volume 46 number 1
march 2024

the sydney law review

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The *Sydney Law Review* is a refereed journal.

ISSN 0082–0512 (PRINT)
ISSN 1444–9528 (ONLINE)

Responsible Government as an Underenforced Norm of the Australian Constitution: *Some Interpretive Consequences*

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Abstract

In this article we argue that responsible government is an underenforced constitutional norm and that it has the potential to play an important role in vindicating constitutional values, but through a principle of statutory interpretation — the principle of legality — rather than constitutional review. Constitutionalising responsible government would raise counter-majoritarian concerns and likely introduce rigidity where flexibility is required. We argue that where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation, the courts ought to apply the principle of legality to restrict the scope of the relevant powers conferred. Of especial concern in this regard are statutes which confer broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. We explain how the capacity for self-government is diminished in these legislative contexts and why the courts are justified in applying legality to vindicate the constitutional norm of responsible government to the extent interpretively possible.

Please cite this article as: Dan Meagher and Benjamin B Saunders, 'Responsible Government as an Underenforced Norm of the *Australian Constitution*: Some Interpretive Consequences' (2024) 46(1) *Sydney Law Review* 1.

DOI: https://doi.org/10.30722/slr.19651

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We express our thanks to the anonymous reviewers for their helpful comments on an earlier version of this article.

I Introduction

'Responsible government is one of the architectonic principles of the *Australian Constitution*'.[1] As the High Court observed in its unanimous judgment in *Lange*, 'That the *Constitution* intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the *Constitution* itself'.[2] Yet the extent to which responsible government is *constitutionalised* — in the sense of being a legally binding principle of constitutional law enforceable by the courts — remains contested.[3] That is probably no surprise. With their origins in the unwritten English constitution, 'the rules relating to responsible government were developed as the result of ... conventions and not strict law'.[4] In Australia, moreover, the key constitutional provisions which provide for responsible government — ss 61, 62, 64 and 83 — do not define its core principles or explain how they are to function. Other than the constitutional mandate that Ministers must be 'a senator or a member of the House of Representatives'[5] the framers 'of the *Constitution* failed to go further than merely to establish ... the *machinery* by which the rules of responsible government could operate and develop'.[6] As Gleeson CJ observed, 'to have descended into greater specificity would have imposed an unnecessary and inappropriate degree of inflexibility upon constitutional arrangements that need to be capable of development and adaptability'.[7]

The principle of responsible government is, then, central to the operation of the *Australian Constitution*. Yet the manner of its operation — including its institutions, membership and processes — is fluid and occurs, primarily, at the sub-constitutional level. Even so, as we detail below, the core elements of responsible government are clear and durable. So too, in our view, is its constitutional essence. It is one of the 'constitutional imperatives which are intended — albeit the intention is imperfectly effected — to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people'.[8] It does so by providing for the executive's accountability to Parliament: a constitutional relationship designed 'to enlarge the powers of self-government of the people of Australia'[9] which is, consequently and principally, mediated through electoral and parliamentary processes. In terms of the constitutional role of Parliament, that accountability is facilitated through Parliament's capacity to

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1 Benjamin B Saunders, 'Responsible Government, Statutory Authorities and the *Australian Constitution*' (2020) 48(1) *Federal Law Review* 4, 4 (citations omitted).

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

3 See Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) ch 7.

4 Geoffrey Lindell, 'Responsible Government' in PD Finn (ed), *Essays on Law and Government Volume 1: Principles and Values* (Law Book Company, 1995) 75, 80.

5 *Australian Constitution* s 64.

6 Lindell, 'Responsible Government' (n 4) 80 (emphasis in original).

7 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 402 [14] ('*Re Patterson*').

8 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J) (citations omitted).

9 *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May 1897, 17 (Sir Edmund Barton) ('*Convention Debates*').

undertake meaningful scrutiny which includes its responsibility for legislation that confers powers on and provides finance to the executive.[10] Of especial interest to our inquiry is the extent to which that political accountability is compromised by certain developments in the institutional and legal arrangements of modern government.

In any event, there can be little doubt that responsible government — and the political accountability which lies at its core — is a *constitutional* norm. Yet it remains orthodoxy in Australia, and properly so in our view, that the accountability required for the effective operation of responsible government is a matter for which Parliament is ultimately responsible. That is, 'the primary means by which the sovereign people are to govern themselves is through the political mechanisms of government, namely Parliament and the executive which is politically accountable to Parliament and the electorate'.[11] It is a constitutional norm which is vindicated, primarily, through the political rather than judicial process. In terms of the judicial role, then, we consider responsible government to be an 'underenforced constitutional norm'.[12] That is, most principles of responsible government in Australia are not legally binding rules of constitutional law enforceable by the courts.

We do, however, wish to argue that there is still an important role for the courts to protect and promote responsible government as a constitutional norm. In the American context, the notion of underenforced constitutional norms has been explained in the following terms: '[t]hey are essentially unenforceable by the Court as a direct limitation upon Congress's power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake'.[13] So too in Australia, in our view. Most relevantly, the constitutional norm of responsible government ought to inform, where appropriate, the application of statutes which confer broadly framed powers and discretions on the executive arm of government, including the power to make secondary legislation. To make that argument, we draw on an account of the judicial role in the context of the High Court's constitutional jurisprudence offered by the then Solicitor-General, Stephen Gageler.[14] That account proceeds from the following proposition:

> You start with the notion that the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power.[15]

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10 See *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ) ('*Egan*'); *Williams v Commonwealth* (2012) 248 CLR 156, 351–2 [516] (Crennan J) ('*Williams*'); Sir Maurice Byers, 'The Australian Constitution and Responsible Government' (1985) 1(3) *Australian Bar Review* 233.

11 Saunders, *Responsible Government and the Australian Constitution* (n 3) 182.

12 See Lawrence Gene Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 *Harvard Law Review* 1212.

13 William N Eskridge Jr and Philip P Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45(3) *Vanderbilt Law Review* 593, 597.

14 Stephen Gageler SC, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138.

15 Ibid 152.

The intensity with which judicial power is exercised is, then, calibrated 'to the strengths and weaknesses of the ordinary constitutional means of constraining government power'.[16] Relevantly, '[y]ou see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered'.[17] We consider that such an account is well suited to the status of responsible government as an underenforced constitutional norm. It provides an attractive normative justification for a judicial role which, in terms of the norm's vindication, is a modest but important one, and one which takes seriously the commitment to self-government which lies at the heart of Australia's constitutional arrangements. It provides also an analytical lens to assist in identifying those elements of responsible government where political accountability as a practical matter is weak.

The focus of our analysis is legislation — specifically, those statutes which confer broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. The argument we offer suggests that there ought to be interpretive consequences for these statutes since the capacity for political accountability is inherently weak as to the manner of their operation. That is because, as Brendan Lim has observed, these kinds of statutes are problematically vague:

> Part of the vice that can attend such vagueness is the democratic deficit incurred when legislatures, by 'refus[ing] to draw the legally operative distinctions [and] leaving that chore to others', seek to avoid responsibility for choices that might be electorally unpalatable if articulated more precisely. Another aspect of that same vice is the distorting effect of delegating that ordinarily legislative responsibility to other branches. …
>
> Vagueness in the conferral of executive power can have the practical effect of delegating to the executive the task of defining the limits of its own authority.[18]

The constitutional norm of responsible government requires Parliament to effectively scrutinise, control and supervise its legislation. If that accountability is strong, the 'ordinary constitutional means of constraining governmental power'[19] are working as the *Constitution* intended. But if Parliament cannot or will not do so, then the capacity for self-government is diminished to that extent. If so, we consider that the courts have a modest but important role in vindicating this constitutional norm. To this end, we will argue that the most appropriate way to give effect to the norm of responsible government in these legislative contexts is through a canon of statutory interpretation, rather than by constitutional implication or a principle of constitutional interpretation. The relevant canon in Australia which may be used and developed to perform this interpretive role is the principle of legality. As Gageler and Keane JJ explained in *Lee v New South Wales Crime Commission*, the principle of legality 'exists to protect from inadvertent and collateral alteration rights,

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16 Ibid.

17 Ibid.

18 Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76, 76–7, quoting John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 130–1.

19 Gageler (n 14) 152.

freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law'.[20] Importantly, legality 'extends to the protection of fundamental principles and systemic values'.[21] The constitutional norm of responsible government is a quintessential principle and value of this kind. If so, then to extend the scope of legality to vindicate responsible government where interpretively possible and constitutionally appropriate is justified in our view. That is the novel doctrinal aspect of our argument. To develop it, we draw on the account of legality offered by Lim in his recent chapter 'Executive Power and the Principle of Legality'.[22] Its application to statutes which confer broadly framed powers and discretions on the executive arm of government would force the legislature to confront the cost of its actions but allow ultimate responsibility to rest with the Parliament.

In order to make our argument, the article will proceed as follows. Part II outlines the analytical framework to be used. It details the concept of underenforced constitutional norms and its relevance to responsible government in the Australian context. We then supplement this with the Gageler account of political accountability and judicial power and explain how it provides an attractive normative justification and useful analytical lens for the core argument offered. Part III considers first how the *Australian Constitution* recognises responsible government. It then explains why the designation of an underenforced constitutional norm is appropriate and what flows from this in terms of the judicial role regarding legislation. Finally, in Part IV, our core argument is fleshed out by way of contemporary examples. We suggest what ought to be the interpretive consequences when political accountability for legislation is strong and when it is weak. As to the latter, we identify those specific contexts where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation. This forms an important part of the wider context in which these statutes fall to be interpreted and applied. On our argument, there is a constitutional justification for applying the principle of legality to restrict the scope conferred by the relevant powers. To do so vindicates the norm of responsible government in legislative contexts where the ordinary processes of political accountability are blocked or weak.

II The Analytical and Theoretical Framework

A *Underenforced Constitutional Norms*

The concept of 'underenforced constitutional norms' was introduced into the American constitutional lexicon by Lawrence Sager.[23] In doing so, he rejected then 'conventional analysis' that 'the scope of a constitutional norm is considered to be

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20 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] ('*Lee*').

21 Ibid. This important point — that the scope of the principle of legality is not confined to 'rights' — was made by Hayne and Bell JJ in *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 [87] ('*X7*'): see Dan Meagher, 'Legality' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1069, 1089–94.

22 Lim, 'Executive Power and the Principle of Legality' (n 18).

23 Sager (n 12).

coterminous with the scope of its judicial enforcement'.[24] Sager rightly observed that due to institutional concerns — such as federalism and judicial competence — there are situations where the federal judiciary cannot 'enforce a provision of the [*United States*] *Constitution* to its full conceptual boundaries'.[25] Consequently, '[w]e … depend heavily upon other governmental actors for the preservation of the principles embodied in these constitutional provisions'.[26] Sager articulated a 'vision of shared responsibility for the safeguarding of constitutional values'.[27] This interesting and valuable insight (in its own right) led Professor Sager to conclude that 'constitutional norms which are significantly underenforced by the federal judiciary nevertheless ought to be regarded as legally valid to their conceptual boundaries:

> [T]he [Supreme] Court would welcome the efforts of Congress and the state courts to shape elusive constitutional norms at their margins, and all governmental officials would regard themselves as bound by the full reach of all constitutional norms, including those which partially elude federal judicial enforcement.[28]

In their seminal article 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' William Eskridge Jr and Philip Frickey employed the concept of underenforced constitutional norms but for a quite different purpose. They did so to offer a possible normative justification for the suite of strong clear statement rules the Supreme Court had developed and applied to protect constitutional values and 'structures, especially structures associated with federalism'.[29] They characterised this as the court 'creating a domain of "quasi-constitutional law" in certain areas: Judicial review does not prevent Congress from legislating, but judicial interpretation of the resulting legislation requires an extraordinarily specific statement on the face of the statute for Congress to limit the states or the executive department'.[30] The development of this quasi-constitutional law was justified, arguably, because 'structural constitutional protections, especially those of federalism, are underenforced constitutional norms'.[31] In so arguing, Eskridge and Frickey employed Professor Sager's concept to explain how the *courts* (rather than other governmental actors) are justified in using their *interpretive* (rather than judicial review) powers to better realise the scope of underenforced constitutional norms. It is this conception which is of interest to our present inquiry.

Yet it is a more sophisticated account of underenforced constitutional norms offered by Ernest Young that will form one of the two bases — theoretical and analytical — of our core argument. First, this account suggests that such norms 'have two primary characteristics: They are plagued by line-drawing problems that make development of invalidation norms difficult, and they are fields in which we can expect *political* safeguards to play the primary role in protecting the underlying

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24 Ibid 1220.
25 Ibid 1213.
26 Ibid 1263.
27 Ibid.
28 Ibid 1264.
29 Eskridge and Frickey (n 13) 597.
30 Ibid.
31 Ibid.

constitutional values'.[32] Second, and as a consequence, the strong normative canons of interpretation known as clear statement rules 'are the best way — and perhaps the *only* way — of giving voice to constitutional norms that are real, not phantoms, and that are generally left underenforced by more conventional types of doctrines'.[33] Third, the account is situated within the wider framework of the *United States Constitution* and the judicial task in applying interpretive principle to determine the legal meaning of a statute:

> [S]tatutory interpretation always takes place against a background of underlying purposes and values, including constitutional values. The basic continuity of statutory and constitutional interpretation, in turn, allows us to think of the avoidance canon and the clear statement rules not so much as substitutes for constitutional adjudication, but rather as a means by which constitutional principles are sometimes vindicated.[34]

On this account, these '[n]ormative canons … become another source of statutory meaning, not materially different from legislative history or judicial precedents'.[35] This proposition, moreover, addresses an important concern raised by Eskridge and Frickey that to use these interpretive canons to 'enforce' these constitutional norms amounts 'to a "backdoor" version of … constitutional activism'.[36] Relevantly, the essence of these constitutional norms is that their enforcement is, primarily, for the political process. If so, then is not the use of these interpretive canons 'a backdoor way for the Court to take these issues back from the political process?'[37] But, as Young observes, these (underenforced) constitutional norms form part of the wider legal context in which statutes fall to be interpreted and applied. That being so, 'the substantive constitutional values protected by the avoidance canon [and others] are inseparable from a court's search for statutory meaning'.[38] The *United States Constitution* — and the interpretive canons which it informs — is 'a source of statutory meaning which is no less legitimate than other "principles and policies" which frequently enter into interpretation'.[39] We would add that the political process is the primary — but not the only — means by which underenforced constitutional norms are vindicated. The fact that courts rarely (if ever) directly enforce these norms through strong judicial review does not, ipso facto, make their vindication through statutory interpretation inappropriate or illegitimate. Indeed, to do so 'integrate[s] statutes into the broader constitutional structure and vindicate[s] broader public values immanent in constitutional law'.[40] We agree with Professor Young that such an (interpretive) approach 'in a constitutional system that leaves

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32 Ernest A Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (2000) 78(7) *Texas Law Review* 1549, 1603 (emphasis in original) ('Constitutional Avoidance').

33 Ibid 1585 (emphasis in original).

34 Ernest A Young, 'The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey' (2010) 98(4) *California Law Review* 1371, 1384.

35 Young, 'Constitutional Avoidance' (n 32) 1591.

36 Eskridge and Frickey (n 13) 598.

37 Ibid 635.

38 Young, 'Constitutional Avoidance' (n 32) 1592.

39 Ibid 1591 (citations omitted).

40 Young, 'The Continuity of Statutory and Constitutional Interpretation' (n 34) 1387.

much of its institutional structure to be "constituted" by ordinary legislation … makes sense'.[41]

We will argue below that, on this account, responsible government is an underenforced constitutional norm of the *Australian Constitution*. Yet we consider that the interpretive consequences of such a designation need to be nuanced and context sensitive. Relevantly, it does not justify in our view the application of a strong interpretive canon such as the principle of legality *whenever* a statute implicates the principle. Indeed, on the contrary. The essence of responsible government as an underenforced constitutional norm is that its vindication is ultimately a matter for the political process; and when those institutional and legal mechanisms are functioning effectively, the judicial role is necessarily a limited one.

The existence of the implied freedom of political communication, which intends to ensure that any restrictions on the free flow of communication about government and political matters are proportionate to a legitimate end, has often been justified by reference to the centrality of representative and responsible government to the Australian constitutional system.[42] The implied freedom is best seen as ensuring that some of the conditions necessary for responsible government to function properly exist rather than any attempt to directly enforce the conventions of responsible government;[43] many other aspects of responsible government remain underenforced.

In terms of legislation, responsible government requires its effective scrutiny, control and supervision by Parliament. But if Parliament cannot or will not perform its constitutional functions, the principle — and the capacity for self-government — is undermined as a consequence. In these circumstances, we argue, the courts may have a modest but important interpretive role in vindicating the norm. But what is then needed is an analytical and theoretical approach to identify those legislative contexts. The account of political accountability and judicial power offered by then Solicitor-General Stephen Gageler could assist in doing so in our view. If used to supplement and inform the notion of responsible government as an underenforced constitutional norm of the *Australian Constitution*, it provides an attractive normative justification and useful analytical lens for the core argument offered below. It is to Gageler's account that we now turn.

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41 Ibid 1392.

42 See, eg, *Lange* (n 2) 561–2, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 222–3 [101]–[102] (Gageler J) ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ) ('*Brown*').

43 *Gerner v Victoria* (2020) 270 CLR 412, 426 [24] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 578 [135] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [196], 601 [225] (Keane J); *Brown* (n 42) 359 [88] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 614 [40] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 196 [51] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 22 [44] (Kiefel CJ, Keane and Gleeson JJ). For an account of the implied freedom of political communication which takes seriously the constitutional principles of representative and responsible government, see Dan Meagher, 'The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference' (2011) 30(1) *University of Queensland Law Journal* 119.

B *Political Accountability and Judicial Power: The Gageler Account*

We agree that statutory interpretation has the capacity to vindicate underenforced constitutional norms. But in terms of responsible government in the Australian constitutional context, it is important to explain how and when this exercise of judicial power is normatively justified. There are myriad ways and instances in which the principles of responsible government are engaged by statute. Yet it is ultimately the constitutional responsibility of Parliament to ensure that the relevant statutory powers, functions and responsibilities are properly exercised. That indeed is the essence of the constitutional norm. The judicial role is, then, ordinarily a limited one in the norm's vindication. If so, it becomes necessary to identify those statutory contexts where our judges are justified in using their interpretive powers to protect and promote responsible government. To this end, we draw on an account offered by then Solicitor-General Stephen Gageler in the published version of his 2009 Sir Maurice Byers Lecture.[44]

The aim of the account was to explain and defend 'some of the main themes of modern constitutional doctrine'.[45] This was done by offering an 'over-arching understanding of the structure and function of the *Australian Constitution* and of the role of the exercise of judicial power in maintaining that structure and function'[46] — specifically, how the structure of the *Constitution* has informed the function of judicial power and the manner of its exercise in the High Court's constitutional jurisprudence. In doing so the account has the capacity 'to explain and to guide judicial review within [Australia's] constitutional system'.[47] Though offered in the constitutional context of judicial review, the account can help explain when and how our judges are justified in using statutory interpretation to vindicate the (underenforced) norm of responsible government. This, we suggest, is no surprise for two reasons. First, Gageler's concern was to outline 'the role of the exercise of judicial power'[48] in the maintenance of constitutional text and structure. Yet the exercise of judicial power involves both judicial review *and* statutory interpretation. Indeed, the former cannot be undertaken without doing the latter first.[49] That being so, an account of the judicial role for the purposes of constitutional review provides a normative basis to ground a complementary approach to statutory interpretation. And second, the foundational premise of the Gageler account is that 'the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia'.[50] This account of Australia's constitutional system of government is underpinned by the principle of responsible government, a constitutional norm which, the High Court has noted, seeks 'to enlarge the powers

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44 Gageler (n 14).
45 Ibid 139.
46 Ibid 140.
47 Ibid 151.
48 Ibid 140.
49 *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 36–41 [49]–[68] (McHugh J), 68 [158] (Gummow and Hayne JJ), 80–1 [207] (Kirby J), 115 [306] (Heydon J).
50 Gageler (n 14) 152. See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 408 ALR 381, 404 [86] (Gordon J) ('*Davis*').

of self-government of the people of Australia'[51] through the institutions and processes of political accountability.

The Gageler account recognises 'that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power'.[52] That being so, Gageler suggested the following as the appropriate role and function of the courts:

> You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.[53]

In terms of the constitutional norm of responsible government specifically, judicial deference will, necessarily, be the default position. This reflects the primacy of political accountability for the norm's vindication. Gageler's account draws on the account of judicial review advocated in John Ely's landmark work *Democracy and Distrust*, which argued that the courts ought to respect decisions reasonably reached by the democratic institutions of government and only exercise judicial review where those institutions gave rise to malfunctions or abuse.[54] According to such a 'representation-reinforcing' approach to judicial review, 'the intensity and strength of judicial review should vary according to the degree of recent and reasoned legislative deliberation'.[55]

In any event, Gageler's account makes good sense in the context of statutes that condition and mediate the relationship between Parliament and the executive. It is principally a matter for Parliament to determine the scope of the powers, functions and responsibilities which are conferred upon the executive arm of government. Parliament also plays a key role in supervising and scrutinising the exercise of power by the executive. But in those legislative contexts where Parliament cannot or will not discharge its constitutional responsibility, a more vigilant judicial role is justified. However, we argue that this ought to be through the principle of legality, a canon of statutory (not constitutional) interpretation. Relevantly, the courts ought to apply these statutes in a manner which vindicates the norm of responsible government to the extent interpretively possible and constitutionally appropriate. That is the core of our argument. To make good on it we turn first to explain why responsible government is an underenforced norm of the *Australian Constitution* before exploring when and what interpretive consequences may then arise.

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51 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 228 (McHugh J), quoting *Convention Debates* (n 9) 17 (Sir Edmund Barton) ('*Australian Capital Television*').

52 Gageler (n 14) 152.

53 Ibid.

54 Ely (n 18).

55 Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) 1, 6.

III Responsible Government as an Underenforced Norm of the *Australian Constitution*

A *Why Judicial Enforcement of Responsible Government as a Constitutional Norm Is Contested*

Many High Court decisions have noted the centrality of responsible government to the *Australian Constitution*. Isaacs J famously described responsible government as 'part of the fabric on which the written words of the *Constitution* are superimposed'[56] and the High Court has described it as 'the central feature of the Australian constitutional system'.[57] However, the text of the *Constitution* relating to the executive is sparse and reveals few of the key features of responsible government;[58] as put by Harrison Moore, the *Constitution* establishes little more than a parliamentary executive, leaving the rest to custom and convention.[59] This means that the nature and meaning of responsible government must be sought from sources external to the *Constitution*,[60] and also, as a result, that its nature is open to contestation.

Some emphasise accountability as the heart of responsible government. Gordon J wrote in *Comcare v Banerji* that '[s]ecuring accountability of government activity is the very essence of "responsible government" — the system of government by which the executive is responsible to the legislature'.[61] Responsible government provides the means by which the executive is held accountable to Parliament.[62] As such, it might be thought that accountability is a core focus of the constitutional norm of responsible government, and that there ought to be increased vigilance when accountability is threatened or undermined.

However, while accountability is a core feature of responsible government, there are other values or features which are also fundamental to it, which include the following. First, the Australian conception of responsible government is a strongly political conception, emphasising that the mechanisms of accountability are primarily political — through the institutions of Parliament and the electoral process

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56 *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413.

57 *R v Kirby; Ex parte Boilermakers' Society* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146–7 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers*'); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 114 (Evatt J) ('*Dignan*'); *Lange* (n 2) 557–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy* (n 42) 224 [106] (Gageler J), 279 [301] (Gordon J); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 112 [260] (Gordon J); *Comcare v Banerji* (2019) 267 CLR 373, 437 [149] (Gordon J) ('*Comcare*').

58 Colin Howard and Cheryl Saunders, 'The Blocking of the Budget and Dismissal of the Government' in Gareth Evans (ed), *Labor and the Constitution: 1972–1975* (Heinemann, 1977) 251, 265.

59 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, 2nd ed, 1910) 168–9.

60 Brian Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' (1980) 15(2) *Politics* 1, 1.

61 *Comcare* (n 57) 436 [146] (Gordon J).

62 *Comcare* (n 57) 436–7 [146]–[148] (Gordon J); *Williams* (n 10) 349–50 [509], 351 [515] (Crennan J); *Egan* (n 10) 451 (Gaudron, Gummow and Hayne JJ); *Dignan* (n 57) 123 (Evatt J); *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 449 (Isaacs J); *Davis* (n 50) 402–3 [78], [80] (Gordon J).

— and not judicial. Second, responsible government is inherently flexible, intended to allow significant changes in the structure of government and mechanisms of accountability so as to adapt to social and political changes.[63] Third, a key feature of responsible government is popular sovereignty; as Gageler observed, 'the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia'.[64]

Some have argued that responsible government ought to be constitutionalised or at least given greater legal effect, for reasons such as to reduce the discretionary power of the Governor-General, to ensure greater ministerial control over non-departmental executive agencies, and to ensure that the will of the people is made effective.[65] However, despite the centrality of responsible government to the constitutional structure, the High Court has shown a reluctance to enforce its principles. There are several reasons for this. The first is due to the sparsity of the constitutional text. As noted, the *Constitution* contains little recognition of the core features of responsible government and does not mandate or entrench its conventions or structures.[66] As such, its meaning must be gleaned from sources external to the *Constitution*. Attempting to enforce responsible government by reference to extra-constitutional sources would not sit easily with the High Court's standard insistence that its task in constitutional interpretation is to interpret and apply the text of the *Constitution*, read in light of the *Constitution* as a whole and informed by history.[67] Implications may only be drawn where these are 'necessary or obvious'.[68]

The second reason for the under-enforcement of responsible government relates to the need to preserve flexibility. The sparse text of the *Constitution* is intended to allow the practical working of responsible government to be determined by legislation and constitutional convention, thus preserving flexibility in governmental arrangements. In *Re Patterson; Ex parte Taylor* Gummow and Hayne JJ considered that the Court 'should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial

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63 *Re Patterson* (n 7) 401 [11], 402 [14] (Gleeson CJ), 459 [211] (Gummow and Hayne JJ); Byers (n 10) 233.

64 Gageler (n 14) 152.

65 Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 18; JE Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 50, 84–5; George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 4–5, 125; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 369.

66 The obvious exception to this is s 64 of the *Constitution*, which requires ministers to be members of Parliament.

67 *Engineers* (n 57) 142, 149 (Knox CJ, Isaacs, Rich and Starke JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549 [35], 551 [40] (McHugh J); *Eastman v The Queen* (2000) 203 CLR 1, 45–7 [145]–[147], 49 [154] (McHugh J); *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19] (Gleeson CJ), 348 [52] (McHugh J), 413 [247] (Kirby J), 425 [295] (Callinan J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 622 [167] (Kirby J).

68 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 362 (Dawson J). See also *Australian Capital Television* (n 51) 135 (Mason CJ); *Lange* (n 2) 570 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

government'[69] and Gleeson CJ held that the provisions of Ch II of the *Constitution* 'are expressed in a form which allows the flexibility that is appropriate to the practical subject of governmental administration'.[70] There has been a judicial reluctance to enforce the conventions of responsible government as rigid constitutional rules, no doubt partly motivated by a desire to preserve flexibility.[71]

Third, responsible government reflects a strongly political model of constitutionalism under which it is considered that it is primarily for the political process, and not the courts, to police compliance with the principles of responsible government. Brennan J wrote in *Australian Capital Television v Commonwealth*:

> The Parliament chosen by the people — not the courts, not the Executive Government — bears the chief responsibility for maintaining representative democracy in the Australian Commonwealth. Representative democracy, as a principle or institution of our *Constitution*, can be protected to some extent by decree of the Courts and can be fostered by Executive action but, if performance of the duties of members of the Parliament were to be subverted by obligations to large benefactors or if the parties to which they belong were to trade their commitment to published policies in exchange for funds to conduct expensive campaigns, no curial decree could, and no executive action would, restore representative democracy to the Australian people.[72]

Because of the limited judicial recognition and enforcement of responsible government, it might seem an obvious conclusion that responsible government is an underenforced constitutional norm. But this is not straightforwardly the case. Sager distinguishes judicial underenforcement of a constitutional concept for analytical reasons from underenforcement for institutional reasons. According to Sager, an underenforced constitutional norm is one that is underenforced primarily for institutional reasons rather than conceptual reasons — that is, where the judiciary is unwilling to enforce the norm because of concerns about capacity or propriety.[73] Judicial restraint which arises from a correct understanding of the concept itself is not underenforced according to Sager's definition.

