The Inherent Jurisdiction of Courts and the Fair Trial

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Abstract

Australian fair trial scholarship tends to focus on common law or statutory rights, or indeterminate constitutional implications. However, fair trial principles originally derive from the inherent jurisdiction of common law courts. There may be a historic link between the inherent jurisdiction of courts and fair judicial proceedings, but does this mysterious class of jurisdiction present a valuable source of fair trial protection today? This article undertakes an original examination of the protection of the fair trial in Australian courts by operation of the inherent jurisdiction. It engages with the under-theorised notion of the inherent jurisdiction in Australia and considers its place in the complex web of statutory, common law and constitutional fair trial protections. Against this background, the article engages a case study analysis of the role of the inherent jurisdiction in matters concerning secret evidence and severe prison conditions. The inherent jurisdiction emerges as a powerful tool in the protection of fair trial rights and principles: complementing, bolstering and aligning with other protections. However, without a deeper understanding of its nature and scope in the Australian context, the inherent jurisdiction may risk the separation of powers and rule of law.

I Introduction

James Spigelman, when Chief Justice of New South Wales ('NSW'), grounded the principle of a fair trial in Australia 'on the inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes'.[1] The inherent jurisdiction of common law courts not only underpins fair trial rights and principles, but 'is the foundation of a whole armoury of judicial powers, many of which are significant and some of which are quite extraordinary and are matters of constitutional weight'.[2]

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1 Chief Justice James Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78(1) *Australian Law Journal* 29, 31.

2 MS Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113 (Jan) *Law Quarterly Review* 120, 120.

This article examines the complex, and presently under-theorised,[3] area of the inherent jurisdiction of Australian courts. Specifically, it scrutinises the inherent jurisdiction as an avenue for the protection of fair trial rights and principles in judicial proceedings. It argues that this set of powers deserves acknowledgment as a robust and effective mechanism for the protection of a fair trial, bolstering and aligning with existing statutory, common law and constitutional protections.

Part II considers the origin, nature and scope of the inherent jurisdiction in Australia and outlines the related concepts of the inherent and implied powers of Australian courts. Part III turns to the concept of the fair trial and the web of statutory, common law and constitutional protections for this notion that exist in Australia. These Parts provide the necessary background to the analysis in Part IV.

The vast scope of the inherent jurisdiction precludes comprehensive analysis of its role in protecting fair trial rights and principles in Australia in this forum. Recognising this, Part IV adopts a case study approach to examine secret evidence and severe prison conditions — two threats to a fair trial that will be considered through the prism of courts' inherent jurisdiction and powers. These case studies represent a small fraction of the potential applications of the inherent jurisdiction to protect fair trial rights and principles. However, valuable insights and lessons may be gleaned from this analysis. Part IV also focuses on issues that arose in Australia's largest terrorism prosecution to date, that of Abdul Nacer Benbrika and his eleven co-accused over the course of 2007–08. Terrorism cases are instructive in this context, as they tend to involve clear legislative or procedural incursions on fair trial rights justified on strong public interest grounds such as national security. They therefore pose a challenge to courts in appropriately protecting trial fairness from legislative incursion, and in balancing the interests of the accused against those of the broader public.

Drawing on the case analysis in Part IV, Part V undertakes a critical assessment of the inherent jurisdiction as a fair trial protection. It concludes that the inherent jurisdiction offers a powerfully broad, adaptable and effective mechanism of fair trial protection, with arguable advantages over other legal protections. Moreover, the inherent jurisdiction complements other protections — including those derived from ch III of the *Australian Constitution* and statutory charters of rights — and contributes to a surprisingly coherent body of fair trial jurisprudence. Accordingly, the inherent jurisdiction deserves clearer recognition as an important protection for the fairness of judicial proceedings, as well as further scrutiny, particularly with respect to its uncertain foundations and scope in the Australian context.

II Inherent Jurisdiction

Writing in 1997, Dockray observed that:

> For a concept in common currency, and one which is doing important work, 'inherent jurisdiction' is a difficult idea to pin down. There is no clear agreement on what it is, where it came from, which courts and tribunals have

[3] *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 295 [122] (Kirby J) ('*Batistatos*').

> it and what it can be used for. The law reports are full of apparently contradictory statements on these questions. In this area, there is little which can be said with complete confidence; the uncertainty of the law is almost the only thing which is never in doubt.[4]

Dockray's observation of the operation of the inherent jurisdiction in the United Kingdom ('UK') is also applicable in Australia. Arguably it is more apt, due to our federal compact. This Part explores this uncertain terrain to outline three fundamental concepts that the phrase 'inherent jurisdiction' tends to capture in Australian jurisprudence, namely: the inherent jurisdiction, the inherent powers, and the implied powers of courts. These terms have tended to be used interchangeably, which has both resulted from, and compounded, the uncertainty that Dockray observed.

The distinction between inherent jurisdiction, inherent powers and implied powers is important. Briefly put, the inherent jurisdiction of courts refers to a species of jurisdiction inhered in superior common law courts of unlimited jurisdiction.[5] In Australia, only superior courts in the states meet this description and therefore enjoy true inherent jurisdiction. While 'jurisdiction' refers to a court's authority to decide certain matters, the term 'inherent powers' describes what the court may do in the exercise of this jurisdiction.[6] Finally, the term 'implied powers' refers to a set of powers exercisable by courts *other than* superior courts of unlimited jurisdiction. These powers are implied from the statutes that provide for the particular court and its jurisdiction, and are in many ways akin to the inherent powers of superior courts of unlimited jurisdiction.[7]

Parts III–V will use the phrase 'inherent jurisdiction' to refer to all three of these concepts (inherent jurisdiction, inherent powers and implied powers). In this Part, however, I explain the relevant concepts more fully, including their (albeit contested) origins, nature and scope.

A *Inherent Jurisdiction and Inherent Powers*

The inherent jurisdiction of superior courts of unlimited jurisdiction in Australia can be traced to the Westminster common law courts of unlimited jurisdiction.[8] The origins of at least some aspects of the inherent jurisdiction lie in the royal prerogative.[9] However, this jurisdiction is generally considered to be 'derived, not from any statute or rule of law, but from the very nature of the court as a superior

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4 Dockray (n 2) 120.

5 *NH v DPP (SA)* (2016) 260 CLR 546 ('*NH*'); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 17 [37] (French CJ, Kiefel, Bell, Gageler and Gordon JJ) ('*PT Bayan Resources*').

6 *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268, 280 [36] (French CJ) ('*Keramianakis*').

7 Wendy Lacey, 'Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31(1) *Federal Law Review* 57, 67–70.

8 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 59–60 [39]–[40] (French CJ) ('*Pompano*'); Rosara Joseph, 'Inherent Jurisdiction and Inherent Powers in New Zealand' (2005) 11(2) *Canterbury Law Review* 220, 220.

9 Ibid 222.

court of law';[10] that is, it refers to 'the power which a court has simply because it is a court of a particular description'.[11]

In his seminal article concerning the inherent jurisdiction, Master I H Jacob provided an evocative description of the concept. Accepting the 'metaphysical'[12] quality of the inherent jurisdiction, Jacob described it as:

> [I]ntrinsic in a superior court; it is its life-blood, its very essence, its immanent attribute. Without such a power it would have form but lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.[13]

Given these vague juridical bases, it is no surprise that the scope of the inherent jurisdiction is expansive and unclear. Dockray queried whether various instances of the inherent jurisdiction were, in fact 'a cocktail of unrelated topics' and concluded that they share almost no unifying features beyond having 'a long history, a similar relationship with statutory powers and (in most cases) they are exercised as a matter of judicial discretion'.[14] Writing in 1983, Mason observed that '[t]he concept resists analysis in view of judicial claims to exercise the jurisdiction wherever necessary for the administration of justice'.[15] Jacob went even further, to describe the inherent jurisdiction as 'so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits'.[16]

As to the relationship between the inherent jurisdiction and statute, it appears well accepted that the scope of the inherent jurisdiction may be altered by clear statutory words.[17] Though, as McHugh J observed in *R v Carroll*, '[s]tatutes are not interpreted as depriving superior courts of their jurisdiction unless the intention to do so appears expressly or by necessary implication'.[18] Moreover, so strong is the imperative that courts maintain control of trial proceedings and prevent abuse of process, a court's inherent jurisdiction 'may be asserted even though the conduct complained of may be in literal compliance with some statute or rule of court'.[19] The High Court of Australia has flagged, but not resolved, the possibility that aspects of the inherent jurisdiction have a constitutional character and may, to an extent, be protected from legislative encroachment. That possibility is discussed in Part IIIB of this article.

Despite its amorphous character, the inherent jurisdiction of courts has well-recognised elements. These include, for example, the power to punish for contempt of court, the power to stay proceedings to prevent an abuse of process, and the *parens*

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10 Master I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23(1) *Current Legal Problems* 23, 27.

11 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J), quoted in *Pompano* (n 8) 60 [40] (French CJ).

12 Jacob (n 10) 27.

13 Ibid. Part of this passage was quoted in *Pompano* (n 8) 60–1 [41] (French CJ).

14 Dockray (n 2) 121.

15 Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57(8) *Australian Law Journal* 449, 449.

16 Jacob (n 10) 23.

17 *Cameron v Cole* (1944) 68 CLR 571, 589 (Rich J) ('*Cole*'), cited in, eg, *Pompano* (n 8) 61 [42] (French CJ).

18 (2002) 213 CLR 635, 678 [145]. See also *Pompano* (n 8) 61 [42] (French CJ); *Cole* (n 17) 589 (Rich J).

19 Mason (n 15) 449.

patriae jurisdiction 'to take care of those who are not able to take care of themselves' (principally persons of unsound mind and children).[20]

Mason identified four 'roles' served by the inherent jurisdiction, which usefully elucidate its character and scope. For Mason, the inherent jurisdiction: (1) ensures convenience and fairness in legal proceedings; (2) prevents steps from being taken that would render judicial proceedings inefficacious; (3) prevents abuse of process; and (4) acts in aid of superior courts and in aid or control of inferior courts and tribunals.[21] These apparent classes of inherent jurisdiction have enabled courts to develop rules of court, practice directions and, for example: Mareva injunctions; Anton Piller orders; the law of contempt of court; orders for security for costs in civil actions; and the power to set aside default orders. The inherent jurisdiction also supports courts' powers to stay proceedings on a wide variety of grounds, including: for want of prosecution; to prevent injustice; pending appeal to a superior court; or where an action is frivolous, vexatious, oppressive or groundless.[22]

In contrast to these expansive approaches to inherent jurisdiction, Joseph has argued for separate conceptions of inherent jurisdiction and inherent powers. She articulates the former as a bundle of separate jurisdictions belonging only to superior courts of unlimited jurisdiction, whereas the latter are inhered in all courts, deriving from their very nature as 'courts'.[23] While Joseph specifically examined the inherent jurisdiction of New Zealand courts, her analysis reflects an intellectually and practically appealing approach to navigating the uncertain terrain of inherent jurisdiction and powers.

