

Constitutional Dignity post Farm Transparency

Ashleigh Barnes*

Abstract

In this article I consider the state of play for dignity in Australian constitutional law in the light of *Clubb v Edwards*; *Preston v Avery* ('*Clubb*') and *Farm Transparency International Ltd v New South Wales* ('*Farm Transparency*'). In Part II, I explore the meaning of dignity in these decisions. I respond to the concern voiced following *Clubb* that dignity is an indeterminate, incoherent or empty concept. Together, the judgments in *Clubb* and *Farm Transparency* give dignity some content and meaning. Doctrinal analysis of these judgments reveals the emerging meaning of dignity in Australian constitutional law. This article offers this original doctrinal analysis, focusing on the new light that *Farm Transparency* can cast on the meaning of dignity. This doctrinal analysis suggests that dignity in Australian constitutional law is a multidimensional concept, including dignity as the intrinsic worth of natural persons, and dignity as a thick autonomy interest. In Part III, I address the second concern voiced following *Clubb* that the quirks of the Australian constitutional law system preclude recognition of the dignity of the speaker, and thus will cause dignity to be relevant only to the limitation of the implied freedom of political communication and not its protection. I address the complexities that apply in the Australian context and argue that none of these completely closes the door on dignity.

Please cite this article as:

Ashleigh Barnes, 'Constitutional Dignity post *Farm Transparency*' (2023) 45(4) *Sydney Law Review* 497.



This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International Licence (CC BY-ND 4.0).

As an open access journal, unmodified content is free to use with proper attribution. Please email sydneylawreview@sydney.edu.au for permission and/or queries.

© 2023 Sydney Law Review and authors. ISSN: 1444-9528

* DPhil Candidate, University of Oxford, Oxford, United Kingdom; Lecturer, Macquarie Law School, Macquarie University, New South Wales, Australia. Email: ashleigh.barnes@mq.edu.au; ORCID iD: <https://orcid.org/0009-0007-6322-6452>.

I thank Professor Kate O'Regan (University of Oxford), Professor Rosalind Dixon (UNSW Sydney) and the reviewers for their helpful comments. Any errors are my own.

I Introduction

It is arguable that dignity was recognised in *Clubb v Edwards; Preston v Avery* ('*Clubb*')¹ as a constitutional value.² In that decision, dignity received 'a degree of constitutional recognition in Australia capable of justifying the imposition of restrictions on the implied freedom'.³ It was 'a major development' and 'the first time that the concept of dignity [had] been used to help interpret the *Australian Constitution*'.⁴ The limited scholarship responding to *Clubb* thus far has raised several concerns. One concern is that it is not immediately clear 'what is actually meant by the term' dignity,⁵ leaving it vulnerable to criticisms that it is a 'vacuous concept'⁶ and that Australia 'has said almost nothing about the concept'.⁷ Another concern is that the High Court of Australia will 'recognise the dignity of listeners and disregard the dignity of speakers'.⁸ This would be 'misleading' and '[flip] the principal objective of dignity on its head'.⁹ Rather than conceiving of dignity as the basis for rights and freedoms, the Court may rely exclusively on dignity as a justification for the limitation of the implied freedom of political communication.¹⁰ This would be wrong, because dignity is relevant to 'both sides of the equation'.¹¹

More recently, dignity appeared in the reasoning in *Farm Transparency International Ltd v New South Wales* ('*Farm Transparency*').¹² Together, the judgments in *Clubb* and *Farm Transparency* begin to answer some of these questions. First, while it is correct that the meaning of dignity is contingent, and faces a 'definitional challenge',¹³ these judgments give dignity some content and meaning. This article develops the argument I advanced in earlier work that doctrinal

¹ *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 ('*Clubb*').

² Caroline Henckels, Ronli Sifris and Tania Penovic, 'Dignity as a Constitutional Value: Abortion, Political Communication and Proportionality' (2021) 49(4) *Federal Law Review* 554, 555–6 (referring to 'the High Court's nascent recognition of dignity as a constitutional value'). It is beyond the scope of this article to make an argument for or against the claim that dignity was in fact recognised as a constitutional value in *Clubb* (ibid). It is also arguable that the dignity value in *Clubb* was a statutory value only and does not yet have an independent constitutional basis. If that is the case, this article offers an explanation of the meaning of dignity adopted in *Clubb*, for which an independent constitutional basis may develop. It is also beyond the scope of this article to answer the separate but related question concerning whether dignity should be recognised as an Australian constitutional value, although the article does respond to some of the concerns regarding the operation of dignity in the Australian constitutional context in Part II. For an overview of what is meant by the term 'constitutional value' and current debates, see Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 3.

³ Scott Stephenson, 'Dignity and the Australian Constitution' (2020) 42(4) *Sydney Law Review* 369, 370.

⁴ Ibid.

⁵ Ibid 388.

⁶ Henckels, Sifris and Penovic (n 2) 556. There are related debates as to whether dignity is properly grounded in the text and structure of the *Constitution*: at 555; Stephenson (n 3) 391.

⁷ Stephenson (n 3) 370.

⁸ Ibid 371.

⁹ Ibid.

¹⁰ Ibid 371–2.

¹¹ Ibid 390.

¹² *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1 ('*Farm Transparency*').

¹³ Stephenson (n 3) 389.

analysis of express invocations of dignity in these judgments may reveal the emerging meaning of dignity in Australian constitutional law.¹⁴ I previously analysed the *meaning* of constitutional dignity in *Clubb*.¹⁵ This article offers original doctrinal analysis in the new light that the *Farm Transparency* judgments cast on the meaning of dignity in Australian constitutional law. Second, this article goes further than my previous work and considers the role of constitutional dignity in *Clubb* and *Farm Transparency*. I briefly respond to the second concern mentioned above that dignity will only be used ‘on one side of the equation’ in Australian constitutional law.¹⁶

A Overview of the Judgments

Both cases concerned challenges to legislation on the basis that the impugned statutes impermissibly burdened the implied freedom of political communication (the ‘implied freedom’). In both cases, members of the High Court identified dignity as one of the purposes or objectives of the impugned laws. The protection of dignity was a legitimate purpose, compatible with the constitutionally prescribed system of representative and responsible government.

Clubb concerned challenges to the constitutional validity of Tasmanian and Victorian legislative provisions prohibiting protest activities within a 150-metre radius of a facility where abortion services are provided (‘safe access zone’). The High Court found that laws restricting protests outside abortion facilities were justified limitations on the implied freedom partly on the basis that they protect the dignity of persons accessing those facilities.¹⁷

Farm Transparency concerned the validity of certain provisions of the *Surveillance Devices Act 2007* (NSW) (‘*Surveillance Devices Act*’) that, in broad terms, prohibit the publication and possession of recordings obtained by unlawful means using optical surveillance devices.¹⁸ Farm Transparency International is a company and a not-for-profit charity which seeks to raise public awareness of animal cruelty, increase understanding of the importance of preventing and alleviating animal suffering, and improve the treatment of animals including through changes to law, policy, practice and custom. It has published photographs, videos and audiovisual recordings of animal agricultural practices in Australia, including in New South Wales, which it obtained through acts of trespass.

Gordon J and Edelman J (writing individual judgments) considered the protection of the dignity of the owners or occupiers of property to form part of the legitimate purpose of the impugned provisions, compatible with the constitutionally prescribed system of representative and responsible government. Their Honours found that the impugned provisions had ‘dual, legitimate purposes which necessarily

¹⁴ Ashleigh Barnes, ‘Constitutional Dignity’ (2023) 46(3) *University of Melbourne Law Review* 683.

¹⁵ *Ibid.*

¹⁶ Stephenson (n 3) 391.

¹⁷ In *Clubb* (n 1), members of the Court also used dignity in a ‘narrow manner’ to identify a distinguishing characteristic of natural persons distinct from corporations: *ibid* 369. For a more detailed account of the role and use of dignity in *Clubb*, see Barnes (n 14).

¹⁸ *Surveillance Devices Act 2007* (NSW) ss 8(1), 11, 12.

intersect'.¹⁹ These were the protection of privacy and dignity, and the protection of property rights.²⁰ In the course of assessing the nature and extent of the burden on the implied freedom by the impugned legislation, Gordon J and Edelman J also considered the way the wider legal context protected dignity.²¹ Edelman J also considered the connection between the legislation's legitimate purpose of protecting dignity and the necessity of the law,²² and considered dignity in undertaking the final 'adequacy in the balance' assessment.²³

Conversely, the remaining five Judges did not consider the protection of dignity to be a purpose of the impugned law. Kiefel CJ and Keane J (Steward J agreeing) identified the legislative purpose of the impugned provisions as the protection of privacy only,²⁴ including 'the interest in privacy which arises out of the enjoyment of private property',²⁵ 'the privacy interests of those having possession of the property'²⁶ and 'privacy interests in activities conducted on premises as an aspect of a person's possessory rights over their property'.²⁷ Writing separately, Gageler J also understood the purpose of the legislative scheme to be 'to protect the privacy of all activities that occur on private property'.²⁸ Gleeson J agreed with Gageler J.²⁹ In summary, two members of the Bench in *Farm Transparency* considered that the impugned provisions pursued the legitimate aim of privacy *and* dignity (Gordon and Edelman JJ), and five members considered that they pursued privacy only (Kiefel CJ, Keane, Steward, Gageler and Gleeson JJ). This detail is significant as whether the harm protected against is appropriately characterised as an interference with privacy, dignity or both tells us something about what each of these values or interests protects.