Responsible government is, perhaps, a unique category because it does not fall neatly on either side of this binary but is underenforced for both analytical and institutional reasons.[74] Indeed, the conduct of government in accordance with constitutional conventions is fundamental to responsible government. That is, the institutional restraint of the judiciary is inherent to the political nature of the concept of responsible government. This means that arguments that responsible government should receive greater levels of recognition and enforcement by the judiciary are not simply calls for the greater enforcement of an underenforced constitutional norm:

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69 *Re Patterson* (n 7) 460 [211] (Gummow and Hayne JJ).

70 Ibid 401 [11], 402 [14] (Gleeson CJ).

71 Cf Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 28–9.

72 *Australian Capital Television* (n 51) 156 (Brennan J). See also *Lange* (n 2) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

73 Sager (n 12) 1217–8.

74 We noted above in Part II(A) that the implied freedom establishes one of the conditions necessary for the proper functioning of responsible government but does not directly seek to enforce its conventions.

arguably, they are calls for the recognition of quite a different conception of responsible government.

B *Vindicating the Constitutional Norm of Responsible Government through Statutory Interpretation*

According to Sager, underenforced constitutional norms should be considered valid to their full conceptual limits, and government officials other than the courts have an important role to play in giving effect to such norms.[75] This is uncontroversially true with respect to responsible government, given that government is conducted in accordance with constitutional conventions which are considered politically binding on relevant actors, and subject to accountability by means of the political process. Further, we consider that the courts ought to play an important role in giving effect to responsible government as well. That role, however, ought to be limited in the constitutional realm. In particular, the courts ought to be cautious before drawing implications from the *Constitution* which limit the freedom of Parliament to structure the institutions of government.[76] We argue that principles of statutory interpretation are the most democratically legitimate means of giving full conceptual effect to the norm of responsible government by the courts, and the means most consistent with its inherently political nature.[77] To this end, a restrictive canon of interpretation such as the principle of legality ought to be applied to statutes that threaten or undermine the core principles of responsible government.

Central to responsible government is a strongly political conception under which courts have a particular constitutional and institutional role. Thus, our argument recognises that there are areas of power within the Australian constitutional system that properly belong to the other branches of government, which are politically accountable.[78] To adapt an argument made by Lynsey Blayden, this is a view of the role of the courts that is 'calibrated for a constitutional system committed to majoritarian principles'.[79] Our argument, moreover, complements that of Lisa Burton Crawford, who has proposed an institutional justification for the principle of legality, based on the accepted constitutional functions of Parliament and the courts.[80] Indeed, the arguments mirror each other: in light of the inadequacy of the democracy-enhancing justification, Crawford is concerned to defend the principle of legality by reference to institutional considerations; our argument aims to vindicate institutional considerations, especially the constitutional principle of responsible government and the values it seeks to promote, by means of the principle of legality.

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75 Ibid 1226–7.

76 Saunders, *Responsible Government and the Australian Constitution* (n 3) 182.

77 Our argument is broadly consistent with the approach taken in *Davis* (n 50), where the High Court employed the constitutional principle of parliamentary supremacy when interpreting the scope of executive power conferred by s 351 of the *Migration Act 1958* (Cth).

78 Lynsey Blayden, 'Institutional Values in Judicial Review of Administrative Action: Re-Reading *Attorney-General (NSW) v Quin*' (2021) 49(4) *Federal Law Review* 594, 611.

79 Ibid 611.

80 Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511.

Our argument is also consistent with the typically incremental development of constitutional doctrine in Australia. There is a strong emphasis on the text and structure of the *Constitution* in constitutional interpretation; as the High Court held in *Amalgamated Society of Engineers v Adelaide Steamship Co*, 'it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed'.[81] According to such an approach, the conventions of responsible government should not be judicially enforceable without clear warrant from the text and structure of the *Constitution*.

Cass Sunstein has argued that interpretive principles and canons of interpretation are desirable and inevitable given that statutory interpretation 'cannot occur without background principles that fill gaps in the face of legislative silence and provide the backdrop against which to read linguistic commands'.[82] The *Constitution* and constitutional norms provide arguably the most important aspect of these background principles against which statutes are enacted and interpreted.[83] The *Constitution* 'is not an ordinary statute: it is a fundamental law' and 'the basic law of the nation'.[84] As such, Sunstein argues that many constitutional norms 'deserve a prominent place in statutory interpretation'.[85] Indeed, 'statutory interpretation always takes place against a background of underlying purposes and values, including constitutional values'.[86]

Several authors have argued that statutory interpretation is one way that courts can uphold constitutional norms without running into counter-majoritarian difficulties, thereby making up for cautious constitutional interpretation.[87] Significant political decisions should be made by those branches of government that are democratically accountable to the people, and so judicial review is an exceptional power which should only be exercised where a statute is clearly inconsistent with the *Constitution*.[88] Thus, canons of statutory interpretation such as presumptions and clear statement rules are one means of enforcing constitutional norms, namely by raising 'the costs of statutory provisions invading such norms', but without striking down the relevant statute as unconstitutional.[89] Implementing constitutional values 'through super-strong clear statement rules (quasi-constitutional law) is less countermajoritarian than [implementing] those values through direct judicial review (constitutional law)'[90] because it forces the legislature to confront the political cost

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81 *Engineers* (n 57) 142 (Knox CJ, Isaacs, Rich and Starke JJ). See also at 149 (Knox CJ, Isaacs, Rich and Starke JJ).

82 Cass R Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103(2) *Harvard Law Review* 405, 504.

83 Ibid 466, 468.

84 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J); *Ha v New South Wales* (1996) 137 ALR 40, 43 (Kirby J). See also *Brownlee v The Queen* (2001) 207 CLR 278, 313 [103] (Kirby J).

85 Sunstein (n 82) 468.

86 Young, 'The Continuity of Statutory and Constitutional Interpretation' (n 34) 1384.

87 Eskridge and Frickey (n 13) 596–7.

88 Ibid 630.

89 Ibid 631.

90 Ibid 637.

of what it is doing, but leaves ultimate responsibility to the legislature.[91] Statutory interpretation results in 'less disruption to the political and legislative processes' than constitutional adjudication.[92] Interpretive canons may lead to results contrary to that desired by the legislature,[93] but this is consistent with the proper role of the courts given that the legislature retains power to override those positions by passing legislation.

Ernest Young has argued that certain constitutional norms ought to be considered as 'resistance norms' — that is, norms that protect structural constitutional values that may be more or less yielding to government action, without being a form of strong judicial review.[94] Young argues that resistance norms are valuable where political safeguards play the primary role in protecting the underlying constitutional values; resistance norms can enhance rather than override these safeguards. Young argues that the *Constitution* does not forbid incursions on resistance norms; it rather makes such incursions more difficult.[95]

In our view, this provides a nuanced and helpful framework for the recognition and enforcement of responsible government in Australian law. As noted, responsible government is central to the Australian constitutional system. There are, however, conceptual and institutional difficulties with seeking to enforce the principles of responsible government judicially. Consistent with the argument of Sager, we argue that, even though responsible government is not fully judicially enforceable as a constitutional norm, it should be considered valid to its full conceptual limits. We have argued above that the norms of accountability, flexibility and popular sovereignty are central to the Australian constitutional conception of responsible government. This means that any attempt to give effect to or recognise responsible government in Australian law must do so in a nuanced way that recognises the primarily political nature of the norm, preserves the ability of the people of Australia to govern themselves and enables flexibility in governance arrangements. As we have noted, responsible government is inherently political, which means that many matters are best dealt with by the political process.[96]

We consider that the principle of legality — a canon of statutory interpretation that can be trumped by the legislature — is consistent with these requirements, unlike the arguments for constitutional recognition proposed by scholars such as Professor Geoffrey Lindell and others.[97] We therefore propose that responsible government should be protected and promoted in Australia through this canon of statutory interpretation rather than judicially enforced constitutional

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91 It is true that judicial interpretations may persist where Parliament fails to pass legislation overturning a decision it disagrees with: Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 400.

92 Daniel B Rodriguez, 'The Presumption of Reviewability: A Study in Canonical Construction and its Consequences' (1992) 45(3) *Vanderbilt Law Review* 743, 744.

93 Sunstein (n 82) 454.

94 Young, 'Constitutional Avoidance' (n 32) 1594.

95 Ibid 1553, 1596.

96 See Blayden, 'Institutional Values in Judicial Review of Administrative Action' (n 78).

97 See above n 65. Here, we disagree with Brendan Lim that the counter-majoritarian difficulty is 'no less acute (and in some circumstances more acute) in the case of "mere" interpretation' because a judicial interpretation may persist in situations where Parliament fails to pass legislation overturning a decision it disagrees with: Lim, 'The Normativity of the Principle of Legality' (n 91) 400.

implications. We outline below the legislative contexts in which legality ought to be applied and why. On our account, responsible government should be given effect to as a form of quasi-constitutional law, providing a resistance norm that is more or less yielding depending on the statutory and wider context. As with Gageler's account, the intensity of review scales up when core values are threatened or undermined. Such an approach would force the legislature to confront the political cost of implementing arrangements that significantly entrench upon core values which underlie responsible government, but would leave ultimate responsibility with the democratic branches of government.

We argue that the constitutional norm of responsible government may find recognition in the principle that when the ordinary constitutional mechanisms of accountability are deficient, the courts apply the principle of legality to interpret legislation in a manner that supports accountability or applies heightened scrutiny: and especially so where the statute is problematically vague. Yet legality would not be applied to all statutes that condition and mediate the relationship between Parliament and the executive. As we detail in Part IVA below, in those contexts where Parliament effectively scrutinises, controls and supervises this legislation, political accountability is strong and the 'ordinary constitutional means of constraining governmental power'[98] are working as the *Constitution* intended. Instead, we argue that the principle of legality ought only to be applied to statutes that threaten or undermine the core values of political accountability and democratic legitimacy. As the analysis undertaken in Part IVB will demonstrate, legality's application will usually operate to restrict the scope of the powers conferred on the executive by the relevant statute. This is done to vindicate the constitutional norm of responsible government. For in those contexts where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation, the capacity for self-government is diminished to that extent.[99]

IV Interpretive Consequences

Ministerial responsibility to Parliament for the conduct of the executive is a core feature of the accountability contemplated by responsible government. However, due to factors such as the sheer size of the executive and the dominance of the party system, ministerial accountability is often considered to provide a weak constraint on the government.[100] In many ways, this ought not to be considered problematic given that there exist extensive mechanisms of review and scrutiny in relation to the executive; these include judicial review and the mechanisms of administrative law

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98 Gageler (n 14) 152.

99 Our argument as to how (and when) the application of the principle of legality ought to vindicate the constitutional norm of responsible government illustrates the point made by Lisa Burton Crawford 'that the principles and process of statutory interpretation are informed by constitutional norms and the constitutional distribution of powers': Crawford (n 80) 527.

100 See, eg, Gabrielle Appleby, 'Unwritten Rules' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 209, 229–30; Janina Boughey and Greg Weeks, 'Government Accountability as a Constitutional Value' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 108–12; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 467 [93] (Kirby J).

such as merits review, as well as scrutiny bodies such as ombudsmen, auditors-general and anti-corruption commissions which exist in many Australian jurisdictions. In addition, many public sector office-holders are subject to enforceable duties[101] and public authorities in some jurisdictions are required to act compatibly with human rights.[102] In many contexts, therefore, there exist effective extra-parliamentary mechanisms to hold the executive to account and ensure compliance with human rights norms. Contrary to stereotypes of the executive as the champion of arbitrary power which are still invoked,[103] executives have a strong incentive to impose mechanisms of scrutiny and control on themselves.[104] Parliamentary committees can also play an important role in improving the effectiveness of rights protection in the development and content of legislation.[105]

While it is difficult to measure accountability,[106] there is some evidence that these mechanisms of accountability function effectively. Greg Weeks has argued that 'there can be no doubt that the Ombudsman is effective in holding the government to account, both by responding to complaints and exercising its own investigatory powers'.[107] Brian Head has argued that specialised integrity agencies 'have often been effective not only in tackling corrupt or fraudulent activities, but also in helping senior office-holders to avoid conflicts of interest and in contributing to a culture of accountability and transparency'.[108] Parliamentary inquiries in different jurisdictions have found that auditors-general perform their role effectively.[109] Mechanisms of accountability such as these provide scrutiny through independent officers who are not subject to the demands of party allegiance and discipline, which helps to fill the gaps in democratic scrutiny and executive accountability that are not sufficiently addressed by the structures of responsible government.[110]

However, there are gaps in the applicability of these mechanisms. Administrative law remedies have limited application to government-owned

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101 *Public Governance, Performance and Accountability Act 2013* (Cth) ss 15–29.

102 *Human Rights Act 2004* (ACT) s 40B; *Human Rights Act 2019* (Qld) s 58; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

103 *Williams* (n 10) 352 [521] (Crennan J).

104 Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999) 105, 396; Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) ch 4.

105 Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Springer, 2020).

106 See generally Brian W Head, AJ Brown and Carmel Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008); Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020).

107 Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 244.

108 Brian W Head, 'The Contribution of Integrity Agencies to Good Governance' (2012) 33(1) *Policy Studies* 7, 7.

109 Public Accounts Committee, Parliament of New South Wales, *Efficiency and Effectiveness of the Audit Office of New South Wales* (Report, September 2013); Joint Standing Committee on Audit, Parliament of Western Australia, *Review of the Operation and Effectiveness of the Auditor General Act 2006* (Report, August 2016).

110 Blayden, 'Institutional Values in Judicial Review of Administrative Action' (n 78) 618. On the adoption of the new administrative law reforms, see Lynsey Blayden, 'Designing Administrative Law for an Administrative State: The Carefully Calibrated Approach of the Kerr Committee' (2021) 28(4) *Australian Journal of Administrative Law* 205.

companies and statutory agencies[111] and there is limited enforcement of the duties owed by public sector officials.[112] Structural agency concerns limit the effectiveness of the mechanisms of ministerial responsibility in relation to non-departmental agencies.[113] Further, the primary mechanism for scrutiny of secondary legislation is through Parliament, and extra-parliamentary mechanisms typically have limited applicability in relation to secondary legislation. This suggests that there are areas of executive activity where existing mechanisms of scrutiny are weak. It is in these contexts that the principle of legality may have important work to do to facilitate the political accountability which lies at the core of the constitutional norm of responsible government.

Our core argument is that in contexts where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation, the courts ought to apply the principle of legality to restrict the scope of the relevant powers conferred or require a clear statement which confronts the cost of conferring such power on the executive. That is justified when legislation (or the manner of its application) undermines the mechanisms and processes of political accountability which lie at the core of responsible government. And legislation does so, in our view, when it confers broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. To this end, we identify below specific legislative contexts where legality may have meaningful interpretive work to do.

The principle underlying our proposed interpretive approach is the following. We argue that the application of the principle of legality would require an unambiguously clear statement before a court would interpret legislation so as to depart from the core principles of responsible government.[114] We have argued that accountability, popular sovereignty and the need to preserve flexibility are central to responsible government. In our view, the court should not readily construe legislation in such a manner as to depart from these norms but should require an unambiguous statement to that effect. We outline below four examples of situations where the requirement of an unambiguously clear statement would apply, and how it might impact the interpretation of legislation. These legislative contexts are instances where the 'ordinary constitutional means of constraining governmental power'[115] are not working as the *Constitution* intended.

A *The Exemption of Delegated Legislation from Disallowance*

First, the promulgation of secondary legislation by the executive government is, by definition, authorised but not enacted by Parliament. In terms of the constitutional norm of responsible government, 'Parliament must retain control over its delegated

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111 Yee-Fui Ng, 'In the Moonlight? The Control and Accountability of Government Corporations in Australia' (2019) 43(1) *Melbourne University Law Review* 303.

112 Benjamin B Saunders and David Lau, 'An Analysis of the Enforcement of Duties Owed by Public Sector Officials' (2021) 32(4) *Public Law Review* 313.

113 Benjamin B Saunders, 'Ministers, Statutory Authorities and Government Corporations: The Agency Problem in Public Sector Governance' (2022) 45(2) *Melbourne University Law Review* 695.

114 Sunstein (n 82) 457–8.

115 Gageler (n 14) 152.

legislative power and be in a position to supervise the exercise of delegated legislative powers in order to be effective in exercising that control'.[116] But problematic in this regard is the increasing reliance of executive governments 'on delegated legislation which is partially or totally exempt from parliamentary disallowance and other forms of scrutiny'.[117] In 2019, for example, at the Commonwealth level '20 per cent of the 1,675 laws made by the executive were exempt from disallowance' and many exemptions received little parliamentary consideration when they were enacted.[118] While there may be legitimate reasons for specific disallowance exemptions,[119] the practice nevertheless undermines Parliament's constitutional role to provide effective scrutiny and supervision of secondary legislation. Parliamentary accountability is weakened as a consequence.

However, one might reasonably posit that as Parliament has caused the problem, it is Parliament that has the power and constitutional responsibility to fix it, should the political will exist to do so. This proposition is clearly correct as a matter of principle. But an important aspect of our system of constitutional government undercuts the practical utility of this principle. Relevantly, governments of both political stripes benefit (when in power) from secondary law-making power which is exempt from parliamentary disallowance and other forms of scrutiny. There is, then, a bipartisan political interest in the maintenance of statutory provisions that provide these exemptions. That being so, there is a justification, in our view, for the courts to apply the principle of legality to presumptively restrict the scope of the secondary law-making power so far as interpretively possible and constitutionally appropriate. To do so would reflect the fact that the ordinary processes of political accountability for this secondary legislation are not functioning optimally; a restrictive interpretation would operate to *minimise* the scope of executive (law-making) power which is not subject to parliamentary scrutiny and supervision. A strict(er) application of legality might, for example, confine the scope of the secondary law-making power to only what is expressly provided and to those matters which are authorised by 'necessary implication' where the test of what is 'necessary' is a stringent one.[120] Relevantly, the matter said to arise by implication is only 'necessary' if the purpose(s) of the statute would otherwise be 'defeated'.[121] This approach may operate within an interpretive and review framework for secondary

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116 Anne Twomey, Submission No 18 to Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (28 June 2020) 1, quoted in *Final Report* (March 2021) 19 [3.41].

117 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Interim Report* (December 2020) 3 [1.3].

118 Ibid xiii, xiv.

119 Ibid 13.

120 This proposition draws on the account of legality offered in the seminal case of *Coco v The Queen* (1994) 179 CLR 427 ('*Coco*') where Mason CJ, Brennan, Gaudron and McHugh JJ stated that the test to rebut the principle of legality by necessary implication was 'a very stringent one': at 438 (citations omitted).

121 This proposition draws on the account of legality offered by Hayne and Bell JJ (Kiefel J agreeing) in *X7* (n 21) 149 [142] where it was stated that to rebut the principle of legality 'the implication must be necessary, not just available or somehow thought to be desirable'. Relevantly, the statutory 'purpose or purposes … would be defeated' if the law did not impliedly authorise infringement of the fundamental rights implicated.

legislation which tailors the intensity with which legality is applied to the importance of the constitutional norm of responsible government and the threat to its core value of political accountability which arises in this legislative context.[122]

This will not remove the threat to responsible government and the capacity for self-government which is posed by this worrying contemporary development. But it will at least minimise the extent to which responsible government is undermined by the absence of effective political accountability in this increasingly important secondary legislative context.

B *Interpretation of Powers Conferred on the Executive*

Second, the courts ought to apply legality to construe powers conferred on executive bodies and officials narrowly, especially non-elected bodies and where broadly framed powers and discretions are conferred.[123] In some contexts extremely broad discretions are conferred on executive officers, especially under migration legislation,[124] to the extent of conferring nearly unlimited discretions on decision-makers.[125] As noted above, Lim has observed that these sorts of statutes are problematically vague because of 'the democratic deficit incurred when legislatures … seek to avoid responsibility for choices that might be electorally unpalatable if articulated more precisely'.[126] Moreover, this species of statutory vagueness 'can have the practical effect of delegating to the executive the task of defining the limits of its own authority'.[127] If so, the constitutional norm of responsible government is imperilled by these drafting techniques which undermine the capacity for meaningful parliamentary scrutiny and accountability.

> Insistence by courts upon clearer authorisation, as achieved through interpretive techniques like the principle of legality, not only facilitates electoral discipline of the legislature, but also reduces the practical scope and incentive for legislatures to delegate to the executive such a self-defining role.[128]

So, for example, legality may have meaningful work to do in determining the proper scope of statutory provisions such as s 195A of the *Migration Act 1958* (Cth). That section confers on the Minister a non-compellable power to grant a particular class of visa '[i]f the Minister thinks that it is in the public interest to do so' and 'whether or not the person has applied for the visa'. Importantly, in *Plaintiff M79 v Minister for Immigration and Citizenship* the High Court held that s 195A authorises the Minister 'to grant visas which might not otherwise be able to be granted because of

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122 See Dan Meagher, Patrick Emerton and Matthew Groves, 'The Principle of Legality and Secondary Legislation: The Role of Proportionality' (2024) 47(2) *Melbourne University Law Review* (forthcoming) pt II.

123 On broadly framed powers see Bret Walker SC and David Hume, 'Broadly Framed Powers and the Constitution' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) 144.

124 Gabrielle Appleby and Alexander Reilly, 'Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation' (2017) 28(4) *Public Law Review* 293.

125 Matthew Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 129.

126 Lim, 'Executive Power and the Principle of Legality' (n 18) 76.

127 Ibid 77.

128 Ibid.

non-satisfaction of substantive or procedural requirements'.[129] Hayne J, in dissent, disagreed. His Honour rejected the Minister's argument that s 195A permitted him to 'grant any class of visas and to do that guided only by public interest considerations', 'relieve[d] from the application of otherwise binding provisions of the Act'.[130] His Honour suggested that such an unfettered discretionary power may amount to executive suspension of the law without parliamentary consent,[131] and also that 'it may well be that any ambiguity in or uncertainty about the reach of a provision like s 195A must be resolved in a way that confines rather than expands the relevant power'.[132] On our account, the application of the principle of legality would buttress such an approach; and it would do so, again, to minimise the incapacity to self-government which the exercise of such extraordinary powers without parliamentary supervision would occasion.

In terms of statutory powers conferred on non-elected executive bodies and officials, Cass Sunstein has argued that '[c]ourts should construe statutes so that those who are politically accountable and highly visible will make regulatory decisions'.[133] Sunstein justifies this canon on the basis of the principle of democratic legitimacy based on electoral accountability, arguing that, where there is doubt, 'statutes should be construed to limit the discretion of regulatory agencies'.[134] Given the importance of the constitutional norm of responsible government, this arguably applies with all the more force in the Australian context. Consider, for example, the Victorian Supreme Court case of *Loielo v Giles*, which concerned the validity of emergency powers that were exercised to impose a curfew on Victorian residents during the COVID-19 pandemic.[135] They were not enacted by a minister who was accountable to Parliament, but a departmental medical officer. Ginnane J wrote as follows:

> One matter that I have reflected on in interpreting the extent of the powers in pt 10 of the [*Public Health and Wellbeing Act 2008* (Vic)], although it has ultimately not been decisive in my decision, is that they can be exercised by an authorised officer. That could potentially result in a person not accountable to Parliament and, perhaps not even a senior administrative officer, exercising powers to close all of Victoria during a state of emergency and confine all the people of Victoria to their homes.[136]

On our account the principle of legality ought to apply in cases such as these, so that the court would not readily find that such extensive powers of this nature have been conferred on unelected bureaucrats without clear language. And again, as noted, this may occur through an interpretive and review framework which tailors the (stricter) intensity with which legality is applied in this legislative context to reflect the

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129 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 350 (French CJ, Crennan and Bell JJ) ('*Plaintiff M79*').
130 Ibid 366 [85], 367 [87] (Hayne J).
131 Ibid 367 [87] (Hayne J).
132 Ibid.
133 Sunstein (n 82) 477 (citations omitted).
134 Ibid 458.
135 *Loielo v Giles* (2020) 63 VR 1.
136 Ibid 40–1 [131]. See also at 9 [13], 46 [151].

importance of the constitutional norm of responsible government and the threat posed to its core value of political accountability.[137]

C *Conferral of Powers which Authorise the Infringement of Fundamental Rights*

The third context is the conferral of law-making power in broad and purposive terms which the executive takes to authorise the promulgation of secondary legislation which infringes fundamental rights. This is a legislative approach which became increasingly common, and of concern, during the COVID-19 pandemic.[138] In doctrinal terms, the authorisation for such infringements can *only* arise by necessary implication.[139] This raises at least two issues for the constitutional norm of responsible government. First, as Lord Hoffman noted in his classic articulation of the principle of legality, fundamental human rights 'cannot be overridden by general or ambiguous words' because this carries 'too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process'.[140] The risk identified here is particularly acute when a law-making power is conferred in broad and purposive terms. This proposition (and problem) is buttressed by the constitutional fact that 'Parliament is the organ of government in which legislative power is vested and Parliament should not be held to have delegated to another repository more power than is clearly denoted by the words it has used'.[141]

The weakness in political accountability which attends this form of legislative process provides a normative justification for the courts to apply the principle of legality more strictly to such secondary law-making powers.[142] The principle of legality would apply by requiring a high threshold before an implication to infringe fundamental rights is considered 'necessary' in the relevant sense in such contexts.[143] And the strictness with which the principle of legality is applied in any specific legislative context of this kind may turn also on those factors we detailed above. Relevantly, the greater the extent to which Parliament has retained control and supervision over such secondary legislation (for example, by way of tabling requirements, disallowance processes, regular renewals by responsible ministers) the more likely that some degree of fundamental rights infringement was authorised in the exercise of these broad and purposive law-making powers. Our account provides an additional normative justification for a stricter conception and application of legality in this (increasingly common and often problematic) legislative context. It does so to provide stricter judicial scrutiny of secondary legislation where political

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137 Meagher, Emerton and Groves (n 122) pts II, III.

138 See Bruce Chen, 'COVID-19 Stay at Home Restrictions and the Interpretation of Emergency Powers: A Comparative Analysis' (2023) 44(1) *Statute Law Review* 1.

139 *Coco* (n 120) 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ). See Dan Meagher, 'Fundamental Rights and Necessary Implication' (2023) 51(1) *Federal Law Review* 102.

140 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

141 *South Australia v Tanner* (1989) 166 CLR 161, 174 (Brennan J).

142 Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (2016) 39(2) *University of New South Wales Law Journal* 450, 486.

143 See Meagher, 'Fundamental Rights and Necessary Implication' (n 139) 125–6.

accountability for any fundamental rights infringement is inherently weak.[144] This, again, vindicates the constitutional norm of responsible government to the extent interpretively possible.

D *Henry VIII Clauses*

Finally, it would seem logical that the principle of legality ought to be presumptively applied to statutory provisions which include Henry VIII clauses. For the inclusion in a statute of a delegated law-making power to amend that or any other statute seems the paradigmatic example of Parliament failing to discharge its constitutional responsibilities regarding executive-empowering legislation. Of additional concern is that 'the use of Henry VIII clauses in the Australian jurisdictions has become more common'.[145] In principle, then, these powers subvert the orthodox constitutional relationship between Parliament and the executive with respect to legislation. If so, the constitutional norm of responsible government is seriously undermined in this legislative context. So, to restrict, so far as interpretively possible, the scope of these law-making powers *and* the secondary legislation which they empower would minimise the incapacity to self-government which the exercise of these extraordinary powers seem to inevitably occasion.

Interestingly, however, Dennis Pearce and Stephen Argument have observed that in Australia 'the various parliamentary committees charged with reviewing the exercise of such powers have largely been able to monitor and report on their use, ensuring that the various parliaments are at least conscious of the use of these mechanisms'.[146] The significance of this form of political accountability (along with parliamentary notice and tabling requirements) was noted by Gageler J in *ADCO Constructions*:

> That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as 'Henry VIII clauses'. The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility

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[144] See Lim, 'Executive Power and the Principle of Legality' (n 18) 85 for the compelling (arguably related) justification for the strict application of the principle of legality to executive power: 'The inherent asymmetry of the principle of legality tells us something important about the kinds of "infringement" to which it can legitimately respond. Put perhaps crudely, the infringement must be of a kind on which the Court is able to "take sides" by applying such an asymmetrical rule of interpretation. It would seem that where legislation "infringes" rights by adjusting the balance of rights involved in a symmetrical relationship between subject and subject, there is good reason to doubt the correctness of an approach to construction that would presumptively privilege one side of the relationship over the other. … Conversely, where legislation "infringes" rights by conferring power on the executive branch of government, the existing and long-recognised asymmetry involved in the relationship between government and subject means that there is not the same objection to applying the presumptive techniques of the principle of legality in a way that favours the subject over the government'. See further Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 435–9.

