td>6%</td>
</tr>
<tr>
<td>2004</td>
<td>&lt;50%</td>
<td>&lt;30%</td>
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</tbody>
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The modern story of linear progressivism for women lawyers nevertheless continues to stumble over positions involving the twin variables of authority and autonomy. Hence, appointment to partnerships, advocacy and judging, particularly at the upper echelons, remain problematic. The equation that prevails within the legal profession, as in other spheres of professional and political life, is the more senior and prestigious the position, the less women there are.

Thus while we now see a modicum of diversity within the profession, women still tend to be concentrated at the lower levels – in managed positions – either as employed staff or in support roles. The ideal lawyer, who is independent and
autonomous, and capable of occupying authoritative positions, continues to be constructed in terms of benchmark masculinity. The unruliness of the feminine, it would seem, can be kept at bay if women accept subordinate, or ‘managed’, positions.

Reflecting this tilted universe is the profile of women judges, the paucity of whose numbers, until very recently, highlights the fear of women in autonomous and authoritative positions. The first woman to be appointed to the judiciary in Australia, Dame Roma Mitchell, was appointed in 1965, having been appointed as the first woman QC only two years before that. There was a long gap before other women were appointed but, once again, they tended to be appointed to the feminised domain of the Family Court and the less authoritative lower courts.

A tiny percentage of women barristers appear before the most senior courts. Even then, it is largely in the capacity of ‘junior’ to a male senior counsel. Justice Kirby has computed that only about 3% of those who address the High Court, or have ‘speaking parts’, are women. The number of women appointed to the Bar as Senior Counsel (SC, formerly QC) has been virtually negligible until the last few years when most State governments have somewhat shame-facedly responded to criticisms of the inequitable profile.

The catalyst for change was the issue of ‘gender bias in the judiciary’, which received intense media scrutiny throughout Australia in 1993. Sexism and misogyny on the part of the overwhelmingly male judiciary was shown to be rampant. The most notorious instance involved a remark by Justice Bollen, a judge of the South Australian Supreme Court who, in the course of a marital rape trial, expressed the view that ‘rougher than usual handling’ was acceptable on the part of a husband towards a wife less than willing to engage in sexual intercourse. As a result of the public outcry, governments were compelled to review their practices in making judicial appointments. The Commonwealth Parliament conducted an inquiry, which highlighted the lack of transparency. A further federal government initiative involved consultants preparing gender-sensitive teaching materials on the themes of citizenship, work and violence for law students.

The question of advertising judicial vacancies and appointing the ‘best person’ rather than relying on the ‘old boys’ club’ began to be mooted. In 2003, the position of Chief Justice of the Supreme Court of Victoria was advertised, and a woman, Justice Warren, was in fact appointed.

The flurry of appointments to senior legal positions provoked a predictable gender backlash. In Queensland, Chief Magistrate, Diane Fingleton, was sentenced to 12 months’ gaol in 2003 on a charge of retaliating against a witness, when she was allegedly attempting to discipline a fellow magistrate. The appointees were also denigrated and maligned, and it was suggested that they were unmeritorious. For example, in Victoria, Robert Richter QC, is reported as having said that it was an advantage for an appointee not to have testicles (The Age, 28 November 2003). Such comments conveniently ignored the public advantage that testicles have conferred since time immemorial.

Before women are attacked on their merits, it should be noted that they figure disproportionately among the top students in law schools, and have done for decades, as Jane Mathews’ study showed more than 20 years ago. But just a minute! If
women were prominent among the top students 20 years ago, why don’t they appear more frequently in the pool of ‘best qualified’ today, the élite group from which judges are drawn? Why is there such animus against them? The unequivocal evidence of excellence and years of experience rebuts the asseverations of those who claim that women are deficient in both respects. While the long hours culture may account for a degree of attrition so far as the paucity of women at the Senior Bar is concerned, it is not a complete answer. Merit, it would seem, is constructed differently for men and women.11

The failure to appoint a woman to the High Court following the resignation of Justice Gaudron mirrors the suspicion associated with the conjunction of women and authority. Her replacement with a male judge, Justice Dyson Heydon, means that there is now not a single woman on the High Court. An all-male superior court puts paid to the populist progressive story of liberalism – that things are always getting better for women. The question of equitable State representation, which overshadowed the issue of gender in the media debate following the appointment of Justice Heydon as Justice Gaudron’s successor, is a furphy. A society that assigns all positions to Benchmark Men on its most authoritative court in this day and age evokes a regressive image of a colonialist and frontier society, hardly that of a modern, first world state of the 21st century. A High Court without a single woman places Australia well behind comparator nation states of the northern hemisphere. For example, three of the nine Canadian Supreme Court judges are women, including the Chief Justice.

Despite the hope that the entry of women into the profession would promote an acceptance of diversity in the culture and patterns of work, this has not been the case despite the rhetoric of flexible hours, part-time work and work/life balance. Benchmark masculinity itself has not been tractable to change. The legal professional culture has constructed its own image of the ideal lawyer who accepts the long-hours culture, has an uninterrupted career pattern and is accepting of the ‘boys’ club’ mentality – drinking, lunching, sport and joke telling. Many women lawyers find this culture so hostile and alienating that they leave. In such ways, we see the centripetal pull of homogeneity and its resistance to the feminine.

The dominant political philosophy of neoliberalism, with its support for the market, also displays a predilection in favour of Benchmark Man in the way that it has revived interest in promotion of the self and property accumulation at the expense of social justice and the common good. I am not postulating an essentialist view of men and women here, but alluding to the way entrepreneurialism and a relentless competitiveness are marked as masculine in the social script. The idea that big business and facilitation of the market are primary goals of lawyering thereby subtly operates to dilute the impact of diversity.

The corporatisation and quasi-privatisation of universities have also acted as brakes on the imperative in favour of diversity. The increase in the number of law schools from 11 to 28 in 15 years has led to greater diversity in the social class, gender and race of law students, as some of these law schools are found in regional areas and less affluent metropolitan centres, but the impact of the market on higher education has muted this ostensible heterogeneity. The shift in favour of a user-pays philosophy of higher education is reflected in a narrowing of the legal curriculum and, in turn, in the imperative in favour of corporate practice as the preferred destination for graduates.
We can see that the legal profession represents an ongoing site of contest between Benchmark Man as the normative inhabitant and Others. One cannot point to a simple progressivist line, running from homogeneity to diversity. They are antinomies in perpetual motion which are affected by the political, economic and social philosophy of the day.

Benchmark Men are the traditional agents of legality and it was their monopoly of the courts a century ago that enabled them to pronounce seriously and authoritatively that only men were ‘persons’ for the purpose of legal practice. Their social power today permits them to maintain a high degree of homosociality within the legal profession despite the ongoing struggle by women and Others in favour of distributive justice.

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1 I have elaborated upon the history of resistance towards professional women in my study of women and the legal profession: Margaret Thornton, *Dissonance and Distrust: Women and the Legal Profession*, Oxford University Press, Melbourne, 1996.
2 Eg, *In re Edith Haynes* (1904) 6 WAR 209.
3 *In re Kitson* [1920] SALR 230.
6 *R v Johns* (SASC 26 August 1992) [unreported].
8 The Citizenship materials were prepared by Professor Sandra Berns, Ms Paula Baron and Professor Marcia Neave, and the Work and Violence materials by Professor Regina Graycar and Associate Professor Jenny Morgan: see R Graycar & J Morgan, ‘Legal Categories, Women’s Lives and the Law Curriculum OR: Making Gender Examinable’ (1996) 18 *Sydney Law Review* 431. The writer chaired the overseeing committee.