II The Meaning of Dignity in Australian Constitutional Law

A *The Meaning of Dignity*

This Part responds to the 'definitional challenge' posed by dignity.³⁰ It is well established that '[d]ignity has come to mean different things to different people'.³¹ Within the legal context alone, dignity is used in different ways in different

¹⁹ *Farm Transparency* (n 12) 40–3 [170]–[181] (Gordon J), 58 [247] (Edelman J).

²⁰ *Ibid* 58 [247] (Edelman J).

²¹ *Ibid* 37–8 [159] (Gordon J), 52 [225], 54–5 [231]–[232], 55 [234], 56 [237], 57 [241] (Edelman J).

²² *Ibid* 61 [258]–[259].

²³ *Ibid* 62–3 [262]–[264].

²⁴ *Ibid* 4 [5].

²⁵ *Ibid* 10 [31].

²⁶ *Ibid* 10 [32].

²⁷ *Ibid* 15 [52].

²⁸ *Ibid* 17 [65].

²⁹ Gleeson J agreed with Gageler J's construction of the impugned provision and his reasons 'why the prohibitions in ss 11 and 12 infringe the constitutional guarantee of political communication by lacking an adequate balance between the benefit sought to be achieved by the provisions and their adverse effect on the implied freedom': *ibid* 65 [273].

³⁰ Stephenson (n 3) 389.

³¹ Meir Dan-Cohen, 'Introduction: Dignity and Its (Dis)content' in Jeremy Waldron, *Dignity, Rank, and Rights*, ed Meir Dan-Cohen (Oxford University Press, 2012) 3, 3.

jurisdictions, areas of law and institutions, and over time.³² I have previously demonstrated that it does not follow that a definition of dignity is completely indeterminate, this being one of the main charges put against dignity by the sceptics, and a concern about the introduction of dignity into Australian constitutional law.³³ What does follow is that there is a range of senses in which dignity is used.³⁴ The meaning of dignity becomes clearer once these different conceptions are separated out.³⁵ Drawing on my previous work, in this Part I *briefly* set out the main uses or understandings of human dignity in modern constitutional law.³⁶ This provides a bird's eye view of the terrain within which we can locate the Australian position. I discuss four uses: (1) dignity as worth, with particular attention to the Kantian notion; (2) dignity as freedom or autonomy, with particular attention to the Dworkinian notion; (3) dignity as an expressive quality; and (4) 'equal status'-based conceptions of dignity, with particular emphasis on Waldron's dignity as transvaluated rank account. These are not necessarily rival accounts. Indeed, some conceptions inadvertently overlap while others consciously borrow or rely on another account. Waldron has hinted that these accounts could be 'combinable as complementary contributions to a single multifaceted idea'.³⁷ An understanding of the various meanings of dignity at play and their relationships to each other will guide our analysis of the meaning of dignity in Australian constitutional law.³⁸

1 *Dignity as Worth, or Dignity as Intrinsic Value*

The predominant 'dignity as worth' account is Kant's moral theory.³⁹ Kantian dignity consists of the intrinsic, non-negotiable, non-fungible worth of each human being as an end in itself. It necessitates two duties of respect: humans cannot use other humans *merely* as a means to an end, and humans have a duty of self-respect.⁴⁰ Dignity inheres in every human being by virtue of his or her moral capacity. Kantian

³² Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 698.

³³ Barnes (n 14).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ For an overview of contemporary debates, see Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 1. For an overview of the proliferation of 'dignity' as a right or value in legal texts throughout the world, see McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 32). For a more detailed exploration of the four accounts briefly explored in this piece and their relationship to each other, see Barnes (n 14).

³⁷ Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Jeremy Waldron, *Dignity, Rank, and Rights*, ed Meir Dan-Cohen (Oxford University Press, 2012) 13, 16. Waldron was referring to (1) the Kantian idea of non-fungibility, (2) the Dworkinian idea of self-determination and (3) his own idea of transvaluated noble rank. His omission of the expressive concept of dignity does not undermine his argument. See also the basic minimum content of human dignity outlined in McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 32) 679.

³⁸ This approach was also used in Barnes (n 14).

³⁹ Another school of thought regarding 'dignity as worth' is the Roman Catholic teaching on human dignity. Kant is understood to have opened the way for a secular understanding of the dignity of human beings: Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) 25.

⁴⁰ *Ibid.*

dignity is a deeply egalitarian concept, applying categorically and equally to each human being.⁴¹

2 *Dignity as Freedom or Autonomy*

A second conception of dignity regards dignity as freedom or autonomy. However, like dignity, autonomy is also a protean concept in need of explication. Dignity could consist of a ‘thin’ concept of autonomy that focuses only on the rational capacity to choose and the exercise of the power to choose.⁴² Dworkin proposes a ‘thicker’ account.⁴³ For Dworkin, dignity consist of two basic principles: self-respect and authenticity. These principles concern how one ought to live (ethics) and how one ought to treat others (morality). First, the principle of self-respect requires that each person take his own life seriously (an ethical principle). The principle of self-respect also yields a moral imperative concerning how one ought to treat others. This is because recognition of the objective importance of one’s own life generates recognition of the objective importance of other people’s lives. This amounts to respect for humanity in all its forms. Accordingly, Dworkin’s principle of self-respect communicates the understanding that all humans have an intrinsic value.⁴⁴ The second principle, that of authenticity, is a robust principle of self-determination. It refers to a special personal responsibility to shape one’s life according to self-chosen standards; to identify, design and live by one’s own understanding of success in life, not according to decisions and values of others. The same ethical responsibility and independence must be recognised and respected in others. The key content of Dworkin’s dignity is thus a principle of self-determination⁴⁵ not incorporated within the Kantian notion of dignity.

3 *An Expressive Dignity: Dignity as the Opposite of Indignity or Humiliation, or Dignity as Virtue*

A third conception of dignity focuses on the expressive character of dignity. Khaitan argues that ‘what dignity takes seriously is the expression of disrespect/insult/humiliation etc to a cherished person, object or value’.⁴⁶ However, several expressive conceptions of dignity are possible. For example, under a ‘dignity as

⁴¹ Dan-Cohen (n 31) 4.

⁴² See, eg, James Griffin, *On Human Rights* (Oxford University Press, 2008) 152; Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980) 151.

⁴³ Dworkin is careful to distinguish his authenticity principle from a thin concept of autonomy, clarifying that ‘[a]uthenticity, on the other hand ... is very much concerned with the character as well as the fact of obstacles to choice’: Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 212.

⁴⁴ *Ibid* 205–9. See also Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Harper Collins, 1993); Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2008) 11–17.

⁴⁵ Dworkin, *Justice for Hedgehogs* (n 43) 214.

⁴⁶ Tarunabh Khaitan, ‘Dignity as an Expressive Norm: Neither Vacuous nor a Panacea’ (2012) 32(1) *Oxford Journal of Legal Studies* 1, 4. Khaitan’s objective is to demonstrate ‘dignity’s special contribution to human rights law, one that sets it apart from other non-expressive values such as autonomy and equality. ... [T]he expressive conceptions alone can make a distinctive contribution to human rights law. If dignity is not expressive, there is little it does that other values cannot do on their own.’: at 5.

autonomy' conception, any action which suggests that an autonomous being is not capable or worthy of being autonomous would violate one's dignity.⁴⁷ This is an instance where one theoretical conception is insufficient to guide legal actors. An expressive dignity must be substantiated by a determinate concept of dignity. This will be closely tied to a community's idea of civilised life and what is distinctly valued about human existence.⁴⁸

Related to dignity as an expressive concept, dignity may even have a *negative* content: 'that which a person has when not humiliated by others'.⁴⁹ For Margalit, the 'essence of the concern' is *indignity*, irrespective of 'whether that human being is conscious of the indignity or not'.⁵⁰ This creates a duty not to humiliate other human beings⁵¹ and an instruction to act in ways that express appropriate attitudes.⁵²

4 *Dignity as Equal Status*

Under status-based accounts of dignity, dignity is an attributed quality giving expression to moral status. Historically, dignity or *dignitas* was connected to hierarchy, rank and office and the privileges and deference due to each. Dignity was understood as an honour attached to people of certain status. Waldron introduces a conception of dignity as universalised high social rank ('dignity as equal status' or 'dignity as transvaluated rank') — an account that is a world apart from, yet in 'faith' with, the historic conception. Waldron's account is of 'dignity as a high-ranking status, comparable to a rank of nobility — only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man'.⁵³ The modern notion of dignity 'involves an upwards equalization of rank'.⁵⁴ Combining the historical conception with modern commitments to equality leads to an equal status-based conception of the dignity of the citizen. The motivation behind the account is Waldron's view that 'we *should* contrive to keep faith' with these ancient connections.⁵⁵

B *The Meaning of Dignity in Clubb and Farm Transparency*

The foregoing brief overview of the main uses of dignity in modern constitutional law will guide our analysis of *Clubb* and *Farm Transparency*. It will assist us to identify the meanings of dignity that are conveyed in the various judgments, including whether these are consistent and coherent uses of the concept.