[145] Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017) 22–3.

[146] Ibid 23.

> and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.[147]

That being so, the *presumptive* application of legality may be inappropriate in those specific contexts (concerning Henry VIII clauses) where the processes of political accountability are strong. Yet the very nature of these clauses triggers issues of constitutional significance. They *are* extraordinary executive law-making powers which, in our view, warrant heightened scrutiny from both Parliament *and* the courts. That is especially so when the relevant statutes become an ongoing fixture of the statute book; the subject matter with which they deal is important matters of substantive and contested policy; and their usage is increasingly common and unexceptional.[148] There is existing authority which suggests that these delegated law-making powers 'should be restrictively interpreted if there is any doubt about the scope of the power'.[149] That is precisely how the principle of legality ought to operate in this context. Further, in terms of secondary legislation made under such powers, our account provides a normative justification for a similar interpretive approach to *supplement* the existing mechanisms of political accountability.[150] To do so is justified to vindicate the norm of responsible government to the extent interpretively possible in this constitutionally challenging legislative context.

V Conclusion

Recent works have examined the core values which underlie the Australian constitutional system and how best to give effect to those values.[151] In this article we have examined how to give effect to responsible government, a norm which is central to the *Australian Constitution*. We have emphasised that care needs to be taken when giving effect to responsible government. It is a complex and contested constitutional concept with a rich history, the effective operation of which is primarily a matter for Parliament. This led to our characterisation of responsible government as an underenforced norm of the *Constitution*. Consequently, we argued that the most appropriate way to give effect to the norm is through the application of an interpretive canon to restrict the scope of certain kinds of executive-empowering statutes, one which operates as a 'resistance norm' to vindicate responsible government in the relevant statutory context but falls short of strong judicial review. To accord responsible government a significant role in constitutional interpretation is not, in our view, consistent with the true nature of responsible government under the *Constitution* and raises significant counter-majoritarian concerns.

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147 *ADCO Constructions Pty Ltd v Gouappel* (2014) 254 CLR 1, 25 (citations omitted) ('*ADCO Constructions*').

148 See, eg, Pearce and Argument (n 145) 153–4.

149 Ibid 498, citing *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v New South Wales* (2014) 242 IR 338, 359–61 [102]–[108] and *Cvetanovski v The Queen* (2015) A Crim R 191, 200 [53].

150 Pearce and Argument (n 145) 498 where the authors note that 'there appears to be no authority for this principle'.

151 See, eg, Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2020); Blayden, 'Institutional Values in Judicial Review of Administrative Action' (n 78).

On our account, however, the application of the principle of legality must be nuanced and context sensitive. If political accountability is strong, the 'ordinary constitutional means of constraining governmental power'[152] are working as the *Constitution* intended. But if Parliament cannot or will not discharge its constitutional responsibilities regarding executive-empowering statutes, the capacity for self-government is diminished. As detailed, the statutes of especial concern in this regard are those which confer broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. In these legislative contexts, the courts have an important but limited role in vindicating the constitutional norm of responsible government where interpretively possible and constitutionally justified. To give effect to responsible government in this way is consistent with democratic concerns about the legitimacy of strong judicial review. In addition, it takes seriously the inherently political and flexible nature of responsible government as it operates under the *Australian Constitution*.

[152] Gageler (n 14) 152.

Family Provision across Borders

Reid Mortensen* **and Sarah McKibbin†**

Abstract

It takes little for family provision claims to cross borders, whether state or national. The property may be located in different places — other states or countries; the personal representatives, claimants or beneficiaries under the will may be from different places; or the deceased may have had a strong personal connection with another place. Any one of those cross-border considerations raises questions of a court's jurisdiction to deal with a family provision application, or of the law that will apply to it. In this article, we give an account of the principles of private international law — which in this area also apply in interstate matters — that affect family provision claims in Australia. In doing so, we explore recurrent complications with these cross-border family provision claims, including those arising under the cross-vesting scheme and in the federal jurisdiction. While we consider that the current equitable principles of choice of law remain best placed to address how provision should be made from different forms of property, reforms must be made to the equitable principles of jurisdiction if complications raised by the cross-vesting scheme and the possible exercise of federal jurisdiction in family provision claims are to be overcome.

Please cite this article as:

Reid Mortensen and Sarah McKibbin, 'Family Provision across Borders' (2024) 46(1) *Sydney Law Review* 27.

DOI: https://doi.org/10.30722/slr.19652

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This article is based on a paper delivered at the Society of Trusts and Estates Practitioners Queensland Annual Conference, Kingscliff, New South Wales, 13 September 2019. The authors are grateful to Professor Mary Keyes for helpful comments on a draft of this article. Any mistakes or errors of judgment are our own.

I Introduction

Australia and other common law countries in the Commonwealth have long made opportunities available for spouses and children (and other dependants — by a judge's decision) to receive property from a deceased estate when a will or intestacy rules did not provide for this. Family provision laws, or testator's family maintenance, are a late 19th-century New Zealand invention.[1] From 1906, these laws were gradually, but not uniformly, adopted by the Australian states and territories.[2] Subsequently, there was broad, but far from universal, uptake of family provision laws across the common law Commonwealth.[3] Family provision laws are just one means by which countries might prioritise the moral claims that dependants have on a former breadwinner's estate over the will-maker's autonomy.[4] In other countries, the competing claims of will-makers, state-directed distributions on intestacy and dependants are often addressed differently. The spouse or child might have a 'forced share' or 'compulsory portion' of the estate: a minimum proportionate entitlement to the property.[5] The legal system may have a scheme of marital or community

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1 *Testator's Family Maintenance Act 1900* (NZ). See Rosalind Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900: The Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202.

2 Titles of the original statutes are given here in chronological order: *Widows and Young Children Maintenance Act 1906* (Vic); *Testator's Maintenance Act 1912* (Tas); *Testator's Family Maintenance Act 1914* (Qld); *Testator's Family Maintenance and Guardianship Act 1916* (NSW); *Testator's Family Maintenance Act 1918* (SA); *Guardianship of Infants Act 1920* (WA) s 11; *Administration and Probate Ordinance 1929* (ACT) pt VII; *Testator's Family Maintenance Ordinance 1929* (NT).

3 Canada (statute titles in chronological order): *Married Women's Relief Act*, SA 1910 (2nd Sess), c 18 (Alberta); *An Act to Amend the Devolution of Estates Act*, SS 1910–11, c 13 (Saskatchewan); *Testators' Family Maintenance Act*, SBC 1920, c 94 (British Columbia); *Dependants' Relief Act*, SO 1929, c 47 (Ontario); *Testators' Family Maintenance Act*, SNS 1956, c 8 (Nova Scotia); *Testators Family Maintenance Act*, SNB 1959, c 14 (New Brunswick); *Family Relief Act*, SN 1962, No 56 (Newfoundland); *Dependants' Relief Ordinance*, SY 1962 (1st Sess), c 9 (Yukon); *Dependants Relief Ordinance*, SNWT 1971 (2nd Sess), c 5 (Northwest Territories); *Testator's Dependants Relief Act*, SPEI 1974, c 47 (Prince Edward Island). England and Wales: *Inheritance (Family Provision) Act 1938* (UK); Northern Ireland: *Inheritance (Family Provision) Act (Northern Ireland) 1960* (UK). See also Bora Laskin, 'Dependants' Relief Legislation: The Inheritance (Family Provision) Act 1938' (1939) 17 *Canadian Bar Review* 181, 181–2.

4 See J Gareth Miller, 'Family Provision on Death: The International Dimension' (1990) 39(2) *International and Comparative Law Quarterly* 261; Anthony Gray, 'Family Provision Applications: A Critique' (2017) 91(9) *Australian Law Journal* 750.

5 International examples abound, particularly among civil law systems: see, eg, Cécile Pérès, 'Compulsory Portion in France' in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmerman (eds), *Mandatory Family Protection* (Oxford University Press, 2020) vol 3, 78; Alexandra Braun, 'Forced Heirship in Italy' in Reid, de Waal and Zimmerman (eds) at 108; Sergio Cámara Lapuente, 'Forced Heirship in Spain' in Reid, de Waal and Zimmerman (eds) at 139; Jan Peter Schmidt, 'Forced Heirship and Family Provision in Latin America' in Reid, de Waal and Zimmerman (eds) at 175; Reinhard Zimmerman, 'Mandatory Family Protection in the Civilian Tradition' in Reid, de Waal and Zimmerman (eds) at 648. The *ius relictae* and the children's *legitim* of Scots law are the most familiar to common law courts (the *ius relictae* requiring a surviving wife to be given a one-third to one-half share of her husband's estate): see, eg, *Naismith v Boyes* [1899] AC 495; *Re Douglas; Umphelby v Douglas* (1909) 9 SR (NSW) 269. Sharia provides for forced shares for wives and children: see, eg, *Haque v Haque [No 1]* (1962) 108 CLR 230 ('*Haque No 1*').

property that denies an individual a complete testamentary power to distribute it.[6] Some property may simply be inalienable.[7] Even where the means of striking this balance is family provision laws, there are differences between countries and states as to who is entitled to make a claim.[8] Furthermore, different courts may be prepared to make distributions from modest estates or to relatives who are relatively wealthy.[9]

It takes little for family provision claims to cross borders, whether state or national. The property may be located in different places. The personal representatives, claimants or beneficiaries under the will may be from different places. The deceased may have had a strong personal connection with another place. Any one of those cross-border considerations can give rise to questions of a court's jurisdiction to deal with an application, and of the law that will apply. Our article, therefore, gives an account of the principles of private international law — which in this area also apply in interstate matters — that affect family provision claims in Australia.[10] At no point do we enter into questions of the substantive law of family provision. Private international law is adjectival in the sense that it provides the structure within which claims are considered but does not supply the dispositive law by which courts address the merits of those claims. Indeed, private international law is increasingly seen as enabling the prior issues about where to litigate and what law to apply to be addressed without reference to the merits — in a practical sense, often giving a clearer legal context for the settlement of claims.[11]

In this article, we therefore locate family provision laws inside broader considerations of adjudicative jurisdiction and applicable law (or 'choice of law'). No Australian family provision statute[12] gives a hint as to how these principles of jurisdiction and applicable law can confine its operation. In the past, family provision laws have given what turned out to be misleading indications as to when a court could deal with provision from out-of-state property. Indeed, in the early evolution of cross-border family provision law, it is sometimes unclear whether a judge considered that the court's power to make provision from out-of-state property was limited by jurisdictional considerations or applicable law rules.

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6 Community property schemes are commonly found in civil law countries: see generally Eugen Dietrich Graue, 'The Rights of Surviving Spouses under Private International Law' (1966–67) 15(1–2) *American Journal of Comparative Law* 164; Michael W Galligan, 'International Estate Planning for US Citizens: An Integrated Approach (2009) 36(10) *Estate Planning* 11, 12–13.

7 For an account of different regimes, see Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (West, 6th ed, 2018) 1266–8.

8 For example, in New South Wales any child can make a claim: *Succession Act 2006* (NSW) s 57 ('*NSW Act*'). But in Victoria only children who are under 18 (or, if students, under 25) or who have a disability may make a claim: *Administration and Probate Act 1958* (Vic) ss 90, 90A ('*Vic Act*'). This is a longstanding policy difference: cf Australian Law Reform Commission, *Choice of Law* (Report No 58, March 1992) 110 [9.6].

9 Anthony Dickey, *Family Provision after Death* (Law Book Company, 1992) 138–45; Leonie Englefield, *Australian Family Provision Law* (Lawbook Co, 2011) 119–22; John de Groot and Bruce Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 6th ed, 2021) 110–24.

10 For an earlier account of this question, see David St Ledger Kelly, 'Testator's Family Maintenance and the Conflict of Laws' (1967) 41(8) *Australian Law Journal* 382.

11 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 468.

12 With the possible exception of New South Wales legislation: see below nn 99–107 and 139–147 and accompanying text.

In Part II, therefore, we introduce the basic structure of territorial limitations on family provision law: the principle of scission. This principle requires the different treatment of issues concerning movable property and of those concerning immovable property. In brief, succession to movable property is governed by the law of the deceased's domicile (*lex domicilii*) and succession to immovable property by the law of the place where the property is situate (*lex situs*). The principle of scission governs the whole of Australian cross-border succession law — whether that arises in probate jurisdiction or the equitable jurisdiction relating to the administration and distribution of estates. It dictates different jurisdictional capacities and legal approaches for dealing with property classified as movable or immovable.

In Part III, we deal with applicable law in family provision claims — the law selected by equitable choice of law rules to determine the issues in dispute. Efforts at modifying these equitable choice of law rules are also entwined with a second territorial limitation on the reach of family provision laws: the constitutional limitations on state and territory powers to legislate extraterritorially. It is not usual in private international law to deal with applicable law before questions of adjudicative jurisdiction, but the issues we consider in Parts II and III have implications for Australian courts' jurisdiction to decide family provision claims. We therefore consider adjudicative jurisdiction in Part IV, where the additional complications arising under the cross-vesting scheme and in federal jurisdiction will also be explored. In Part V, we make recommendations about the best direction for the law.

II Fundamental Structure: Scission

The shape of Australian cross-border law for family provision reflects the shape of cross-border succession law in general. It is still structured by the principle of scission and that principle's unqualified distinction in English probate and equitable jurisdictions between the reliance on domicile for questions relating to movable property, and *situs* (or location) for immovable property. Furthermore, there is a strong identity in cross-border family provision between those connections that identify applicable law and those that ground adjudicative jurisdiction. The (also unqualified) alignment of applicable law and jurisdiction is typical of the handling of cross-border suits within a court's equitable jurisdiction — so much so that it is sometimes unclear in early family provision applications whether a statute is being applied because it is selected by applicable law rules or because the applications are within the court's jurisdiction.[13] In the development of classical equitable doctrine, the distinction between applicable law and jurisdiction was sometimes irrelevant.[14] Yet the cost-efficiency of family provision litigation — and, in Australia,

[13] This is because terms referring to jurisdiction and applicable law rules or 'making provision' out of the estate are used interchangeably — see, eg, *Pain v Holt* (1919) 19 SR (NSW) 105, 106–7; *Re Found; Found v Semmens* [1924] SASR 236, 240 ('*Found*'); *Re Osborne* [1928] St R Qd 129, 130–1 ('*Osborne*') — or they are not used at all: *Re Stewart* [1948] QWN 11 ('*Stewart*').

[14] This was especially the case when domicile was the connection for applicable law: see, eg, *Enohin v Wylie* (1862) 10 HL Cas 1, 15–16. A divergence between jurisdiction and applicable law was more likely where interests in real estate were in issue: see, eg, *Nelson v Bridport* (1846) 8 Beav 547; 50 ER 215.

constitutional and legislative principles of jurisdiction — mean that the distinction must be made.

The principle of scission creates different regimes for questions relating to movable property on the one hand, and immovable property on the other.[15] Australian courts have traditionally insisted in strong terms on maintaining the scission (or separation) of property regimes in cross-border succession law. In *Lewis v Balshaw*, the High Court of Australia endorsed the view that a grant of probate made in England — the testatrix's place of domicile (*forum domicilii*) — was valid only for movable property located outside England; insofar as immovable property outside England was concerned, it was invalid.[16] The estate included movable and immovable property in New South Wales, including land. The trial judge in New South Wales, Nicholas J, considered that 'convenience and international comity' justified a unitary grant of probate — giving plenary effect to the grant made in the *forum domicilii*.[17] This entitled the English executor to deal with land in New South Wales. The High Court categorically rejected that view,[18] refusing to recognise the grant to the extent that it admitted a power to deal with land and other immovables. Rich, Dixon, Evatt and McTiernan JJ said: 'no forum but the *forum situs* and no law but the *lex situs* can govern the title to land. Considerations of convenience and of comity could not, and have not, overcome this rule.'[19]

Certain practicalities, particularly relating to the disposition of land, motivate not only the scission of an estate, but also its being addressed by two or more, potentially different, applicable laws. This may give rise to *depeçage* — that is, the application of different places' laws to different assets of the estate. However, even in *Lewis v Balshaw*, the High Court recognised the inconvenience of the principle,[20] and law reform agencies have consistently recommended dealing with the estate under principles of 'unitary succession'. The Hague Conference on Private International Law, on concluding its *Convention on the Law Applicable to Succession* ('*Succession Convention*') in 1989,[21] recommended a single applicable law for all succession claims — including family provision.[22] This Convention has not been ratified by a single country, and Australia has shown no interest in it. At first blush, the applicable law under the *Succession Convention* appears to be the law of the place of the deceased's habitual residence at the time of death, as long as the testator was also a national of that place. However, default laws and exceptions apply

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15 Atle Grahl-Madsen, 'Conflict between the Principle of Unitary Succession and the System of Scission' (1979) 28(4) *International and Comparative Law Quarterly* 598; H Christian AW Schulze, 'Conflicting Laws of Conflict in Cases of International Succession' (2001) 34(1) *Comparative and International Law Journal of Southern Africa* 34; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 5th ed, 2023) 565–7; Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2020) 775–81.

16 *Lewis v Balshaw* (1935) 54 CLR 188.

17 Ibid 194–5 (Rich, Dixon, Evatt and McTiernan JJ).

18 Ibid 195, 198.

19 Ibid 195.

20 Ibid 195, 197.

21 *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, opened for signature 1 August 1989 (not yet in force) ('*Succession Convention*').

22 Ibid art 7(2)(a).

(but still to the whole estate) when nationality and habitual residence do not coincide. These can take the question of succession to the law of the place of nationality, the law of the place with which the deceased had his or her closest connection, or the law chosen by the deceased (so long as there is also a connection of nationality or habitual residence).[23] If the applicable law is that of a state not party to the *Succession Convention*, a transmission of the applicable law — a form of *renvoi*[24] — is permitted if that state's choice of law rules make the law of a second non-party state applicable.[25] The *Succession Convention* also allows *depeçage*, providing for the deceased to be able to choose different laws for application to different assets of the estate, the one estate thus being governed by multiple chosen applicable laws.[26] In 1992, the Australian Law Reform Commission ('ALRC') also endorsed a principle of unitary succession.[27] However, compatibly with its preference throughout the *Choice of Law* report for using the common law concept of domicile, the ALRC recommended that the applicable law for all questions of succession — including family provision[28] — would be the law of the place where the deceased was domiciled at the time of death.[29]

Still, greater care needs to be taken before endorsing these approaches. Even countries that claim to have schemes of unitary succession often make exceptions for land located in a foreign country,[30] which is not much different to the principle of scission. The Hague Conference and the ALRC prefer that the single applicable law is the *personal law* of the deceased, an applicable law that could simply prove unworkable when title to foreign land is involved. The legal disposition and management of land are usually questions in which state interests loom large — the control of land being the essence of state sovereignty.[31] In this respect, external efforts to control title to foreign land, or its use, through application of the residential law, the national law (*lex patriae*) or the *lex domicilii* may just be futile. In partial recognition of this, the *Succession Convention* displaces the law of the place of habitual residence where the *lex situs* dictates an inheritance regime for economic, family or social reasons.[32] This effectively recognises that scission cannot be completely eliminated from cross-border succession law. However, the *Succession Convention* also exemplifies the problem of efforts at reaching a regime of unitary succession. The complexity of an applicable law requiring the simultaneous assessment of habitual residence, nationality and the place of closest connection has little to commend it. In fact, the *Succession Convention*'s allowance of *depeçage* is a denial of the objective of unitary succession. The ALRC was critical of the potential role of testamentary choice in identifying the applicable law, and so

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23 Ibid arts 3, 5.
24 See below nn 117–133 and accompanying text.
25 *Succession Convention* (n 21) art 4.
26 Ibid art 6.
27 Australian Law Reform Commission (n 8) 110–11.
28 Ibid 118.
29 Ibid 110–11. See also Kelly (n 10) 391–2.
30 Geoffrey Schoenblum, 'Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates' (1991) 32(1) *Virginia Journal of International Law* 83, 87–8.
31 Ibid 89–90.
32 *Succession Convention* (n 21) art 13. Cf Schoenblum (n 30) 89.

allowing a testator to evade Australian family provision laws by choosing an applicable law that did not have a family provision statute.[33] However, the ALRC also made no concession to the interests of another state in the land it comprises. While admitting that foreign laws restricting inheritance to land 'might be a problem', it still insisted that the *lex domicilii* could deal with that.[34] The ALRC's recommendations are, in truth, both simplistic and unsatisfactory. However, nothing is likely to come of these proposals. The *Succession Convention* has not been ratified by a single country, and the ALRC's report, made in 1992, lies forgotten.

A difficult implication of the principle of scission is the need initially to classify items of property as either movable or immovable — a distinction that does not necessarily parallel the common law classifications of realty and personalty. A lease, for instance, which is personalty at common law, is immovable property in private international law.[35] The principles by which Australian law will classify different kinds of property as movable or immovable were explored by the High Court in the *Haque* litigation. The question was whether to prioritise the will-maker's autonomy as recognised by the law of Western Australia, or the forced shares for a wife and children that were provided for by sharia. In *Haque v Haque [No 1]*, the High Court accepted that sharia, as the personal law applicable to the testator as an Indian-domiciled Muslim, would govern the distribution of the movable property of the estate.[36] In *Haque v Haque [No 2]*, the Court therefore had to identify what assets in the testator's complex estate amounted to movable property.[37] The basic proposition was that interests in land were immovable,[38] although not every equity or interest in land would be sufficiently close to the land to assure it of an immovable quality.[39] Accordingly, in *Haque No 2* a vendor of land's lien for unpaid purchase money was regarded, by a majority, as movable because the 'principal thing' was the right to the money.[40] The same conclusion was reached for an interest in a partnership (even one holding land).[41] Most controversially in *Haque No 2*, a mortgage debt was classified as movable because the repayment of the debt was regarded as the most valuable quality of the mortgage and this could shift with the location of the mortgagor.[42] In this connection *Haque No 2* effectively overruled the New South Wales family provision case of *Donnelly*, where Harvey CJ in Eq held that a mortgage debt should be treated as immovable

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33 Australian Law Reform Commission (n 8) 118–19.
34 Ibid 111.
35 *Freke v Carbery* (1873) LR 16 Eq 461, 466; *Duncan v Lawson* (1889) 41 Ch D 394, 398.
36 *Haque No 1* (n 5).
37 *Haque v Haque [No 2]* (1965) 114 CLR 98 ('*Haque No 2*').
38 Ibid 119.
39 Ibid 129, 133, 146, 152.
40 Ibid 129, 133–4, 152. Cf ibid 121, 146.
41 Ibid 122, 130, 134, 152.
42 Ibid 129, 133; followed in *Re Greenfield* [1985] 2 NZLR 662, 664 ('*Greenfield*'). See also Frank Kitto, 'Are Mortgage Debts Immovables?' (1928) 2(3) *Australian Law Journal* 85, 87. In England and Canada, mortgage debts are regarded as immovable: *Re Hoyles; Row v Jagg* [1911] 1 Ch 179 (Court of Appeal) ('*Hoyles*'); *Hogg v Provincial Tax Commissioner* [1941] 4 DLR 501 (Saskatchewan); *Re Ritchie* [1942] 3 DLR 330 (Ontario).

property.[43] Intellectual property rights have sometimes been a point of contention, but the tendency is to treat them as movable.[44]

The whole question of classification is complicated by the theoretical requirement that the law of the place where the property is situate (*lex situs*) itself determines whether property is to be regarded as movable or immovable.[45] The classifications outlined in the *Haque* litigation are only to be made if the property is situate in Australia; other classifications of an item of property may be applicable if it is located somewhere else.[46] The whole approach fails if the *lex situs* does not recognise the distinction between movable and immovable property — which is the case with the law of countries that apply sharia.[47] However, the original reason for importing the movable-immovable distinction into the common law was to have common ground with the continental civil law systems when classifying property.[48] Presumably, this also maximises the possibility that a foreign *lex situs* will use the distinction between movable and immovable property. In truth, this requirement is usually ignored and the identification of property as movable or immovable is, in practice, implicitly made by reference to Australian law.[49]

III Applicable Law

The settled approach to statutes in cross-border settings is to examine the 'text, context or subject matter' of the statute for indications of its territorial application.[50] However, when a statute is expressed in general terms that suggest no territorial limits on its application, it may be interpreted as applicable only if it is part of the

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43 *Re Donnelly* (1927) 28 SR (NSW) 34, 37 ('*Donnelly*'). See Kitto (n 42) 85–6.

44 See *Re Usines de Melle's Patent* (1954) 91 CLR 42, 48. Cf *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 494. See the treatment of copyright in *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179 (High Court of New Zealand); *Lucasfilm v Ainsworth* [2012] 1 AC 208.

45 *Haque No 2* (n 37) 139; *Re Cutcliffe's Will Trusts; Brewer v Cutcliffe* [1940] Ch 565, 571; *Macdonald v Macdonald* 1932 SC (HL) 79, 85.

46 If a mortgage debt were located in Canada or England, it would be classified as immovable: see above n 42.

47 See the discussion of sharia succession principles in the Karachi High Court in *Yusuf Abbas v Ismat Mustafa* PLD 1968 480. However, some Arab states have legislated to adopt a distinction between realty and movables: William Ballantyne, *Essays and Addresses on Arab Laws* (Taylor & Francis, 2014) 146–7.

48 See *Hoyles* (n 42) 185; *Haque No 2* (n 37) 109. For further background on the introduction of this distinction, see JA Clarence Smith, 'Classification by the Site in the Conflict of Laws' (1963) 26(1) *Modern Law Review* 16, 17.

49 Cf Mortensen, Garnett and Keyes (n 15) 566–7; Davies et al (n 15) 777–8.

50 *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, 160; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 964–5 [33]–[39]; *Karpik v Carnival plc* (2023) 98 ALJR 45, 52 [21] ('*Karpik*'). See also *Mynott v Barnard* (1939) 62 CLR 68, 86, 89, 94; *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418, 424–6; *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274, 283.

law selected by the relevant choice of law rule.[51] The latter is effectively the approach taken to family provision legislation in Australia.[52]

Family provision legislation usually does not specify its intended scope of application in cross-border cases. Even if it did, it would be applied by the relevant forum court without reference to whether it formed part of the otherwise applicable law (although it might not be given an overriding effect by other Australian courts). Rather, family provision legislation tends to have its geographical operation determined in the traditional manner by equitable choice of law rules. The New South Wales family provision laws have, at times, ambiguously suggested a broader geographical reach than the equitable principles allowed.[53] Nevertheless, while the New South Wales family provision statute still states its geographical application, the statute probably now conforms to the principles of equity.[54]

The questions that arise when applicable law is being considered in a court exercising federal jurisdiction are important to note. Federal jurisdiction may arise in family provision claims.[55] Section 79(1) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') provides that state and territory laws — including 'laws relating to procedure, evidence, and the competency of witnesses' — bind a court exercising federal jurisdiction in that state or territory. Section 80 then provides:

> So far as the laws of the Commonwealth are not applicable … the common law in Australia as modified by the *Constitution* and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the *Constitution* and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

The reference to 'the common law in Australia' in s 80 is to the common law in the broad sense, including judge-made principles of equity[56] and, although there is yet

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[51] *Karpik* (n 50) 52 [22]. See also Adrian Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' [2005] *Singapore Journal of Legal Studies* 189, 194. See also Mary Keyes, 'Statutes, Choice of Law, and the Rule of the Forum' (2008) 4(1) *Journal of Private International Law* 1, 10–16, 32–3; Maria Hook, 'The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 175, 178–80.

[52] *Family Provision Act 1969* (ACT) ss 7–22 ('*ACT Act*'); *NSW Act* (n 8) ss 55–73; *Family Provision Act 1970* (NT) ss 7–22 ('*NT Act*'); *Succession Act 1981* (Qld) ss 40–44 ('*Qld Act*'); *Inheritance (Family Provision) Act 1972* (SA) ss 6–16 ('*SA Act*'); *Testator's Family Maintenance Act 1912* (Tas) ss 3–11 ('*Tas Act*'); *Vic Act* (n 8) ss 90–99A; *Family Provision Act 1972* (WA) ss 6–21A ('*WA Act*'). See also Kelly (n 10) 382–3.