For Joseph, inherent jurisdiction includes only: *parens patriae*; punishment for contempt of court; judicial review; bail, jurisdiction over officers of the court; and the court's jurisdiction to revisit its own null decisions.[24] Inherent powers, on the other hand, include all powers required to 'enable the court to regulate its own procedures, to ensure fairness in trial and investigative procedures, and to prevent abuse of its processes'.[25] Joseph's approach addresses much of the conceptual and semantic confusion in this area and has been cited with approval by the New Zealand Supreme Court.[26] However, it ought not be transplanted nor applied to the Australian context without careful consideration. As Rodriguez Ferrere has observed, 'particular nuances' in Australian case law (such as jurisprudence concerning *implied* jurisdiction and powers that are effectively identical to the inherent

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20 *Pallin v Department of Social Welfare* [1983] NZLR 266, 272 (Cooke J) (Court of Appeal).

21 Mason (n 15) 447–9.

22 For an extended list of powers arising from the inherent jurisdiction, see Lacey (n 7) 66. Lacey draws on the following sources in compiling this list: Justice Paul de Jersey, 'The Inherent Jurisdiction of the Supreme Court' (1985) 15 *Queensland Law Society Journal* 325, 326–9; Mason (n 15) 449–58; Jacob (n 10) 32–51.

23 Joseph (n 8) 225–32.

24 Ibid 225.

25 Ibid 232.

26 *Siemer v Solicitor-General* [2013] 3 NZLR 441, 486.

jurisdiction) make it a 'problematic' comparator to New Zealand and, indeed, to most other common law jurisdictions in this field.[27]

The terminology of 'inherent jurisdiction' and 'inherent powers' continues to be a source of confusion in Australia. Inherent jurisdiction has been described by the High Court as 'a collection of powers in aid of jurisdiction'[28] and as 'the inherent power necessary to the effective exercise of the jurisdiction granted'.[29] As Toohey J recognised in a passage oft quoted by the High Court:

> The distinction between jurisdiction and power is often blurred, particularly in the context of 'inherent jurisdiction'. But the distinction may at times be important. Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'.[30]

The pragmatic acknowledgment that the distinction between jurisdiction and power is fundamentally important, and yet elusive, is keenly reflected in the following passage from the judgment of French CJ, Kiefel, Bell, Gageler and Gordon JJ in *PT Bayan Resources*:

> 'Jurisdiction' is a word of many meanings. The term 'inherent jurisdiction' has been described as 'elusive', 'uncertain' and 'slippery'. The difficulty is minimised if the term is confined to its primary signification: to refer to the power inhering in a superior court of record administering law and equity to make orders of a particular description. For present purposes, inherent jurisdiction can be used interchangeably with 'inherent power'.[31]

Thus, acknowledging the imperfection in this approach, Parts III–IV of this article too will use the phrases 'inherent jurisdiction' and 'inherent power' interchangeably.

B *The Implied Powers of Courts of Statute*

The distinctions between inherent jurisdiction, inherent powers and implied powers, not to mention the bases, nature and scope of these concepts, are further confused by the federal compact. As the roots of the inherent jurisdiction are found in the unlimited jurisdiction of the common law courts of Westminster, courts of limited jurisdiction, such as those created by statute, cannot lay claim to inherent jurisdiction

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27 Marcelo Rodriguez Ferrere, 'The Inherent Jurisdiction and Its Limits' (2013) 13(1) *Otago Law Review* 107, 112, 116. See also French CJ's harnessing of broader contextual features in distinguishing the UK case of *Al Rawi v Security Service* [2012] 1 AC 531, which concerned the scope of inherent powers of a UK trial court of a similar nature to the powers at issue in *Pompano*: *Pompano* (n 8) 64 [49].

28 *NH* (n 5) 577 [61] (French CJ, Kiefel and Bell JJ).

29 *Keramianakis* (n 6) 280 [36] (French CJ), quoted in *Pompano* (n 8) 60 [40] (French CJ).

30 *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J), quoting *Parsons v Martin* (1984) 5 FCR 235, 241, and quoted in *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [64] (Gleeson CJ, Gaudron and Gummow JJ); *Batistatos* (n 3) 263 [5] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *NH* (n 5) 581 [68] (French CJ, Kiefel and Bell JJ).

31 *PT Bayan Resources* (n 5) 17–18 [38] (French CJ, Kiefel, Bell, Gageler and Gordon JJ). See also *Pompano* (n 8) 59–61 [39]–[42] (French CJ).

per se. In Australia, this includes all federal and territory courts, as well as inferior courts in the states.

The High Court of Australia has employed constitutional and statutory interpretation to hold that Australia's federal and other statutory courts possess *implied* powers akin to the inherent jurisdiction and powers of superior state courts.[32] The High Court has reasoned that, as 'a matter of statutory construction', federal courts have all powers expressly or impliedly conferred by the statute that creates them and that proscribes their jurisdiction, as well as 'such powers as are incidental and necessary to the exercise' of such.[33] Further, as courts exercising the judicial power of the Commonwealth, federal courts possess certain powers 'arising by necessary implication from Ch III [of the federal *Constitution*]'.[34] The 'most frequently cited test in Australian jurisprudence'[35] for determining the existence of an implied power was provided by Dawson J in *Grassby v The Queen*, who reasoned that '[e]very court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise'.[36]

These implied powers of Australian courts include classic incidents of the inherent jurisdiction such as 'the power to punish for contempt and the power to preserve the subject matter of a pending application for special leave to appeal'.[37] Like the inherent jurisdiction, the implied powers of a court are directed to facilitating the due administration of justice.[38] Despite serving much the same function as the inherent jurisdiction of superior state courts, implied powers are limited by the scope of the statutes from which the court and its jurisdiction are derived.[39] Specifically, an implied power must 'relate either to the exercise of the court's jurisdiction or to the exercise of its powers'.[40] In *Grassby*, Dawson J identified the limits of permissible implication as follows:

> Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'.[41]

The test, as outlined in *Grassby* and elsewhere, is one of necessary implication.[42] Necessary, in this context, has been held to demand more than desirability or usefulness,[43] but 'not [to] have the meaning of "essential"; rather it is

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32 Lacey (n 7) 67–70.

33 *DJL v The Central Authority* (2000) 201 CLR 226, 241 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('*DJL*').

34 Ibid 241 [27] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

35 *BUSB v The Queen* (2011) 80 NSWLR 170, 175 [25] (Spigelman CJ, Allsop P agreeing at 184 [88], Hodgson JA, McClellan CJ at CL and Johnson J agreeing at 185 [94]–[96]) ('*BUSB*').

36 *Grassby v The Queen* (1989) 168 CLR 1, 16 ('*Grassby*').

37 *DJL* (n 33) 241 [27] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

38 *BUSB* (n 35) 176 [28] (Spigelman CJ).

39 *DJL* (n 33) 241 [27] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

40 *BUSB* (n 35) 175 [27].

41 *Grassby* (n 36) 17 (Dawson J), quoting *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J).

42 *Grassby* (n 36) 15–17 (Dawson J); *BUSB* (n 35).

43 *Pelechowski v The Registrar, Court of Appeal* (NSW) (1999) 198 CLR 435, 452 [51] (Gaudron, Gummow and Callinan JJ).

to be "subjected to the touchstone of reasonableness"'.[44] 'Necessity' will also adapt its meaning in light of what is needed for the proper administration of justice. As Spigelman CJ observed in *BUSB*:

> A test of necessity can be applied with varying degrees of strictness. Where, as is the case here, the power said to be implied impinges upon a fundamental principle of the administration of criminal justice — the right to confront accusers — the test must be applied with a higher level of strictness than may be applicable in other circumstances. The extent of the power in such circumstances may be "minimalist". As the purpose for which an implied power exists is to serve the administration of justice, such a power cannot be exercised for a different purpose.[45]

Thus, although courts of statute lack inherent jurisdiction as such, the statutes on which they are based give rise to implied powers akin to the inherent jurisdiction. Far from being a 'cocktail of unrelated topics' that merely share a long history of discretionary application,[46] these implied powers are drawn by necessary implication from statute or Constitution to enable the court to serve the administration of justice.

III The Fair Trial

A *Principles*

The requirement for disputes to be determined by a fair process is globally recognised as a fundamental human right. Article 14(1) of the *International Covenant on Civil and Political Rights* states:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[47]

Similar entitlements have been incorporated in human rights instruments the world over, including in the United States ('US'),[48] the UK,[49] Canada,[50] New Zealand,[51] and in Australia's three human rights charters: the *Charter of Human Rights and Responsibilities Act 2006* (Vic),[52] the *Human Rights Act 2004* (ACT)[53] and the *Human Rights Act 2019* (Qld).[54]

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44 Ibid.
45 *BUSB* (n 35) 176 [33]–[34] (citations omitted).
46 Dockray (n 2) 121.
47 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). See also *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, UN Doc A/810 (10 December 1948) art 10; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended, art 6 ('*European Convention on Human Rights*').
48 *US Constitution* amends V, XIV.
49 *Human Rights Act 1998* (UK) s 1(1).
50 *Canada Act 1982* (*UK*) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').
51 *Bill of Rights Act 1990* (NZ) s 27(1).
52 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1) ('*Victorian Charter*').
53 *Human Rights Act 2004* (ACT) s 21(1) ('*ACT HRA*').
54 *Human Rights Act 2019* (Qld) ss 31–3 ('*Qld HRA*').