⁴⁷ Ibid 14.

⁴⁸ R James Fyfe, 'Dignity As Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007) 70(1) *Saskatchewan Law Review* 1, 3.

⁴⁹ McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' (n 36) 40.

⁵⁰ Ibid.

⁵¹ Avishai Margalit, 'Human Dignity between Kitsch and Deification' in Christopher Cordner (ed), *Philosophy, Ethics and a Common Humanity: Essays in Honour of Raimond Gaita* (Routledge, 2011) 106, 110–19.

⁵² Khaitan (n 46) 5.

⁵³ Waldron, 'Lecture 1: Dignity and Rank' (n 31) 22.

⁵⁴ Ibid 33.

⁵⁵ Ibid 30 (emphasis added).

First, we can learn something from the presence of dignity in *Clubb* for Kiefel CJ and Keane J (the joint judgment)⁵⁶ and for Gageler J, and the absence of dignity from their reasoning in *Farm Transparency*. Second, we can learn something from the use of dignity by Edelman J and Gordon J who, in individual judgments, handled dignity briefly in both *Clubb* and *Farm Transparency*. I analyse these uses and compare them to determine whether the meaning of dignity in Australian constitutional law thus far is consistent and coherent. To identify the meaning of dignity in Australian constitutional law, I adopt an ‘inductive approach: identifying the ideas about dignity that are seeping from the pores’ of these decisions.⁵⁷ In Australia, the High Court ‘takes a “cautious and restrained” approach to answering questions concerning the constitutional validity of provisions’.⁵⁸ The parties are not entitled to an answer on a question of law unless the Court is satisfied that ‘there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties’.⁵⁹ It follows that what we can learn about dignity is relatively narrow. However, the inductive approach enables us to piece together the dignity puzzle.

1 *Presence in Clubb; Absence from Farm Transparency: Kiefel CJ and Keane J, and Gageler J*

(a) *Dignity Is Connected to but Different from Privacy*

The first observation that can be drawn from the presence of dignity in *Clubb* and its absence from *Farm Transparency* for Kiefel CJ and Keane J is that privacy is different from and not equivalent to dignity. This is significant as both privacy and dignity are contested, amorphous concepts and both have been tied to an autonomy interest. Following *Clubb* alone, the distinct features of each value for the plurality were not necessarily clear. Kiefel CJ, Keane J and Bell J observed that privacy is ‘closely linked’ to dignity⁶⁰ and often referred to them in tandem throughout their judgment.⁶¹ The judgment cited Aharon Barak’s account of dignity.⁶² This was particularly notable as Barak was the only person cited in the judgment on the meaning of dignity.⁶³ Barak observed: ‘Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity

⁵⁶ Bell J also wrote the joint judgment in *Clubb* (n 1) (2019), but was no longer on the Bench when *Farm Transparency* (n 12) was decided (2022).

⁵⁷ McCrudden, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’ (n 36) 55.

⁵⁸ *Farm Transparency* (n 12) 7 [20] (Kiefel CJ and Keane J), quoting *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (*Mineralogy*). See also *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52]; *Knight v Victoria* (2017) 261 CLR 306, 324 [32]; *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216, 229–30 [21]; *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 511 [90].

⁵⁹ *Farm Transparency* (n 12) 7 [20] (Kiefel CJ and Keane J), quoting *Mineralogy* (n 58) 247 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJR 282, 283 (Dixon CJ).

⁶⁰ *Clubb* (n 1) 195–6 [49].

⁶¹ See *ibid* 195 [47], 197–8 [56], 198–9 [60], 203 [78], 204 [82], 205 [85]. Cf at 196 [50]–[51], 208–9 [98], 209 [99], 209 [101].

⁶² *Ibid* 196 [50].

⁶³ Stephenson (n 3) 374.

unites the other human rights into a whole.⁶⁴ In isolation, this could have been understood as suggesting that dignity is only relevant as the source of other interests, such as privacy or the implied freedom. However, the presence of dignity in *Clubb* coupled with its absence from *Farm Transparency* for Kiefel CJ and Keane J may further our understanding of what both dignity and privacy capture. Dignity is the primary focus of this article, but the meaning of privacy following *Farm Transparency* is also ripe for investigation.

(b) *Dignity Attaches to Natural Persons and not Corporations*

In *Clubb*, the plurality considered dignity to apply only to natural persons and their activities. This is clear from their Honours' response to Mrs Clubb's argument concerning the alleged special potency of on-site protests. In rejecting that argument, the plurality relied on dignity to identify a type of harm caused by the protest activities — 'an attack upon the privacy and dignity of other people'.⁶⁵ Stephenson observes that, in doing so, their Honours distinguished the position of natural persons from that of corporations:

The reason why the harm to dignity was relevant in *Clubb*, but not *Brown*, is that in *Brown*, the protests were targeted at forestry operations (that is, corporations and their activities), while in *Clubb*, the protests were targeted at persons accessing abortion services (that is, natural persons and their activities).⁶⁶

Thus, natural persons have an interest that corporations do not: the protection of their dignity. The provisions challenged in *Farm Transparency* protect the owner's or occupier's interests. This could plausibly be either a natural person or a corporation. For instance, Farm Transparency International expressly intended to expose the practices of commercial agricultural facilities, which would include corporations. However, such corporations would have employees who are natural persons and are also protected by the impugned law. The facts of *Farm Transparency* were that the plaintiffs engaged in conduct that purportedly contravened the impugned provisions, and they may in the future engage in such conduct. However, the conduct engaged in, or to be engaged in, was not specified in any detail. Given that both corporations and natural persons may have been affected by the proscribed conduct, it was arguably open to Kiefel CJ and Keane J to find dignity relevant in *Farm Transparency*. However, this is a very narrow point. To say that natural persons have dignity tells us something about dignity but does not give the full picture. It tells us who has dignity, but not what it means to have dignity or what dignity requires. Whether dignity was relevant in *Farm Transparency* thus necessitates a more thorough understanding of what dignity comprises.

My previous work identified key aspects or dimensions of the dignity reasoning in the joint judgment in *Clubb*.⁶⁷ In *Clubb*, the plurality suggested that dignity: (i) protects a natural person's life-shaping choice from being denied or

⁶⁴ Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 86, quoted in *Clubb* (n 1) 196 [50] (Kiefel CJ, Bell and Keane JJ). This passage was also quoted in *Monis v The Queen* (2013) 249 CLR 92, 180 [247] (Heydon J).

⁶⁵ *Ibid* 204 [82] (Kiefel CJ, Bell and Keane JJ).

⁶⁶ Stephenson (n 3) 375–6, citing *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').

⁶⁷ Barnes (n 14).

impacted; (ii) protects a person's autonomous political participation; (iii) protects a natural person's choice not to receive a political message; (iv) is more serious than, and distinct from, the protection of subjective hurt feelings or discomfort; (v) may prevent particular speech, dependent on the time, place and content of the message, as well as the identity of the messenger and recipient; and (vi) where the conditions in (v) justify proscribing speech, also prevents the speaker from using the recipient as a means to communicate their political message. The first three aspects suggest that dignity consists of a thick autonomy interest, related to but distinct from privacy, and invoking the Dworkinian conception of dignity. The fourth aspect casts additional light on what indignity means: it is different from and more serious than discomfort or hurt feelings. This recalls dignity as an expressive concept. The fifth and sixth aspects concern the relationship between dignity and certain forms of political communication. They invoke, among other ideas, dignity as worth, prohibiting the manipulation, co-optation or use of a natural person. They suggest that dignity protects the non-fungible worth of humans, preventing them from being used as *merely* a means to an end, in line with the Kantian tradition. Several (but not all) of these key aspects also emerge in *Farm Transparency*. The reasoning in the two decisions is fruitfully contrasted below.

(c) *Dignity Protects Life-Shaping Choices*

The first aspect of dignity in *Clubb* is concerned with an individual's life-shaping choice being denied or impacted. There was nothing on the facts of *Farm Transparency* suggesting that the owners or occupiers being protected by the *Surveillance Devices Act* were at risk of their autonomous, life-shaping choices being interfered with. There was no suggestion that the owners or occupiers were at risk of ceasing or altering their behaviour due to a risk of surveillance. There was also no suggestion that they were exercising *life-shaping* choices, comparable to those of the individuals in *Clubb*. Therefore, in this regard, the absence of dignity from *Farm Transparency* is arguably consistent with its presence in *Clubb*. For instance, in the latter case Kiefel CJ and Keane J stressed the consequences of the proscribed conduct, adding more depth or 'thickness' to the autonomy interest protected by dignity, and differentiating it further from mere privacy. The concern was that the proscribed conduct would prevent women from exercising their choice to have an abortion. This was clear in the plurality's characterisation that 'persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to *cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain*'.⁶⁸ Further, in the course of rejecting Mrs Clubb's argument as to the alleged special potency of on-site protests, the plurality said:

[I]t is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is *apt to be most effective to deter those persons* from making use of the facilities available within the safe access zones.⁶⁹

⁶⁸ *Clubb* (n 1) 198 [59] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

⁶⁹ *Ibid* 204 [82] (emphasis added).