[53] *Family Provision Act 1982* (NSW) s 11(1)(b), repealed by *Succession Amendment (Family Provision) Act* (NSW) s 5. See *Hitchcock v Pratt* (2010) 79 NSWLR 687 ('*Hitchcock*'); below nn 99–107 and accompanying text.

[54] *NSW Act* (n 8) s 64.

[55] See below nn 179–206 and accompanying text. State courts are invested with any federal jurisdiction which the High Court has under ss 75 and 76 of the *Commonwealth Constitution*: *Judiciary Act 1903* (Cth) s 39(2).

[56] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152, where Gleeson CJ and Gummow, Callinan, Heydon and Crennan JJ use the term 'common law of Australia' when referring

no authority directly on point, rules of probate.[57] Before the High Court's decision in *Rizeq v Western Australia*,[58] the position was that choice of law rules, whether purely judge-made or modified by state or territory legislation, came to apply in federal jurisdiction through both sections,[59] or either just s 79[60] or s 80 — with the more recent authority supporting the latter.[61] In *Rizeq*, a case that did not concern applicable law, Bell, Gageler, Keane, Nettle and Gordon JJ took a much narrower approach to the scope of s 79. They held that the section only 'pick[s] up' the text of state legislation 'governing' how state jurisdiction is exercised, and applies it 'as a Commonwealth law to govern the manner of exercise of federal jurisdiction'.[62] An aspect of this that may affect the application of rules of private international law is that, as Bell, Gageler, Keane, Nettle and Gordon JJ noted, '[i]t would be wrong … to seek to delimit the scope of the section's operation by invoking the difficult and sometimes elusive distinction between '"substance" and "procedure"'.[63] Kiefel CJ took the same approach.[64] This approach also means that s 79 is not the source by which *judge-made* law — including judge-made applicable law rules — is applied in the exercise of federal jurisdiction.[65]

The High Court confirmed the narrower approach of *Rizeq* in *Masson v Parsons*.[66] However, neither *Rizeq* nor *Masson* delineated the related question of the role of s 80 in the exercise of federal jurisdiction.[67] Its relationship with s 79 nevertheless suggests that its pre-*Rizeq* interpretation no longer stands, and like s 79 the scope of s 80 will have shrunk.[68] Although it has been mooted that the reconfiguration of ss 79 and 80 could mean, in effect, the outcome of a cross-border case could be affected by whether it is determined in the exercise of state or federal jurisdiction,[69] this remains conjectural. A number of reasons, even within the *Rizeq*–*Masson* paradigm, suggest that approaches to applicable law in the exercise of state

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to equitable principles. See also Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 223–4, 269–70.

57 See also *Lipohar v The Queen* (1999) 200 CLR 485, 551 ('*Lipohar*'), where Kirby J describes the common law of Australia as being constantly defined and refined by judges.

58 *Rizeq v Western Australia* (2017) 262 CLR 1 ('*Rizeq*').

59 *Musgrave v Commonwealth* (1937) 57 CLR 514, 543–4, 547–8 ('*Musgrave*'); *Pedersen v Young* (1964) 110 CLR 162, 169–70; *Parker v Commonwealth* (1965) 112 CLR 295, 306; *Suehle v Commonwealth* (1967) 116 CLR 353, 356; *Commonwealth v Mewett* (1997) 191 CLR 471, 554–5 ('*Mewett*'); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 258. Cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 529–32 ('*Pfeiffer*').

60 *Musgrave* (n 59) 532.

61 *Mewett* (n 59) 492–3, 521; *Northern Territory v GPAO* (1999) 196 CLR 553, 574–5; *Blunden v Commonwealth* (2003) 218 CLR 330, 339; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 403.

62 *Rizeq* (n 58) 27; *Masson v Parsons* (2019) 266 CLR 554, 564, 574 ('*Masson*').

63 *Rizeq* (n 58) 33 (citations omitted). Accordingly, statutes of limitation are expressly listed as matters that are 'picked up' by s 79 even though they are regarded as matters of substance under common law applicable law rules: *Pfeiffer* (n 59) 544. See also James Stellios, 'Choice of Law in Federal Jurisdiction after *Rizeq v Western Australia*' (2018) 46 *Australian Bar Review* 187, 196–8.

64 *Rizeq* (n 58) 15. Cf Edelman J in *Rizeq* (n 58) 73.

65 Ibid 31.

66 *Masson* (n 62) 564, 574; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 623. Cf Edelman J in *Masson* (n 62) 587–90.

67 *Rizeq* (n 58) 14.

68 Leeming (n 56) 289–93. Cf Stellios (n 63) 203.

69 Stellios (n 63) 196–201.

and federal jurisdictions are still aligned. First, even if s 80 were inapplicable, the common law of Australia (in the broad sense) applies in federal jurisdiction. The common law 'that is constantly in the process of definition and refinement by the judges of the several courts of Australia'[70] has a status that is prior even to the *Commonwealth Constitution*, and therefore applies in courts exercising federal jurisdiction 'as part of the ultimate constitutional foundation'.[71] It does not need federal legislation, such as s 80, to make it applicable in a court exercising federal jurisdiction.[72] Second, in *Rizeq* itself, Bell, Gageler, Keane, Nettle and Gordon JJ recognised that

> State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction — because they are laws.[73]

Again, even if s 80 were inapplicable, state laws could be applied by their own force and effect in federal jurisdiction because they are part of Australia's 'composite body of law' made by the federal and state Parliaments and the self-governing territories' legislatures.[74] Any state legislative modification of choice of law rules would therefore still seem to be applicable in the exercise of federal jurisdiction by a court — whether state or federal — that was sitting in the state in question. Although Justice Leeming has cautioned, extra-curially, that we should be careful not to draw implications from the recognition of this 'composite body of law', he himself concluded that the determination of cross-border cases in the exercise of state and federal jurisdictions after *Rizeq* remained aligned. To infer otherwise would be 'capricious and arbitrary'.[75] There is also no case law or obiter dicta since *Rizeq* to suggest the contrary.[76] In considering, then, the equitable principles of applicable law in family provision cases, the safest assumption is that they should be applied in the exercise of federal jurisdiction as they would be in the exercise of state or territory jurisdiction — as part of the common law of Australia and, where modified in the family provision legislation,[77] the 'composite body of law' created by Australia's Parliaments and legislatures.[78]

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70 *Lipohar* (n 57) 551 (Kirby J).

71 *Pfeiffer* (n 59) 531 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Leeming (n 56) 292.

72 Leeming (n 56) 292.

73 *Rizeq* (n 58) 24.

74 Ibid 21–2. See Davies et al (n 15) 124.

75 Leeming (n 56) 266, 292; Davies et al (n 15) 124.

76 In *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303, 311 [32], Markovic, Downes and Kennett JJ observed that, by reason of ss 79 and 80, 'federal cases become part of the normal flow of business in [state] courts and usually do not even need to be consciously identified as such'.

77 See below nn 93–107 and accompanying text.

78 In intra-Australian family provision cases, whether in the exercise of state or federal jurisdiction, any conflict of laws is also necessarily between the statutes of two different states or territories. There are suggestions that the *Commonwealth Constitution*, and s 118 in particular, should have a direct role in determining these conflicts, without recourse to applicable law rules: see Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31(2) *Federal Law Review* 247; Stephen Gageler, 'Private Intra-national Law: Choice or Conflict, Common Law or Constitution' (2003) 23 *Australian Bar Review* 184, 186–8. However, to date, the courts have not

The equitable principles for applicable law questions relating to the distribution of estates were assumed to apply when a cross-border family provision case first arose. This was in the pre-Judicature system Equity Division of the Supreme Court of New South Wales, and so only the equitable principles could have been adopted.[79] A form of scission had developed in property suits in the Court of Chancery during the 18th and early 19th centuries. Personal property was held to be governed by the law of the deceased's residence in 1744,[80] with that connection eventually being recast as the place of domicile.[81] Real estate was explicitly recognised as subject to distribution under the *lex situs* from 1808.[82] On Chancery's adoption of the movable–immovable distinction,[83] the modern shape of applicable law in questions of the distribution of deceased estates was settled.

A *Movable Property: The Equitable Principles*

There was formerly some prospect that family provision laws might be considered an aspect of the administration of the deceased's estate and, as a question of administration, governed by the law of the forum (*lex fori*). Indeed, the Victorian laws, found in the *Administration and Probate Act 1958* (Vic), may be more easily characterised in those terms. An argument to this effect was put in 1919 to Harvey J in the Supreme Court of New South Wales in *Pain v Holt*, the first case in which family provision was considered in a cross-border application.[84] The testator, killed on active service in 1918, left a will providing for his executors to pay for the maintenance of his wife and children and, after the youngest child turned 21, to distribute the estate to the wife and children as they saw fit. The estate comprised movable property: life assurance policies, shares and bank accounts. Having applied for provision under the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), the wife confronted the executors' objection that the applicable law in a question of succession to movable property was the *lex domicilii* — and that her husband had died domiciled in Fiji, where there was no family provision law. The wife's argument was that a family provision 'right' was a chose in action for an unliquidated amount, and that those entitled to make claims were, in effect, creditors of the estate. Harvey J noted that the Act of 1916 required debts to be paid before the estate was available for family provision, and administration to be completed

addressed intra-national family provision cases in this way: see *Hitchcock* (n 53); *Blackett v Darcy* (2005) 62 NSWLR 392; *O'Donnell v O'Donnell* (2019) 19 ASTLR 160 ('*O'Donnell ACT*'); *O'Donnell v O'Donnell* [2022] NSWSC 1742 ('*O'Donnell NSW*'). Further, the reasons given by the High Court for reshaping the applicable law rule for torts to conform to the *Commonwealth Constitution* would seem equally to apply to questions of succession. However, no court has been prepared to extend this approach beyond the sphere of cross-border torts: Mortensen, Garnett and Keyes (n 15) 360–1.

79 *Pain v Holt* (n 13).

80 *Pipon v Pipon* (1744) Amb 25; 27 ER 14, 15; *Thorne v Watkins* (1750) 2 Ves Sen 35; 28 ER 24, 25; *Solomons v Ross* (1764) 1 H Bl 131n; 126 ER 79; *Jollett v Deponthieu* (1769) 1 H Bl 133n; 126 ER 80. Cf *Wallis v Brightwell* (1722) 2 P Wms 88; 24 ER 652, 652, where residential law was applied because it represented the testamentary intent.

81 *Brodie v Barry* (1813) 2 Ves & B 127; 35 ER 267, 268–9.

82 *Curtis v Hutton* (1808) 14 Ves Jr 537; 33 ER 627, 628; *Brodie v Barry* ibid; *Nelson v Bridport* (n 14) 224.

83 *Freke v Carbery* (n 35) 466.

84 *Pain v Holt* (n 13).

before an order for distribution to relatives was possible; the usual principle that movables follow the person (*mobilia sequuntur personam*) applied.[85] Although, significantly, that principle could be displaced by the clear words of the statute, there were no such words.[86] The question was governed by the law of the place of the testator's last domicile and, that being the law of Fiji, no claim was possible.[87] If the testator died domiciled in a place that does not have family provision laws, the movable property of the estate is not available for provision.[88]

This rule has been consolidated in subsequent adjudication, and is the settled equitable principle.[89] Indeed, whenever the rule has been expressly challenged, Australian and New Zealand courts have continued also to confirm that family provision is not, for choice of law purposes, a question of administration governed by the *lex fori*.[90] This choice of law rule evidently entitles the court to make provision from movable property wherever in the world it might be, as long as it is distributed in accordance with the *lex domicilii*.[91] It is certainly lumbered with the need to determine the testator's domicile at death although, given that the testator will inevitably have been of an age where a domicile of choice can be identified, that may not be as problematic in family provision as it is in other areas where a person's domicile is relevant.[92]

B *Movable Property: Legislative Modification*

In *Osborne*, Woolcock J hinted that a family provision order under the Queensland laws could be made in relation to movable property in the state — but not explicitly because it was the place of the testatrix's last domicile.[93] Stronger observations were made in *Found* where, in the Supreme Court of South Australia, Murray CJ concluded that provision could be made out of any assets situated in the state.[94] A possible, but not convincing, interpretation of family provision legislation is that it

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85 Ibid 107.

86 Ibid.

87 Ibid.

88 *Taylor v Farrugia* [2009] NSWSC 801, [26] ('*Taylor*').

89 *Osborne* (n 13) 129–30 (probable Queensland domicile); *Re Paulin* [1950] VLR 462, 467–8 ('*Paulin*'); *Greenfield* (n 42) 664.

90 *Re Butchart (Deceased)* [1932] NZLR 125, 131 ('*Butchart*'); *Heuston v Barber* (1990) 19 NSWLR 354, 359; *Hitchcock* (n 53) 690.

91 *Re Sellar* (1925) 25 SR (NSW) 540, 545.

92 The utility of the concept of domicile can be doubted, especially since use of the personal connection of 'habitual residence' has become more common: see, eg, Leon Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11(3) *Journal of Private International Law* 317. 'Habitual residence' is a connecting factor with respect to the formal validity of a will: *Wills Act 1968* (ACT) s 15C(c); *NSW Act* (n 8) s 48(1)(b); *Wills Act 2000* (NT) s 46(1)(b); *Qld Act* (n 52) s 33T; *Wills Act 1936* (SA) s 25B; *Wills Act 2008* (Tas) s 60(1)(b); *Wills Act 1997* (Vic) s 17(1)(b); *Wills Act 1970* (WA) s 20(1)(b). At least where, as with family provision, reliance is on the *testator*'s domicile, the technicalities that bedevil the domicile of children born outside wedlock or born with the assistance of reproductive technology are unlikely to arise: see Mortensen, Garnett and Keyes (n 15) 319–24; Davies et al (n 15) 338–43.

93 *Osborne* (n 13) 132. The testatrix's last domicile is unclear from the judgment. She had been domiciled in Queensland 'for many years' but towards the end of her life, as Woolcock J noted, '[s]he did not live in one place altogether, but moved from place to place': at 130.

94 *Found* (n 13) 240.

allows provision to be made out of movable property in the state even when the testator died domiciled somewhere else. In fact, Murray CJ expressed the opinion in *Found* that 'the subject of domicile may be disregarded'.[95] *Osborne* is ambiguous in this respect because the testatrix was *probably* domiciled in Queensland.[96] And, while *Found* is an overt challenge to the *lex domicilii* rule, Murray CJ also found 'unhesitatingly' that the testator had died domiciled in South Australia and consequently the case did not turn on the question.[97] Sholl J gave some consideration to *Found* in his judgment in *Paulin*, and thought that *Found* 'runs counter to the general view' unless the South Australian legislation had expressly provided for a different rule.[98]

The question is therefore whether legislation ever has, by clear words, provided a different choice of law rule for family provision from movable property. The most likely candidate for this arose in 1989 when the New South Wales Parliament amended its family provision legislation. At that point, the amended s 11(1)(b) of the *Family Provision Act 1982* (NSW) provided:

> An order for provision out of the estate or notional estate of a deceased person may … be in respect of property which is situated in or outside New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of his death, domiciled in New South Wales.

Section 11(1)(b) was re-enacted in s 64 of the *Succession Act 2006* (NSW) ('*Succession Act*'). As will be seen,[99] in *Hitchcock v Pratt* Brereton J ruled that s 64 exceeded the constitutional powers of the state Parliament.[100] The section had to be read down so as to apply only in circumstances in which the testator *was* domiciled in the state if property outside New South Wales was to be included in a family provision order.[101] A secondary question concerning s 64 was whether it could, in effect, have served as a legislative modification of the equitable choice of law rule. If there was property in the state, could s 64 allow a family provision order to be made even if the testator was not domiciled in New South Wales at death?

Taylor v Farrugia had given the opportunity to consider this but, in that case, Brereton J held, without commenting on s 64, that he did not have power to deal with movable property in New South Wales when the testator had died domiciled in Malta.[102] Under the law of Malta, the spouse and children did not have family provision rights but, instead, had forced shares of the estate.[103] In effect, Brereton J's method in *Taylor* confined the application of s 64 to property in New South Wales only when the testator had died domiciled in the state. The question was later raised in *Hitchcock*, but could not be finally resolved because in that application no

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95 Ibid.
96 *Osborne* (n 13) 130.
97 *Found* (n 13) 240.
98 *Paulin* (n 89) 468.
99 See below nn 139–145 and accompanying text.
100 *Hitchcock* (n 53).
101 Ibid 692–3, confirming *Balajan v Nikitin* (1994) 35 NSWLR 51, 60–1.
102 *Taylor* (n 88) [26].
103 Ibid.

property whatsoever was in New South Wales.[104] The effect of Brereton J's decisions under s 64 is therefore twofold. First, an order for provision from any property within New South Wales, regardless of where the testator had been domiciled at death, is within state legislative power.[105] Secondly, the language of s 64 had not been sufficiently clear to displace the equitable limitations on the application of the family provision laws and, even under s 64, they could only apply to movable property when New South Wales was the place where the testator had died domiciled. It is evident that the geographical operation of family provision laws can only be changed when that is given the clearest express indication in the legislation itself.

Section 64 of the *Succession Act* was repealed and replaced in 2018.[106] The Act now provides: 'A family provision order may be made in respect of property situated outside New South Wales when, or at any time after, the order is made only if the deceased person was, at the time of death, domiciled in New South Wales.'[107] The amendment plainly responded to *Hitchcock* and the problem of the section's constitutional over-reach. However, in addressing the constitutional question the Parliament also removed the express statement of the repealed s 64 that an order for provision could be made out of property *inside* New South Wales. It is now even clearer that the applicable law to movable property in New South Wales is the *lex domicilii*.

C *Immovable Property*

The principle of scission has the inevitable implication that the law governing family provision from any immovable property in the estate is the law of the place where the property is situate (*lex situs*). However, as we explain below,[108] where the *situs* is outside the state, the choice of law rule also directs a limitation on the jurisdiction of the court to deal with it — a limitation that is possibly reinforced by other restrictions on adjudicative jurisdiction.[109] As a result, in family provision claims an Australian court rarely considers how to deal with a foreign immovable, even if the terms of the foreign *lex situs* are properly established. In this respect, the conclusion that the *lex situs* is the applicable law is generally inferred from the approach taken to adjudicative jurisdiction.[110] There are nevertheless two ways that foreign immovable property has been considered when making family provision orders, even when the local legislation is inapplicable to it.

The first approach is to recognise that the immovable property is unavailable to the court when making orders for provision, but to take it into account when

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104 *Hitchcock* (n 53) 694, 695–6, 701.
105 Ibid 694.
106 *Justice Legislation Amendment Act 2018* (NSW) sch 1.
107 *NSW Act* (n 8) s 64.
108 See below n 137 and accompanying text.
109 See below nn 148–157 and accompanying text.
110 For an express statement of the choice of law rule in family provision claims, see *Re Bailey* [1985] 2 NZLR 656, 660 ('*Bailey*'); *Hitchcock* (n 53) 695; *Lai v Huang* [2016] NZHC 2828, [65]. For inferences from the limitations on jurisdiction over claims involving immovables, see *Butchart* (n 90) 131; *Paulin* (n 89) 465, 467; *Bailey* (n 110).

determining the size of the estate and, so, the kind and quantum of orders that can be made from it. In *Chen v Lu*, the testator had died domiciled in New South Wales with a net distributable estate of movable and immovable property in the state of around AUD325,000.[111] There were more substantial holdings of Chinese immovable property valued at around AUD700,000.[112] Brereton J noted that no claim was made against the Chinese property, but also that the existence of the property could be used to inform his decision about making provision out of the assets that *were* located in the state.[113]

A second, even more direct, application of family provision laws to out-of-state assets was made in the Supreme Court of Queensland in *Stewart*.[114] The testator, domiciled in Queensland, left an estate covering properties in Queensland and New South Wales. Recognising that he did not have power to deal with the immovable property in New South Wales, Macrossan CJ nevertheless held that he had the power to deal with the income earned from it. He considered that, once earned, the income became personalty and, therefore, movable. It was therefore available under the Queensland family provision laws that were applicable to movable property as the *lex domicilii*. Once more, Sholl J gave *Stewart* some consideration in *Paulin* and 'respectfully' ventured that it also ran 'counter to the general view'.[115] Indeed, if the New South Wales court had exercised jurisdiction in a family provision claim against the same real estate, the decision in *Stewart* risked different states' orders being applied to the same property.[116]

D *Renvoi*

The whole area of succession to property is one in which the doctrine of *renvoi* has a recognised role.[117] Although *renvoi* is rare, in the cases where it has arisen it has commonly involved a question of succession.[118] A question of *renvoi* arises where the applicable law for an issue that is selected by the Australian choice of law rule itself requires a different law to govern the case. It has occurred particularly in England where the court determining the case has initially identified that a foreign law applies to the claim as the *lex domicilii* or *lex situs*. The foreign law gives a forced share of an estate to a spouse or child, but also has its own choice of law rule

111 *Chen v Lu* [2014] NSWSC 1053, [74] ('*Chen*').
112 Ibid [75].
113 Ibid. See also *Re Turnbull* [1975] 2 NSWLR 360, 367; *Taylor* (n 88) [26], [70], [74]; *Re Grundy* [2018] NSWSC 104, [95]–[101].
114 *Stewart* (n 13).
115 *Paulin* (n 89) 467.
116 Ibid 467–8.
117 *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 1 WLR 978, 1008.
118 For Australia, see *Simmons v Simmons* (1917) 17 SR (NSW) 419 ('*Simmons*'); *Kong v Yan* [2021] SASC 82, [91]–[92]. For England, see, eg, *Collier v Rivaz* (1841) 2 Curt 855; 163 ER 608; *In the Goods of Lacroix* (1877) 2 PD 94; *In the Goods of Brown-Sequard* (1894) 70 LT 811; *Re Trufort; Trafford v Blanc* (1887) 36 Ch D 600; *Re Johnson; Roberts v Attorney-General* [1903] 1 Ch 821; *Re Annesley; Davidson v Annesley* [1926] Ch 692 ('*Annesley*'); *Re Ross; Ross v Waterfield* [1930] 1 Ch 377 ('*Ross*'); *Re Askew; Marjoribanks v Askew* [1930] 2 Ch 259; *Re O'Keefe (Deceased); Poingdestre v Sherman* [1940] Ch 124; *Re Duke of Wellington; Glentanar v Wellington* [1947] Ch 506 ('*Duke of Wellington*'); *Re Estate of Fuld, dec'd [No 3]* [1968] P 675; *Vucicevic v Aleksic* [2017] EWHC 2335 (Ch) ('*Vucicevic*'). Cf *Bremer v Freeman* (1857) 10 Moo PC 306; 14 ER 508.

requiring the national law (*lex patriae*) to apply to the question of beneficial succession, and the foreign law considers that the national law is either English or the law of a third country.[119] The question of *renvoi* has been whether the English court should apply the first applicable law (and give effect to the forced shares), or accept the foreign choice of law rule's return to English law ('remission') or its application of the third country's law ('transmission'). The tendency in common law countries is to decide the case as the foreign court would.[120]

Renvoi therefore arises when the choice of law rules of the forum and the choice of law rules of the applicable law differ, and the forum's rules select the choice of law rules of the applicable law and not just its internal law.[121] It has arisen in respect of both movable[122] and immovable[123] property. In *Simmons v Simmons*, a New South Wales court identified the law of New Caledonia (the *lex domicilii*) as the applicable law for a question of forced shares in an estate, only to find that the law of New Caledonia required the law of New South Wales to apply to the issues as the *lex patriae*.[124] It therefore decided the case as it was presumed that a New Caledonia court would decide it, and that was in accordance with New South Wales law.[125] *Renvoi* has been relatively rare, and is generally discouraged in international instruments.[126] However, in Australia the High Court gave it significant impetus in *Neilson v Overseas Projects Corporation* where, without precedent, *renvoi* was recognised as being available in cross-border tort claims.[127] Although care was taken in *Neilson* to emphasise that the recognition of *renvoi* in tort cases did not mean it was available in all cross-border claims,[128] there was nothing particularly distinctive to tort in the adoption of the doctrine.[129] As a result, it was subsequently recognised in Australia even in a cross-border claim in contract.[130]

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119 See, eg, *Annesley* (n 118); *Ross* (n 118); *Duke of Wellington* (n 118). See generally Graue (n 6) 178–9.

120 *Simmons* (n 118); *Annesley* (n 118); *Ross* (n 118); *Duke of Wellington* (n 118); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 ('*Neilson*'). For an overview of the foreign court theory's application, see Graue (n 6) 179.

121 Reid Mortensen, '"Troublesome and Obscure": The Renewal of *Renvoi* in Australia' (2006) 2(1) *Journal of Private International Law* 1, 12–18.

122 *Simmons* (n 118); *Annesley* (n 118); *Ross* (n 118).

123 *Duke of Wellington* (n 118); *Vucicevic* (n 118).

124 *Simmons* (n 118).

125 Ibid.

126 See, eg, *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40 art 24; *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 11 July 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6 art 20. Cf *Succession Convention* (n 21) art 4 (which allows *renvoi* where the applicable laws of non-contracting states are concerned); *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession* [2012] OJ L 201/107 art 35.

127 *Neilson* (n 120).

128 Ibid 366, 388, 421.

129 Mortensen (n 121) 23.

130 *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25. Cf *Proactive Building Solutions v MacKenzie Keck Ltd* [2013] NSWSC 1500, [27]–[29], where McDougall J said it was not open to a trial judge to extend *renvoi* to contract cases.

As the use of *renvoi* in succession cases long preceded the decision in *Neilson*, this fact can only strengthen the conclusion that the doctrine is available in family provision cases. The fact that family provision approaches to the moral claims of relatives against estates have only been taken in Commonwealth countries, and that the relevant Commonwealth countries use the same choice of law rules, means that the conflicting choice of law rules needed to give rise to the problem of *renvoi* have not yet occurred in cross-border family provision cases.[131] Having said that, Sholl J in *Paulin*[132] and Prichard J in *Bailey*[133] recognised the possibility of *renvoi* in family provision claims. *Renvoi*'s probable appearance in family provision applications would be more likely if, at any point, the equitable principles of applicable law were, in any one place, adjusted by legislation.

IV Jurisdiction

Family provision claims are initiated by application to the relevant state or territory Supreme Court.[134] The cross-border jurisdiction of the court is therefore not determined merely by reference to service of initiating process outside the state;[135] it could arise even when all interested parties are inside the state. Interpretation of family provision laws has also consistently refused to require any connection between the claimant and the state.[136] Geographical limits on jurisdiction have had to be developed differently. In this respect, the Supreme Courts maintain the pre-*Judicature Act* approaches of courts of equity and have developed principles of jurisdictional competence and choice of law together. The equitable principles are relatively settled. Having sifted through the previous 30 years of adjudication on cross-border family provision, Sholl J comprehensively summarised the principles of jurisdiction in 1950 in his decision in *Paulin*:

> (1) The Courts of the testator's domicil alone can exercise the discretionary power arising under the appropriate testator's family maintenance legislation of the domicil so as to affect his movables and immovables in the territory of the domicil …
>
> (2) The same Courts alone can exercise such discretionary power so as to affect under the same legislation his movables outside the territory of the domicil …
>
> (3) The Courts of the *situs* can alone exercise a discretionary power to affect, and then only if there is testator's family maintenance legislation in the *situs* providing for it, immovables of the testator out of the jurisdiction

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131 *Bailey* (n 110) 660.
132 *Paulin* (n 89) 466–7.
133 *Bailey* (n 110) 660.
134 *ACT Act* (n 52) s 8(1); *NSW Act* (n 8) s 58; *NT Act* (n 52) s 7(1); *Qld Act* (n 8) s 41(1); *SA Act* (n 8) s 7(1); *Tas Act* (n 8) s 3(1); *Vic Act* (n 8) s 90A(1); *WA Act* (n 52) s 6(1).
135 As under *Service and Execution of Process Act 1992* (Cth) ss 12, 15; *Trans–Tasman Proceedings Act 2010* (Cth) s 9; and the various long-arm jurisdictions exercised under rules of court that permit service on persons outside Australia and New Zealand: Mortensen, Garnett and Keyes (n 15) 43–64; Davies et al (n 15) 41–76.
136 *Found* (n 13) 239–40; *Donnelly* (n 43) 35; *Butchart* (n 90) 129; *Paulin* (n 89) 465, 467; *Bailey* (n 110).