The *Australian Constitution*, however, lacks a due process clause. Andrew Inglis Clark's proposal for the inclusion of a due process and equal protection clause was rejected at the 1898 Convention.[55] Section 80 of the *Australian Constitution* provides for the trial of indictable Commonwealth offences to be by jury, however this provision has been interpreted to grant Federal Parliament the sole power to determine which offences are subject to jury trial.[56] That is not to say, however, that procedural fairness does not have a well-established, 'deeply rooted'[57] place in the Australian justice system.[58]

While procedural fairness and the related notions of a fair trial and natural justice[59] 'do not have an immutable fixed content',[60] they do have 'a recognised core of meaning'[61] comprised of the hearing rule *audi alteram partem* (hear the other side), and the bias rule *nemo debet esse judex in propria sua causa* (no one can be a judge in their own cause).[62] Together, these rules give procedural fairness a two-pronged definition that requires that 'people be afforded a hearing that is fair and without bias before decisions which affect them are made'.[63]

Beyond this vague standard, the High Court of Australia has acknowledged that defining the specific attributes of procedural fairness is neither possible nor desirable.[64] As such, these requirements have been left to the ad hoc determinations of judges, taking into account the unique and varied circumstances of each particular case, as well as prevailing social values and community expectations.[65] From this piecemeal and dynamic approach, a range of 'widely accepted general attributes' of procedural fairness have emerged, which the Australian Law Reform Commission summarised as including:[66]

- the independence of the court;
- a public trial;

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55 For discussion see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 65–7.

56 *Australian Constitution* s 80; ibid 356.

57 *Pompano* (n 8) 47 [5] (French CJ); Chief Justice Robert French, 'Procedural Fairness — Indispensable to Justice?' (Speech, Sir Anthony Mason Lecture, University of Melbourne, 7 October 2010) 1.

58 French (n 57) 1, 18. See also Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate Publishing, 2002) 2–3; Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23(3) *Australian Journal of Administrative Law* 164, 165; *Kioa v West* (1985) 159 CLR 550, 614 (Brennan J).

59 Justice James Edelman, 'Why Do We Have Rules of Procedural Fairness?' (2016) 23(3) *Australian Journal of Administrative Law* 144, 144.

60 *Pompano* (n 8) 99 [156] (Hayne, Crennan, Kiefel and Bell JJ).

61 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 4th ed, 2015) 634.

62 Ibid.

63 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 397.

64 *Dietrich v The Queen* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J), 364 (Gaudron J) ('*Dietrich*'); *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J) ('*Jago*'); Spigelman (n 1) 33–4, 43–6.

65 *Dietrich* (n 64) 364 (Gaudron J); Spigelman (n 1) 43.

66 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Interim Report No 127, 2015) 279–80, referring to common law, Parliamentary reforms, international treaties, conventions, human rights statutes and bills of rights, but particularly citing *ICCPR* (n 47) art 14.

- the presumption of innocence;
- that the defendant is informed of and understands the charge against him or her;
- that the defendant has adequate time and facilities to prepare a defence and instruct counsel;
- that the trial should be conducted without undue delay;
- a right to a lawyer; and
- the right to examine witnesses.

B *Protections*

Australia may lack an express constitutional due process clause, but fair trial principles are protected by common law rules, numerous statutes, the principle of legality, the inherent jurisdiction and, implicitly at least, the constitutional separation of powers. These layers of protection reflect the centrality of the fair trial to the liberal democratic system grounded in the rule of law. They have also evolved out of centuries of judicial responsiveness to the 'limitless ways in which the due administration of justice can be delayed, impeded or frustrated'.[67] In order to appreciate the role that the inherent jurisdiction does and might play in protecting a fair trial, it is necessary to understand the complex web of fair trial protections that operate in Australia today.

This article opened with Chief Justice Spigelman's observation that the Australian 'principle of a fair trial is based on the inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes'.[68] This comment recognises not only the long history of the inherent jurisdiction, but its broad and discretionary qualities that have supported courts generally in their efforts to ensure fairness and prevent unfairness in the course of judicial proceedings. This fundamental relationship between the notion of a fair trial and the inherent jurisdiction is reflected in specific classes of the jurisdiction — for example, in Mason's first 'role' for the inherent jurisdiction, being to ensure convenience and fairness in legal proceedings, and his third role, to prevent abuse of process. Moreover, trial fairness may be ensured by the operation of specific powers and remedies that derive from the inherent jurisdiction, such as the power to stay proceedings, to close the court, or to call witnesses on the court's own motion.

While Chief Justice Spigelman's comment illuminates the origins of fair trial protections and hints at a contemporary relevance for the inherent jurisdiction, it hardly describes the dominant contemporary approach. First, a broad notion of procedural fairness that applies to administrative as well as judicial decisions finds protection through the common law. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship,* the High Court held:

> '[T]he common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be

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67 Mason (n 15) 449.
68 Spigelman (n 1) 31.

> exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.[69]

As a rule of statutory interpretation founded in the common law, this protection is subject to alteration by statute.[70] Common law principles of procedural fairness may be altered not only directly, but also by implication,[71] or when legitimate public policy interests would be frustrated if the ordinary incidents of procedural fairness were to apply.[72] That said, the courts will presume that it is 'highly improbable that Parliament would overthrow fundamental principles [of natural justice] or depart from the general system of law, without expressing its intention with irresistible clearness', a presumption which derives from the principle of legality.[73] Despite this, common law rights to procedural fairness may be 'reduced, in practical terms, to nothingness'.[74] In *Leghaei v Director General of Security*, the Federal Court of Australia found that there existed a common law duty to afford procedural fairness insofar 'as the circumstances could bear, consistent with a lack of prejudice to national security'.[75] When balanced against the public interest in security, however, this duty was effectively nullified. This notion that procedural fairness is not subject to an irreducible minimum[76] has generated significant academic debate.[77]

Fair trial rights also find direct and indirect protection in a range of statutes across Australia. Charters of rights in the Australian Capital Territory ('ACT'), Victoria and Queensland grant specific protection to fair trial rights,[78] and require that legislation be interpreted 'so far as possible … in a manner consistent with human rights'.[79] In the event that a provision 'cannot be interpreted [by the supreme court] consistently with a human right', the legislative incursion will stand and the

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69 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ) ('*S10/2011*'). In this ruling, the High Court avoided the debate — first conducted between Brennan and Mason JJ in *Kioa v West* (n 58) — as to whether principles of natural justice conditioning the exercise of statutory power are founded in common law rights or arise as a matter of statutory construction. The position is now that the root of the obligation is ultimately irrelevant, with both analyses leading to the same result. See also *Plaintiff M16/2010E* (2010) 243 CLR 319, 352 [74] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

70 *S10/2011* (n 69) 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

71 See, eg, ibid.

72 See, eg, *Kioa v West* (n 58) 584 (Mason J); *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537, 553–5.

73 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [14]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

74 *Leghaei v Director-General of Security* [2005] FCA 1576, [88] ('*Leghaei*'). On appeal, the Full Federal Court considered that the balance struck by the primary judge was correct: *Leghaei v Director-General of Security* [2007] FCAFC 37, [51]–[55]. See also *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1.

75 *Leghaei* (n 74) [83].

76 See, eg, *Kioa v West* (n 58) 615 (Brennan J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 622 (Gageler J).

77 See, eg, Graeme Johnson, 'Natural Justice and Legitimate Expectations in Australia' (1985) 15(1) *Federal Law Review* 39, 71; Pamela Tate, 'The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice' (1988) 14(1) *Monash University Law Review* 15, 69–71; Bruce Dyer, 'Determining the Content of Procedural Fairness' (1993) 19(1) *Monash University Law Review* 165, 199–201.

78 *Victorian Charter* (n 52) s 24(1); *ACT HRA* (n 53) s 21(1); *Qld HRA* (n 54) ss 31–3.

79 *Victorian Charter* (n 52) s 32(1); *ACT HRA* (n 53) s 30. The *Qld HRA* similarly provides that '[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights': (n 54) s 48.

court may issue a declaration of inconsistent interpretation, to which the Minister must in due course respond.[80] Civil procedure rules support courts' inherent jurisdiction to administer justice by adopting the just and expeditious resolution of disputes as their guiding ethos.[81] Likewise, the Uniform Evidence Acts permit the court to refuse to admit evidence if its probative value is 'substantially outweighed' by the risk that the evidence might be unfairly prejudicial, mislead or confuse, or unduly waste time.[82]

The High Court has interpreted ch III of the *Australian Constitution* to extend a degree of implied protection to fair trial rights and principles. Chapter III enshrines the actual and perceived independence and impartiality of all federal, state and territory judges.[83] The institutional integrity of the courts and their processes is also protected by ch III and the High Court has recognised that procedural fairness is closely entwined with this notion.[84] Finally, procedural fairness has been identified as an 'immutable characteristic' of 'courts' and therefore subject to constitutional protection.[85] It is, however, important to note that protections derived from ch III do not extend to proceedings in administrative tribunals as these bodies are not entitled to the defining characteristics of courts.[86]

The High Court has resisted identifying particular fair trial requirements as constitutionally entrenched. Instead, jurisprudence in this area tends to engage with the fair trial as a vital, but amorphous, set of principles, best considered on a case-by-case basis.[87] It is arguably difficult to reconcile the High Court's indications that

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80 *Victorian Charter* (n 52) s 36; *ACT HRA* (n 53) s 32; *Qld HRA* (n 54) s 53.

81 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Civil Procedure Act 2005* (NSW) s 56; *Civil Procedure Act 2010* (Vic) s 7; *Rules of the Supreme Court 1971* (WA) rr 1.4A, 1.4B. See also *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

82 *Evidence Act 1995* (Cth) s 135.

83 See, eg, *North Australian Legal Aid v Bradley* (2004) 218 CLR 146, 163 [29]–[30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205. This protection extends to judges vested with functions in their personal capacities: *Grollo v Palmer* (1995) 184 CLR 348, 376 (McHugh J), 365 (Brennan CJ, Deane, Dawson and Toohey JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [43] (French CJ and Kiefel J); Rebecca Ananian-Welsh and George Williams, 'Judges in Vice-Regal Roles' (2015) 43(1) *Federal Law Review* 119, 140–1.

84 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 426 [44] (French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ) ('*Gypsy Jokers*'); *South Australia v Totani* (2010) 242 CLR 1, 52–3 [82]–[83] (French CJ), 63 [132] (Gummow J), 82 [204], 88–9 [226] (Hayne J), 158 [428] (Crennan and Bell JJ) ('*Totani*').

85 *Pompano* (n 8) 105 [177] (Gageler J); Williams and Hume (n 55) 375–6.

86 For example, in proceedings before the Security Division of the Administrative Appeals Tribunal key aspects of fairness including principles of open justice and the right to see all the evidence are curtailed and, in some instances, removed entirely by statute: *Administrative Appeals Tribunal Act* 1975 (Cth) ss 35AA, 39B. The status of state institutions as courts or as administrative bodies has received new emphasis and attention since the High Court's decision in *Burns v Corbett* (2018) 92 ALJR 423. A majority of the Court in that case interpreted ch III to hold that only state *courts* may be vested with federal jurisdiction and, accordingly, state bodies must be characterised as either courts or administrative bodies. For elaboration of the defining characteristics of courts (as opposed to state administrative tribunals), see, eg, *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254.