Finally, in the course of rejecting Mr Preston's argument that the protest prohibition should be limited to protest likely to cause distress or anxiety, the plurality put this in even clearer terms. It stated that a threat to dignity inevitably arises 'whether or not such a person is likely to suffer distress or anxiety as a result. *A decision to avoid a protest* about abortions may reflect a calm and reasonable decision to eschew an unwelcoming environment as well as a stressed and anxious reaction to it.'⁷⁰

These descriptions demonstrate a clear understanding that interfering with someone's autonomous decision amounts to an interference with dignity. However, consistent with Dworkinian dignity, the nature of the autonomous decision in question is of a certain importance. The plurality consistently emphasised the personal nature of the decision, the fact that it is connected to health, and the vulnerability of the person making the decision. These factors do not necessarily apply to the decisions of corporations or employees to participate in commercial agricultural practices.⁷¹ Therefore, the absence of this aspect of dignity from *Farm Transparency* is arguably consistent with its presence in *Clubb*.

(d) *Dignity Protects a Listener from Unwanted Political Messages*

Another key aspect of dignity reasoning in the joint judgment in *Clubb* is the concern that 'to force upon another person a political message is inconsistent with the human dignity of that person'.⁷² Akin to the first aspect, proscribing interference with life-shaping choices, this suggests that dignity protects an autonomy interest.⁷³ In this instance, the plurality extended that autonomy interest to preventing a person from being forced to receive political information they do not want to receive. This was underscored by the plurality's statement that the implied freedom does not operate to oblige any member of the Australian community to receive information, opinions and arguments concerning government and political matters. The implied freedom 'is not an entitlement to force a message on an audience held captive to that message'.⁷⁴ The plurality also repeatedly used the word 'captive' in this context.⁷⁵ This can be dealt with briefly because this conception of dignity clearly did not arise in *Farm Transparency*, where the impugned provisions were concerned with the *surreptitious* interference with owners or occupiers. Thus, they were not 'listeners' or 'recipients' of a political message. Therefore, the absence of this aspect of dignity from *Farm Transparency* is consistent with its presence in *Clubb*.

⁷⁰ Ibid 214 [126] (emphasis added).

⁷¹ There may be exceptions to this that did not arise on the facts. For example, it is plausible that the decision by vulnerable persons to work in a commercial agricultural business may be deeply personal and may not arise in conditions that reflect 'thick autonomy' or dignity.

⁷² *Clubb* (n 1) 196 [51] (Kiefel CJ, Bell and Keane JJ). Applying a reconstructive gloss, it may be more plausible to say that dignity prevents particular speech, dependent on the time, place and content of the message, as well as the identity of the messenger and recipient.

⁷³ Barnes (n 14) 718–20.

⁷⁴ *Clubb* (n 1) 208 [98] (Kiefel CJ, Bell and Keane JJ).

⁷⁵ Ibid 204–5 [83], 208–9 [97]–[100] (Kiefel CJ, Bell and Keane JJ).

(e) *Indignity or Harm to Dignity Is More Serious than Discomfort or Hurt Feelings*

Another dimension of dignity conveyed by Kiefel CJ and Keane J in *Clubb* is that indignity is more serious than discomfort or hurt feelings and does not flow automatically from all political speech.⁷⁶ This emerged from the response to Mrs Clubb's argument that political speech is inherently apt to cause discomfort⁷⁷ and that all political speech has the potential to or does affect the dignity of at least some others.⁷⁸ The plurality said that the argument had

no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain.⁷⁹

This passage has already been relied on above to develop the idea that dignity protects interference with certain autonomous choices. It suggests that the harm in *Clubb* — which amounted to a threat to dignity — is different from, and more serious than, discomfort or hurt feelings, and does not flow automatically from all political speech. That this dimension was present in *Clubb* but not in *Farm Transparency* is also entirely conceivable. It conveys that there is a high bar for a dignity interference. It also reinforces that harm to dignity (an objective quality, consisting of a gravity that is more serious than subjective discomfort or hurt feelings) is different from the privacy interference occasioned by illegal surveillance and the publication and possession of material gained through that surveillance.

This same passage also gives us a further clue as to what indignity is (in addition to an interference with a life-shaping choice or an imposition of an unwanted political message).⁸⁰ Gageler J's brief identification of the legitimate aim as being 'to ensure that women have access to premises at which abortion services are lawfully provided in an *atmosphere* of privacy and dignity' is also helpful.⁸¹ Together, an expressive notion of dignity emerges. In the context of *Clubb*, that included protecting the *atmosphere* of the exercise of the choice and extended to proscribing harassment, stigma, shame-inducing treatment, haranguing or molestation. In a similar vein, Nettle J (who was on the Bench in *Clubb* but not in *Farm Transparency*) identified the legitimate purpose as facilitating 'access to a lawful termination service, privately, with dignity and without harassment, stigma or shame'.⁸² His Honour observed that 'women seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and with dignity, without haranguing or molestation' and that the implied freedom 'is not a licence to accost persons ... still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of

⁷⁶ Barnes (n 14) 723.

⁷⁷ *Clubb* (n 1) 197 [53] (Kiefel CJ, Bell and Keane JJ).

⁷⁸ *Ibid* 261 [259] (Nettle J).

⁷⁹ *Ibid* 196–7 [52] (Kiefel CJ, Bell and Keane JJ).

⁸⁰ Barnes (n 14).

⁸¹ *Clubb* (n 1) 235–6 [197] (emphasis added).

⁸² *Ibid* 280–1 [307].

seeking lawful medical advice and assistance'.⁸³ These passages add depth to the expressive conception of dignity emerging in *Clubb*.

(f) *Dignity as Non-Fungible Human Worth*

Finally, the conception of dignity arguably recognised by the joint judgment in *Clubb* concerned natural persons being manipulated. In *Clubb*, the plurality was concerned that 'co-optation as part of a political message' amounts to an 'interference with the privacy and dignity of members of the people of the Commonwealth'.⁸⁴ The concern was with being manipulated as part of the unwanted message. This invokes a Kantian notion of dignity, consisting of the non-fungibility of natural persons. This notion of dignity prevents natural persons from being used as merely a means to an end.

However, this conception of dignity is potentially relevant to *Farm Transparency*. If the impugned provisions are valid and the material obtained through trespass could be published, the property owners or occupiers could become 'co-opted' as part of Farm Transparency International's political message. How should we understand the presence of this aspect of dignity in *Clubb* and its absence from *Farm Transparency*? It could be understood to suggest that this is not the primary concern of dignity in *Clubb* and, in fact, is more relevant to dignity as decisional autonomy, which is invoked in both *Clubb* and *Farm Transparency*. However, the connections between this concern and the Kantian concept of dignity are difficult to overlook. Moreover, the plurality also quoted Barak's invocation of Kant: 'Human dignity regards a human being as an end, not as a means to achieve the ends of others.'⁸⁵ It could simply be that this omission is a consequence of the Court's 'restrained' approach to adjudication. As this did not arise on the fact pattern in *Farm Transparency*, it was not necessary to consider this interest.

2 *Interim Conclusions*

Following *Clubb*, Stephenson intuited that 'recognising dignity as a legitimate purpose might yield important benefits. ... [I]t might help attach an appropriate level of importance and weight to particular categories of government action'.⁸⁶ I suggest that there is, for the plurality, a distinction drawn here between the protection of vulnerable persons attending to a life-shaping decision in *Clubb*, which furthers both dignity and privacy, and the proscription of the possession and publication of the business activities of owners and occupiers, which furthers only privacy. This could be one such instance of attaching 'an appropriate level of importance and weight' to certain activity.⁸⁷ Alternatively, removing the normative lens, it could simply help us to understand the differences between dignity and privacy, with neither necessarily having a greater level of importance. Together, the judgments could be understood as suggesting that the publication or possession of a recording of an

⁸³ Ibid 260–1 [258]–[259], 280–1 [307].

⁸⁴ Ibid 280–1 [60] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

⁸⁵ Ibid 196 [51] (Kiefel CJ, Bell and Keane JJ), quoting Barak (n 64) 86.

⁸⁶ Stephenson (n 3) 388.

⁸⁷ Ibid.

owner's or occupier's activities does not generate harm to the dignity of those persons. Instead, it generates harm to their privacy.

In sum, three key lessons can be learned from comparing the absence of dignity from the reasoning of Kiefel CJ, Keane J and Gageler J in *Farm Transparency* against the presence of dignity in their reasoning in *Clubb*. First, dignity and privacy are discrete interests; not every interference with privacy amounts to an interference with dignity. Second, one of the discrete interests protected by dignity is the exercise of decisional autonomy (the protection of certain life-shaping choices and the conditions of the exercise of these choices). Together, the decisions give us some insight into the particularities of Australian constitutional dignity. This adds depth to Stephenson's argument that the use of dignity in *Clubb* 'must be understood as the protection of *particular* messages being forced upon *particular* people in *particular* circumstances'.⁸⁸ I demonstrate that dignity may prevent particular speech, dependent on the time, place and content of the message, as well as the identity of the messenger and recipient. Third, it is unclear whether dignity also protects against being co-opted as part of a political message.