> of the Courts of his domicil; and the Courts of his domicil cannot exercise their discretion so as to deal with such immovables.[137]

Sholl J's summary continues to be accepted as the definitive statement of adjudicative jurisdiction in family provision claims, except where legislation (within its constitutional limits) has adjusted it.[138] In *Hitchcock* Brereton J noted that these rules of jurisdiction had been modified by s 11(1)(b) of the *Family Provision Act 1982* (NSW) and its successor, the then s 64 of the *Succession Act*.[139] This legislation erased these rules of adjudicative jurisdiction completely. In removing any requirement that the testator had been domiciled in New South Wales to entertain an application for provision, the legislation eliminated jurisdictional grounds (1) and (2). In enabling a court to deal with 'property' situated outside New South Wales, the legislation eliminated jurisdictional ground (3). *Hitchcock* involved claims against an estate of a testator who had died domiciled in Victoria, and who — it was ultimately determined — left no assets in New South Wales. The claims clearly illustrated how s 64 of the *Succession Act* purported to apply to estates that had no connection with New South Wales.

The question of s 64's violating the extraterritorial limits on state legislative power had already been raised in previous litigation.[140] As state legislation must address considerations that have at least *some* connection with the state,[141] in *Hitchcock* Brereton J had no qualms in ruling s 64 invalid.[142] However, New South Wales law also enabled constitutionally suspect legislation to be read down if, in doing so, its validity could be maintained.[143] Brereton J held that a connection with New South Wales could be established if s 64 were read as allowing a court to deal with movable property in New South Wales of testators who were domiciled elsewhere, and of immovable property outside New South Wales of testators who were domiciled in the state.[144] These connections, while saving the legislation, are not the connections that had been recognised as giving jurisdiction or selecting the applicable law in equity, and therefore still allowed s 64 to adjust *Paulin* jurisdictional grounds (1) and (3). As it turned out, when s 64 was amended in 2018, all references to dealing with property inside New South Wales were also removed.[145] Accordingly, s 64 no longer explicitly adjusts jurisdictional ground (1) and, on normal principles, it is possible to regard this limitation as having been restored in New South Wales. This was precisely the argument that was subsequently

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137 *Paulin* (n 89) 465.
138 *Taylor* (n 88) [26]; *Hitchcock* (n 53) 691.
139 *Hitchcock* (n 53) 689. See above nn 99–107 and accompanying text.
140 *Balajan v Nikitin* (n 101) 60–1, applying *Flaherty v Girgis* (1985) 4 NSWLR 248, 267. See also *Re Theiss; Brinkman v Johnston* (Supreme Court of New South Wales, Hodgson J, 4 February 1994) 19; *Bepper v Steed* (Supreme Court of New South Wales, Master McLaughlin, 17 December 1996) 22–3; *Blackett v Darcy* (n 78) 395; *Chen* (n 111) [75]; Note, 'Family Provision Act: Extraterritorial Operation' (1994) 68(8) *Australian Law Journal* 612.
141 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 22–3 (Gleeson CJ), 34 (Gaudron, Gummow and Hayne JJ); *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692, 723–5.
142 *Hitchcock* (n 53) 693.
143 *Interpretation Act 1987* (NSW) s 31.
144 *Hitchcock* (n 53) 694.
145 See above n 107 and accompanying text.

made by the defendants in a summary judgment application in *Gardner v Selby*, but Hallen J found that the question was more appropriate for determination at trial.[146]

To the extent that, when a testator has died domiciled in New South Wales, the Supreme Court can order provision from immovable property outside the state, s 64 does modify jurisdictional ground (3).[147] At present, a modification of the effect of jurisdictional ground (3) may only be possible in New South Wales. There is a general prohibition in Australia in all civil litigation on dealing with claims involving foreign immovable property. The ban stems from the House of Lords' decision in *British South Africa Co v Companhia de Moçambique*, where it was held that an English court cannot hear any matter concerning title to or possession of foreign land, or any action relating to trespass to foreign land.[148] The *Moçambique* rule is law in most parts of Australia and has been extended to other immovable property.[149] Although in recent years the High Court has expressed doubts about its value,[150] it is still accepted as remaining a part of the common law of Australia.[151]

The *Moçambique* rule has been completely abolished by statute in New South Wales.[152] Instead, in New South Wales, a court that has a question before it involving immovable property outside the state may decline to exercise jurisdiction if it considers that it is not the appropriate court to hear the matter[153] — but it is not *required* to decline jurisdiction. To the extent that a question of title to land is not involved, the rule is partially modified in the Australian Capital Territory.[154]

There are a number of claims in admiralty, probate and equity relating to immovable property in which the *Moçambique* ban is inapplicable, including proceedings for the administration and distribution of deceased estates.[155] The application of the *Moçambique* rule to family provision claims dealing with foreign immovable property was explored at some length in *Bailey*.[156] There, Prichard J left the question open, but accepted that the choice of law rules applicable to family provision from immovable property had much the same effect as the application of *Moçambique* at the point of determining jurisdiction.[157] To this could be added jurisdictional ground (3) which, without modification by statute, limits consideration of immovable property to the *forum situs*. This also suggests that jurisdictional

146 *Gardner v Selby* [2022] NSWSC 298, [113].
147 *Xiang v Tong* [2021] NSWSC 44, [314].
148 *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 629 (Lord Herschell LC).
149 *Potter v Broken Hill Pty Co Ltd* (n 44) (patents).
150 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520; *Moti v The Queen* (2011) 245 CLR 456, 474–5.
151 *Singh v Singh* (2009) 253 ALR 575. Cf *Uhlmann v Harris [No 2]* [2018] 3 Qd R 392, 400–1 ('*Uhlmann No 2*'). For the survival of the *Moçambique* rule in bankruptcy proceedings in the Federal Court, see *Re Doyle; Ex parte Brien and Doyle* (1993) 41 FCR 40. Cf *Dagi v Broken Hill Pty Co Ltd [No 2]* [1997] 1 VR 428; JLR Davis, 'The Ok Tedi River and the Local Actions Rule: A Solution' (1998) 72(10) *Australian Law Journal* 786.
152 *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) s 3.
153 Ibid s 4.
154 *Civil Wrongs Act 2002* (ACT) s 220.
155 Mortensen, Garnett and Keyes (n 15) 72–4; Davies et al (n 15) 82–5.
156 *Bailey* (n 110).
157 Ibid 658–9.

ground (3) should receive similar treatment to *Moçambique* when the complex interaction of cross-vested and federal jurisdiction is considered.

A *Cross-Vested Jurisdiction*

The uniform state and territory cross-vesting Acts see the swapping of all Supreme Court jurisdictions in any 'state matter' between the state and territory Supreme Courts.[158] For present purposes, this includes all jurisdictions that a Supreme Court has in relation to land and other immovable property in its state or territory, any statutory jurisdiction that a Supreme Court is given under its family provision laws, and any restrictions placed on its jurisdiction by the general law. From the inception of the cross-vesting scheme, it has been recognised that it has profound implications for the application of *Moçambique* in interstate property questions in Australia.[159] So where, before the cross-vesting scheme commenced, the Supreme Court of Queensland had no jurisdiction under *Moçambique* to deal with a question involving title to land in New South Wales, the cross-vesting scheme now gives the Queensland court the jurisdiction that the Supreme Court of New South Wales has in 'state matters' dealing with title to land in the state.[160] To some extent,[161] this makes *Moçambique* irrelevant in interstate questions in Australia.

It follows that, before the cross-vesting scheme, *Paulin* jurisdictional ground (3) meant that the Supreme Court of Queensland had no power under its family provision laws to order provision from land in New South Wales — even where the testator had died domiciled in Queensland.[162] The New South Wales cross-vesting legislation now gives to the Supreme Court of Queensland the Supreme Court of New South Wales's discretionary powers under its family provision laws to make provision from land in New South Wales. Jurisdictional ground (3), therefore, 'must give way and is cut down' in family provision questions that cross state and territory borders.[163] So where, under jurisdictional ground (2), a state Supreme Court as *forum domicilii* has had an unlimited extraterritorial jurisdiction to make provision from movable property, the cross-vesting scheme gives it an Australia-wide jurisdiction to make provision from immovable property located anywhere in the country. The *situs* remains relevant for choice of law, though, insofar as any item of immovable property is still to be addressed by the family provision laws of its *situs*.

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158 *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (SA) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Tas) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA) s 4(3).

159 See, eg, David St L Kelly and James Crawford, 'Choice of Law under the Cross-Vesting Legislation' (1988) 62(8) *Australian Law Journal* 589, 591; *Starr-Diamond v Diamond [No 3]* [2013] NSWSC 351, [6]–[9] ('*Starr-Diamond*'); *Greater Bank Ltd v Official Trustee in Bankruptcy* [2017] NSWSC 1496, [4].

160 *Starr-Diamond* (n 159); *Uhlmann No 2* (n 151) 397–8.

161 See below nn 179–206 and accompanying text.

162 See above n 137 and accompanying text. Cf *Osborne* (n 13); *Stewart* (n 13).

163 *Uhlmann No 2* (n 151) 398 (Jackson J).

Where different family provision applications are brought concurrently in different states, the cross-vesting scheme gives the Supreme Courts power to transfer the proceedings to the single most appropriate court for dealing with them.[164] It seems most likely that the state or territory providing the applicable law for the predominant portion of the estate must have a reasonable claim to receive the transfer of proceedings,[165] and the Supreme Court of the place of the testator's domicile at death must have a significant claim in that respect.[166]

Two transfer cases arguably test this logic. In *Sherrin v M J Sherrin Pty Ltd*, the deceased died domiciled in New South Wales where he left much of his AUD14 million estate.[167] In the Supreme Court of South Australia, the deceased's brother claimed various forms of relief against the deceased's personal representatives. Olsson J viewed the plaintiff's fifth claim under the *Inheritance (Family Provision) Act 1972–75* (SA) as a '"fall back" position'[168] — an alternative to his first four claims. The corporate defendant applied to transfer proceedings to New South Wales where five separate proceedings for family provision had been commenced by relatives of the deceased. Olsson J refused to transfer the South Australian proceedings which were not only first in time but also involved 'specific and discrete causes of action' and a question about 'the occupancy of South Australian land'.[169] Those seeking transfer to New South Wales were 'to be seen as the tail seeking to wag the dog, in a manner which could possibly prejudice the plaintiff's causes of action'.[170]

O'Donnell ACT[171] does not necessarily challenge the significance of the *forum domicilii* in transfer cases, as the testator's domicile at death was considered to be 'evenly balanced' between New South Wales and the Australian Capital Territory,[172] but there was an arguable case that he was domiciled in New South Wales and the proceedings were ultimately transferred there. However, *O'Donnell ACT* does also suggest that juridical advantages to the claimants might assist the decision to transfer. The testator died in Canberra leaving a large estate with a net value of AUD6.64 million to be divided equally among his five children. In addition to those estate assets that were located exclusively in the Australian Capital Territory, the testator had owned 'very substantial assets, including real property in NSW' tied up in 'trusts controlled by companies of which he was a director and in

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164 *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (SA) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Tas) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA) s 5. See *Hitchcock* (n 53) 695–6.

165 Cf *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400. See *Hitchcock* (n 53) 695–6.

166 *Sherrin v M J Sherrin Pty Ltd* (Supreme Court of South Australia, Olsson J, 31 July 1992) ('*Sherrin*'). Cf *O'Donnell ACT* (n 78).

167 *Sherrin* (n 166).

168 Ibid 2.

169 Ibid 4.

170 Ibid 6.

171 *O'Donnell ACT* (n 78) 176.

172 Cf *O'Donnell NSW* (n 78) [297], [299], [314].

some cases a shareholder'.[173] Two sets of proceedings for family provision were pending in the Supreme Courts of both jurisdictions.[174] Crowe AJ of the Supreme Court of the Australian Capital Territory concluded that it was more appropriate and in the interests of justice to transfer family provision proceedings to New South Wales for determination.[175] A decisive consideration was New South Wales's 'unique' notional estate provisions.[176] If the testator was domiciled in the Australian Capital Territory, as the Supreme Court of New South Wales subsequently found,[177] only the net estate would be available for provision. On the other hand, if the testator died domiciled in New South Wales, the Supreme Court of New South Wales could make an order taking into account net assets *and* any property designated as notional estate.[178] The proceedings were transferred to New South Wales.

B *Federal Jurisdiction*

In proceedings that are heard in federal jurisdiction, a different account is required. As Jackson J pointed out in *Uhlmann v Harris [No 2]* — a Queensland case for the recovery of land in New South Wales — the cross-vesting of Supreme Court jurisdictions in any 'state matter' does not include any federal jurisdiction exercised by a Supreme Court.[179] Further, the federal cross-vesting legislation does not address, at all, the federal jurisdiction of the state and territory Supreme Courts.[180] This has two consequences. First, no federal jurisdiction held by a state or territory Supreme Court is invested in any other Supreme Court, or in any federal court.[181] Secondly, no state or territory Supreme Court receives the federal jurisdiction of another state or territory Supreme Court. In other words, once a Supreme Court is exercising federal jurisdiction, the possibility that it could exercise a cross-vested jurisdiction is excluded.

It is conceivable that a family provision application could find itself in federal jurisdiction simply because the parties before the court — applicants, affected beneficiaries, personal representatives — are residents of different states. Section 75(iv) of the *Australian Constitution* provides that the High Court has original jurisdiction '[i]n all matters … between residents of different States'. The section paraphrases art III § 2 of the *United States Constitution*. In both countries, there is a complicated jurisprudence surrounding this federal 'diversity jurisdiction' but,

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173 *O'Donnell ACT* (n 78) 168.

174 Subsequently, six proceedings arising out of the estate were heard together: *O'Donnell NSW* (n 78) [1].

175 *O'Donnell ACT* (n 78) 168.

176 Ibid 179. See *NSW Act* (n 8) s 63(5).

177 *O'Donnell NSW* (n 78) [313]–[320].

178 *O'Donnell ACT* (n 78) 169.

179 *Uhlmann No 2* (n 151) 399.

180 *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 4.

181 The constitutional limitations on federal courts receiving state jurisdictions do not apply in this instance: cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Brown v Gould* (1998) 193 CLR 346. It is possible for federal legislation to invest in federal courts the federal jurisdictions it has given to state and territory Supreme Courts, by means other than the cross-vesting of existing court jurisdictions. The federal Parliament has tended not to do this: see, eg, *Re Kodak (Australasia) Pty Ltd v Commonwealth* (1988) 22 FCR 197; *Courtice v Australian Electoral Commission* (1990) 21 FCR 554.

unlike the United States, in Australia it can be exercised by state courts due to the *Judiciary Act* investing the original jurisdiction of the High Court in all state courts.[182] This is subject to several limitations that do not, however, affect diversity jurisdiction.[183] Not uncommonly, it can arise in ordinary civil litigation before state courts.

There is also a longstanding scepticism that federal jurisdiction in general, and diversity jurisdiction in particular, contribute anything of value to Australian law.[184] In 1922, Higgins J said diversity jurisdiction was 'a piece of pedantic imitation of the Constitution of the United States, and absurd in the circumstances of Australia'.[185] Efforts have therefore been made to limit its incidence.[186] In *Watson v Cameron*, a unanimous High Court held that, wherever one party on each side was resident in the same state, diversity jurisdiction would not arise.[187] Proceedings brought by co-parties resident in Victoria and New South Wales against a New South Welsh resident were held not to be within diversity jurisdiction. The High Court has also consistently denied that a corporation can be considered a 'resident' of a state for the purposes of s 75(iv)[188] — although corporations are attributed a *situs* and residence for many other purposes of the law. Further, the presence of a single corporation amongst the parties seems to disqualify the entire proceedings from diversity jurisdiction, even if the natural parties would otherwise satisfy the conditions for it to arise.[189] There is no logic or textual justification for this; the High Court's glosses represent a sustained policy of stifling the incidence of diversity jurisdiction. It would, though, assure that diversity jurisdiction could never arise in a family provision claim when a corporation had been appointed the personal representative, and was necessarily a party to the application.

However, diversity jurisdiction remains a possibility in Australian family provision claims. American federal courts, which otherwise have no jurisdiction in matters of probate or the administration of estates,[190] have assumed jurisdiction on

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182 *Judiciary Act* (n 55) s 39(2).

183 Ibid s 38.

184 Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 606–8; Zelman Cowen, *Federal Jurisdiction in Australia* (Oxford University Press, 1959) x, xv; Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler, *The Australian Federal Judicial System* (Melbourne University Press, 2000) 265, 266; Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 221 n 130.

185 *Australasian Temperance & General Mutual Life Assurance Society v Howe* (1922) 31 CLR 290, 330 ('*Howe*').

186 Zelman Cowen, 'Diversity Jurisdiction: The Australian Experience' (1957) 7 *Res Judicatae* 1; Cowen (n 184) 74–93; Zines (n 184) 284–5.

187 *Watson v Cameron* (1928) 40 CLR 290, 330.

188 *Howe* (n 185); *Cox v Journeaux* (1934) 52 CLR 282; *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22.

189 *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 196.

190 In general, the 'probate exception' to federal diversity jurisdiction precludes American federal courts from probating wills or administering estates. For an overview of authorities on the probate exception, see *Marshall v Marshall*, 547 US 293, 306–12 (2006).

the basis of diversity of state citizenship,[191] a term approximating domicile.[192] In Australia, again in contrast to the United States, there has never been any decision that the subject-matter of a civil claim could prevent its being captured by diversity jurisdiction — despite all other judicial efforts to limit the reach of s 75(iv). However, it is even more likely that probate and equitable jurisdictions relating to succession could be brought within Australian diversity jurisdiction than American.[193] There are certainly instances, when in diversity jurisdiction, of Australian courts entertaining equitable claims.[194] It would therefore appear that there is no subject-matter restriction on a court in diversity jurisdiction exercising the equitable jurisdiction that envelops the application of family provision statutes.[195]

And it may well happen. Although there are no explicitly recognised instances of diversity jurisdiction arising when making family provision, the conditions for the jurisdiction to arise seem to have been present in *Hitchcock* and, possibly, *Donnelly* and *Found*. It has sometimes only been an afterthought; recognised after the proceedings have been running.[196]

Although in *Uhlmann No 2* Jackson J referred to *Rizeq*[197] and concluded that s 79 of the *Judiciary Act* was inapplicable,[198] he held that, as he was sitting in federal diversity jurisdiction, *Moçambique* applied as part of the common law in Australia under s 80 of the *Judiciary Act*.[199] The silence of the *Rizeq–Masson* paradigm on s 80 means this interpretation was open to Jackson J,[200] although *Moçambique* might be best considered applicable in federal jurisdiction simply because courts exercising it apply the common law of Australia.[201] Following this analysis, if federal diversity jurisdiction is engaged in a family provision claim, the proceedings are governed by the common law of Australia, including its equitable principles. Any state family

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191 *Borer v Chapman*, 119 US 587, 600–1 (1887); *Lawrence v Nelson*, 143 US 215, 223–4 (1892); *Sutton v English*, 246 US 199, 205 (1918). See Note, 'Federal Jurisdiction in Matters Relating to Probate and Administration' (1930) 43 *Harvard Law Review* 462, 465–6; Allan Vestal and David Foster, 'Implied Limitations on the Diversity Jurisdiction of Federal Courts' (1956) 41 *Minnesota Law Review* 1, 13–23.

192 See *Messick v South Pennsylvania Bus Co*, 59 F Supp 799, 800 (ED Pa 1945); Zelman Cowen, 'Diversity Jurisdiction: The Australian Experience' (1954–55) 4 *Utah Law Review* 480, 487. Cf *Howe* (n 185) 324 (the terms 'resident' and 'residents' in s 75(iv) of the *Australian Constitution* mean the person is a habitual resident).

193 See also Michael Pryles and Peter Hanks, *Federal Conflict of Laws* (Butterworths, 1974) 144.

194 See, eg, *Glover v Walters* (1950) 80 CLR 172, 172; *Bromley v Ryan* (1956) 99 CLR 362, 381, 412; *McM v C [No 2]* [1980] 1 NSWLR 27; *Tweedie v Treffery* (Supreme Court of New South Wales, Bryson J in Eq, 13 January 1987); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 399.

195 In the exercise of its original jurisdiction, the High Court is empowered to grant 'all such remedies' as is appropriate to resolve the controversy between the parties: *Judiciary Act* (n 55) ss 31–2.

196 This appears to have happened in *Uhlmann v Harris* (2017) 327 FLR 394, and in numerous tribunal proceedings after *Burns v Corbett* (2018) 265 CLR 304 where the High Court held that, as state tribunals cannot exercise federal jurisdiction, they cannot hear proceedings between '"residents of different states" within the meaning of s 75(iv) of the *Constitution*': at 342–5, 413.

197 See above nn 55–78 and accompanying text.

198 *Uhlmann No 2* (n 151) 398.

199 Ibid 401.

200 See above nn 67–74 and accompanying text; *Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280, [405].

201 See above nn 70–72 and accompanying text.

provision laws that apply would do so in federal jurisdiction, where the law of the state in which the court is sitting becomes applicable.[202] That being so, the jurisdiction is not one relating to a 'state matter', and cannot be invested in another Supreme Court under the state or territory cross-vesting laws. Jackson J was not entirely certain that the common law limitations of the *Moçambique* rule would apply to a question concerning possession of land in another state when a court is exercising federal jurisdiction.[203] However, those doubts arose more from the continuing authority of *Moçambique* at common law, especially in an interstate setting, and not from any claim that the *Judiciary Act* could not import limitations within state jurisdictions into a federal jurisdiction.[204] In *Uhlmann No 2*, Jackson J actually did conclude that, when in federal diversity jurisdiction in a Queensland court, *Moçambique* applied to limit the court's power to deal with a question of the possession of land in another state.[205] The decision strongly suggests that, if a family provision claim were to fall within federal jurisdiction, *Paulin* ground (3) would also limit the capacity of most Australian Supreme Courts to make orders for provision from immovable property in other states or territories. The exception would again be the Supreme Court of New South Wales, which could claim under the amended s 64 of the *Succession Act* to deal with immovable property outside the state if it were the *forum domicilii*.[206]

V Conclusion

As we have emphasised, an issue that persists in cross-border succession law is Australia's strong insistence on the principle of scission. This can commonly see the laws of two or more places apply to the one estate. Attempts to have a single applicable law govern the distribution of a whole estate have been unsuccessful. But as problematic as application of the principle of scission might be,[207] the caution inherent in making the *lex situs* the applicable law for immovable property remains, in our view, the best option. Especially in the case of land, the state's sovereign interests in determining title to and the management of immovable property inside its borders lie at the heart of its existence as a separate political entity. Straightforward application of the *lex situs* as the applicable law for immovable property therefore ensures that the law respects another state's sovereignty.

We have, on the other hand, drawn attention to the problems that the *situs* rule creates in questions of adjudicative jurisdiction. These problems need addressing. In most states and the territories, *Paulin* jurisdictional ground (3) limits the power of the court to order provision from immovable property[208] — subject, perhaps, to the power to take foreign immovable property into account when determining the value of the estate, and how much is available for family

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202 See above nn 55–78 and accompanying text.
203 *Uhlmann No 2* (n 151) 398.
204 Ibid 400–1.
205 Ibid 401.
206 See above nn 139–145 and accompanying text.
207 See above nn 35–49 and accompanying text.
208 See above nn 137–157 and accompanying text.

provision.[209] At present, if strictly applied, jurisdictional ground (3) requires a separate family provision application to be made in every state, territory or country in which real estate (and other immovable property) is held. As long as all of these concurrent applications are within Australia, the cross-vesting scheme enables the jurisdictional problems to be resolved by a transfer to one Supreme Court, able to exercise the powers of every Australian *forum situs* under the relevant state or territory family provision statutes.[210] There will still be separate application of the *leges situs* to immovable property in different states, but the one court can make that determination.

However, as has so often been the case, the peculiarities of federal jurisdiction in Australia disrupt the solutions of the cross-vesting scheme.[211] Jackson J's analysis in *Uhlmann No 2* of the effect of federal jurisdiction on the *Moçambique* rule is a compelling one. It is hard to escape the conclusion that it is equally applicable to *Paulin* jurisdictional ground (3) in family provision claims. As far as immovable property is concerned, a state Supreme Court exercising federal jurisdiction in an application for family provision will only be able to draw on immovable property in that state. It takes little imagination to foresee that, if the property comprising an estate spans borders, claimants for family provision, beneficiaries and personal representatives are also likely to live in different states — and so, as we have suggested, are just as likely to engage federal diversity jurisdiction. Ironically, as *Uhlmann No 2* established, it is easier to recover land in another state when none of the parties are resident there. Equally, it is easier to gain access to immovable property in other states and territories for family provision when all of the parties to the application live in only one single state or territory.

The answer to the problem of importing jurisdictional ground (3) into federal jurisdiction is, as has occurred in New South Wales, modifying it by legislation. The purpose of s 64 of the *Succession Act* was not to address jurisdictional problems raised by the cross-vesting scheme. However, it does have the collateral benefit of addressing them effectively, allowing immovable property outside the state to be dealt with in an order for family provision when the testator has died domiciled there.

Legislation modelled on those lines has much to commend it. It would give every state and territory Supreme Court the power to make reference to the whole estate, wherever the property is located, for family provision, as long as the court in question was the *forum domicilii*. Section 64-style legislation would eliminate jurisdictional ground (3) but extend jurisdictional ground (2) to include immovable property as well as movables. The power would be applicable even where federal jurisdiction was being exercised because residents of different states were involved. Claimants would still be forced to apply for provision in the place of the testator's domicile, but it would immediately eliminate the need to make concurrent applications in different courts to bring claims against real estate within the powers of any Supreme Court.

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209 See, eg, *Chen* (n 111) [75]. See above nn 111–113 and accompanying text.
210 See above nn 158–165 and accompanying text. Cf Kelly (n 10) 392.
211 See above nn 179–206 and accompanying text.

Act of Grace Payments and the Constitution

Oscar I Roos* **and Yee-Fui Ng†**

Abstract

This article focuses on a hitherto underexplored but increasingly important area of public expenditure: act of grace payments. Act of grace payments are voluntary, highly discretionary gifts of money made by the executive in the absence of any legal duty to do so. The expenditure on such payments in Australia has been significant, and a lack of transparency creates serious risks to integrity. Further, the cases of *Pape v Federal Commissioner of Taxation*, *Williams v Commonwealth* and *Williams v Commonwealth [No 2]* have transformed the constitutional framework for public expenditure. Accordingly, this article conducts a fine-grained analysis of the constitutional legality of act of grace payments at the Commonwealth, state and territory levels. The authors argue that there are significant constitutional issues with act of grace payments at the Commonwealth level, and that many state-based act of grace payments are likely to be illegal. To address these issues, and to reduce the risk that payments will be made illegally, the authors recommend several legislative and soft law changes.

Please cite this article as:

Oscar I Roos and Yee-Fui Ng, 'Act of Grace Payments and the *Constitution*' (2024) 46(1) *Sydney Law Review* 55.

DOI: https://doi.org/10.30722/slr.19653

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The authors would like to thank Callum Linehan and Ariella Gordon for their research assistance and the Australian Institute of Administrative Law for the opportunity to present an earlier version of this article at its 2022 National Conference. The authors would also like to thank the anonymous reviewers and the Sydney Law Review editorial board for their helpful comments on this article. All errors and omissions are the authors' own.

I Introduction

In the Australian federation, judicial review of both administrative and legislative action is axiomatic and fundamental to the constitutional assumption of the rule of law. But it is also well recognised that there are areas where judicial review cannot, or will not, go. One of the areas where in the 20th century the High Court went infrequently concerned the constitutionality of executive spending. In the Commonwealth sphere it was widely understood — as a result of the High Court's equivocal and obscure 1975 decision in the *AAP Case*[1] — that an appropriation Act enacted pursuant to ss 81 and 83 of the *Constitution* was effectively unchallengeable *and* that it conjunctively authorised spending by the Commonwealth executive of the appropriated moneys.[2] In the absence of any clear authority to the contrary it was assumed that the executive's capacity to spend was either (1) constitutionally unlimited, like that of a natural person; or (2) slightly more narrowly confined only by the *scope* of the Commonwealth express legislative powers, such that the executive could spend money within the Commonwealth's areas of legislative competence without specific legislative authority other than a facultative appropriation provision.[3] That generous assumption was no doubt to the executive's liking, but in the first two decades of the 21st century, things changed. Specifically:

- In 2009 in *Pape v Federal Commissioner of Taxation* the High Court rejected the Commonwealth's submissions that s 81 gave the Commonwealth a power to spend and that an appropriation Act was sufficient legal authority for Commonwealth executive expenditure.[4]
- In 2012 in *Williams v Commonwealth* ('*Williams No 1*') the High Court rejected both (1) the Commonwealth's submission that the Commonwealth executive has the capacity in common with other legal persons to spend, unrestricted by the contours of federal legislative power;[5] and (2) the narrower assumption common to all the parties that the Commonwealth executive could spend appropriated moneys without specific statutory authority, provided that the Commonwealth Parliament *could* so legislate.[6]

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1 *Victoria v Commonwealth* (1975) 134 CLR 338 ('*AAP (Australian Assistance Plan) Case*').