87 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ) ('*International Finance Trust*'); Gabrielle Appleby, 'Protecting Procedural Fairness and Criminal Intelligence: Is There a Balance to Be Struck?' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Routledge, 2015) 75, 84–6.

fair process is entitled to constitutional protection, with the breadth of the legislative and executive interference with court processes that have withstood constitutional challenge.[88] Lacey resolved this dilemma by contending that ch III may not protect elements of judicial process as such, but courts' inherent jurisdiction and therefore capacity 'to ensure the integrity, efficiency and fairness of its process'.[89] That is, Lacey claims that ch III protects the inherent jurisdiction of courts rather than giving rise to an implied due process clause. In *Pompano*, French CJ identified this possibility, but resisted addressing the question.[90] I have argued elsewhere that Lacey's framework successfully: makes sense of the disparate case law; maintains the crucial focus on the constitutional concepts of judicial independence and institutional integrity; accounts for the considerable weight attributed to the maintenance of inherent discretions and powers in preserving constitutional validity; and 'sits comfortably with statements to the effect that a court cannot be *required* to exercise power in a manner that is inconsistent with procedural fairness'.[91]

Other scholars, including Beck, have drawn upon the High Court's decisions in cases such as *Kirk v Industrial Relations Commission of New South Wales*[92] to argue that aspects of the inherent jurisdiction, for instance the supervisory jurisdiction and power to punish contempt, are defining characteristics of state supreme courts and are therefore 'immune from legislative abrogation' by operation of ch III.[93] This reasoning prompts the, as yet unresolved, questions of which aspects of the inherent jurisdiction qualify as defining characteristics of a court, and whether a defining characteristic of a state supreme court might also define other Australian courts and attract broad constitutional protection across the integrated national judicial system.

In sum, the multifaceted notion of a fair trial finds degrees of protection at common law, across a wide variety of statutes, and by implication from ch III of the *Australian Constitution*. The inherent jurisdiction provides the historical foundation for these modern fair trial protections, and has developed alongside them. But the flexible and undefined notion of fair process does not appear to have been fractured by the simultaneous development of parallel protections. Instead, an underlying conception of fair process arises from a remarkably compatible and coherent array of protections. For example, as will be demonstrated in the case studies in Part IV, fair trial principles protected by the inherent jurisdiction have informed and shaped both constitutional doctrine and statutory charter rights.

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88 See generally Rebecca Ananian-Welsh, '*Kuczborski v Queensland* and the Scope of the *Kable* Doctrine' (2015) 34(1) *University of Queensland Law Journal* 47, 67. Moreover, Gray has argued that the factors relied upon by the High Court to uphold the use of secret evidence in judicial proceedings are inadequate: Anthony Gray, 'Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions' (2014) 37(1) *University of New South Wales Law Journal* 125, 161.

89 Lacey (n 7) 59.

90 *Pompano* (n 8) 61 [42], 62 [44] (French CJ), citing Lacey (n 7); Luke Beck, 'What is a "Supreme Court of a State"?' (2012) 34(2) *Sydney Law Review* 295.

91 Rebecca Ananian-Welsh (n 88) 67 (emphasis in original) citing *Kable* (1996) 189 CLR 51, 98 (Toohey J); *Thomas v Mowbray* (2007) 233 CLR 307, 355 (Gummow and Crennan JJ); *Polyukovich v The Queen* (1991) 172 CLR 501, 607 (Deane J), 685 (Toohey J), 703 (Gaudron J); *Gypsy Jokers* (n 84) 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ); *International Finance Trust* (n 87) 360 [77] (Gummow and Bell JJ); *Totani* (n 84) 63 [132] (Gummow J).

92 (2010) 239 CLR 531.

93 Beck (n 90) 303–8.

IV Two Case Studies

The inherent jurisdiction of courts has a fundamental role to play in preserving the fairness of trial proceedings. The following case studies represent two examples from a vast jurisprudence in which courts have relied upon their inherent jurisdiction to address fair trial concerns. Further examples might be found in, for instance, cases applying the *Dietrich* limited right to state funded legal representation,[94] or concerning undue delay[95] or abuse of process.[96] This Part considers how the inherent jurisdiction has been drawn upon to preserve fairness and the interests of justice in cases concerning secret evidence and severe prison conditions.

The analysis focuses particularly on some of the issues that arose in pre-trial and interlocutory applications in Australia's largest terrorism trial: *R v Benbrika*.[97] This case involved the prosecution of 12 men on a range of terrorism-related charges. Following raids on various properties around Melbourne on 8 November 2005, ten men were arrested and charged with terrorism offences, including membership and support of an alleged terrorist organisation led by Benbrika. A further three men were arrested on 31 March 2006, bringing the total to 13. Izydeen Atik (who had been arrested in the initial raids) pleaded guilty to being a member of a terrorist organisation and to providing resources, namely himself, to that organisation. The remaining 12 men pleaded not guilty to a total of 27 counts against them. Over the course of 2007, the Victorian Supreme Court dealt with a considerable number of pre-trial applications in this matter, and applications continued throughout the trial proper. The six-month trial of the accused commenced in February 2008 and jury deliberations commenced on 20 August 2008. On 15 September 2008, almost three years after the initial raids, the jury returned its verdicts. Four of the accused were acquitted of all charges. Seven men, including Benbrika, were found guilty of various terrorism and terrorist organisation offences. The jury was unable to reach a verdict in relation to the final accused, Shane Kent, who would later plead guilty to two charges before he could be retried.[98]

The nature of this trial and the severity of Australia's terrorism laws raised a number of fair trial issues that Bongiorno J of the Victorian Supreme Court was at pains to balance against the public interest in national security. Similar issues have arisen in other cases, some of which are also examined in this Part to provide broader context and bases for comparison and analysis.

A *Secret Evidence*

Over the last decade, schemes for secret evidence have found their way into federal, state and territory Acts, most prominently incorporated within organised crime

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94 (1992) 177 CLR 292, cited in *Pompano* (n 8) 61 [42] (French CJ).

95 *Jago* (n 64).

96 Bradley Selway, 'Principle, Public Policy and Unfairness – Exclusion of Evidence on Discretionary Grounds' (2002) 23(1) *Adelaide Law Review* 1, 13–20; Mason (n 15) 449–53.

97 *R v Benbrika* (2009) 222 FLR 433 (Supreme Court of Victoria).

98 *R v Kent* [2009] VSC 375, 376 [1] (Bongiorno JA).

control order legislation.[99] These schemes undermine fair trial rights in a number of ways. A fair criminal trial is contingent upon the accused having the opportunity to confront his or her accusers, knowing and having an opportunity to test the case against him or herself, and enjoying the benefits of 'equality of arms' in court. These basic requirements of a fair trial have clear links to the presumption of innocence and to the actual and perceived impartiality of the arbiter. As with all aspects of a fair trial, these are not absolute requirements. There may be circumstances in which the administration of justice requires in camera or private proceedings,[100] and the doctrine of public interest immunity has long existed to permit the exclusion of relevant and admissible evidence on public interest grounds.[101]

In this Part, I examine two constitutional challenges to secret evidence provisions: *Pompano*[102] and *Lodhi v The Queen*[103] — and discuss the role that the inherent jurisdiction played in each court's decision to uphold the impugned provisions. I then turn to *R v Benbrika (Ruling No 1)*[104] to demonstrate how the inherent jurisdiction can operate in practice to preserve a fair trial when secret evidence is adduced under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*'). Together these cases demonstrate the multifaceted relationship between the inherent jurisdiction, ch III of the *Australian Constitution* and fair trial principles.

Since the 11 September 2001 terrorist attacks in the US ('9/11'), statutory secret evidence schemes have become increasingly common across Australia. Common law and statutory fair trial rights have posed little obstacle to the clear statutory infringements on openness and fairness presented by these provisions. As such, some of those subject to secret evidence schemes have challenged them on constitutional grounds. These cases reveal not only the scope of ch III of the *Australian Constitution*, but also the role of the inherent jurisdiction in protecting fair process.

The constitutional validity of secret evidence was most recently affirmed in *Pompano*.[105] This case concerned organised crime control order legislation of a kind now enacted in most states and territories.[106] These Acts permit secret evidence in the form of 'criminal intelligence'.[107] This information may be relied upon as evidence in court, but withheld from open court and from the other party or parties to the matter. The South Australian legislation, for example, defines 'criminal intelligence' as:

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99 Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362, 380.

100 Mason (n 15) 452.

101 *Evidence Act 1995* (Cth) s 130; Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2006) 544–6.

102 (n 8).

103 (2007) 179 A Crim R 470.

104 [2007] VSC 141 ('*Benbrika (No 1)*').

105 (n 8).

106 For discussion of the passage and migration of organised crime control order legislation across Australia, see Ananian-Welsh and Williams (n 99).

107 Ibid.

> [I]nformation relating to actual or suspected criminal activity … the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety.[108]

Organised crime control order schemes tend to allow for criminal intelligence to be adduced and relied upon as secret evidence, subject to its classification by a Police Commissioner and a court determination (in a closed, *ex parte* hearing).[109]

In *Pompano*, the High Court held that the criminal intelligence provisions of the *Criminal Organisation Act 2009* (Qld) did not undermine judicial independence or institutional integrity as protected by ch III of the *Australian Constitution*. Chief Justice French opened his judgment by acknowledging that 'at the heart of the common law tradition' rests the fair trial — namely, a method that 'requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it'.[110] The Chief Justice identified secret evidence as '[a]ntithetical to that tradition'.[111] With similar force, Gageler J began his judgment by stating:

> Ch III of the *Constitution* mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair.[112]

Nonetheless, the provisions were held not to infringe the *Australian Constitution*.

In a joint judgment, Hayne, Crennan, Kiefel and Bell JJ reasoned that under the impugned provisions, the Supreme Court of Queensland retained 'its capacity to act fairly and impartially' which was 'critical to its continued institutional integrity.'[113] For example, the Court could determine what weight to attribute to the secret evidence,[114] and in exercising its discretion to declare information to be criminal intelligence, the court was 'bound to have regard' to the issue of fairness to the respondent.[115] While the joint judgment hinged upon the preservation of the Supreme Court's independent capacities to ensure fairness, it was the separate judgments of French CJ and Gageler J that clearly harnessed the inherent jurisdiction of the Supreme Court as key to the validity of the secret evidence provisions.