3 *Absence from Clubb; Presence in Farm Transparency: Edelman J and Gordon J*

We can also learn something from the use of dignity by Edelman J and Gordon J who, in individual judgments, handled dignity briefly in both *Clubb* and *Farm Transparency*. Their Honours understood the provisions under review in *Farm Transparency* to be pursuing privacy *and* dignity. Both Judges also understood privacy *and* dignity to be relevant in *Clubb*. This could mean three things: first, that Edelman and Gordon JJ understand these interests to be inextricably connected or equivalent; second, that Edelman and Gordon JJ understand dignity to be something different from and *additional* to privacy, *and* that both concepts are relevant in *Farm Transparency*; third, that their Honours understand dignity to be a multivalent concept, and that some aspect of it is relevant to *Farm Transparency*, even if not the same aspect that was relevant to *Clubb*. A closer review of the judgments suggests the latter position is the best understanding. This has significant implications for the meaning of Australian constitutional dignity: additional dimensions of dignity emerge from these judgments. In *Clubb*, Edelman and Gordon JJ conceived of dignity as protecting a decisional, thick autonomy interest, in line with the plurality and Gageler J. However, this is not the aspect of dignity that was relied on by Edelman J or Gordon J in *Farm Transparency*. In that decision, their Honours identified a dignity interest that protects private information that is 'personal' and the harm that occurs in certain types of privacy violations. Two different, but related, dimensions of dignity are at play in each case. These dignity interests are neither incompatible nor incoherent.

(a) *Dignity Protects Life-Shaping Choices*

In *Clubb*, Edelman and Gordon JJ conceived of dignity as protecting a thick autonomy interest, in line with the plurality and Gageler J. Edelman J understood

⁸⁸ Stephenson (n 3) 371 (emphasis in original).

the impugned laws to be pursuing ‘the safety, privacy, and dignity of clinic workers and visitors’⁸⁹ and ‘social human rights goals involving respect for the dignity of the human person’.⁹⁰ Gordon J also accepted that the purpose of the impugned provisions was ‘to protect the safety and wellbeing, and respect the privacy and dignity, of both people accessing the services provided at those premises and employees and other persons who need to access those premises in the course of their duties and responsibilities’.⁹¹

Edelman J additionally observed that the legitimate purpose included ‘ensuring that women have access to termination services in a confidential *manner without the threat of harassment*’.⁹² Edelman J cited the extrinsic materials preceding the *Reproductive Health (Access to Terminations) Act 2013* (Tas) including the second reading speech:

Today members are, quite simply, being asked to vote for or against women’s *autonomy* ... to vote for or against a bill that acknowledges women as *competent and conscientious decision-makers* and recognises that a woman is in the best position to make decisions affecting her future and her health.⁹³

Thus, consistent with Kiefel CJ, Keane and Gageler JJ, Edelman J invokes a Dworkinian concept of dignity as thick autonomy. Edelman J also refers to the manner or way in which the choice is exercised, suggesting that the threat of harassment while exercising a private medical choice offends dignity.⁹⁴ This is consistent with, and builds on, the expressive concept of dignity that proscribes certain conduct. However, this is not the aspect of dignity that was relied on by Edelman J or Gordon J in *Farm Transparency*.

(b) *Dignity Underpins Certain Aspects of Privacy and May Protect against the Communication of Certain Private Information*

In *Farm Transparency*, Edelman J and Gordon J, in individual judgments, undertook a review of the general law outside the impugned provisions to determine the extent of the incremental burden the *Surveillance Devices Act* imposed on freedom of political communication. This was because

[w]here the general law validly denies liberty of communication on particular political matters, then any law that imposes a prohibition upon political communication can only incrementally burden the implied freedom in so far as it extends beyond the existing prohibition.⁹⁵

⁸⁹ *Clubb* (n 1) 324 [440] (Edelman J).

⁹⁰ *Ibid* 344 [499]. See also at 344 [497] (Edelman J): ‘Another facet is the ability of Parliament to make laws for peace, order and good government, including those laws that provide substantive aspects of a free and democratic society and laws that guarantee social human rights, such as “respect for the inherent dignity of the human person”’ (citations omitted).

⁹¹ *Ibid* 291 [344] (citations omitted).

⁹² *Ibid* 344 [499] (emphasis added).

⁹³ *Ibid* 345 [500], quoting Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 13 (emphasis added).

⁹⁴ This is also consistent with Nettle J: see above n 82 and accompanying text.

⁹⁵ *Farm Transparency* (n 12) 52 [223] (Edelman J).

This required a review of the action in equity for breach of confidence, which protects three categories of information: private information that arises in the course of a relationship of confidence, private information that is secret, and private information that is personal in the sense that it concerns the dignity of an individual.⁹⁶

At the outset of her Honour's review, Gordon J observed that the protection afforded to personal affairs and private life at general law 'has been said to be based on "respect for human autonomy and dignity"'.⁹⁷ Notably, Gordon J cited the plurality in *Clubb*.⁹⁸ This was a clear adoption of the plurality view that dignity and privacy are bound up in autonomy interests. In the 'breach of confidence' sphere, dignity interests bolster the privacy claim over 'personal' information.

Edelman J cast further light on the relationship of dignity and privacy in his consideration of the third category of information protected by a breach of confidence action in equity. His Honour observed: 'It may be that personal information should be protected not merely where the information is secret, but also where further disclosure would compromise foundational interests of human dignity and autonomy.'⁹⁹ He continued: 'Whatever might be the boundaries of this category of confidential information, its protection extends beyond the secrecy of the information to the dignity of the individual.'¹⁰⁰ Edelman J cited *Lenah Game Meats* in which Gleeson CJ observed that the 'foundation of much of the privacy protection afforded by the action for breach of confidence is "human dignity"'.¹⁰¹ Edelman J concluded:

At its narrowest, the present state of the law concerning the third category of breach of confidence is, therefore, that it can extend to all private information where human dignity is concerned. In that category, *it cannot be conclusively said that extends to corporations or that human dignity would be compromised by the communication of any private information*.¹⁰²

These passages are consistent with the idea of decisional autonomy or autonomy as control, whereby only the person to whom the personal information applies can permit the communication of that information.

Following this, Edelman J held that the equitable doctrine was consistent with the implied freedom of political communication. He considered the constitutional requirements of representative democracy and in so doing observed:

It is no more necessary for representative democracy to require, in the name of political communication, a liberty to impair a person's dignity by the communication of private and personal information concerning lawful activities that might be

⁹⁶ Ibid 52 [225].

⁹⁷ Ibid 38 [159], quoting *OBG Ltd v Allan* [2008] AC 1, 74 [275] and citing *Campbell v MGN Ltd* [2004] 2 AC 457, 472–3 [50]–[51] (Lord Hoffman) and *Clubb* (n 1) 195–6 [49] (Kiefel CJ, Bell and Keane JJ).

⁹⁸ *Farm Transparency* (n 12) 38 [159] n 161, citing *Clubb* (n 1) 195–6 [49] (Kiefel CJ, Bell and Keane JJ).

⁹⁹ Ibid 54 [231] (Edelman J), citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226–7 [43], 256 [125] ('*Lenah Game Meats*').

¹⁰⁰ *Farm Transparency* (n 12) 54 [232].

¹⁰¹ Ibid 55 [234], citing *Lenah Game Meats* (n 99) 221 [43] (Gleeson CJ).

¹⁰² *Farm Transparency* (n 12) 56 [237] (emphasis added).

characterised in the broad sense as political, than it is for the law to provide a liberty to assault a person or to trespass on a person's property in order to communicate about matters that could broadly be described as political.¹⁰³

Several ideas about dignity emerge from this part of the judgment. For Edelman J, the general law, which is consistent with the *Constitution*, provides that the possession and publication of private and personal information concerning lawful activities *may* offend a person's dignity. This adds content to the notion of dignity he invoked in *Clubb*: that dignity is an expressive concept proscribing certain conduct. It sheds new light on the particularities of dignity in Australian constitutional law. Both Gordon J and Edelman J also confirmed the close relationship between dignity and privacy suggested by the plurality in *Clubb*. However, Edelman J clearly maintained that they are not equivalent concepts. This is evident from his explanation that a breach of privacy does not always amount to a harm to dignity.

This could be read as a divergence from Kiefel CJ, Keane and Gageler JJ, who characterised the same conduct as amounting to a harm to privacy only. However, the judgments could also be read so as to be consistent. Kiefel CJ, Keane and Gageler JJ may have omitted the dignity interest because, as highlighted by Edelman J, 'it cannot be conclusively said that ... human dignity would be compromised by the communication of any private information'.¹⁰⁴ Absent facts establishing this, it could be that Kiefel CJ, Keane and Gageler JJ did not consider it necessary to mention the dignity interest. Alternatively, it could be that in this instance, their Honours were content to rely on privacy as the umbrella term that includes the foundational interests of dignity. In this way, the word 'privacy' may have been shorthand and intended to include dignity to the extent it was relevant.