2 See Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20(4) *Public Law Review* 256; Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11(3) *Melbourne University Law Review* 369.

3 Shipra Chordia, Andrew Lynch and George Williams, '*Williams v Commonwealth*: Commonwealth Executive Power and Australian Federalism' (2013) 37(1) *Melbourne University Law Review* 189, 190–1.

4 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55 [111] (French CJ), 73–5 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [601]–[602] (Heydon J) ('*Pape*'); Peta Stephenson, *Nationhood, Executive Power and the Australian Constitution* (Hart Publishing, 2022) 54.

5 *Williams v Commonwealth* (2012) 248 CLR 156, 180 [4], 192–3 [35]–[37], 216 [83] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 258–9 [215]–[217], 271 [252]–[253] (Hayne J), 353 [524] (Crennan J), 368–74 [576]–[595] (Kiefel J) ('*Williams No 1*').

6 Ibid 179–80 [4], 187 [27], 192–3 [36]–[37], 216–17 [83] (French CJ), 232–3 [134]–[137] (Gummow and Bell JJ), 356–8 [539]–[544] (Crennan J). See also Stephenson (n 4) 28–31.

- In 2014 in *Williams v Commonwealth [No 2]* ('*Williams No 2*') the Court rejected the Commonwealth's submission that the express incidental head of power, s 51(xxxix) of the *Constitution*, generally empowered the Parliament to legislate to authorise executive spending of appropriated moneys.[7]

These three High Court decisions have made assessing the lawfulness of spending by the Commonwealth executive more complex. Effectively they mean that, apart from limited exceptions, the Commonwealth executive can only spend money with specific, enacted statutory authority (in addition to a 'mere appropriation'), and that this authority must be characterisable as a law made with respect to a substantive head of Commonwealth legislative power. Furthermore, they have added to the uncertainty about the hitherto largely unexamined spending powers of the state executives.

Act of grace payments are voluntary, highly discretionary 'gifts of money'[8] made by the executive 'out of grace' in the absence of any legal duty to do so. No payment sets a precedent for future decisions, and each 'responds to a particular case, not the generic claim'.[9] They are akin to ex gratia payments, but the former are a 'last resort' concession to a specific person who has been unfairly disadvantaged by some government action,[10] whereas the latter are governed by 'guidelines and rules developed for a group of individuals suffering a particular class of losses'.[11]

Although act of grace payments 'should promote equal treatment of all members of the community and should not be used to advantage some people over others',[12] they — and the opacity which frequently attends decisions about who gets paid and how much — pose obvious risks for government integrity. The expenditure on such payments in Australia has been significant,[13] and the lack of transparency that frequently attends such payments is a serious, aggravating problem. Moreover, payments are not necessarily confined to the impecunious and to obvious objects of sympathy, such as the welfare recipient who, relying on erroneous government advice, suffers a financial detriment which they can ill afford.[14] Big companies may also apply for, and receive, large amounts of money. For example, in the Australian Capital Territory in 2019–20, act of grace payments worth $1.033 million were made

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7 *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 469–70 [85]–[87] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Williams No 2*').

8 Commonwealth Ombudsman, *To Compensate or Not To Compensate? Own Motion Investigation of Commonwealth Arrangements for Providing Financial Redress for Maladministration* (Report, September 1999) 74 ('*To Compensate*').

9 Stephen Winter, 'Australia's Ex Gratia Redress' (2009) 13(1) *Australian Indigenous Law Review* 49.

10 See *Butterworths Australian Legal Dictionary* (Butterworths, 1997) 'Act of grace payment'.

11 *To Compensate* (n 8) 34. See also at 45, 76, 83, 88; Commonwealth Ombudsman, *Executive Schemes* (Report No 12, August 2009) 8. This distinction is not universally observed: see, eg, Treasury (NSW), *Ex Gratia Payments* (Circular, NSW TC 11/02, 1 February 2011) ('*NSW Treasury Circular*').

12 *To Compensate* (n 8) 37.

13 For example, in 2020–21 the Commonwealth government paid $16 million in act of grace payments under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*'), and $45 million in 2019–20: Department of Finance, *Decisions Made on Waivers of Commonwealth Debts under Section 63 and Act of Grace Payments under Section 65 of the Public Governance, Accountability and Performance Act 2013 (PGPA Act)* (Report, 2021).

14 See, eg, *Pearce v Minister for Finance* (2020) 352 FLR 34.

to Casino Canberra, as well as small- and medium-club gaming machine licensees as part of the economic survival package from the COVID-19 health emergency.[15]

While it is now well settled that act of grace decision-making is judicially reviewable, a *lis inter partes*[16] is required before judicial power can be exercised, and it is rare for the legality of payments of government money to be challenged. Moreover, any *constitutional* challenge would almost inevitably work against the interests of a disappointed applicant for a payment, and no other persons (with the exception of the states) are likely to have standing to bring a judicial review application.[17] Litigants such as Bryan Pape and Robert Williams who dispute the constitutionality of government payments that are ostensibly for their direct or indirect benefit are rare exceptions, and both may have been denied standing to litigate in any event, had their standing been vigorously contested.[18] Unsurprisingly, the Commonwealth has blithely assumed it has the power to make act of grace payments since the first decade after Federation.[19]

It is taken as given that Australian governments have a '"settled ethical" commitment'[20] to spending public money lawfully, and Australian public service codes of conduct echo the High Court's expectation that 'discretionary powers must be exercised in accordance with any applicable law, including the *Constitution* itself'.[21] Although the agencies comprising the so-called integrity arm of government — such as that of the ombudsman and the auditor-general — may be much better placed than the judiciary and legislature in combatting any unlawful maladministration of act of grace payment schemes, as well as promoting their good administration,[22] the work of those agencies must be predicated on a sound understanding of the legal parameters within which act of grace decisions are made. The scarcity of 'black letter' legal scrutiny of the various act of grace payment schemes in the Australian federation therefore seems to us to be an unfortunate deficiency, albeit a constitutionally and practically understandable one. This article is our modest contribution to remedying it.

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15 ACT Gambling and Racing Commission, *Annual Report 2019–20* (Report, May 2019) 52–3.

16 Legal suit between parties.

17 Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35(2) *Sydney Law Review* 253, 280.

18 *Pape* (n 4) 34–6 [45]–[53] (French CJ), 68–9 [150]–[159] (Gummow, Crennan, and Bell JJ), 98–9 [399]–[402] (Hayne and Kiefel JJ), 137–8 [271]–[274] (Heydon J); *Williams No 1* (n 5) 223–4 [111]–[112] (Gummow and Bell JJ), 288–93 [315]–[331] (Heydon J).

19 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 29 September 1910, 3947; Commonwealth, *Parliamentary Debates*, House of Representatives, 7 October 1909, 4275; Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1909, 3472; Commonwealth, *Parliamentary Debates*, House of Representatives, 5 June 1908, 12197; Commonwealth, *Parliamentary Debates*, Senate, 2 April 1908, 10060; Commonwealth, *Parliamentary Debates*, Senate, 14 December 1907, 7496; Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 1901, 1778.

20 Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020) 231, quoting Judith N Shklar, 'Political Theory and the Rule of Law' in Allan Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, 3.

21 *Wotton v Queensland* (2012) 246 CLR 1, 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See *Public Service Act 1999* (Cth) s 13(4).

22 W Bateman (n 20) 267–7.

Because constitutionality predicates *all* questions of legality — whether those questions arise during original decision-making, merits review, judicial review or the work of integrity agencies — the article contains a fine-grained analysis of the *constitutional legality* of these payments at the Commonwealth, state and territory levels. Specifically, Part II considers the constitutional validity of the two general Commonwealth act of grace payment schemes, the scheme under the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*') ('PGPA Scheme') and the non-statutory Compensation for Detriment Caused by Defective Administration scheme ('CDDA Scheme'); and Part III considers the constitutional validity of the general schemes operating in the state and territory jurisdictions. Finally, it should be noted that, to confine this article's length within publishable limits, we focus exclusively on the *general* act of grace payment schemes operating in the various Australian jurisdictions (in contrast to the range of subject-specific act of grace payment schemes),[23] although many of the arguments presented could be applied to those specialist schemes.

As our detailed analysis below shows, the Commonwealth's general statutory act of grace provision, s 65 of the *PGPA Act*, is likely to be limited by the scope of Commonwealth executive power under s 61 of the *Constitution*. Thus, any payments under s 65 will need to arise in the course of (in terms of s 61) the exercise of 'the executive power of the Commonwealth' which 'extends to the execution and maintenance of the *Constitution* [or] the laws of the Commonwealth'. Of greater concern, however, is our conclusion that the Commonwealth's CDDA Scheme and several state-based act of grace payment schemes are on constitutionally shaky ground, meaning that many act of grace payments may be illegal. To ensure constitutionality, we argue that the Commonwealth and several states need to amend or enact legislation to put act of grace payments on firmer legal footing. Further, all Australian jurisdictions, including the Australian Capital Territory and the Northern Territory, should provide soft law instruments on act of grace decision-making which guide decision-makers on the constitutional constraints that must limit and inform their decisions. As it felicitously turns out, these changes are relatively small and achievable, although explaining why they need to be made requires the detailed and comprehensive analysis which this article undertakes.

II Two Commonwealth Act of Grace Payment Schemes

Of the two Commonwealth act of grace payment schemes, the PGPA Scheme is the older, broader and more centralised. Its statutory ancestry can be traced back to s 25 of the *Audit Amendment Act 1979* (Cth) which inserted a new s 34A, entitled 'Act of grace payments', into the (now repealed) *Audit Act 1901* (Cth).[24] Section 34A — like its successors, s 33 of the *Financial Management and Accountability Act 1997* (Cth) ('*FMA Act*') and s 65 of the *PGPA Act* — reposed act of grace decision-making power centrally in the Ministry of Finance (specifically in the Finance Minister, or

[23] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (Report, December 2010) ('*Review of Government Compensation Payments*').

[24] Repealed by *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 1.

persons authorised by that Minister).[25] By contrast, the CDDA Scheme was established in 1995 as a more decentralised adjunct to the existing statutory scheme to deal specifically with a narrower range of circumstances, namely 'defective administration'.[26] It authorised Commonwealth agencies to provide a financial remedy for the effects of their own defective administration as a 'last resort', hopefully inducing agencies to fix any systemic problems to avoid further payments.[27]

Neither the PGPA Scheme nor the CDDA Scheme is 'designed to assist claimants who have a viable claim for legal compensation against the Commonwealth Government'.[28]

A *PGPA Scheme*

As noted, the PGPA Scheme is administered by the Finance Minister. Section 65 of the *PGPA Act* provides that the 'Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances', even if the payments 'would not otherwise be authorised by law or required to meet a legal liability'.[29] This section has been described as envisaging 'an interrelationship and interaction between the circumstances, their specialness and the appropriateness of authorising a payment. It contemplates a melange of those considerations, rather than some neat compartmentalisation or division between them'.[30] Although the terms 'appropriate' and 'special circumstances' are not defined in the *PGPA Act*,

> [a]n object of the Act is, under s 5, to require the Commonwealth and Commonwealth entities to meet high standards of governance, performance and accountability, so what is generally (but not exclusively) contemplated under s 65(1) is authorisation of payments in appropriate cases where those standards are not met.[31]

The Minister's powers under s 65 may be delegated under s 107(1) of the *PGPA Act* by written instrument to the Secretary of the Department of Finance, but the Secretary can only authorise payments capped at $100,000 per payment.[32] Additionally, r 24 of the *Public Governance, Performance and Accountability Rules 2014* (Cth) provides that, if the Minister 'proposes to authorise' an act of grace payment exceeding $500,000, the Minister must establish an advisory committee to

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25 *To Compensate* (n 8) 102–3.
26 Ibid 86.
27 Ibid 69, 73, 81, 83, 104.
28 Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 295.
29 *PGPA Act* (n 13) s 65.
30 *Dobie v Minister for Finance* [2022] FCA 528, [29] (Rangiah J) ('*Dobie*'). See also *Toomer v Slipper* [2001] FCA 981, [28]–[32] ('*Toomer*'); *Dennis v Minister for Finance* [2017] FCCA 45, [46], [59], [64]; *Tomson v Minister for Finance and Deregulation* (2013) 136 ALD 610, 620 [35].
31 *Dobie* (n 30) [27] (Rangiah J).
32 *Ashby v Commonwealth* (2021) 386 ALR 23, 32–5 [40]–[53]; *Ashby v Commonwealth* (2022) 291 FCR 585, 589–90 [15]–[17], 592–3 [31]–[39].

report on the appropriateness of the authorisation and must consider the report before making the authorisation.

There is no provision for merits review, but s 65 decision-making is amenable to judicial review in the High Court under s 75(iii) or (v) of the *Constitution*, or the Federal Court under s 39B(1) or (1A)(c) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). In addition, s 65 decisions can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), as they are made 'under an enactment'.[33]

B *CDDA Scheme*

The CDDA Scheme hinges on the concept of defective administration and is thus more prescriptive than the PGPA Scheme.[34] It is also more limited in its scope because it only encompasses claims against non-corporate Commonwealth entities, not private contractors nor Commonwealth corporations.[35]

The CDDA Scheme purports to be established pursuant to the authority of the Commonwealth executive,[36] and seeks to provide compensation to members of the public where there is no legal remedy but there is a moral justification to provide 'purely restorative'[37] compensation for 'detriment'. Detriment comprises 'a quantifiable loss as a direct consequence of defective administration',[38] and can include financial compensation for non-financial damage.[39] However, the Scheme is not available to offset the payment of any recoverable debt owed to the Commonwealth, even if the debt arose from defective administration.

The CDDA Scheme 'is permissive, in that it permits but does not oblige the decision-maker to approve a payment in any particular case'[40] and is intended to 'operate in a relatively flexible and responsive manner, lacking the rigid formality and procedures utilised by [other] legal mechanisms'.[41] It is primarily regulated in accordance with *RMG 409*, a guide written by the Department of Finance which 'aims to assist staff of non-corporate Commonwealth entities in managing and determining CDDA Scheme claims'.[42] *RMG 409* allows individual portfolio Ministers and their staff (as agents)[43] to make act of grace payment decisions at their discretion for 'defective administration', with the proviso that the Scheme 'is not to be used in relation to … claims in which it is reasonable to conclude that the

33 Boughey, Rock and Weeks (n 28) 309.
34 Ibid 302–7.
35 Department of Finance, *Scheme for Compensation for Detriment Caused by Defective Administration* (Resource Management Guide 409) [13] ('*RMG 409*').
36 Ibid 66.
37 Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration: Administration of Decision-Making under the Scheme for Compensation for Detriment Caused by Defective Administration* (Report, August 2009) 31 ('*Putting Things Right*').
38 *To Compensate* (n 8) 36.
39 Ibid 67–8.
40 Ibid 67.
41 Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2022) 265.
42 *RMG 409* (n 35).
43 Ibid [2], [7]–[9].

Commonwealth would be found liable, if the matter were litigated'.[44] *RMG 409* provides that CDDA payments may be made where a claimant suffers detriment caused by 'a specific and unreasonable lapse in complying with administrative procedures', 'an unreasonable failure to institute appropriate administrative procedures', the giving of ambiguous advice, or an unreasonable failure to give proper advice.[45] There is no obligation upon a decision-maker to approve or refuse compensation in any given case; compensation is at the discretion of the department or agency and 'the scheme is not limited by the quantum of the loss'.[46]

CDDA Scheme decision-making, being non-statutory, is not subject to merits review; nor is it made 'under an enactment'[47] in terms of the *ADJR Act* and hence subject to judicial review under that Act.[48] However, CDDA decisions are reviewable in the High Court under s 75(iii) or (v) of the *Constitution*, or the Federal Court under s 39B(1) of the *Judiciary Act*. Specifically, the High Court's original jurisdiction under s 75(v) and the Federal Court's analogous jurisdiction under s 39B(1) can be invoked on the basis that the decision-maker falls within the constitutional expression 'officer of the Commonwealth'.[49]

C *Constitutionality*

In December 2010, more than a year after the High Court published its reasons in *Pape*, the Senate Legal and Constitutional Affairs References Committee tabled its report on the Review of Government Compensation Payments.[50] The review examined both the Commonwealth's general act of grace payment scheme under the now superseded *FMA Act* (which, as mentioned, has been substantially re-enacted as the PGPA Scheme) and the CDDA Scheme. For our purposes, what is noteworthy about the review is the persistence of the pre-*Pape* orthodoxy that the Commonwealth executive's capacity to spend was effectively unlimited by the *Constitution*: the report simply asserts that '[t]he power to make payments under the CDDA Scheme arises from the Commonwealth's executive power under s 61 of the *Constitution*',[51] and tacitly assumes that the relevant provisions of the *FMA Act* are constitutionally valid. Perhaps such blithe constitutional optimism can be explained

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44 Ibid [23].
45 Ibid [17].
46 *Putting Things Right* (n 37) 2.
47 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 ('*ADJR Act*').
48 *Smith v Oakenfull* (2004) 134 FCR 413. This case was, however, decided before the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) ('*FFLA Act No 3*') which, it has been claimed, places the CDDA Scheme on a statutory footing: see below in Part II(C)(2). We dispute that claim and, if we are right, the reasoning in *Smith v Oakenfull* is accordingly unaffected by the enactment of the *FFLA Act No 3*. However, even if we are wrong on this point, the *ADJR Act* ibid still does not apply to CDDA Scheme decisions. This is because: (1) the substantive power 'to make, vary or administer the arrangement or grant' referred to in *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) is found in s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) ('*FF(SP) Act*'); (2) s 32B decisions are decisions under pt 2 of that Act; and (3) *FF(SP) Act* pt 2 decisions are decisions to which the *ADJR Act* does not apply: see *ADJR Act* ibid sch 1(he).
49 *Putting Things Right* (n 37) 19.
50 *Review of Government Compensation Payments* (n 23).
51 Ibid 47 [3.33].

by the limited scope of the Senate's reference to the committee, confined as it was to '[t]he administration and effectiveness of current mechanisms used by federal and state and territory governments to provide discretionary payments in special circumstances'.[52] However, as we will see below, establishing the constitutional validity of both the PGPA and CDDA Schemes is much more complex than the report suggests.

1 *PGPA Scheme*

(a) *Is Section 65 of the PGPA Act Characterisable as a Law with Respect to a Commonwealth Head of Legislative Power?*

At first glance it might seem that the PGPA Scheme is constitutionally secure because it is statutory and hence avoids the strictures of *Williams No 1* (that is, the general principle that Commonwealth executive spending must be authorised by specific statute). However, that begs the *Williams No 2* question: is s 65 of the *PGPA Act* characterisable as a law with respect to a Commonwealth head of legislative power?

Because s 65 is cast in such general terms, the section can only be characterised as a law with respect to:

- s 97 of the *Constitution* in combination with s 52(xxxvi);
- s 52(ii) of the *Constitution* which gives the Commonwealth Parliament exclusive legislative power 'to make laws … with respect to … matters relating to any department of the public service'; or
- s 52(xxxix) of the *Constitution* which gives the Commonwealth Parliament power to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in … the Government of the Commonwealth … or any department or officer of the Commonwealth'.

The text of s 65 is not even tenuously or remotely linked to the other specific heads of Commonwealth legislative power.

(i) *Section 97 of the Constitution in Combination with Section 51(xxxvi)*

Under the heading 'Audit', s 97 of the *Constitution* provides:

> *Until the Parliament otherwise provides*, the laws in force in any Colony which has become or becomes a State with respect to … the expenditure of money on account of the Government of the Colony … shall apply to … the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.[53]

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52 Ibid 1 [1.1].

53 *Constitution* s 97 (emphasis added).

Conjunctively, s 51(xxxvi) of the *Constitution* provides that the Commonwealth Parliament 'subject to this *Constitution*' has power to make laws with respect to '[m]atters in respect of which this *Constitution* makes provision until the Parliament otherwise provides'. Given that the Australian colonies engaged in the practice of making non-statutory act of grace payments,[54] could it be argued that s 65 of the *PGPA Act* can be characterised as a law with respect to s 51(xxxvi) — in other words, that s 65 is a law made by the Commonwealth Parliament to replace the laws which it inherited, by means of s 97 of the *Constitution*, from the colonies in relation to act of grace payments?

Putting aside the powerful objection that this argument necessitates a radical departure from the hitherto settled, vestigial understanding of s 97 — the section is understood to encompass solely 'the review and audit of federal accounts'[55] and its only purpose was to ensure that 'until the enactment of Commonwealth legislation' (which occurred in 1901) 'State laws were to apply to the auditing of Commonwealth moneys within each State'[56] — we maintain that the argument is also fundamentally inconsistent with the High Court's reasoning in *Pape* and the *Williams* cases. Whatever non-statutory executive capacities the non-federal colonies enjoyed to spend public moneys subject to a relevant appropriation by a colonial Parliament (which capacities may be analogised to the unlimited power of the Crown in right of the United Kingdom to spend in a unitary jurisdiction), the basic premise of *Pape* and the *Williams* cases is that any such capacity was denied to the Commonwealth executive by the entrenched and federal *Constitution*. Thus, the *Constitution* forecloses the possibility that the Commonwealth executive inherited from the colonies a capacity to make act of grace payments without statutory support, such that the Commonwealth Parliament could subsequently 'otherwise provide' for such support in the form of s 65 of the *PGPA Act* using s 51(xxxvi). That the s 51(xxxvi) head of power is 'subject to this *Constitution*' only serves to reinforce this point.

(ii) *Section 52(ii) of the Constitution*

Section 52(ii) of the *Constitution* gives the Commonwealth Parliament exclusive legislative power 'to make laws … with respect to … matters relating to any department of the public service the control of which is by this *Constitution* transferred to the Executive Government of the Commonwealth'. This head of power needs to be read in conjunction with s 69 of the *Constitution* which provides for the transfer of the state departments of '[p]osts, telegraphs, and telephones', '[n]aval and military defence', '[l]ighthouses, lightships, beacons, and buoys' and '[q]uarantine' to the Commonwealth.[57]

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54 See below footnote 130 and accompanying text.

55 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 872.

56 John Trone, *Lumb, Moens and Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis, 10th ed, 2021) 467.

57 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 435–6 (Dawson, Toohey and Gaudron JJ), 424 (Brennan CJ), 449 (McHugh J), 462 (Gummow J); Quick and Garran (n 55) 660–1, 715; Trone (n 56) 423, 517–18.

Section 52(ii) is at best only a partial solution to the characterisation problem because s 65 of the *PGPA Act* can only be characterised as a law with respect to s 52(ii) of the *Constitution* if it is capable of being read down to authorise act of grace payments relating only to the Commonwealth departments particularised in s 69 of the *Constitution*. This seems highly unlikely. Reading down 'is part of the process of ascertaining the essential meaning of the words of the provision'[58] and there is nothing in the text of s 65 which would provide a toehold for such a narrow interpretation. Indeed, statutory context points in the opposite direction, towards a broad interpretation of the section. Specifically:

- s 65 is in pt 2-4 of the *PGPA Act* which concerns 'the use and management of public resources *by the Commonwealth and Commonwealth entities*';[59]
- the objects of the *PGPA Act* include 'to require *the Commonwealth and Commonwealth entities* to use and manage public resources properly'[60] and 'to establish a *coherent* system of governance and accountability *across Commonwealth entities*';[61]
- the expression 'public resources' is defined in s 8 of the *PGPA Act* as 'relevant money, relevant property, or appropriations', and 'relevant money' is defined in the same section as '(a) money standing to the credit of any bank account of *the Commonwealth or a corporate Commonwealth entity*; or (b) money that is held by the Commonwealth or a corporate Commonwealth entity';[62] and
- 'relevant property' is defined in s 8 of the *PGPA Act* as '(a) property (other than relevant money) that is owned or held by *the Commonwealth or a corporate Commonwealth entity*; or (b) any other thing prescribed by the rules'.[63]

Given the *PGPA Act*'s text and statutory context, for what 'reason based upon the law itself'[64] or 'the terms of the law'[65] could the capacious words 'the Commonwealth or a corporate Commonwealth entity' permit an interpretation which encompasses only the Commonwealth departments referred to in s 69 of the *Constitution*: a fortiori when such an interpretation would establish an *in*coherent system of governance and accountability across Commonwealth entities in contradiction of a clear legislative intention that 'the law was intended to operate fully and completely according to its terms'?[66] And if reading down is not possible, there is no 'separately expressed'[67] 'substantially independent part'[68] of s 65 — or

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58 *Clubb v Edwards* (2019) 267 CLR 171, 313 [416] (Edelman J) ('*Clubb*').
59 *PGPA Act* (n 13) s 50 (emphasis added).
60 Ibid s 5(c)(iii) (emphasis added).
61 Ibid s 5(a) (emphasis added).
62 Ibid s 8 (emphasis added).
63 Ibid (emphasis added).
64 *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ) ('*Pidoto*').
65 *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').
66 *Pidoto* (n 64) 108 (Latham CJ).
67 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 577 (Brennan and Toohey JJ).
68 *Clubb* (n 58) 317 [422] (Edelman J).

of the 'one collective expression'[69] 'the Commonwealth or a corporate Commonwealth entity' — which can be 'blue pencilled' and severed.

(iii) *Section 51(xxxix) of the Constitution*

The characterisation of s 65 of the *PGPA Act* as a law with respect to s 51(xxxix) is complicated by the High Court's decision in *Williams No 2*, which forecloses the argument that s 65 is a law with respect to s 51(xxxix) on the basis that the placitum empowers the Parliament to enact a law authorising expenditure by the Commonwealth executive of any moneys lawfully appropriated in accordance with ss 81 and 83 of the *Constitution*, *no matter what the purpose of the expenditure may be*. The Court in *Williams No 2* maintained that such an expansive construction of s 51(xxxix) would erroneously treat spending by the Commonwealth executive as *incidental to* an appropriation Act and bring the expenditure of *any* moneys appropriated in accordance with ss 81 and 83 within the power of the Commonwealth. It would thus, the Court reasoned, be fundamentally inconsistent with the Court's earlier decision in *Pape* which characterised an appropriation Act as a 'mere earmarking' of revenue, and which recognised justiciable limits on the Commonwealth executive's power to spend appropriated moneys.[70]

Following *Pape*, one must turn to the powers vested in the Commonwealth executive by the *Constitution*, specifically s 61 which describes the executive power of the Commonwealth. Two possibilities will be considered. The first is the so called 'nationhood power'; the second relies on the attribution of a non-literal, legal meaning to s 65 of the *PGPA Act*.

The canonical expression of the nationhood power is that of Mason J in the *AAP Case*:

> [T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[71]

Accordingly, it could be argued that (1) a Commonwealth executive power to make act of grace payments can 'be deduced from the existence and character of the Commonwealth as a national government'; and (2) s 51(xxxix) allows that power to be given 'legislative expression'[72] in the form of s 65 of the *PGPA Act*. To put that argument at its highest, 'a polity must possess all the powers that it needs to function as a polity'[73] and the *state* governments cannot be expected 'to engage effectively

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69 *Newcastle & Hunter River Steamship Co Ltd v A-G (Cth)* (1921) 29 CLR 357, 369 (Knox CJ, Higgins, Gavan Duffy, Powers, Richard Starke JJ).

70 *Williams No 2* (n 7) 462–3 [52]–[55], 469–70 [85]–[87] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

71 *AAP Case* (n 1) 397.