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108 *Serious and Organised Crime (Control) Act 2008* (SA) s 3.

109 Ibid s 5A; *Criminal Code Act 1995* (Cth) ('*Criminal Code*') ss 104.12A(3)(c)–(d); *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 28; *Serious Crime Control Act 2009* (NT) s 73; *Criminal Organisation Act 2009* (Qld) pt 6; *Criminal Organisations Control Act 2012* (Vic) pt 4; *Criminal Organisations Control Act 2012* (WA) pt 5.

110 *Pompano* (n 8) 46 [1] (French CJ).

111 Ibid.

112 Ibid 105 [177]. See also the Chief Justice's discussion of the defining characteristics of courts: at 71 [67], 75 [78], 80 [89] (French CJ).

113 Ibid 102 [167] (Hayne, Crennan, Kiefel and Bell JJ).

114 Ibid 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

115 Ibid 101 [162] (Hayne, Crennan, Kiefel and Bell JJ). See also, discussion in Rebecca Ananian-Welsh, 'Secrecy, Procedural Fairness and State Courts' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Routledge, 2015) 120, 132.

For Gageler J, '[t]he procedural difficulty' of unfairness created by secret evidence 'demands a procedural solution'.[116] Attributing less, or even no, weight to the untested evidence did not offer the procedural solution Gageler J required, but the inherent jurisdiction did. Thus, for Gageler J, the preservation of the Supreme Court's inherent jurisdiction to stay proceedings 'in any case in which practical unfairness to a respondent becomes manifest' was the sole factor that preserved the constitutional validity of the secret evidence provisions.[117] This suggests that a curtailment of the inherent jurisdiction may signal constitutional invalidity.

Chief Justice French engaged with the inherent jurisdiction at length,[118] and the existence and scope of the Supreme Court's inherent jurisdiction supported his Honour's decision in two respects. First, like the remainder of the Court, French CJ emphasised that the impugned statute preserved the Supreme Court's inherent jurisdiction to control proceedings and to take practical steps to prevent unfairness, including by calling witnesses on its own motion. For French CJ, these aspects of the inherent jurisdiction provided an effective counterbalance to potential unfairness and, therefore, constitutional invalidity.[119] Second, the Chief Justice harnessed the inherent jurisdiction to determine the scope of the *Kable* doctrine, which enshrines state courts' independence and institutional integrity. Specifically, his Honour cited the Supreme Court's inherent jurisdiction to conduct proceedings in camera 'and to privately inspect documents the subject of a claim for public interest immunity' as analogous to the impugned secret evidence scheme.[120] While declining to expressly align the scope of ch III's implied due process protections with the scope of the inherent jurisdiction, or to consider whether the inherent jurisdiction itself was protected by ch III,[121] his Honour reasoned that: 'The existence of that group of inherent powers suggests that statutory analogues will not readily be regarded as impairing the defining or essential characteristics of the courts to which those analogues apply.'[122]

In summary, the High Court in *Pompano* hinged constitutional validity on the Supreme Court's enduring capacity to overcome procedural unfairness by operation of the inherent jurisdiction. In addition, French CJ's judgment suggests that the scope of implied protections for fair process arising from ch III corresponds with, or is at least compatible with, the scope of the relevant court's inherent jurisdiction.

The decision in *Pompano* substantially aligned with the earlier ruling of the NSW Court of Criminal Appeal in *R v Lodhi*.[123] *R v Lodhi* concerned legislation that would prove fundamental to the success of the *Benbrika* prosecutions, namely the *NSI Act*. This Act creates a scheme by which information relating to national security may be adduced as secret evidence in a court proceeding, thus avoiding the risks associated with placing national security information in the public eye while

116 *Pompano* (n 8) 115 [212] (Gageler J).
117 Ibid 115 [212]. See also 105 [178] (Gageler J).
118 Ibid 59–64 [38]–[49] (French CJ).
119 See, eg, ibid 61–2 [43]–[44], 75 [76], 79–80 [88]–[89] (French CJ).
120 Ibid 63 [46] (French CJ).
121 Ibid 61 [42] (French CJ).
122 Ibid 63 [46] (French CJ).
123 *R v Lodhi* (2006) 65 NSWLR 573.

preserving its evidential value.[124] The *NSI Act* may be considered the predecessor to the criminal intelligence provisions of the state control order Acts, grounded in a counter-terrorism, rather than an anti-organised crime, paradigm.[125]

The *NSI Act* is intended to be a comprehensive legislative framework for the handling of national security information in court proceedings. The Act defines 'national security' broadly as 'Australia's defence, security, international relations or law enforcement interests'.[126] In a closed hearing, within the context of a criminal trial, the court will be called upon to determine the disclosure of national security information based on three factors. First, whether, having regard to the Attorney-General's non-disclosure or witness exclusion certificate, there would be a risk of prejudice to national security if the information was disclosed or the witness called.[127] Second, whether such an order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence.[128] Third, the court may also have regard to 'any other relevant matter'.[129] Uniquely, s 31(8) of the *NSI Act* provides that the court 'must give greatest weight' to risk of prejudice to national security in making its decision, over and above considerations of fairness and justice.[130] This tilted balancing exercise formed the basis of Faheem Lodhi's constitutional challenge.[131]

The *NSI Act* was applied in the course of Australia's first successful terrorism prosecution, against Lodhi. A constitutional challenge was launched in the course of this trial submitting that the law impermissibly enabled the executive to direct the judiciary as to how they should prioritise fair trial and national security considerations. Pre-empting the High Court's later decision in *Pompano*, Whealy J rejected the challenge and hinged his decision on the preservation of the Court's inherent discretion and control of proceedings. His Honour observed that the Court's discretion remained 'intact', as did its fundamental independence and emphasised that '[t]he legislation does not intrude upon the customary vigilance of the trial judge

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124 See also *Administrative Appeals Tribunal Act* 1975 (Cth) ss 35AA, 39B, which establishes a similar scheme for hearings in the Security Division of the Administrative Appeals Tribunal. This scheme provided something of a template for the later *NSI Act* and other like statutes.

125 Ananian-Welsh and Williams (n 99) 380.

126 *NSI Act* s 8.

127 Ibid s 31(7)(a).

128 Ibid s 31(7)(b).

129 Ibid s 31(7)(c). The criteria in civil proceedings are much the same: s 38L(7).

130 Ibid s 31(8). Unlike the UK, security cleared counsel have not become a prominent feature of the Australian scheme. These 'special advocates' are able to see the information and test it in a closed hearing, though are unable to speak with the accused or take instructions regarding the closed material. These factors led one former special advocate to famously criticise the scheme as giving a 'fig leaf of respectability and legitimacy' to an 'odious' process: United Kingdom Parliament Constitutional Affairs Committee, *Seventh Report 2004–05* (2005) [41]. That said, the Australian scheme operates in the absence of even this 'fig leaf'. For comparison of Australia and UK's secret evidence schemes, see Tamara Tulich, Andrew Lynch and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in David Cole, Federico Fabbrini and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013) 154.

131 *R v Lodhi* (2006) 163 A Crim R 448; *Lodhi v The Queen* (n 103).

in a criminal trial' or, specifically, the court's task of ensuring 'that the accused is not dealt with unfairly.'[132]

On appeal, the Court of Criminal Appeal endorsed these comments[133] and confirmed that the tilted balancing exercise in favour of national security did not 'impinge upon the integrity of the process by which the judgment is formed. It may affect the outcome of the process but not in such a way as to affect its integrity'.[134] The inherent jurisdiction did not play an overt role in this decision. Indeed, Spigelman CJ flatly rejected the approach that would later be adopted by Gageler J in *Pompano*, as: '[a]lthough the Court's power to order a stay of proceedings to prevent abuse of its process is acknowledged, it is a power that is rarely exercised, particularly where criminal proceedings are instituted with respect to charges of a serious character'.[135] Nonetheless, the Court of Criminal Appeal engaged in extensive reasoning by analogy, upholding the tilted balancing exercise under s 31(8) by reference to 'thumb on the scales'[136] approaches in contempt[137] and public interest immunity proceedings.[138] Thus, there are underlying consistencies in approach across both *Lodhi v The Queen* and *Pompano*.

It can be seen that, to an extent, the preservation of a fair trial in the face of direct legislative challenge hinges on the judge's fortitude in harnessing the inherent jurisdiction to preserve fairness by, for example, ordering a stay of proceedings. The first judgment delivered in the *Benbrika* proceedings suggests how this discretion may be exercised.[139] It also demonstrates the force with which a court can be expected to protect its inherent jurisdiction in the course of a proceeding.

The evidence against the accused in the *Benbrika* trial included some 50 witnesses[140] and 482 intercepted conversations.[141] Unsurprisingly, some of this evidence qualified as national security information, which the prosecution sought to rely on in the form of secret evidence. It did so by entering into agreements with the Attorney-General and the defendants concerning the disclosure, protection, storage, handling and destruction of the information.[142] Consent-based agreements of this nature are provided for by s 22 of the *NSI Act* — a provision that has allowed parties to strategically avoid much of the procedural complexity of the Act. Importantly, s 22(2) preserves the court's final say over the handling of national security information.

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132 *R v Lodhi* (n 131) 469 [108]. See also Justice Anthony Whealy, 'Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis' (Paper, British Institute of International and Comparative Law, April 2010) 27.

133 *Lodhi v The Queen* (n 103) 483 [36] (Spigelman CJ).

134 Ibid 488 [73] (Spigelman CJ). Special leave to appeal this decision to the High Court was refused: Transcript of Proceedings, *Lodhi v The Queen* [2008] HCATrans 225.

135 *Lodhi v The Queen* (n 103) 481 [27] (Spigelman CJ).

136 Ibid 484–5 [41], [45] (Spigelman CJ).

137 Ibid 484 [42]–[44] (Spigelman CJ).

138 Ibid 488 [68]–[69] (Spigelman CJ).

139 *Benbrika (No 1)* (n 104).

140 Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34(2) *Criminal Law Journal* 92, 108.

141 *R v Benbrika* (2009) 222 FLR 433, 439 [21].

142 *Benbrika (No 1)* (n 104) [19] (Bongiorno J).