In summary, across *Clubb* and *Farm Transparency*, the close relationship between dignity and privacy is maintained by Kiefel CJ, Keane, Gageler, Gordon and Edelman JJ.¹⁰⁵ It also appears each Judge maintains that, despite this close relationship and a degree of overlap, dignity and privacy make distinct contributions. Only Gordon J and Edelman J explicitly identify that a breach to privacy through the communication of surveillance of owners' and occupiers' lawful activities can amount to a breach to dignity.

(c) *Dignity as Non-Fungible Human Worth*

Edelman J also invoked a second understanding of dignity in *Farm Transparency*. When considering whether the impugned provisions were a permissible limitation on the implied freedom, his Honour observed:

It would diminish the respect which the law affords to dignity, privacy, and the security of property to conclude that the *Surveillance Devices Act* is invalid in its application to trespassers, and those complicit in the trespass, who seek to *take*

¹⁰³ Ibid 57 [241].

¹⁰⁴ Ibid 56 [237].

¹⁰⁵ This was also the position of Bell J, who sat on the Bench in *Clubb* but not *Farm Transparency*.

advantage of their trespass by communicating or publishing a record or report of lawful activities.¹⁰⁶

This invokes the Kantian aspect of dignity as non-fungible human worth, which I argue is also invoked by the plurality in *Clubb*.¹⁰⁷ Here, Edelman J was concerned with the trespassers, and those complicit in the trespass, seeking to use their trespass (and relatedly, the persons recorded during the trespass and possibly the property owners) as *merely* a means to their political end. The concern was that the dignity of the persons recorded during the trespass or the dignity of the property owners is diminished. While this was hardly central to the facts of the case, this articulation is consistent with the plurality's use of dignity in *Clubb*. This was also consistent with (albeit not identical to) Edelman J's own use of dignity in *Clubb*, as an expressive concept that proscribes certain conduct. Gordon J also narrowed in on the precise purpose of ss 11 and 12 of the *Surveillance Devices Act* as prohibiting the possession of or use of 'the fruits of trespass', which furthers the protection of privacy, dignity and property rights.¹⁰⁸ In addition, in her assessment of adequacy in the balance, Gordon J held: 'It is open to Parliament to prevent such persons from *benefiting from* the fruits of their unlawful conduct.'¹⁰⁹ With those of Edelman J, these statements strike at an interest that is connected to but independent of the privacy interest. They invoke the non-fungible dimension of dignity, and the indignity caused through publication, for a political purpose, of material that was obtained through a privacy violation.

C *Conclusions: Consistent Ideas about Dignity in Australian Constitutional Law?*

This Part has explored the meaning of dignity in Australian constitutional law. It responded to the first, pressing concern following *Clubb* that dignity is an indeterminate, incoherent or empty concept and that this indeterminate, incoherent or empty concept had been imported into Australian constitutional law. I began with a sketch of the main uses or understandings of human dignity. The ensuing doctrinal analysis of *Clubb* and *Farm Transparency* exposed that three of these accounts are present in Australian constitutional law: dignity as intrinsic value inhering in a person, dignity as thick autonomy, and dignity as an expressive concept proscribing certain conduct. While certain invocations of dignity may be mutually inconsistent, these particular meanings are not.¹¹⁰ They are combinable and severable. I have argued elsewhere that dignity in Australian constitutional law is a multidimensional concept.¹¹¹ In this article, I enrich that account, illustrating these dimensions. Dignity is an interest held by natural persons. It is related to the privacy interest but is distinct from it. This means that not every interference with privacy amounts to an interference with dignity. Dignity consists of and protects a range of human qualities, including most predominantly a thick concept of autonomy akin to the Dworkinian principle of self-determination. This protects certain life-shaping choices from

¹⁰⁶ Ibid 62 [263] (emphasis added).

¹⁰⁷ See above Part II(B)(1)(f).

¹⁰⁸ Ibid 41 [171] (emphasis added).

¹⁰⁹ Ibid 42 [178] (emphasis added).

¹¹⁰ Barnes (n 14) 702–8.

¹¹¹ Ibid.

interference and prescribes certain conditions of the exercise of these choices. There have been some suggestions that the non-fungible nature of dignity's inherent worth protects against being co-opted as part of a political message. This multi-layered understanding of dignity has operated in *Clubb* and *Farm Transparency* to justify legislative proscription of treatment that is inconsistent with these qualities, despite interfering with the implied freedom of political communication. I do not claim that this conception of dignity is highly developed or stable. Rather, I seek to point out 'the kind of ideas [that] are creeping into our constitutional law'.¹¹² Understanding precisely what dignity means in *Clubb* and *Farm Transparency* opens the door to important normative analysis of whether this is the appropriate meaning of dignity in Australian constitutional law.

III The Relationship between Dignity and the Implied Freedom

Many questions about Australian constitutional dignity remain including, inter alia, its appropriate role in constitutional adjudication. Part II of this article responded to concerns regarding the meaning of dignity. In Part III, I respond to Stephenson's concern that the High Court may 'recognise the dignity of listeners and disregard the dignity of speakers'.¹¹³ This would be 'misleading' and '[flip] the principal objective of dignity on its head'.¹¹⁴ Rather than conceiving of dignity as the basis for rights and freedoms, the Court may rely exclusively on dignity as a justification for limiting the implied freedom of political communication.¹¹⁵ This would be a distortion, because dignity is relevant to 'both sides of the equation'.¹¹⁶ To respond to this concern, I highlight judicial recognition of dignity as relevant to both sides of the equation in *Clubb* and *Farm Transparency*. I also consider the relevance of the implied freedom's complexities to the scope for dignity to protect as well as limit the implied freedom. These include the 'text and structure' approach to interpreting the implied freedom of political communication, and the implied freedom's conceptual basis as a limit on power as opposed to an individual right. To conclude, I briefly consider the relationship between dignity and freedom of speech generally. Despite acknowledging complexities in the Australian context, I argue that none of these completely close the door on dignity.

A The Basis of the Implied Freedom

It is helpful here to summarise the established basis and nature of the implied freedom. Freedom of political communication is an indispensable incident of the system of representative and responsible government established in the *Australian Constitution*. Specifically, it is implied by the requirement discerned from ss 7 and 24 that 'the members of the Senate and the House of Representatives ... be directly

¹¹² Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 75.

¹¹³ Stephenson (n 3) 371.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 371–2.

¹¹⁶ *Ibid* 390.

chosen at periodic elections by the people', by the requirement of responsible ministerial government found in the provisions that set out the relationship between the executive and Parliament, and by the provision for constitutional amendment by popular referendum in s 128. These sections necessarily protect 'that freedom of communication between the people concerning political or government matters which enables the people to *exercise a free and informed choice* as electors'.¹¹⁷ The implied freedom restrains Commonwealth and state power but does not confer a personal right on members of the Commonwealth.¹¹⁸ Instead, the implied freedom 'invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control'.¹¹⁹ This means that the assessment whether a law impermissibly burdens the freedom considers how the law burdens the freedom of political communication 'generally'.¹²⁰ The modern test for infringement of the implied freedom is:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people.¹²¹

B *Judicial Recognition of Dignity as Relevant to the Implied Freedom*

The first point to make in response to Stephenson's concern is that there is already some judicial recognition that dignity is a basis of the implied freedom and thus relevant to its protection as well as its limitation. In *Clubb*, the plurality allayed the concern that dignity will be relied on exclusively as a justification for the abrogation of the implied freedom rather than for its protection. While dignity was ultimately part of the justification for limiting the implied freedom in that case, the plurality explicitly recognised that dignity was a constitutional value that underpinned the implied freedom. Thus, they held that dignity was relevant to both sides of the equation. Their Honours stressed that 'the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom';¹²² that the protection of dignity 'accords with the constitutional values that underpin the implied freedom';¹²³ that a 'law calculated to maintain the dignity of members of the sovereign people ... accords with the political sovereignty which underpins the implied freedom';¹²⁴ and

¹¹⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (emphasis added) ('*Lange*').

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, quoting *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J).

¹²⁰ *Unions NSW v New South Wales* (2013) 252 CLR 530, 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*').

¹²¹ *Lange* (n 117) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted).

¹²² *Clubb* (n 1) 204 [82] (Kiefel CJ, Bell and Keane JJ).

¹²³ *Ibid* 205 [85].