72 Stephenson (n 4) 65.

73 *Williams No 2* (n 7) 467–8 [78] (French CJ, Hayne, Kiefel, Bell and Keane JJ), quoting from the defendants' submissions.

in the … activity in question'[74] that is, to make act of grace payments in relation to *Commonwealth* activities. Hence, the making of act of grace payments by the Commonwealth 'involves no real competition with State executive or legislative competence'[75] and — as an adjunct to the Commonwealth's primary activities — is itself an 'exclusively'[76] Commonwealth activity 'which cannot otherwise be carried on for the benefit of the nation'[77] under s 61 of the *Constitution* 'in the execution and maintenance of this *Constitution* and of the laws of the Commonwealth'. Additionally, such payments are non-coercive and voluntarily received, and hence do not interfere with the legal rights and duties of individuals.[78]

However, the nationhood power argument seems to us to be unconvincing. The nationhood power does not encompass '*all* those matters that are *reasonably capable* of being *seen* as of national benefit or national concern'[79] and the argument misses the *nationhood* power's essential and fundamental *national* character.[80] The making of act of grace payments is not an activity 'peculiarly adapted to the government *of a nation*',[81] nor 'appropriate to a *national* government',[82] nor a power 'possessed by the national government alone'.[83] Rather it is an ad hoc, sporadic but enduring activity of *all* governments within the common law world, whether national or *sub-national*, including the several (sub-national) Australian states. Moreover, as Peta Stephenson has observed, 'since *Pape* the nationhood power has been defied as a power to respond to national *emergencies*',[84] and act of grace payments (in contrast to the payments unsuccessfully impugned in *Pape*) are clearly not 'short-term fiscal measures taken to respond to a national financial and economic crisis'.[85]

However, the problems with the nationhood power can be avoided: it is possible to mount a simple and plausible argument for the constitutional validity of s 65 of the *PGPA Act* anchored in orthodox principles of statutory interpretation and constitutional text. If s 65 is read *literally*, it does not manifest an obvious connection with s 61 of the *Constitution*. But we would argue that is not its *legal* meaning.[86] It is a basic constitutional principle of statutory interpretation (recognised in s 15A of the *Acts Interpretation Act 1901* (Cth)) that a statutory provision should be

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74 *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J) ('*Davis*').

75 Ibid 94 (Mason CJ, Deane and Gaudron JJ). See also *Pape* (n 4) 60 [127] (French CJ), 90–1 [239] (Gummow, Crennan and Bell JJ).

76 *Williams No 1* (n 5) 348 [503] (Crennan J).

77 *Pape* (n 4) 87 [228], approving the formulation in *Davis* (n 74) 111 (Brennan J) of the principle stated in *AAP Case* (n 1) 397 (Mason J).

78 *Pape* (n 4) 24 [10] (French CJ), 92 [244]–[245] (Gummow, Crennan and Bell JJ).

79 *Williams No 2* (n 7) 466–7 [72] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis in original).

80 Peta Stephenson, 'Justice Mason in the *Australian Assistance Plan Case* (1975): Nationhood, Federalism and Commonwealth Executive Power' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 169, 180–3. See also *Williams No 1* (n 5) 348 [503] (Crennan J).

81 *AAP Case* (n 1) 397 (Mason J) (emphasis added). See also *Pape* (n 4) 63 [133] (French CJ); *Williams No 2* (n 7) 466 [71] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

82 *AAP Case* (n 1) 397 (Mason J) (emphasis added).

83 Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2017) 214.

84 Stephenson (n 4) 57 (emphasis added).

85 Ibid 54.

86 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

interpreted in conformity, rather than disconformity, with the *Constitution*, provided such a validating constructional choice is reasonably open.[87] Accordingly, the following can be implied into the *legal* meaning of s 65(1) without violating its text, to secure the necessary validating connection between it and s 61:

> The Finance Minister may on behalf of the Commonwealth authorise in writing one or more payments to be made to a person if the Finance Minister thinks it is appropriate to do so because of special circumstances *which have arisen in the exercise of executive power under s 61 of the* Constitution.

(b) *Is RMG 401 Consistent with the Constitutionally Determined Meaning of Section 65 of the PGPA Act?*

It is unfortunate that the constitutional constraints on the meaning of s 65 of the *PGPA Act* are not expressly referred to in *RMG 401*.[88] In its current form, the guide may mislead its presumably largely non-legally-qualified audience into approving a payment not authorised by s 65. Paragraph 13 of *RMG 401* states:

> Payments under the act of grace mechanism must be made from money appropriated by the Parliament. Therefore, as a matter of practice, the act of grace mechanism is generally not available:
>
> - when a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent or NCE [non-corporate Commonwealth entity] of the Commonwealth and the matter is not related to the impact of any Commonwealth legislation …

However, the words 'as a matter of practice … is generally not available' obscure the underlying hard law constitutional prohibition on payments in the circumstances described in the accompanying dot point imposed by (the constitutionally determined, read-down meaning of) s 65. The risk that *RMG 401*'s audience will breach the constitutional limits on their powers is exacerbated by the advice in paragraph 9 of *RMG 401* that '"special circumstances" and "appropriate" are not defined in the *PGPA Act* and are for the decision-maker to assess'. That advice fails to draw a distinction between the *definition* of terms within a statute, and the *application* of that definition to a set of facts. Paragraph 9 of *RMG 401* may thus unfortunately imply, in the minds of its non-legally-qualified audience, that the meaning of 'special circumstances' and 'appropriate' can be determined at their discretion. But a discretion allowed by statute must be exercised 'according to law, and not humour',[89] and the High Court — drawing on United States Supreme Court Marshall CJ's foundational constitutional declaration in 1803 in *Marbury v Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is'[90] — has committed the Australian legal system 'to a strict version of

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87 *Williams No 2* (n 7) 457 [36] (French CJ, Hayne, Keifel, Bell and Keane JJ); *Industrial Relations Act Case* (n 65) 501–3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

88 Department of Finance, *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013* (Resource Management Guide 401) ('*RMG 401*').

89 *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC).

90 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

judicial supremacy'.[91] Accordingly, it is presumed that a statutory expression must have *a* meaning and its *correct* meaning can only be authoritatively determined by the courts applying the relevant rules of statutory interpretation, including of reading down, to the extent reasonable constructional choices are open, to avoid constitutional invalidity. Hence, it would be more constitutionally prudent if *RMG 401* advised its audience that, although the terms 'special circumstances' and 'appropriate' are not further defined in the *PGPA Act*, they *do* have a legal meaning and then to posit that meaning (subject to the proviso that in our constitutional system, only courts can determine legal meaning authoritatively).

Unfortunately, the constitutional problems with *RMG 401* worsen in its paragraph 10. In that paragraph's list of '[e]xamples of special circumstances that may make it appropriate to approve an act of grace payment', the following dot point appears: 'the matter is not covered by legislation or specific policy, but the Commonwealth intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively'.[92] But that gives rise to an obvious objection: how is a Commonwealth payment based *not* on existing legislation or policy but on a mere *intention* of the Commonwealth executive to introduce legislation or policy supported by the *legal* meaning of s 65(1), constitutionally confined, as it must be, to circumstances 'which have arisen in the course of the execution and maintenance of the *Constitution* and of the laws of the Commonwealth'? Although, as will be explained shortly, it can be argued that s 65(1) encompasses payments made in the ordinary, well-established course of Commonwealth executive administration (by the link between the Commonwealth executive power to make such payments and s 51(xxxix)), it would be very difficult, if not impossible, to maintain that a payment made based on *intended, but non-existing*, legislation or policy falls within that description.

2 *CDDA Scheme*

The constitutional status of the CDDA Scheme is far more questionable than the status of the PGPA Scheme. Although the Department of Finance website asserts that the 'CDDA scheme was established under the executive power of section 61 of the *Constitution*',[93] following *Pape* and the *Williams* cases, the scheme still requires statutory support. Boughey, Rock and Weeks seem to be confident that it is constitutionally secure, by virtue of a reference to the Scheme in the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) ('*FFLA Act No 3*') which was hastily enacted by the Commonwealth in response to *Williams No 1*.[94] However, we are not as sanguine as they are about the effectiveness of the *FFLA Act No 3* amendments.

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91 W Bateman (n 20) 184.

92 *RMG 401* (n 88) [10].

93 'Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)', *Department of Finance* (Web Page, 2024) <https://www.finance.gov.au>.

94 Boughey, Rock and Weeks (n 28) 293–4.

Boughey, Rock and Weeks appear to assume that item 407.059 in sch 2 of the *FFLA Act No 3* — which now appears as item 407.059 in pt 4 of sch 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) ('*FF(SP) Regulations*') — refers to the CDDA Scheme.[95] The item reads:

> **Compensation and Debt Relief**
>
> Objective: To provide access for eligible recipients to discretionary payments in special circumstances or financial relief from amounts owing to the Commonwealth.

If Boughey, Rock and Weeks' assumption is correct, then there is, at very least, a plausible argument that the CDDA Scheme has sufficient statutory support to pass constitutional muster. The argument can be set out thus:

Proposition 1: Section 32B(1) of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) ('*FF(SP) Act*') relevantly provides:

> If:
>
> (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
>
> (i) an arrangement under which relevant money or other [Consolidated Revenue Fund] money is, or may become, payable by the Commonwealth; or
>
> …
>
> (iii) a grant of financial assistance to a person other than a State or Territory; and
>
> (b) the arrangement or grant, as the case may be:
>
> (i) is specified in the regulations; or
>
> (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
>
> (iii) is for the purposes of a program specified in the regulations;
>
> the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be.

Proposition 2: The CDDA Scheme is either:

- specified in the *FF(SP) Regulations*;
- included in a class of arrangements or grants, as the case may be, specified in the Regulations; or
- for the purposes of a program specified in the Regulations

by virtue of the inclusion of item 407.059 of pt 4 of sch 1AA of the Regulations.

Proposition 3: Section 32B(1) of the *FF(SP) Act* and item 407.059 in pt 4 of sch 1AA of the *FF(SP) Regulations* are constitutionally valid.

Conclusion: Therefore, the CDDA Scheme has statutory support and does not fall foul of the strictures of *Williams No 1*.

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[95] Ibid 293.

Like Boughey, Rock and Williams we agree that proposition 3 above is strongly arguable, employing a similar argument to the one used to secure the *PGPA Act*. Specifically:

- The express incidental head of power allows the Parliament to enact laws incidental to Commonwealth executive power conferred by the *Constitution*.
- Section 61 of the *Constitution* describes the Commonwealth executive's power to execute and maintain the *Constitution* and the laws of the Commonwealth.
- Consistently with the basic principle of statutory construction that legislation should be interpreted to ensure compatibility with the *Constitution* if reasonable constructional choices are open, s 32B(1) of the *FF(SP) Act* and item 407.059 of pt 4 of sch 1AA of the *FF(SP) Regulations* should be read down so as only to confer powers relating to the Commonwealth executive's power to execute and maintain the *Constitution* and the laws of the Commonwealth.
- Therefore, s 32B(1) of the *FF(SP) Act* and item 407.059 of pt 4 of sch 1AA of the *FF(SP) Regulations* are sourced in s 51(xxxix) as laws incidental to powers vested in the Commonwealth executive by the *Constitution*.

However, in contrast to Boughey, Rock and Weeks, we (like Sapienza it appears[96]) entertain grave doubts that a court would find that item 407.509 *does* refer to the CDDA Scheme (proposition 2 above). Given that the purpose of insisting on statutory authorisation in *Williams No 1* was to ensure that the Commonwealth Parliament (including the Senate as a 'states' House') has a direct say on Commonwealth executive spending — 'to ensure "parliamentary control" over the executive and enforce the federal division of powers established by the *Australian Constitution*'[97] — it would seem unlikely that a court would reason that the vague words of the item would be sufficient to put the Parliament on notice that the CDDA Scheme is included in it.

Although the High Court in *Williams No 2* may have subsequently set the bar low,[98] the imprecise language of the item stands in stark contrast to the precision with which other programs are included by name in the schedule (for example, the Remote Youth Leadership and Development Corps, the Remote Jobs and Communities Program, and the Productive Ageing Package).[99] Even more significantly, the list of programs in pt 4 of sch 1AA is organised by reference to a series of government departments and item 407.509 is part of a set of programs, all beginning with the numbers '407', which appears under the heading 'Department of Education, Employment and Workplace Relations'. That department (which no longer exists, having been divided into two departments, the Department of Education and the Department of Employment and Workplace Relations in 2022)

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96 Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) 37 n 205.
97 W Bateman (n 20) 185.
98 Ibid 187.
99 *FFLA Act No 3* (n 48) sch 2.

was not primarily responsible for oversight of the CDDA Scheme, nor are its two successor departments; the Department of Finance has always occupied that position. Moreover, as noted previously, the CDDA Scheme traverses all non-corporate Commonwealth entities, not just the Department of Education, Employment and Workplace Relations or its successor departments.

The item is possibly a reference to a proposal, which was current from 2010 to 2015 but never enacted, to give Comcare (a Commonwealth statutory authority for which the department was responsible) the statutory power to make discretionary compensation payments for defects in its administration analogous to the CDDA Scheme.[100] Or, at best, item 407 is a reference to the administration of the CDDA Scheme *within* the department (and now its successor departments), but not in the numerous other departments that make CDDA Scheme decisions.

On the assumption that we are correct in our misgivings, and that there is a real risk that a court would find that item 407.509 does not refer to the CDDA Scheme (or at least not to the extent that it is administered outside the Department of Education and the Department of Employment and Workplace Relations), we will now consider the CDDA Scheme's constitutionality on the assumption that it has *no* statutory support.

Act of grace payments out of the bounty of the Crown originated as a response to 'a lacuna in the rule of law'[101] created by the Crown's legal immunity, encapsulated in 'the legal apophthegm that the King can do no wrong'.[102] They were (and remain in the United Kingdom) premised on an unconstrained executive power to spend, with the qualification — once the supremacy of Parliament over the Crown was secured in the 17th century — that the requisite funds are appropriated by Parliament.[103] Hence the Australian constitutional conundrum post *Pape* and the *Williams* cases: given that the High Court has decided that the United Kingdom premise does not apply to the Commonwealth executive under the *Constitution*, is the CDDA Scheme lawful if — as we have assumed — it has no statutory footing?

On the premise that '[i]t is well settled that the [Commonwealth] Executive can spend (with an available appropriation) where power to do so is conferred by valid statute *or by the* Constitution *itself*',[104] the High Court in *Williams No 1* identified three exceptions to the general principle that, under the *Constitution*, the Commonwealth executive cannot spend without legislation authorising that expenditure.

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100 *Review of Government Compensation Payments* (n 23) 50 [3.42]; Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (Cth) cl 70C; Explanatory Memorandum, Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill (Cth) 27–8, 32–3.

101 Committee on Ministers' Powers (UK), *Report* (Cmd 4060, 1932) 112.

102 Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth, 1820) 5.

103 Boughey, Rock and Weeks (n 28) 290–1.

104 *Williams No 1* (n 5) 249 [193] (Hayne J) (emphasis added) (citations omitted). See also at 361 [558], 366 [569] (Kiefel J).

(a) *Nationhood Exception*

The first exception (hereafter referred to as the 'nationhood exception') relates to the so-called 'nationhood power'[105] which derives 'from the character and status of the Commonwealth as a national government'.[106] It can be dealt with here briefly. Although we would concede that the making of act of grace payments by the Commonwealth without legislative support could come within the *depth* of the nationhood power (as noted previously, the *faculty* to make such payments does not interfere with the legal rights and duties of individuals because their receipt is non-coercive and voluntary), we maintain that act of grace payments fall outside the *breadth* of the nationhood power.[107] As expounded above,[108] the making of such payments is not an activity 'peculiarly adapted to the government *of a nation*',[109] nor 'appropriate to a *national* government',[110] nor an exercise of a power 'possessed by the national government alone'.[111]

(b) *Ordinary Functions Exception*

The second exception is where the expenditure relates to 'the ordinary course of administering a recognised part of the Government of the Commonwealth or with the incidents of the ordinary and well-recognised functions of that Government' (hereafter referred to as the 'ordinary functions exception').[112] While this exception provides significant assistance to the Commonwealth, it cannot cover the whole of the CDDA Scheme: the Scheme purports to embrace compensation for 'defective administration' by *all* 'non-corporate Commonwealth entities',[113] without reference to the exception. At the risk of stating the obvious, it would be specious to maintain that making act of grace payments for defective administration relating to the *non*-ordinary or *not* well-recognised functions of the Commonwealth government can be characterised as incidental to the ordinary and well-recognised functions of the Commonwealth government.

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105 Discussed above in Part II(C)(1)(iii).

106 *AAP Case* (n 1) 397 (Mason J); *Williams No 1* (n 5) 249–52 [194]–[198], 267 [240] (Hayne J), 362 [559], 370–3 [582]–[594] (Kiefel J), 346–9 [497]–[507], 357 [542] (Crennan J). See also at 180 [4], 184–5 [22], 188–91 [29]–[34], 216–17 [83] (French CJ), 230–1 [131], 234–5 [144]–[146] (Gummow and Bell JJ), 272 [256] (Hayne J), 342 [485], 355 [535] (Crennan J), 361 [558] (Kiefel J).

107 For a discussion of the use of the concepts of breadth and depth to analyse Commonwealth executive power, see Stephenson (n 4) 36–8. For a discussion of the limitations on the nationhood power framed by those concepts, see at 59–70.

108 See above Part II(C)(1)(iii) for our discussion of the possible engagement of the nationhood power, in combination with s 51(xxxix) of the *Constitution*, to provide constitutional support to s 65 of the *PGPA Act* (n 13).

109 *AAP Case* (n 1) 397 (Mason J) (emphasis added).

110 Ibid 397 (Mason J) (emphasis added).

111 Hanks, Gordon and Hill (n 83) 214.

112 *Williams No 1* (n 5) 233–4 [139]–[141] (Gummow and Bell JJ), 255–6 [208]–[209] (Hayne J), 342 [484], 343 [487], 345 [493], 353–5 [525]–[534] (Crennan J). See at 370 [582] (Kiefel J). In *Williams No 1*, the existence of the ordinary functions exception was not in dispute between the parties: *Williams No 1* (n 5) 233 [139] (Gummow and Bell JJ), 342 [482]–[484], 345 [493] (Crennan J), 370 [582] (Kiefel J).

113 *RMG 409* (n 35) [1].

(c) *Prerogative Exception*

The third exception is where the expenditure is an exercise of the Commonwealth executive's prerogative powers inherent in s 61 (hereafter referred to as the 'prerogative exception').[114] The extent to which this exception can provide a constitutional foothold for the CDDA Scheme depends on how act of grace payments made in the absence of statutory authorisation are characterised.

The term 'prerogative' can bear two meanings. In a narrow sense (commonly associated with the writings of Blackstone) it refers to the unique or special *powers* and *privileges* of the Crown which can interfere with the legal rights and interests of others. However, in the broader sense (commonly, but perhaps erroneously, associated with the writings of Dicey)[115] it encompasses additionally those legal *capacities* that the Crown enjoys in common with its subjects, and which cannot be used to interfere with the legal rights and interests of others without their consent. When the High Court in *Williams No 1* recognised the prerogative exception, it was referring to the narrow 'true prerogative',[116] consistently with longstanding, conventional Australian usage:[117] otherwise, the impugned contract between the Commonwealth and Scripture Union Queensland to spend Commonwealth moneys would have fallen within the prerogative exception and survived challenge. Consequently, *if* act of grace payments made without legislative support are made in the exercise of a broad executive *capacity* to spend, *then* payments under the CDDA Scheme do not fall within the narrow, true prerogative exception and are unlawful, unless they fall within the ordinary functions exception.

While acknowledging 'that the dividing line between special government powers and mere legal capacities may not always be clear'[118] we maintain that when the Commonwealth makes an act of grace payment, it exercises a *capacity* derived from its legal personality as a polity (which, following the usage of Gageler J in *Plaintiff M68/2015*, we will hereafter refer to as a 'non-prerogative executive capacity')[119] not a narrow, unique (Blackstonian) 'prerogative executive power'.[120] If we are right, then important constitutional consequences follow, so it is incumbent upon us to explain why we have come to that conclusion.

First, as emphasised previously, when the Commonwealth makes an act of grace payment to a subject, there is no legal coercion and no power 'exercisable over individuals'.[121] The prospective recipient is not compelled to take the money; they

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114 *Williams No 1* (n 5) 216 [83] (French CJ), 342 [484], 343 [487], 358 [544] (Crennan J), 373 [594] (Kiefel J). See generally at 184–6 [22]–[25] (French CJ), 227–8 [123]–[124] (Gummow and Bell JJ). The existence of the prerogative exception was not in dispute between the parties in *Williams No 1*: *Williams No 1* (n 5) 342 [482]–[484], 345 [493] (Crennan J); 370 [582] (Kiefel J).

115 *L v South Australia* (2017) 129 SASR 180, 188 [29]–[30] (Kourakis CJ).

116 Ibid 31 [107] (Kourakis CJ).

117 Ibid 30 [102] (Kourakis CJ). See also Stephenson (n 4) 21.

118 Hanks, Gordon and Hill (n 83) 214.

119 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98 [134] ('*Plaintiff M68*').

120 Ibid.

121 Chitty (n 102) 25.

can refuse. It is therefore not 'an act which is capable of interfering with legal rights of others':[122]

> Such effects as the act might have on legal rights or juridical relations result not from the act being uniquely that of the Executive Government but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor.[123]

In other words, an act of grace payment is relevantly analogous to a voluntary payment by a subject to another subject based on a perceived moral obligation (in contrast to a claim of legal right) and 'involves nothing more than the utilisation of a bare capacity or permission, which can also be described as an ability to act or as a "faculty"'.[124]

Secondly, to apply the 1759 maxim from *Finch's Law* concerning the prerogative:[125] it *is* the law in the case of a subject that she has the legal capacity to make a payment to another based on a perceived moral obligation rather than claim of legal right, and hence it is *not* the law unique to the Crown. It does not, therefore *ex hypothesi* fall within the scope of a prerogative executive power.

Thirdly, there is no reference to any prerogative power to make act of grace payments in Joseph Chitty's monumental 500-page *A Treatise on the Law of the Prerogatives of the Crown* published in 1820, HV Evatt's famous 1924 doctoral thesis, *The Royal Prerogative*, or the first edition of *Halsbury's Laws of England* published in 31 volumes from 1907 to 1917. Moreover, both Chitty and Evatt make it clear at the outset that their conception of the prerogative is entirely Blackstonian:[126] if act of grace payments were an exercise of a prerogative power, then it is astonishing that the power to make them is not mentioned in either. Although there are some United Kingdom authorities on act of grace payments which refer to such payments as 'under the prerogative powers of the executive',[127] it needs to be borne in mind that the United Kingdom usage of the term 'prerogative' (in contrast to Australia) generally follows the Diceyan conception.[128]

Fourthly, a prerogative executive power must be a product of the common law: it only exists if the common law historically recognises its existence. In the pre-Federation era, both the government of the United Kingdom[129] and the Australian colonial governments made act of grace payments from time to time, thus enhancing 'the constitutional framework in which the claims of the citizen upon the state could be resolved'.[130] In the colony of New South Wales, for example, the established

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122 *Plaintiff M68/2015* (n 119) 98 [135] (Gageler J).
123 Stephenson (n 4) 64.
124 *Plaintiff M68* (2016) 257 CLR 42, 98 [135] (Gageler J) (citations omitted).
125 'You shall find it to be the law almost in every case of the King, that is law in no case of a subject': Sir Henry Finch, *Law or a Discourse Thereof in Four Books* (Henry Lintot, 1759) 85.
126 Chitty (n 102) 4; HV Evatt, *The Royal Prerogative* (Law Book Company, 1987) 11–12.
127 *R v Ministry of Defence; Ex parte Walker* (2000) 2 All ER 917, 928
128 Stephenson (n 4) 19–21.
129 See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 28 July 1896, 827.
130 Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 75. See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 February 1891; Western

practice was for the aggrieved citizen to petition Parliament and then for Parliament to 'appoint a select committee to inquire and report as to whether a recommendation should be made to the Government for an ex gratia payment'.[131] Therefore, if the making of act of grace payments is an exercise of a prerogative executive power, one would expect that Australian courts in the colonial period would have had occasion to recognise it as such. But they did not. Although there is some curial recognition of the practice,[132] act of grace payments were never described in terms consistent with an exercise of a prerogative executive power. Instead, they were described in terms consistent with our position that such payments are an exercise of non-prerogative executive capacity.[133]

If our position is correct, then the Commonwealth must rely solely on the ordinary functions exemption to secure the constitutional legality of CDDA payments (on the assumption that, *contra* Boughey, Rock and Weeks, the CDDA Scheme lacks statutory support). On that premise, any CDDA payments that fall outside the scope of that exception are made in violation of the *Constitution*.

It is perhaps unduly cynical to observe that it is to the advantage of the Commonwealth that no disappointed applicant for a payment under the CDDA Scheme is likely to challenge the constitutionality of the Scheme itself. However, *if* an applicant's CDDA Scheme application concerned defective administration related to 'the ordinary course of administering a recognised part of the Government of the Commonwealth, or with the incidents of the ordinary and well-recognised functions of that Government',[134] and that relationship was *not* considered by the CDDA decision-maker rejecting the application (and why would it be, given that the language of the ordinary functions exemption does not appear in *RMG 409*), *then* that applicant would have a compelling argument that the decision is infected with jurisdictional error: the decision-maker has ignored a constitutionally mandated precondition to the exercise of their power. And it is possible to envisage situations where the fact that a person suffered a loss because of defective administration related to the *ordinary, well-recognised* functions of the Commonwealth government (as opposed to *extraordinary, novel* functions, where some diminution of the standard and quality of administration might be anticipated and excused) militates in favour of a moral obligation to make a payment. Think of Karen Green, a 16-year-old school leaver who was denied unemployment benefits for some months because of the Department of Social Security's defective administration of an ordinary, well-recognised function of the Commonwealth relating to an entirely foreseeable and ordinary event — that is, that a 16-year-old would choose to leave

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Australia, *Parliamentary Debates*, Legislative Assembly, 18 January 1892, 285; Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 December 1892, 447–8; Parliament of New South Wales, *Sessional Papers*, 1899(3) 462–3, 870, 867.

131 Finn (n 130) 75. See also *Parramatta River Steamers & Tramway Co v Hixson* (1895) 16 NSWLR 105, 109 (Martin CJ), 109–10 (Windeyer J), 110 (Innes J) ('*Parramatta River Steamers*'); *Twaddell v Driver* [1877] Knox Reports 459 ('*Twaddell*').

132 Finn (n 130) 75.

133 *Parramatta River Steamers* (n 131) 109 (Martin CJ), 109–10 (Windeyer J), 110 (Innes J). See *Twaddell* (n 131).

134 See above n 112 and accompanying text.

school at the end of the school year and immediately start actively and genuinely looking for full-time employment.[135]

However, even if we are wrong, and the Commonwealth *does* enjoy a prerogative executive power to make act of grace payments without statutory support under s 61 of the *Constitution*, there are still consequences for the legality of CDDA Scheme decision-making. As a creature of the common law, any prerogative power to make act of grace payments must be legally limited: it follows, therefore, that CDDA payments can only lawfully be made within the legal limits of that prerogative.[136] Moreover, and in contrast to the inapposite 'nationhood power', the legal orthodoxy is that *those limits on the prerogative are fixed by the common law in aspic and determined retrospectively*.[137] As Lord Diplock famously warned in 1964, 'it is 350 years and a civil war too late for the Queen's courts to broaden the royal prerogative'.[138] While it is conceded that the prerogative may be 'capable of being *adapted* to "new situations"',[139] act of grace payments are an ancient practice from time out of mind, not a 'new situation'. Hence, if the Commonwealth executive transgresses the historically determined limits of the posited prerogative in making a CDDA decision which does not fall within the ordinary functions exception, then it is vulnerable to judicial review. That raises a difficult question: what would be the historically determined limits on any posited prerogative executive power to make act of grace payments?

Although the *Case of Proclamations* in 1610 established that the authority to determine the existence and extent of the prerogative belonged to the courts, not the Crown,[140] traditionally 'the manner of exercise of a prerogative power was considered unreviewable on any ground whatsoever'.[141] This position was not abandoned until the second half of the 20th century,[142] hence 'there exists a modest body of case law'[143] only. However, we maintain that if such an executive prerogative power exists, then it must have some qualities to make it distinguishable. Specifically, we propose that it must be (1) predicated upon the existence of a relevant appropriation by the legislature; (2) exercisable at the discretion of the Crown 'out of grace' or favour, without any legal duty or compulsion to make a payment, usually as a remedy of last resort in the absence of another viable available remedy;[144] and (3) exercised on the basis of some sense of a moral obligation to make a payment in exceptional or special circumstances.[145] Of these qualities, it is (3) that is the most distinctive: a sense of moral, in contrast to legal, obligation

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135 *Green v Daniels* (1977) 13 ALR 1.
136 Sapienza (n 96) 177.
137 Ibid 141; Stephenson (n 4) 25.
138 *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).
139 Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) 39(2) *Melbourne University Law Review* 385, 406, quoting George Winterton, 'The Prerogative in Novel Situations' (1983) 99 *Law Quarterly Revie*w 407, 408 (emphasis in original).
140 *Case of Proclamations* (1610) 12 Co Rep 74; 77 ER 1352.
141 SA de Smith, *Judicial Review of Administrative Action* (Stevens & Sons, 1959) 118.
142 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
143 *Clement v Minister for Finance & Deregulation* [2009] FMCA 43, [32] (Neville FM) ('*Clement*').
144 Ibid [25], [30], [38]; *Hartigan v Treasurer (ACT)* (2018) 228 FLR 324, 329 [29] ('*Hartigan*').
145 See, eg, *Toomer* (n 30) [47].

imposed on the Crown would be the 'lodestar'[146] of any posited act of grace prerogative.