On 21 March 2007, the Court issued its first published reasons in the pre-trial hearings.[143] This decision concerned a fresh application for s 22 orders, correcting deficiencies in an earlier set of orders that have not been made publicly available. Appropriately, the Court exercised its own rigorous and independent review of the draft orders. The initial set of draft orders 'were regarded by the Court as unsatisfactory in a number of respects'.[144] The revised s 22 orders were, however, made by the Court.[145] In issuing these orders, Bongiorno J observed that he might have relied on ss 85B and 93.2 of the *Criminal Code*[146] or the court's inherent jurisdiction[147] to issue the orders in the absence of s 22. Whatever the legal basis for this exercise of the Court's discretion, Bongiorno J emphasised that his determination would turn upon principles of open justice and a fair trial.[148] 'Most importantly' for his Honour, however, was that the orders did not encroach on the Court's inherent jurisdiction.[149] His Honour observed that

> the whole process remains under the control of the Court at all times. This is probably the most important aspect of these orders as it makes clear that the Court can vary or even revoke the orders if they lead to unintended consequences which have an unacceptable effect on principles of a fair trial or open justice.[150]

Justice Bongiorno's decision demonstrates some validity in the reasoning employed in *Pompano*. The Court was prepared to withhold its discretion to make the orders pertaining to secret evidence as requested by the prosecution, even in circumstances where 12 defendants had consented to those orders. The driving concerns of the Court in exercising its jurisdiction were identified as the maintenance of the fair trial and, relatedly, the preservation of its full and ongoing capacity to ensure a fair trial and prevent abuse of process by operation of its inherent jurisdiction.

The inherent jurisdiction has played a multifaceted role in preserving trial fairness where legislation provides for secret evidence. The full preservation of the court's inherent jurisdiction is necessary to preserve constitutional validity, and for Bongiorno J it was a necessary element of any judicial order. The inherent jurisdiction may be relied upon to undermine basic trial fairness by giving effect to secret evidence agreements. But it may also limit the impact of secrecy on trial process and outcomes by, for example, empowering a court to call witnesses on its own motion, ensuring the evidence bears little or no weight, or supporting a stay of proceedings, as discussed in *Pompano*. Through each of these mechanisms, the inherent jurisdiction provides an avenue for the judge to consider and give effect to the interests of justice, including the basic principles of fair and open justice even in the face of clear legislation, countervailing public interests, and even pressure by the parties.

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143 Ibid.
144 Ibid [4].
145 Ibid. See [19] for the redacted text of these orders, which extend to 45 paragraphs covering information storage, access, confidentiality, copying, transportation, declassification, destruction and more.
146 Ibid [14].
147 Ibid [16].
148 Ibid [15]–[16].
149 Ibid [7].
150 Ibid. See also [15], in which his Honour emphasises the importance of a fair trial.

B *Prison Conditions*

The inherent jurisdiction empowers courts to control their own processes to prevent unfairness. But its reach does not extend beyond the walls of the courtroom and into prison management. In this Part, I consider a set of cases in which courts have harnessed the inherent jurisdiction in arguably creative ways, enabling them to prevent trial unfairness arising from administrative action outside the trial itself, specifically, where unfairness is alleged to arise from the accused's conditions of imprisonment.

In *R v Benbrika (Ruling No 20)*,[151] Bongiorno J dealt with an application by the accused seeking to invoke the Court's inherent jurisdiction to stay proceedings on grounds of unfairness. This unfairness was allegedly brought about by the conditions of the accused's imprisonment and transfer to and from court. The ruling was delivered on 20 March 2008, more than two years after the initial arrests and a month into the six-month trial. In this context, the accused's options were limited in challenging the source of alleged unfairness. Both *Victorian Charter* and inherent jurisdiction arguments were raised, though only the latter were successful.

Since their arrests, Benbrika and his co-accused had been held in Barwon maximum-security prison under 'the most austere conditions in the Victorian prison system'.[152] The chief justification for this appears to have been the classification of the accused as A1 prisoners, the maximum security level in the system.[153] This classification, however, was almost inevitable considering the terrorism-related charges against the accused and the attendant presumption against bail in the absence of extraordinary circumstances (which were not made out for any of the defendants).[154] When they were not in court, the accused were mostly confined to their cells, sometimes for up to 23 hours a day. Their rights to associate with other prisoners, including each other, to have visitors and to access prison amenities were all restricted. Transfers both to and from the Supreme Court of Victoria each day involved the defendants being strip-searched, handcuffed in cuffs attached to a waist belt, and shackled in leg chains. This process took around one hour for each prisoner.[155] At the time of the application, none of the men had ever been found to be in possession of prohibited items.[156] The drive between Barwon Prison and the Supreme Court took between 65 and 80 minutes,[157] during which the defendants were held in 'small box-like steel compartments with padded seats'[158] in a prison van that had no natural light and that one expert described as '"very claustrophobic"'.[159]

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151 (2008) 18 VR 410 ('*Benbrika (No 20)*').
152 Ibid 418 [31].
153 *R v Benbrika (Ruling No 12)* [2007] VSC 524, 532–3 [17]–[19] (Bongiorno J) ('*Benbrika (No 12)*').
154 Ibid.
155 Ibid [33].
156 Matthew Groves, 'Editorial: Prison Conditions and the Right to a Fair Trial' (2008) 32 *Criminal Law Journal* 133, 133.
157 *Benbrika (No 20)* (n 151) 419 [34].
158 Ibid 419 [35].
159 Ibid 422 [54], quoting the evidence of Dr Amanda Silcock, occupational physician.

Until December 2007, these conditions were compounded by novel security arrangements inside the courtroom. These conditions had been addressed and altered in an earlier ruling, in which Bongiorno J had engaged the Court's inherent jurisdiction to control courtroom security in the interests of trial fairness.[160] In his Honour's twelfth published judgment during the pre-trial phase, Bongiorno J described this courtroom security structure as follows:

> [S]uperimposed on the dock is a Perspex structure which not only isolates the dock and its occupants from the body of the Court but also serves to create a number of small cells in the dock itself, each containing two seats bolted to the floor. Each cell is surrounded on three sides by the Perspex screen which sits on the floor and rises to a height of 1.8 metres. … [T]he position of the Perspex screen in front of each seat in the dock means that, for a person of average height or above, the occupant's knees are jammed hard against the Perspex necessitating frequent postural adjustment to achieve even a moderate degree of comfort.[161]

In addition to the Perspex structure, computer monitors were positioned in front of the accused which further obstructed sightlines between the accused and the rest of the court, including the judge, jury and witnesses.[162] His Honour relied on the court's inherent jurisdiction to order the removal of the Perspex structure and alter the computer screens and number of security officers in the courtroom on the basis that they adversely impacted the accused's presentation to the courtroom,[163] diminished their right to the presumption of innocence,[164] and undermined their right to adequately defend the case.[165]

While the accused's conditions of imprisonment were raised in the 2007 application regarding courtroom security, it was not until the trial commenced in 2008 that these conditions prompted an application for a stay of proceedings on grounds of unfairness. In his Honour's resolution of the application, Bongiorno J found that, as a whole, the severe conditions of imprisonment and transport to and from the Court negatively impacted each defendant's physical health, mental health,[166] and fundamental right to attend his own trial 'and take an active part in defending the charges against him by instructing counsel'.[167]

Nonetheless, the *Victorian Charter* aspect of the application failed on two grounds. First, the conditions were imposed before the *Charter* commenced, so the transitional provisions of the *Charter* rendered it inapplicable.[168] Second, compliance with the notice provisions of the *Charter* would (ironically) risk significant delay and thus escalate the unfairness.[169] Ultimately, however, having

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160 *Benbrika (No 12)* (n 153).
161 Ibid [7].
162 Ibid [28]–[29].
163 Ibid [28].
164 Ibid [29].
165 Ibid [28].
166 *Benbrika (No 20)* (n 151) 427 [85].
167 Ibid 428 [88].
168 Ibid 415 [16], citing *Victorian Charter* (n 52) s 49(2).
169 *Benbrika (No 20)* (n 151) 416 [17]–[19]. Justice Bongiorno observed that the mere fact that the accused had been in custody for two years or more was 'of itself unsatisfactory' (at 417 [26]) and sounded a general warning that the notice provisions of the *Victorian Charter* might be 'used to delay

considered the bases and nature of the Court's inherent jurisdiction, Bongiorno J found that the *Charter* was simply not required in order to assert the accused's fair trial rights in this case.[170] This suggests that, in at least some scenarios, the Court's inherent jurisdiction might be as effective in protecting a fair trial as an express *Charter* right.

Justice Bongiorno took the opportunity presented by this case to elaborate the balancing exercise involved in an exercise of the court's inherent jurisdiction: 'balancing the interests of the community, represented by the Crown, against the interests of the accused'.[171] Beyond this vague notion of balance, Bongiorno J drew upon Deane J's candid observation in *Jago*, noting that '[t]he identification of what constitutes unfairness and the steps which need to be taken to avoid it involve what his Honour described as an "… undesirably, but unavoidably, large content of essentially intuitive judgement"'.[172] Employing this 'intuitive' balancing exercise, Bongiorno J concluded that: 'the accused in this case are currently being subjected to an unfair trial because of the whole of the circumstances in which they are being incarcerated at HM Prison Barwon and the circumstances in which they are being transported to and from court.'[173]

The inherent jurisdiction may have supported Bongiorno J's decision to stay the proceedings to prevent unfairness, but it did not permit the court to dictate the conditions of the accused's imprisonment: 'That is a matter for the Executive Government which must act, of course, according to law in the discharge of its obligations.'[174] Instead, his Honour threatened (but did not ultimately order) a stay of proceedings in exercise of the Court's inherent jurisdiction. But his Honour also listed the 'minimum alterations' necessary to remove the unfairness and therefore to avoid the granting of a stay. These included that the accused be moved to the Metropolitan Assessment Prison on Spencer Street in central Melbourne, that they be granted a minimum of ten hours per day out of their cells when not attending court, and that they no longer be subject to any restraining devices other than ordinary handcuffs not connected to a waist belt.[175] Groves has argued this decision 'clearly amounted to an order for the specific alteration of the defendants' conditions, even though Bongiorno J had earlier asserted that it was not for the court to make an order'.[176]

The awkward line between a court permissibly ordering a stay for want of fairness on clear grounds and impermissibly making orders requiring the unfairness to be remedied by specific administrative action has been explored in subsequent cases. For instance, *R v Rich (No 2)*[177] concerned an application for a stay of proceedings for want of fairness by Hugo Rich, who was being held on remand

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or even disrupt the orderly conduct of criminal trials', effectively amounting to an abuse of process (at 416 [18]).