¹²⁴ *Ibid* 209 [99] (citations omitted).

that the ‘challenged law can, in significant part, be assessed in terms of the same values as those that underpin the implied freedom itself in relation to the protection of the dignity of the people of the Commonwealth’.¹²⁵ Thus, while the protection of the dignity of the listeners was justified in this particular assessment, it cannot be said that this judgment suggests dignity is irrelevant to the protection of the implied freedom. Indeed, the only cited definition of dignity referred to dignity as ‘the source from which all other human rights are derived’.¹²⁶

This connection was not revisited by Kiefel CJ and Keane J in *Farm Transparency* because, as set out above, their Honours maintained that only the privacy interest was in the balance in that case. However, the idea was picked up by Edelman J, who observed:

[T]he balance is not even truly between the values of dignity, privacy, and security of property, on the one hand, and freedom of political communication, on the other. In the relevant application to trespassers and those complicit in the trespass, the protection of dignity, privacy, and security of property is itself a protection of freedom of political communication. An assault on the one can be an assault on the other. As Gageler J said in *Smethurst v Commissioner of the Australian Federal Police*, paraphrasing the State Trials report of Lord Camden’s speech in *Entick v Carrington*, there is a ‘link between protection of personal property and protection of freedom of thought and political expression’. Thus, as Kirby J said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, the Tasmanian legislation empowering the issue of an injunction in the circumstances of that case was not merely compatible with the representative democracy created by the *Constitution*, it was ‘a feature of that democracy’.¹²⁷

In line with the plurality in *Clubb*, this statement indicates that the dignity interests are relevant to the implied freedom of speech. Edelman J suggests that the protection of the owners’ or occupiers’ privacy and dignity in turn bolsters the freedom of political communication. As mentioned above, an assessment of the interference on political freedom involves assessing freedom of political expression ‘generally’.¹²⁸ Notwithstanding this, the extent of the burden is usually ascertained by reference to the effect upon the ability of persons to communicate political speech in various ways.¹²⁹ In this case, it involved considering the burden on the privacy, dignity and expression interests of the owners or occupiers, and the burden on the same interests of the trespassers or those complicit in trespass. Again, while the

¹²⁵ Ibid 209 [101].

¹²⁶ Ibid 196 [50], quoting Barak (n 64) 86. When analysing *Clubb*, Henckels, Sifris and Penovic (n 2) also state: ‘We have seen that dignity operates on both sides of the scale in speech cases’: at 562. Later in their paper they observe that ‘one could argue that the only real relevance of the identification of the constitutional value is to serve as a yardstick in order to determine whether the impugned provisions’ statutory purpose is legitimate (compatible with the system of representative and responsible government protected by the *Constitution*), rather than to serve some higher purpose’: at 563. But this sits in tension with their more thoroughly developed claim that dignity both underpinned the implied freedom itself and underpinned the limitation of the implied freedom, and that this played out ‘most significantly in relation to the balancing stage of proportionality review’. While this had ‘its predicate in a law having an objective compatible with the implied freedom’, dignity played a far larger role than merely as a ‘yardstick’ for assessing compatibility. It also was significant to the ultimate finding of validity.

¹²⁷ *Farm Transparency* (n 12) 62–3 [264] (citations omitted).

¹²⁸ *Unions NSW* (n 120) 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹²⁹ *Brown* (n 66) 374 [150] (Kiefel CJ, Bell and Keane JJ).

protection of the dignity of the owners or occupiers justified a burden on the implied freedom in that assessment, it cannot be said that the Court is not alive to the relevance of dignity to freedom of political communication. While I agree with Stephenson that it is not appropriate for dignity to be in use only on one side of the equation, I do not consider that to be an accurate characterisation of the two instances of dignity balancing that we have seen so far. Two current (Keane and Edelman JJ) and two former (Kiefel CJ and Bell J) High Court Justices understand dignity to be relevant on both sides of the equation. A better explanation of dignity operating to limit the implied freedom in these two cases is that the dignity value guided the application of the proportionality test on this occasion.

C *Is 'Text and Structure' a Dead End for Dignity?*

Despite this judicial recognition of dignity as a basis of the implied freedom, Stephenson is concerned that this claim cannot be maintained unless dignity has 'some basis in the text and structure of the *Australian Constitution*'.¹³⁰ There are two related points to make in response to this argument. First, the plurality in *Clubb* asserted that the constitutional text and structure requires political sovereignty for the members of the Commonwealth, which in turn requires a degree of protected political communication. The political sovereignty of the members of the Commonwealth also safeguards the dignity of the members of the Commonwealth.¹³¹ Whether this is a strong argument is open for debate and beyond the scope of this article.¹³² The first short point is that it has not been conclusively shown that dignity cannot be sourced in the 'text and structure' method.

The second point is that it is not settled that the only way to source values relevant to the interpretation and the application of the implied freedom is through the 'text and structure' method developed in *Lange v Australian Broadcasting Corporation* ('*Lange*'). There is a near consensus among scholars that the 'text and structure' approach to constitutional implications established in *Lange* is unsatisfactory. Several scholars have argued that this interpretive method is unsustainable because it does not guide the Court in instances of indeterminacy.¹³³

¹³⁰ Stephenson (n 3) 391.

¹³¹ *Clubb* (n 1) 196 [51], 198–9 [60] (Kiefel CJ, Bell and Keane JJ).

¹³² In a footnote Stephenson observed that 'the problem with this understanding of representative and responsible government is that it is arguably so capacious as to include almost anything (ie, if representative and responsible government requires the protection of the dignity of the people, presumably it also requires protection of the safety, wellbeing, prosperity, happiness, etc of the people)': Stephenson (n 3) 391 n 123.

¹³³ See, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *UNSW Law Journal* 842; Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24(3) *Melbourne University Law Review* 645; Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24; Nicholas Aroney, 'Towards the Best Explanation of the Constitution' (2011) 30(1) *University of Queensland Law Journal* 145; Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9; Jeffrey Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (2014) 40(1) *Monash University Law Journal* 75; Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29(2) *Federal Law Review* 151.

Adrienne Stone has persuasively argued that the constitutional text and structure method provides little guidance as to the values that underpin the implied freedom, and that this value base is deeply disputed and necessitates judicial choice.¹³⁴ It is arguable that, particularly in the context of guiding constitutional values, other options are open to the Court. Dixon has observed that ‘there are at least two possible understandings of what it means for the text and structure of the *Constitution* to provide support for various values’.¹³⁵ There is the ‘stronger’ understanding, wherein the *Constitution* must provide affirmative support for a value in order for it to attract the label ‘constitutional’.¹³⁶ There is also the ‘weaker’ understanding, which requires merely that the *Constitution* is consistent with a value.¹³⁷ Dixon intuits:

When the High Court identifies a freestanding implication under the *Constitution*, the current interpretive consensus in Australia is generally that it must show textual and structural support of a stronger, more affirmative kind. But where values are relied on only as a source of additional guidance to the Court in interpreting and enforcing some other capital ‘C’ constitutional norm, it seems plausible to apply either a strong or weak notion of textual and structural support.¹³⁸

It is plausible that dignity has *at least* the weaker understanding and therefore could be relevant to the shape of the implied freedom. Outside of this astute observation, the question of what it means for a value to be appropriately sourced in the text and structure of the *Constitution* largely turns on one’s method of constitutional interpretation:

[T]he more strictly textual or originalist one’s approach to constitutional meaning, the more difficult it will be to see how the text and structure of the *Constitution* provide support for a broad range of values; whereas the ‘looser’, or more hybrid one’s approach to interpretation of the text, the more scope there will be to find indirect sources of support for a variety of constitutional values.¹³⁹

Importantly, the ‘text and structure’ method does not prescribe a certain approach to constitutional interpretation. Within this approach, members of the High Court of Australia can use any methodology they see fit.¹⁴⁰ Thus, it is the interpretive method of any given judge that will be most decisive in determining the relevance of dignity to the implied freedom or not. Indeed, this is one of the reasons the ‘text and

¹³⁴ Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (n 133) 843, 850; Adrienne Stone, ‘Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication’ (2011) 30(1) *University of Queensland Law Journal* 79, 90–1. See also Arcioni and Stone (n 112).

¹³⁵ Dixon, ‘Functionalism and Australian Constitutional Values’ (n 2) 10.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* 10–11 (citations omitted).

¹³⁹ *Ibid.* Dixon also explains that adherents of textualism or originalism consider the *Constitution* to have a relatively settled meaning and therefore reject the argument that values can be adopted by the judicial custom.

¹⁴⁰ Justice Bradley Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14(4) *Public Law Review* 234, 250; Justice Susan Kenny, ‘The High Court on Constitutional Law: The 2002 Term’ (2003) 26(1) *UNSW Law Journal* 210; Nicholas Aroney, ‘The High Court on Constitutional Law: The 2012 Term — Explanatory Power and the Modalities of Constitutional Reasoning’ (2013) 36(3) *UNSW Law Journal* 863, 864–5; Chief Justice Robert French, ‘Theories of Everything and Constitutional Interpretation’ (Speech, University of New South Wales, 19 February 2010).

structure' approach is criticised.¹⁴¹ This puts further pressure on any claim that it is not possible to source dignity from the 'text and structure' of the *Constitution*. It is far from settled, but *Clubb* and *Farm Transparency* provide glimmers of an implied freedom partially underpinned by dignity values.