170 Ibid 424–6 [71]–[86].

171 Ibid 425 [75].

172 Ibid 426 [79], citing *Jago* (n 64) 57 (Deane J).

173 *Benbrika (No 20)* (n 151) 428 [91].

174 Ibid 429 [93].

175 Ibid 430–1 [100].

176 Groves (n 156) 134.

177 (2008) 184 A Crim R 161 ('*Rich (No 2)*').

pending his trial before the Victorian Supreme Court. Rich argued that unfairness arose from Corrections Victoria's decision to deny him computer access, which in turn hampered his capacity to adequately prepare for his upcoming trial. Quoting Bongiorno J's remarks in *Benbrika (No 20)*,[178] Lasry J agreed that it was not for the court 'to order any specific alteration of the terms of the accused's detention', as that was 'a matter for the Executive government'.[179]

Like Bongiorno J, however, Lasry J articulated that a risk of unfairness could arise if the accused did not have reasonable access to specific equipment, including a supervised colour printer, certain data, as well as 'whatever software and hardware is necessary for him to examine all the audio and video evidence … for the purpose of preparing the defence case'.[180] Noting the matter remained under his supervision, Lasry J said that:

> The fundamental facilities required for a person in the position of the accused are those which will enable him to have access to the evidentiary material to be led against him at his trial in all its forms, coupled with the time and facilities to give proper instructions about that material. It also involves him having timely access to any material which he considers as exculpatory so that it can be provided to his lawyers accompanied by all the necessary narrative and explanation from him …[181]

The issue of computer access later arose before NSW courts in *Commissioner of Corrective Services (NSW) v Liristis*[182] and *McKane v Commissioner of Corrective Services (NSW) (No 3)*.[183] Each of these cases concerned claims by prisoners that a lack of access to computer facilities interfered with their ability to prepare for trial and consult with counsel. As in *Benbrika (No 20)* and *Rich (No 2)*, the NSW courts made clear that the inherent jurisdiction can be relied upon to stay proceedings, but not to explicitly compel executive agencies to undertake a positive step to remedy the unfairness.

In *Liristis*, however, Schmidt J had purported to make orders *compelling* Corrections to provide a prisoner whose trial was pending in the District Court with computer access.[184] Justice Schmidt did not explicate the jurisdiction on which she relied, but referred to the prisoner's right to a fair trial in making the orders. It arose for consideration whether the inherent jurisdiction authorised the making of such orders, particularly where the Supreme Court was not the court exercising criminal jurisdiction in the matter, the indictment having been presented in the District Court.[185] President Beazley observed that:

> leaving aside the special protective jurisdiction, the Supreme Court's inherent and/or s 23 jurisdiction is essentially preventative … regardless of the form in which any relief is framed.

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178 Ibid 173–4 [52], quoting *Benbrika (No 20)* (n 151) 429 [93]

179 *Rich (No 2)* (n 177) 173–4 [52]. See also 181 [86] where his Honour observes: 'it is not appropriate to make any coercive orders in relation to Corrections in relation to the requirements of the accused'.

180 Ibid 181 [92].

181 Ibid 172 [48].

182 (2018) 98 NSWLR 113 ('*Liristis*').

183 [2018] NSWSC 1060.

184 *Liristis* (n 182) 122 [37] (Basten JA).

185 Ibid 121–2 [35]–[36] (Beazley P).

> Accordingly, adopting the conception of the inherent jurisdiction as a power or collection of powers, I cannot accept that a power exists to make positive binding orders against a third party to criminal proceedings of the kind made by the primary judge. This is all the more so where the order made directly affected the operations of a correctional facility.[186]

The limits on the capacity for the inherent jurisdiction to protect fair trial rights are clear in these cases, formally if not substantively. A court may issue a stay to prevent unfairness or abuse of process. In doing so, the Victorian cases of *Benbrika (No 20)* and *Rich (No 2)* indicate a judge might make specific suggestions as to how the unfairness might be remedied and the stay avoided. But the NSW cases reinforce the rule that no particular remedial actions may be ordered by the court and thereby imposed on the executive government by operation of the inherent jurisdiction in these circumstances. That is, there is a separation of powers limit on the scope of the inherent jurisdiction.

Could an express right to a fair trial better protect an accused from trial unfairness arising from their conditions of imprisonment? The case of *Castles v Secretary of the Department of Justice (Vic)* demonstrates that the same separation of powers limit applies to *Victorian Charter* rights.[187] In *Castles*, Emerton J applied the *Charter* to allow a prisoner, Kimberly Castles, access to IVF (in vitro fertilisation) treatment. Her Honour stopped short of specifying further requirements, such as prisoner transfer, to facilitate that treatment, and warned that courts should not 'enter into the process of fine-tuning arrangements' to accommodate the legislative, health and practical requirements in issue.[188] Thus, Emerton J did not go even so far as Bongiorno J or Lasry J in suggesting how the issue might be addressed by the relevant agencies.

Justice Bongiorno's approach of listing the minimum requirements to avoid the granting of the stay arguably extended the court's reach into prison management and undermined the separation between the judicial and executive branches of government. A tension certainly exists between a court respecting the separation of powers by leaving issues of prisoner management to the executive branch of government, and the imperative on courts to prevent administrative decisions and policies from grossly undermining the fairness (and thus integrity) of judicial proceedings. The potential impact of the inherent jurisdiction on the separation of powers is further explored below.

V Assessing the Inherent Jurisdiction as a Fair Trial Protection

Fair trial rights and principles are subject to multiple layers of protection under Australian common law, statute and constitutional doctrine. The inherent jurisdiction of courts is another of these layers. The scope of the inherent jurisdiction and how it interacts with other fair trial protections is, however, not immediately

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186 Ibid.
187 *Castles v Secretary of the Department of Justice (Vic)* (2010) 28 VR 141 ('*Castles*').
188 Ibid 176 [145].

clear. As the foundations of the inherent jurisdiction are uncertain, so too is its relationship to statute. This has led to it being approached on occasion as a 'gap filling' device, stepping in to support a judicial decision grounded in 'justice' in the absence of clear statutory or even common law authority to do so. This is reflected in the observation of de Jersey, well before his ascension to the roles of Chief Justice and later Governor of Queensland:

> We have all heard Judges, anxious to make obviously just orders, but uncertain of an express statutory authority, resorting, sometimes — I have thought, rather coyly — to the inherent jurisdiction of the court. We have also heard inadequately prepared Counsel, inviting resort to the inherent jurisdiction, and being chided by a Judge who is acquainted with a specific statutory authorisation.[189]

The case studies discussed in this article do not contradict this conception of the inherent jurisdiction. However, they demonstrate a role and relevance for the inherent jurisdiction well beyond the legal lacunae. The cases discussed reveal synergies between fair trial claims grounded in the inherent jurisdiction and statutory human rights charters. *Pompano* demonstrates that the inherent jurisdiction and constitutional fair trial protections are complementary to the point of working in tandem to preserve judicial independence and impartiality. Just as Chief Justice Spigelman observed that Australian fair trial principles are grounded in the inherent jurisdiction, it appears that courts have developed a fairly consistent and coherent fair trial jurisprudence, encompassing and mutually developing rules and principles derived from statute, common law, ch III, and the inherent jurisdiction. Thus, the inherent jurisdiction of courts may be somewhat mysterious, and attempts to rely on it may be approached 'rather coyly', but it has the potential to serve as a robust protection for fair trial rights in Australian courts. As such, assertions of fair trial rights and principles grounded in the inherent jurisdiction might be confidently put alongside, for example, assertions of statutory rights or even constitutional principles.

Against this background, the case studies in Part IV highlight a number of specific strengths and weaknesses in the inherent jurisdiction as a protection for fair trial rights and principles. First, the inherent jurisdiction itself may be undergoing an incremental process of entrenchment as a constitutional characteristic of Australian courts. Writing in 2013, Guy surmised that the *Australian Constitution* 'now affords a substantial degree of protection for state supreme courts and their procedural processes'.[190] In *Pompano*, this protection was borne out to the extent that courts must retain their inherent jurisdiction to preserve fairness and prevent unfairness. Chief Justice French went so far as to harness the inherent jurisdiction to determine the scope of fair trial principles protected by ch III. On the other hand, these cases provide little to suggest that the *Australian Constitution* protects fair trial rights as

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189 de Jersey (n 22) 326.

190 Scott Guy, 'The Constitutionality of the Queensland Criminal Organisation Act: *Kable*, Procedural Due Process and State Constitutionalism' (2013) 32(2) *University of Queensland Law Journal* 265, 285. For discussion of the constitutional protection of procedural fairness in federal courts, see William Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31(3) *Sydney Law Review* 411.

such.[191] Thus, the inherent jurisdiction may be the vehicle through which fair trial rights find constitutional protection. The High Court's robust protection of the inherent jurisdiction relies on, and is reflected in, the dedication of individual judges to protecting the inherent jurisdiction from erosion. This is demonstrated in Bongiorno J's decisions in the *Benbrika* proceedings. Not only did the inherent jurisdiction support his Honour's decisions, but in each ruling his Honour emphasised his continuing control of proceedings and undiminished capacity to exercise the inherent jurisdiction at any time.

The clearest strengths of the inherent jurisdiction as a mechanism for the protection of fair trial rights arise from its breadth and flexibility. The inherent jurisdiction encompasses a wide variety of tools to achieve fairness and avoid unfairness as the specific case may require. It focuses on fairness in a broad sense, which invites judges to cut through statutory rules and take account of changing circumstances and community expectations.[192] Thus, in invoking the inherent jurisdiction, the court has a wide discretion to do what it considers necessary to remedy unfairness however it has arisen, and to stay proceedings if such a remedy is unavailable or beyond the court's power.

In addition to being flexible and adaptable, the inherent jurisdiction can operate as a singularly practical mechanism of rights protection, capable of satisfying applicants with a pertinent remedial outcome — as demonstrated in Bongiorno J's orders removing the Perspex structure from his courtroom. Where the inherent jurisdiction will not support orders to compel executive action, as in the cases concerning prison conditions, similar outcomes have been achieved by the suggestion of the minimum requirements to preserve fairness and to avoid the granting of a stay. However, this approach has been criticised as risking the separation of powers by operating effectively, if not formally, to force the hand of the executive and compel a specific outcome.[193]

The difference between *ordering* and *suggesting* executive action is a fine line, but a crucial one — as the NSW Court of Appeal recognised in *Liristis*. The scope and sources of the inherent jurisdiction are amorphous and uncertain; should this jurisdiction be allowed to dictate executive discretion in areas such as prison management, serious separation of powers and legitimacy issues would arise. Moreover, as Groves queried, 'what would happen if a court were to order changes to prison conditions that prison officials could not satisfy'?[194] At the end of the day, if a court merely suggests remedial actions, even with specificity, the executive agency might nonetheless elect to experiment with a range of responses beyond the suggestions of the judge. This path might invite, rather than avoid, a further stay application. However, as the executive agency would be best placed to properly assess the issues, contextual considerations (such as funding implications) and possible responses, it is conceivable that the agency could design an alternative

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191 Ananian-Welsh (n 88) 67. For more detailed discussion of the High Court's treatment of procedural fairness as an incident of ch III, see Williams and Hume (n 55) 375–9.

192 *Dietrich* (n 64) 364 (Gaudron J); Spigelman (n 1) 43.

193 Groves (n 156).

194 Ibid 138.

course of action outside the judge's contemplation, and still address the court's concerns and avoid a stay of proceedings.

Despite the breadth of the inherent jurisdiction, it is a well-established and traditional mechanism for protecting the fair trial in the common law system of justice. By contrast, current uncertainty and misunderstanding as to the nature, scope and operation of the *Victorian Charter* has complicated and deterred attempts to rely on its protections,[195] and constitutional fair trial principles are notoriously complex, dynamic and uncertain.[196]

Finally, on a pragmatic level the inherent jurisdiction may present a relatively cost- and time-efficient option for a party wishing to assert his or her fair trial rights. It can be invoked by simple application in the course of proceedings. No special notice or procedural requirements are involved and additional counsel or prolonged proceedings may not be required.

The inherent jurisdiction also has its weaknesses as a mechanism for protecting fair trial rights and principles. Its scope is limited to court proceedings; it does not extend to administrative proceedings. Even within the court system, the inherent jurisdiction rests on shaky foundations in all but superior state courts. As outlined in Part II, courts of statute cannot lay claim to inherent jurisdiction as such. While, in practice, the implied powers of these courts serve much the same function as the inherent jurisdiction of superior state courts, these powers are limited by the scope of their underlying statutes and may be more susceptible to express or implied statutory curtailment.[197] These factors confuse an already complex area of ch III jurisprudence when one turns to query whether these powers are constitutionally entrenched in any, some, or all Australian courts.

The considerable breadth and flexibility of the inherent jurisdiction give it pragmatic and strategic efficacy, but raise rule of law and separation of powers concerns. The inherent jurisdiction resembles a well of loosely defined, unpredictable and relatively unconstrained power. It has been described as amorphous, ubiquitous,[198] nebulous,[199] intuitive,[200] metaphysical,[201] and as including, though not being limited to, 'a general power, taking various specific forms, to prevent unfairness'.[202] It 'gives rise to a vast armoury of remedies',[203] which the few examples discussed in this article have demonstrated. The efficacy of the inherent jurisdiction requires that it be sufficiently adaptable to equip the court to respond to 'the limitless ways in which the due administration of justice can be delayed, impeded or frustrated'.[204] However, when power is so vaguely defined, it

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195 Julie Debeljak, 'The Rights of Prisoners under the *Victorian Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) *University of New South Wales Law Journal* 1332.

196 Williams and Hume (n 55) 325.

197 *DJL* (n 33) 241 [27] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

198 Jacob (n 10) 23.

199 Groves (n 156) 138.

200 Ibid; *Jago* (n 64) 57 (Deane J).

201 de Jersey (n 22) 326; Mason (n 15) 459.

202 *Connelly v DPP* (1964) AC 1254, 1347 (Lord Devlin).

203 Mason (n 15) 449.

204 Ibid.

becomes unpredictable and may be insusceptible to the usual avenues of oversight, particularly appeal to a superior court. Likewise, the possible constitutional entrenchment of courts' inherent jurisdiction[205] supports its potential to act as a robust protection for fair trial rights, but also hampers the prospect for effective oversight or constraint by the legislature. Ultimately, resolving the scope of the inherent jurisdiction will first require a clear understanding of its nature. At present, it is unclear whether the inherent jurisdiction of some (or even all) Australian courts is derived from statute, entrenched in the *Australian Constitution*, or is more closely aligned with common law or even prerogative powers.

An exercise of the inherent jurisdiction to prevent trial unfairness hinges on a balancing exercise, however this exercise is vaguely defined and admittedly 'intuitive'. In the *Benbrika* and *Lodhi* proceedings, the competing interests were national security and trial fairness. Appleby and Meyerson have each warned that this scenario provides fertile ground for inappropriate levels of judicial deference: 'With no explicit process associated with "balancing", the weighing up is unpredictable and indefensible as a step within rational judicial decision-making'.[206] Each scholar has argued that balancing in the national security context may lead to restraint to the point of deference.[207]

There is little evidence of inappropriate deference in Bongiorno J's conduct of the *Benbrika* proceeding. However, Appleby and Meyerson each raise valid concerns that have arguably played out in other cases.[208] These concerns deserve serious consideration in the context of the inherent jurisdiction, where Deane J employed the broadest possible language to describe the reasoning process that underpins determinations of whether a trial is unfair. In an oft quoted passage that Bongiorno J drew upon expressly, Deane J said:

> The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.[209]

Speaking to the *Victorian Charter* context, Meyerson argued for judicial over-enforcement of rights, granting them greater weight in the public interest balancing exercise.[210] In that legislatively driven context, a clearer articulation of how balancing is to be undertaken makes sense. The inherent jurisdiction does not,

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205 Lacey (n 7) 59; Ananian-Welsh (n 88) 67; Beck (n 90) 303–8.

206 Appleby (n 87) 92; Denise Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31(3) *Melbourne University Law Review* 873.

207 Appleby (n 87) 93–4; Meyerson (n 206).

208 See, eg, *Leghaei* (n 74); *Castles* (n 187). For broader, pointed critique of the *Victorian Charter* cases concerning prisoners' rights, see: Debeljak (n 195).

209 *Jago* (n 64), quoted in, eg, *Benbrika (No 20)* (n 151) 426 [79].

210 Meyerson (n 206).

however, lend itself so easily to this kind of elaboration and constraint. This compounds the risks associated with the vague form of balancing involved in an exercise of the inherent jurisdiction.[211]

Justice Bongiorno's 'unprecedented'[212] decision concerning the accused's conditions of imprisonment sparked fears not of judicial deference, but of inconsistency and overreach. By venturing into prison management, this decision 'sits awkwardly' alongside cases in which the High Court has been reluctant to enter disputes about the conditions of immigration detainees, and against *Victorian Charter* cases like *Castles*.[213] The risks posed by this decision to the separation of powers deserve serious consideration and highlight the importance of boundaries and constraints on the inherent jurisdiction.

Ultimately, one judge may be deferential, another might not be, and the concentration of relatively unconstrained power in the judiciary under the inherent jurisdiction means that '[f]aith is placed in the judgment of the individual judge in each instance'.[214] This is far from ideal for the rule of law or separation of powers and it highlights the potential for the inherent jurisdiction to undermine these fundamental constitutional principles. But the inherent jurisdiction has a lengthy history, predating many, if not most, other avenues of fair trial protection. This amorphous set of powers is built into and even underpins the common law system of justice. Its exercise is wedded to the interests of justice and it is subject to oversight by superior courts and, at least to an extent, statutory regulation. The advantages of the inherent jurisdiction as an avenue of fair trial protection are clear. A degree of risk to the rule of law and separation of powers may be the price paid for maintaining the efficacy of the inherent jurisdiction as an instrument for the administration of justice. The weaknesses in the inherent jurisdiction, though troubling, might also begin to be addressed by greater understanding of its nature, bases, scope and operation in the Australian context.

VI Conclusion

The inherent jurisdiction and powers of Australian courts is a complex area shrouded in uncertainty. The inherent jurisdiction is, however, relied upon throughout Australia to support important decisions that significantly impact the processes and outcomes of court proceedings. This article has examined the role of the inherent jurisdiction in the protection of fair trial rights and principles; specifically, in cases concerning secret evidence and conditions of imprisonment.

Though narrow in its scope, this analysis supports a number of conclusions. First, the simultaneous development of fair trial protections and principles under the common law, statute, the *Australian Constitution*, and the inherent jurisdiction does not appear to have rendered the field fractured or incoherent. Focusing on the role

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211 *Jago* (n 64) 57 (Deane J).

212 Bree Carlton and Jude McCulloch, '*R v Benbrika and Ors (Ruling No 20)*: The "War on Terror", Human Rights and the Pre-emptive Punishment of Terror Suspects in High-Security' (2008) 20(2) *Current Issues in Criminal Justice* 287, 288.

213 Groves (n 156) 138; Debeljak (n 195) 1339–51.

214 Appleby (n 87) 91.

of the inherent jurisdiction in this broader context reveals, for example, how this inherent set of powers has shaped constitutional doctrine, while also providing complementary and parallel fair trial protections to statutory charter rights.

Second, as Kirby J recognised in *Batistatos*, the inherent jurisdiction 'has not been subjected to an analysis appropriate to a country whose courts are not established out of the prerogative' but in written constitutions and other Acts of Parliament.[215] The sources, nature, scope and operation of inherent jurisdiction and powers of Australian courts deserve greater scrutiny and analysis.

Third, the inherent jurisdiction has the potential to be a powerful tool in the protection of fair trial rights and principles, with arguable advantages over other protections. It is broad in scope, flexible and adaptable. It is a pragmatic option, with the potential to provide appropriate remedial outcomes at a minimum of additional time or cost to the parties. It has an established place in the common law tradition and is entitled to a (as yet unsettled) degree of protection under the *Australian Constitution*.

But the inherent jurisdiction should be approached with care. Its undefined scope poses a risk to the separation of powers by allowing courts to incur on the domain of the executive government. Simultaneously, its vague contours risk undue judicial deference, again undermining the proper relationship between the branches of government. The scope of the inherent jurisdiction is clearly limited to court proceedings, but its operation and foundations are uncertain in all but superior state courts. The efficacy of the inherent jurisdiction rests upon its breadth and flexibility, and greater understanding of this important class of jurisdiction has the potential to remedy many of its weaknesses. If these issues can be addressed, then the inherent jurisdiction, inherent powers and implied powers of Australian courts have the potential to be better appreciated and perhaps better utilised as one of our most robust, effective and important protections for the fundamental principles of a fair trial in the Australian justice system.

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[215] *Batistatos* (n 3) 295 [122].