D *Is the Implied Freedom's Character as a Limitation on Power a Dead End for Dignity?*

Stephenson also argues that dignity is precluded as a value underpinning the implied freedom on the basis that 'the implied freedom is a limitation on power, not a personal right. This means that the focus of analysis is not on the law's effect on individuals and their dignity, but the law's effect on political communication generally.'¹⁴² Underpinning this statement is Stephenson's related concern that the dignity interests of the speakers will be overlooked.¹⁴³

However, the assessment of the burden on 'political communication generally' does not preclude considerations of the interests of the speaker, which may or may not include dignity. The case law demonstrates that it is not the case that this assessment considers only listeners and not speakers. As a starting point, the extent of the burden on protected speech is usually ascertained by reference to the effect upon the ability of persons to communicate political speech in various ways.¹⁴⁴ Thus, it is arguable that the general or holistic nature of the assessment of political communication at large necessitates some consideration of the interests of both the speaker and the listener.¹⁴⁵

One example of where the interests of the speaker prevailed is the case of *Coleman v Power*.¹⁴⁶ The case considered the quality of political communication and to some extent safeguarded critical and unpleasant political debate. It concerned the constitutional validity of a state law criminalising offensive language in public in its application to a protestor against police corruption. A bare majority quashed Mr Coleman's conviction, holding that the law could not apply to his protected political speech. The majority did so partially by reference to the practices of political debate, which necessarily includes the interests of the speaker. In Kirby J's

¹⁴¹ See above n 133.

¹⁴² Stephenson (n 3) 391.

¹⁴³ *Ibid* 392.

¹⁴⁴ *Brown* (n 66) 374 [150] (Kiefel CJ, Bell and Keane JJ).

¹⁴⁵ If Stephenson is correct that the assessment of interference with the freedom of political communication as a whole precludes consideration of the interests of the speaker, an alternative argument would be to attribute to free political communication a type of dignity — the dignity of free political communication. This would fly in the face of the use of dignity in *Clubb* (n 1) and *Farm Transparency* (n 12), which were understood to attach dignity to natural persons. However, there is a body of scholarship on the dignity of inanimate objects which could help to develop this argument: see Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 327; Christopher Tollefson, 'The Dignity of Marriage' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 483. A full consideration of this argument is beyond the scope of this article.

¹⁴⁶ *Coleman v Power* (2004) 220 CLR 1.

words, ‘insult and emotion, calumny and invective’ are protected speech.¹⁴⁷ Importantly, this vision of public debate was justified because it was understood to improve the political process and ensure that voters exercise a true choice in federal elections. Thus, without being converted into a claim right, considerations of how to safeguard the political process do involve both the speaker and the listener. Thus, both the speaker and listener are relevant to assessing a burden on the implied freedom of political communication, even though this burden is ultimately determined by reference to its impact on the freedom ‘generally’.

However, it remains to be seen whether the dignity interest of the speaker is relevant, or whether it is some other interest or interests that are. It is arguable that dignity is relevant. While the word ‘dignity’ has not yet been used in connection to the speaker in an implied freedom case, considerations relevant to the speaker’s dignity interest arguably have been. As set out above, the freedom of political communication is implied from the Australian constitutional institutions of representative and responsible government. It protects ‘the making and receipt of communications capable of bearing on electoral choice’.¹⁴⁸ It has already been shown in Part II that dignity is bound up in autonomy. Electoral choices could arguably be understood as the type of life-shaping decisions at least partially underscored by the dignity value. Despite a mass of scholarship on the various theories which may support a free speech principle (including, inter alia, justifications based on the functioning of democracy, the importance of discovering truth, speech as an aspect of self-fulfilment, and a suspicion of government),¹⁴⁹ the links between such theories should not be overlooked. For instance, the interest in participation in political debate (the so-called ‘democratic justification for free speech’) can be linked to arguments for free speech from dignity and self-fulfilment.¹⁵⁰

E *Is Dignity Relevant to the Protection of Freedom of Speech?*

Despite contesting Stephenson’s claim that the implied freedom as a limitation on power required by the text and structure of the *Constitution* cannot be underpinned by dignity, I do accept that in a certain category of cases dignity will have a greater weight on one side of the equation. The reason dignity will be more relevant to the limitation of freedom of speech as opposed to its protection is that, as alluded to above, dignity is but one value that justifies freedom of speech. Nor is it self-sufficient as a justification for free speech. A justification for free speech must be one that ‘can be distinguished from other areas of human conduct and activity’.¹⁵¹ A principle protecting free speech on the basis of dignity alone ‘does not provide any clear basis for determining the scope of a free speech principle or for distinguishing it from a general claim to liberty’.¹⁵² So, while free speech may be associated with or underpinned by human dignity, human dignity alone will not provide a coherent

¹⁴⁷ Ibid 91 [239] (citations omitted). See also Stone, ‘Insult and Emotion, Calumny and Invective’ (n 133).

¹⁴⁸ *Brown* (n 66) 388 [194]–[195] (Gageler J).

¹⁴⁹ For an overview, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) ch 2.

¹⁵⁰ Ibid 20, 34.

¹⁵¹ Ibid 7.

¹⁵² Ibid 14–15.

principle for free speech. For robust protection of free speech, an argument is needed to show ‘why *speech* is special’.¹⁵³ Moreover, a glance at comparative constitutional law confirms that this is not a novel conundrum faced by the dignity value and its relationship to free speech. For example, several jurisdictions have proscribed hate speech directed at racial or religious groups on the basis of human dignity.¹⁵⁴ It is plausible that dignity may operate to limit speech more than it protects speech.¹⁵⁵

F *Conclusions: Dignity and the Implied Freedom*

Part III has addressed Stephenson’s concern that dignity may be confined to acting as a limitation on the implied freedom, rather than as a basis for its protection. I have highlighted initial judicial recognition that dignity is relevant to the implied freedom itself, and not just its limitation. I have argued that the constitutional text and structure does not rule out the relevance of dignity to the implied freedom. A judge’s interpretive method will likely be more determinative for the relevance of dignity than the ‘text and structure’ approach developed in *Lange* because that approach itself necessitates judicial value judgments. I have also argued that the nature of the implied freedom as a limitation on power as opposed to a personal right does not confine the dignity value or interest to one side of the equation. However, what does limit dignity’s relevance to the protection of political communication is the meaning of dignity itself. Indeed, it could simply be the case that, in a certain set of circumstances, dignity is more suited to limiting freedom of speech not due to any of the Australian constitutional constraints addressed here but because of the content of dignity and the interests it serves to protect, set out in Part II of this article.

Stephenson correctly observed that ‘[a] striking feature of dignity is that it is used simultaneously to justify the protection of human rights and freedoms and to justify the imposition of limitations on human rights and freedoms’.¹⁵⁶ However, it does not follow that ‘[i]f the High Court were to use dignity only as a legitimate purpose, it would turn the concept solely into a vehicle for limiting rights and freedoms’.¹⁵⁷ Dignity operating as a limit on a particular right or freedom — for example, the implied freedom of political communication — does not turn it into exclusively a ‘vehicle for limiting rights and freedoms’. Rather, in limiting political communication, it can operate to prioritise another important value or interest. It is well established that the implied freedom covers only a narrow category of expression and provides relatively weak protection for that expression.¹⁵⁸ However, rather than focusing on these weaknesses, this article has sought to welcome the value-oriented reasoning in *Clubb* and *Farm Transparency*. While acknowledging its complexities, I have sought in Part III to begin to demonstrate its potential significance for the implied freedom and beyond.

¹⁵³ Ibid 15 (emphasis added).

¹⁵⁴ For an assessment of the merits of this approach, see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); Jonathan Seglow, ‘Hate Speech, Dignity and Self-Respect’ (2016) 19(5) *Ethical Theory and Moral Practice* 1103.

¹⁵⁵ Notwithstanding this position, dignity as a limitation will only be relevant in a subcategory of cases and so its influence as a limitation may be intermittent only.

¹⁵⁶ Stephenson (n 3) 390.

¹⁵⁷ Ibid 393 (emphasis added).

¹⁵⁸ See, eg, Stone, ‘Insult and Emotion, Calumny and Invective’ (n 133) 80.

IV Conclusion

This article has considered the state of play for dignity in Australian constitutional law in the light of *Clubb* and *Farm Transparency*. It addressed two concerns. Part II built on previous work to explore the meaning of dignity in these decisions. It responded to the first pressing concern following *Clubb* that dignity is an indeterminate, incoherent or empty concept and that this indeterminate, incoherent or empty concept had been imported into Australian constitutional law. The focus was on the new light that *Farm Transparency* can cast on the meaning of dignity. This doctrinal analysis suggested that dignity in Australian constitutional law is a multidimensional concept, including dignity as the intrinsic worth of natural persons and dignity as a thick autonomy interest. This explanation will enable important normative work on whether this is the appropriate meaning of dignity in Australian constitutional law.¹⁵⁹ In Part III, I addressed the second concern following *Clubb* that the quirks of Australian constitutional law preclude recognition of the dignity of the speaker, and thus will cause dignity to be relevant only to the limitation of the implied freedom and not its protection. I addressed the complexities that apply in the Australian context and argued that none of these completely closes the door on dignity. Many questions remain including, inter alia, if dignity is a constitutional value, how (if at all) might constitutional law change? Specifically, how (if at all) might the implied freedom change? My future research will probe these, and other related, questions.

¹⁵⁹ This is the subject of my doctoral research.