A problem: paragraphs 17 and 18 of *RMG 409* explain, under the heading 'What does the CDDA Scheme do?':

> The CDDA Scheme provides that if a minister or an official authorised by the minister forms an opinion that an official of the entity, acting, or purporting to act, in the course of duty, has directly caused a claimant to suffer detriment, or, conversely, prevented the claimant from avoiding detriment, due to:
>
> - a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant's circumstances
> - an unreasonable failure to institute appropriate administrative procedures to cover a claimant's circumstances
> - giving advice to (or for) a claimant that was, in all circumstances, incorrect or ambiguous
> - an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or was reasonably capable of being obtained by the official to give) the minister or the authorised official may authorise a payment to the claimant.
>
> The CDDA Scheme is permissive, in that it does not oblige the decision-maker to approve a payment in any particular case. However, the decision to approve or refuse a payment must be publicly defensible, having regard to all the circumstances of the matter.

All the above is undoubtedly very helpful for the staff member to whom *RMG 409* is directed, but nowhere in paragraphs 17 and 18, nor in the other 90 paragraphs of the guide, is there any *express* reference to *morality*, nor indeed *justice* (in contrast to repeated references to *unreasonableness*). Specifically, the guide does not expressly advise the staff member that they need to consider whether the Commonwealth is under a moral obligation to make a payment and if so, the size of the payment that would be required to discharge that obligation. It is conceded that the need to discern such an obligation may be *implicit* in *RMG 409* but there are dangers in not making the requirement *explicit*.[147] A staff member (frequently without any legal qualifications) in ignorance of both the prerogative, and the distinction between hard and soft law, might be misled by the guide into not giving 'proper' and 'due' consideration[148] to the moral dimension of a CDDA Scheme claim.[149] Indeed, government agencies have been criticised for 'adopting an overly defensive and legalistic approach to CDDA decision-making'[150] that 'is not in the

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146 *Clement* (n 143) [31] (Neville FM).

147 Sapienza (n 96) 151–2.

148 *Tickner v Chapman* (1995) 57 FCR 451, 455, 465.

149 The Commonwealth Ombudsman identified a similar problem with the way in which Centrelink's *Customer Compensation Handbook* described the CDDA Scheme: *Putting Things Right* (n 37) 25–7, 32.

150 *Review of Government Compensation Payments* (n 23) 52 [3.47], referring to concerns of the Acting Commonwealth Ombudsman.

spirit of the "moral" as opposed to "legal" obligation that is central to CDDA'.[151] Within that bureaucratic culture, one can envisage a staff member, dealing with an emotive application for a CDDA payment, scrupulously following the guide and falling into a crude legal positivist trap. She might reason, for example:

> I note the repeated references in your application to the injustice of your predicament and the Government's moral obligation to make a payment to you, but ultimately my decision must be made according to the law, and I am not satisfied that the Government acted unreasonably as set out in paragraphs 17 and 18 of *RMG 409*.

Although it concerns a statutory act of grace scheme, the 2018 decision of the ACT Supreme Court in *Hartigan* illustrates this danger.

Hartigan concerned an *Administrative Decisions (Judicial Review) Act 1989* (ACT) application to review a decision of the Australian Capital Territory Treasurer under the *Financial Management Act 1996* (ACT) to refuse an act of grace payment of $200,000. The plaintiff had been attacked as a six year old in 2010 by a pit bull terrier when he was visiting a tenant in a house managed by the Australian Capital Territory Commissioner for Social Housing, and had suffered significant facial, head and leg injuries.[152] In 2015, he unsuccessfully sued the Commissioner in the Australian Capital Territory Supreme Court in negligence for compensation.[153] He subsequently, in 2017, sought an act of grace payment.[154] Section 130 of the *Financial Management Act 1996* required the Treasurer to be satisfied of 'special circumstances' before authorising any payment and, in refusing the application, the Treasurer reasoned:

> In reading the decision of the Supreme Court, I noted that Justice Penfold found that the Commissioner for Social Housing was not liable for the dog involved in the attack and breached no duty of care to prevent the dog attack on your client. Her Honour found that there were no steps the Commissioner might have reasonably taken that could have prevented the attack. Accordingly, pursuant to s 130 of the *Financial Management Act 1996* I am not satisfied that there are special circumstances to warrant authorising a payment to your client and it is for this reason that I am declining your request. I am sympathetic to the serious injuries that your client sustained, but they are not the Commissioner's or the Territory's responsibility.[155]

The Treasurer's decision, unsurprisingly, did not survive judicial review. The Supreme Court found that he had misconstrued the nature of the power under s 130 because he had focused solely on the lack of legal liability; he had thus missed the 'whole premise of an act of grace payment [as] an appeal to the Treasurer's goodwill and moral conscience'.[156]

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151 Ibid, quoting Women's Legal Service NSW, Submission No 108 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) 3.

152 *Hartigan* (n 144) 335–8 [76]–[93].

153 *Hartigan v Commissioner for Social Housing (ACT)* (2017) 319 FLR 158.

154 Boughey, Rock and Weeks (n 28) 319–20.

155 *Hartigan* (n 144) 326 [4].

156 Ibid 331 [47] (McWilliam AsJ).

III State and Territory Schemes

A *States*

The potential problem for the states is that all of them bar Queensland either rely exclusively on an inherent executive power to make discretionary act of grace payments (Victoria, Tasmania and South Australia) or assert such a power in addition to their statutory arrangements (Western Australia and New South Wales).[157] Thus, *if* the constraints on the Commonwealth executive's expenditure identified in *Williams No 1* apply wholly or in part to the states, it can be powerfully argued that many of the act of grace payments made by the states without statutory support are unlawful. This Part sets out why it is probable that the strictures of *Williams No 1* apply to the states and then identifies the possible suspect and non-suspect categories of state non-statutory act of grace payments.

1 *Why It Is Probable that Williams No 1 Applies to the States*

The High Court has emphasised that *Williams No 1* did not consider the spending powers of the state executives,[158] and academic opinion as to whether its constraints on executive spending apply to the states is divided.[159] On the one hand, it can be argued that the limits on Commonwealth executive power to spend identified in *Williams No 1* were anchored in the text and structure of the *Constitution*,[160] and that they therefore do not apply to the states, as there are no state equivalents to s 61 of the *Constitution*, nor to s 81.[161] Moreover, while the Commonwealth Parliament is a legislature conferred with limited, express heads of power, the state parliaments are not.[162] However, we maintain that it is possible, even probable, that the constraints on Commonwealth executive expenditure identified in *Williams No 1* will be applied wholly or in part to the states for the following reasons:

(1) The application of the High Court's reasoning in *Williams No 1* to the state executives would be consistent with what has been described as an 'undertone'[163] in the High Court's jurisprudence — since its 2010 decision

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157 Western Australia distinguishes between 'act of grace payments' under the *Financial Management Act 2006* (WA) and 'ex gratia payments' made 'under non-statutory executive power': 'Treasurer's Instruction 319: Act of Grace Payments' in Treasury (WA), *Financial Administration Bookcase* (Update 92, November 2023) ('*WA Treasurer's Instruction*'). By contrast, in New South Wales the two terms are treated as interchangeable: *NSW Treasury Circular* (n 11).

158 *Williams No 2* (n 7) 464 [64] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

159 See, eg, Hanks, Gordon and Hill (n 83) 220, 236–7; Selena Bateman, 'Constitutional Dimensions of State Executive Power: An Analysis of the Power to Contract and Spend' (2015) 26(4) *Public Law Review* 255.

160 *Williams No 1* (n 5) 254 [206] (Hayne J).

161 With the arguable exception of WA: see *Constitution Act 1889* (WA) s 64. However, in contrast to s 81 of the *Constitution* which is entrenched (and binds the Commonwealth Parliament), s 64 of the *Constitution Act 1889* is not entrenched.

162 Anne Twomey, 'Post-*Williams* Expenditure: When Can the Commonwealth Spend Public Money without Parliamentary Authorisation?' (2014) 33(1) *University of Queensland Law Journal* 9, 25.

163 Kathleen Foley, 'What is the Relevance of *Williams* and *Plaintiff M61* for the Exercise of State Executive Power?' (2013) 36(2) *University of Western Australia Law Review* 168, 179.

in *Plaintiff M61/2010E v Commonwealth*[164] — of 'concern … about the dangers of unconstrained executive power'.[165]

(2) The High Court's reasoning in *Williams No 1*, where it is based on the requirement of representative and responsible government 'that the Parliament, as the directly elected representative of the people, must have control over the expenditure of money by the Executive',[166] may be applied equally to the states.[167]

(3) The High Court's reasoning in *Williams No 1*, insofar as it is based 'on the need to … enforce the federal division of powers established by the *Australian Constitution*',[168] may be applied to the states.[169] Although the *Constitution* is structured such that the *means of enforcement* of its federal division of powers upon the Commonwealth is different from the *means of enforcement* of that federal division upon the states,[170] it remains the case that the *Constitution* must require both the states and the Commonwealth to comply with that division.

(4) Given that the High Court in *Williams No 1* found the 'natural person' analogy advanced by the Commonwealth unhelpful in delimiting the power of the Commonwealth executive, it is likely that the Court would find any submission that a state executive's powers to spend can be ascertained by reference to a natural person's powers to spend similarly unhelpful.[171]

(5) The High Court's reasoning in *Williams No 1* may be applied to the state Legislative Councils in so far as that reasoning is protective of the role of the Senate as an integral component of a *bicameral* legislature (in contrast to the Senate's role as a 'states' House', a role which is inapplicable to the state Legislative Councils).[172] A fortiori as the existence of the state Legislative Councils in all states except Queensland has been effectively entrenched by means of s 6 of the *Australia Acts 1986* (Cth and UK).[173]

(6) The argument that Commonwealth executive spending should be supported by legislation, in contrast to an appropriation Act only — because 'the Senate has limited powers to deal with an Appropriation Bill, whereas it has much greater powers with respect to general legislation which might authorise the executive to spend money in specific ways'[174] — can be applied with equal

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164 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.
165 Foley (n 163) 179.
166 Appleby and McDonald (n 17) 270. See *Williams No 1* (n 5) 241 [173] (Hayne J).
167 Appleby and McDonald (n 17) 253.
168 W Bateman (n 20) 185. See *Williams No 1* (n 5) 192–3 [37] (French CJ); *Williams No 2* (n 7) 468–9 [79]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
169 Appleby and McDonald (n 17) 280.
170 For example, the Commonwealth's legislative powers are directly conferred by the *Constitution*, whereas the states enjoy the 'unexpressed residuary' of legislative power; and s 109 gives Commonwealth laws paramountcy over inconsistent state laws.
171 Foley (n 163) 176, 178.
172 *Williams No 1* (n 5) 205 [60] (French CJ), 232 [136] (Gummow and Bell JJ).
173 S Bateman (n 159) 269–70.
174 *Williams No 1* (n 5) 205 [60] (French CJ).

force to the South Australian and Tasmanian Legislative Councils, and with even greater force to the Victorian and New South Wales Legislative Councils. The restrictions on the South Australian and Tasmanian Legislative Councils in relation to appropriation Bills are analogous to those imposed on the Senate by s 53 of the *Constitution*.[175] The restrictions on the Victorian and New South Wales Legislative Councils in relation to appropriation Bills are significantly greater than those imposed on the Senate by s 53 of the *Constitution*: in Victoria and New South Wales, appropriation Bills for the ordinary annual services of government, which can include appropriation for capital works and new policies, can be enacted without the respective Legislative Council's agreement.[176]

(7) The High Court's reasoning in *Williams No 1* — where it draws on the fundamental constitutional principle that the executive does not have the power to impose taxation (that is, just as the executive cannot levy tax without legislation, it cannot spend the money raised by taxation without legislation)[177] — can be applied equally to the state executives.

(8) The High Court's reasoning in *Williams No 1* — where it draws a distinction between, on the one hand, a natural person spending their '"own" moneys'[178] and, on the other hand, the spending of 'public moneys'[179] by the Commonwealth executive — can be equally applied to the spending of public moneys by the state executives.[180]

(9) The application of the High Court's reasoning in *Williams No 1* to the state executives may be characterised as another instance of an uncontroversial principle that the text and structure of the *Constitution* imposes limitations on state legislative and executive power, including implied limitations, such as the implied freedom of political communication. It is also consistent with the Court's rejection of the term 'plenary' as an accurate description of *any* executive or legislative power under the *Constitution*.

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175 Section 62(1) of the *Constitution Act 1934* (SA) provides that the South Australian Legislative Council cannot amend any 'money clause', which is defined in s 60(4) as 'a clause of a Bill, which clause appropriates revenue or other public money, or deals with taxation, or provides for raising or guaranteeing any loan or for the repayment of any loan'. The Legislative Council can, however, under s 62(2), 'return to the House of Assembly any Bill containing a money clause with a suggestion to omit or amend such clause or to insert additional money clauses, or may send to the Assembly a Bill containing suggested money clauses requesting, by message, that effect be given to the suggestion'. However, s 62(3) provides that s 62(2) 'applies to a money clause contained in an appropriation Bill only when such a clause contains some provision appropriating revenue or other public money for some purpose other than a previously authorised purpose or dealing with some matter other than the appropriation of revenue or other public money'. In Tasmania, s 42(1) of the *Constitution Act 1934* (Tas) provides that the Legislative Council 'may not amend … a provision of a Bill for an Appropriation Act … to meet the cost of the ordinary annual services of the Government' although it may, under s 43(1) 'request, by message, the amendment of the Bill'.

176 *Constitution Act 1975* (Vic) ss 62, 64, 65; *Constitution Act 1902* (NSW) s 5A.

177 *Williams No 1* (n 5) 352 [519] (Crennan J).

178 Ibid 236 [151] (Gummow and Bell JJ), 241 [173] (Hayne J).

179 Ibid 236 [151] (Gummow and Bell JJ), 241 [173] (Hayne J), 368 [577] (Kiefel J).

180 Twomey (n 162) 9.

(10) Just as the High Court has recognised that the *Constitution* impliedly attributes certain essential, entrenched characteristics to state courts, it may recognise that the textual references to the state executives and parliaments in the *Constitution* imply certain essential, entrenched characteristics, including the characteristics of democratic representative and responsible government such as parliamentary control over executive spending.

2 *Some Constitutional Problems if the Constraints Imposed by Williams No 1 Are Applied to the State Executives*

If we accept that the constraints on Commonwealth executive expenditure identified in *Williams No 1* might apply wholly or in part to the states, then the states that persist in making non-statutory act of grace payments (that is, all states except Queensland) may find themselves in some difficulty in upholding their commitment to spend public money lawfully. Specifically:

(1) The ordinary functions exception is unlikely to cover all non-statutory act of grace payments made by the states.[181] Of those States that have soft law instruments regulating such payments (South Australia, Victoria and New South Wales),[182] no reference is made in those instruments to the exception; it can thus be inferred that payments are made without reference to it. In Tasmania and Western Australia, in the absence of soft law instruments (Western Australia having a soft law instrument in relation to its statutory act of grace payment scheme, but no such instrument relating to its assertion of the prerogative),[183] one is left to assume that non-statutory payments are also made without reference to the exception.

(2) The prerogative exception is more promising for the states that persist in making non-statutory act of grace payments, but it is also not without similar difficulties to those faced by the Commonwealth. To reprise: *if* state act of grace payments made without legislative support are made in the exercise of a non-prerogative executive capacity to spend, *then* non-statutory act of grace payments do not fall within the prerogative exception and are unlawful, unless they fall within the ordinary functions exception; all other payments are, in constitutional principle, illegal. Moreover, as was the case with the Commonwealth, any putative prerogative executive power will be subject to legal limits, including most likely a requirement that the state is under a moral obligation to make a payment.

(3) Of the existing state soft law instruments regulating non-statutory act of grace payments (that is, in South Australia, Victoria and New South Wales), only the Victorian instrument refers to morality;[184] the New South Wales and

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[181] Ibid 27.

[182] Those instruments are Treasury (SA), *Ex Gratia Payments* (Treasurer's Instruction 14, July 2020) ('*SA Treasurer's Instruction*'); Treasury (Vic), *Disclosure of Ex Gratia Expenses* (Financial Reporting Direction 11, April 2022) [6.1] (emphasis added) ('*Victorian Treasurer's Direction*') and *NSW Treasury Circular* (n 11).

[183] *WA Treasurer's Instruction* (n 157).

[184] *Victorian Treasurer's Direction* (n 182) 6.1 (emphasis added).

> South Australian instruments[185] are devoid of any reference to it. This increases the risk that act of grace decisions in New South Wales and South Australia (as well as in Tasmania and Western Australia where there is no soft law guidance at all) will be made unlawfully, and without jurisdiction, on the basis that a relevant consideration of act of grace decision-making was not considered.[186]

Finally, should the post-*Pape* constitutional framework be applied to the states, it should be noted that the one area where the position of the states is fundamentally different from that of the Commonwealth is in relation to legislative power. As detailed in the previous Part, the Commonwealth must grapple with the complexities of s 51(xxxix) and s 61 of the *Constitution* to place its act of grace payment schemes on a statutory footing. The legislative powers of the state parliaments are not constrained by heads of legislative power, and thus placing their act of grace payment schemes on a statutory footing is less legally complicated.[187] If Victoria, New South Wales, South Australia, Tasmania or Western Australia is reluctant to contain its act of grace payments within a comprehensive statutory scheme, one possible solution may be the enactment of a provision in similar terms to s 51(1) of the *Constitution of Queensland Act 2001* (Qld) which provides: 'The Executive Government of the State of Queensland … has all the powers, and the legal capacity, of an individual.' If act of grace payments in the absence of statutory support are an exercise of the prerogative executive power, then such a provision is not needed and would not affect such payments. But if we are right, and they are an exercise of the non-prerogative executive capacity, then such a provision may arguably provide those payments with sufficient statutory authorisation to satisfy the requirements of *Williams No 1*.[188]

B *Territories*

In contrast to the unclear position in the Australian states, we maintain that the constraints imposed by *Williams No 1* on the Commonwealth executive must also apply to the exercise of executive power in the Australian territories. Constitutionally speaking (and in stark contrast to the constitutional autonomy of the state executives),[189] the source of any territory executive power is Commonwealth executive power, and the stream cannot rise higher than its source. Fortunately, both of the self-governing Australian territories (that is, the Australian Capital Territory and the Northern Territory) have made statutory provision for act of grace payments.

As mentioned earlier in our discussion of *Hartigan*,[190] s 130(1) of the *Financial Management Act 1996* empowers the Australian Capital Territory Treasurer to authorise an act of grace payment '[i]f the Treasurer considers it appropriate to do so because of special circumstances … although the payment of

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185 *NSW Treasury Circular* (n 11); *SA Treasurer's Instruction* (n 182).
186 *Craig v South Australia* (1995) 184 CLR 163, 179.
187 Foley (n 163) 178–9.
188 Twomey (n 162) 27.
189 *R v Governor of South Australia* (1907) 4 CLR 1497.
190 See above Part II(C)(2)(c).

that amount … would not otherwise be authorised by law or required to meet a legal liability'. The Northern Territory equivalent is s 37(1) of the *Financial Management Act 1995* (NT), which empowers the Northern Territory Treasurer to authorise an act of grace payment '[i]f the Treasurer is satisfied that, by reason of special circumstances, it is proper to do so'. Given that the Australian Capital Territory and Northern Territory Legislative Assemblies each have 'power to make laws for the peace, order and good government of the Territory',[191] both s 130(1) of the Australian Capital Territory Act and s 37(1) of the Northern Territory Act are almost certainly valid and hence sufficient to place act of grace payments in the Australian Capital Territory and the Northern Territory on a constitutionally secure statutory footing.

There are also relevant soft law instruments in each jurisdiction, namely section 2 in part 6 of the *Treasurer's Directions* in the Northern Territory, and the *Act of Grace Payments: Policy and Procedures Guide* ('*ACT Guide*') in the Australian Capital Territory. The Northern Territory Directions are skeletal, and hence of little help to decision-makers. By contrast, the *ACT Guide* is much more detailed (running to eight A4 pages in its pdf version) and hence more helpful. Unfortunately, however, two of its paragraphs may mislead.

First, paragraph 23 of the *ACT Guide* repeats the advice in paragraph 9 of *RMG 401* that '"special circumstances" and "appropriate" are not defined in the [Act] and are for … the decision-maker to assess and decide on'. Paragraph 23 of the *ACT Guide* is thus vulnerable to the same criticism that was made previously of paragraph 9 of *RMG 401*: it pays insufficient heed to Australian judicial supremacy in the interpretation of the law.

Secondly, paragraph 27(c) of the *ACT Guide* states:

> Act of grace payments may not be approved, for example: … when a request has arisen from private circumstances outside the sphere of ACT administration, there has been no involvement of an agent or ACT Government employee or entity and the matter is not related to the impact of any ACT legislation …

Analogously with the criticism made previously of paragraph 13 of *RMG 401*, this statement risks misrepresenting the legal position for its non-legal audience. It is hardly likely that a court would find a payment falling within paragraph 27(c) of the *ACT Guide* to be legal: the slightly ambiguous word 'may' should therefore be hardened to 'must'. By contrast s 37(2) of the *Financial Management Act 1995* (NT) adds, with commendable clarity: 'Subsection (1) does not authorise a payment of money ex gratia unless the special circumstances arose in the course of the business of the Government of the Territory.'

[191] *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22; *Northern Territory (Self-Government) Act 1978* (Cth) s 6. Section 22(2) of the former adds that 'power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive'.

IV Conclusion

In his detailed analysis of public finance law in the United Kingdom and Australia, Will Bateman has argued that the Australian High Court's early 21st century attempts to police 'the authority possessed by treasury departments over public expenditure'[192] has 'resoundingly failed'.[193] This article, albeit confined as it is to one narrow and somewhat arcane area of public expenditure, would suggest that Bateman's conclusion might be too pessimistic and sweeping. At the very least, it may distract attention from some of the specific 'ripples of affection' of *Pape* and the *Williams* cases.

This article has sought to identify some of those ripples of affection for the ancient Crown practice of act of grace payments, which has been imported from one constitutional universe, comprising an unwritten, unitary constitution, to another constitutional universe, comprising a written, federal constitution. It concludes that:

- the Commonwealth's general statutory act of grace provision, s 65 of the *PGPA Act*, should be read down with reference to Commonwealth executive power under s 61 of the *Constitution* to ensure that it is sufficiently connected to a head of Commonwealth legislative power (that is, s 51(xxxix) of the *Constitution*);
- an explicit and unambiguous reference to the Commonwealth's non-statutory CDDA Scheme should be included in the *FF(SP) Regulations*;
- the States of Victoria, New South Wales, South Australia, Tasmania and Western Australia should enact legislation to provide statutory support for their general act of grace payment schemes; and
- all Australian jurisdictions, including the self-governing territories of the Australian Capital Territory and the Northern Territory, should ensure that they have soft law instruments on act of grace decision-making which alert decision-makers to the constitutional constraints which must limit and inform their decisions.

192 W Bateman (n 20) 179.
193 Ibid 195.

Before the High Court

Reassessing "Reliance Damages": The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*

David Winterton*

Abstract

The forthcoming appeal in *Cessnock City Council v 123 259 932 Pty Ltd* affords the High Court an opportunity to reconsider the law governing the recovery of expenditure incurred in reliance upon an unperformed contractual promise. The appeal's central focus is likely to be the nature and status of the so-called 'presumption of recoupment' commonly said to provide the legal foundation for the recovery of such expenditure as damages for breach of contract. Depending on the arguments made, and on the Court's approach, the appeal may additionally provide the chance to identify more precisely when expenditure incurred in reliance upon an unperformed contractual promise is presumptively recoverable as damages: in particular, the relevance of the rule established in *Hadley v Baxendale* in this context. It is argued that the High Court should reject the expansive interpretation of the *Amann* decision some have adopted or, alternatively, provide further guidance regarding the appropriate limits on presumptively recoverable reliance expenditure.

Please cite this column as:

David Winterton, 'Reassessing "Reliance Damages": The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*' (2024) 46(1) *Sydney Law Review* 87.

DOI: https://doi.org/10.30722/slr.19654

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I thank the participants who attended the University of Oxford Obligations Group session and the University of Western Australia 2023 Private and Commercial Law Conference where earlier versions of this column were presented. I also thank the anonymous referee, and the following people, for helpful written feedback on draft versions: Professor Lusina Ho, Professor David McLauchlan, Professor Robert Stevens, Amelie Berz, Michael Dimarco, Alexander Georgiou, Lachie Muir, Tim Pilkington and Scott Ralston. I retain responsibility for any errors. The final published version of this column contains amendments made after publication of the advance version.

I Introduction

Following contractual breach, the settled principle is that, at least absent contrary agreement, the innocent party is entitled to be placed in 'the same situation … as if the contract had been performed'.[1] But in *McRae v Commonwealth Disposals Commission*,[2] the High Court of Australia held that, where 'the breach of contract itself … makes it impossible' to determine the value of the promised performance, the 'burden' shifts to the defendant to show that, if there had been no breach, 'reasonable' expenditure incurred in reliance upon the unperformed promise 'would equally have been wasted'.[3] In *Commonwealth v Amann Aviation*,[4] the High Court arguably extended the range of circumstances where it is presumed that the plaintiff would have recouped any expenditure reasonably incurred in reliance upon an unperformed contractual promise[5] to situations where there is sufficient evidential uncertainty as to what position the plaintiff would have occupied had the breach not occurred. Notably, a majority of the Court also apparently accepted that, in determining this 'non-breach position', regard may be had to any consequential benefits falling within the scope of the rule in *Hadley v Baxendale*[6] that may potentially have accrued to the plaintiff following performance.[7]

Precisely what *Amann* establishes, and the cogency of its reasoning, have been the subject of ongoing debate.[8] The decision also leaves important matters unresolved: in particular, the principles by which 'contractual reliance expenditure awards'[9] are properly restricted. The appeal in *Cessnock City Council v 123 259 932 Pty Ltd* ('*Cessnock*')[10] provides the High Court with a welcome opportunity to reconsider *Amann* and to provide some guidance regarding this question of restriction. The present column identifies the central issues upon which the appeal will turn and proposes two possible avenues for its disposition.

The discussion commences, in Parts II–IV, by summarising the relevant background to the appeal and the key issues raised. These issues are then examined further in Parts V–IX, where the following claims are defended. First, the broader interpretation of *Amann* is both incorrect and indefensible in principle. Secondly,

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1 Hereafter, 'the *Robinson v Harman* principle': see *Robinson v Harman* (1848) 1 Ex 850, 855 (Parke B).

2 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 ('*McRae*').

3 Ibid 412–14 (Dixon and Fullagar JJ).

4 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 ('*Amann*').

5 Hereafter, 'the presumption of recoupment'.

6 See *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145, 152.

7 In combination, these two propositions are hereafter denoted by 'the broader interpretation of *Amann*'.

8 See, eg, GH Treitel, 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 *Law Quarterly Review* 226; HK Lücke, 'The So-called Reliance Interest in the High Court' (1994) 6(2) *Corporate and Business Law Journal* 117; Nick Seddon, 'Contract Damages where Both Parties Are at Fault' (2000) 15(3) *Journal of Contract Law* 207.

9 As Gaudron J pointed out in *Amann* (n 4) 154, although awards of this kind are often described as 'reliance damages', that expression 'is apt to give the erroneous impression that damages [for breach of contract are] … awarded on some basis other than compensation for the loss of contractual rights'.

10 *Cessnock City Council v 123 259 932 Pty Ltd* (High Court of Australia, Case No S115/2023) ('*Cessnock*').

recovering expenditure reasonably incurred in reliance upon a contractual promise in an action seeking damages for breach of that promise must be distinguished from recovery on a restitutionary basis of expenditure ostensibly incurred in performance of an agreement between the parties. Thirdly, subject to the plaintiff affirmatively establishing the likely recoupment of the claimed expenditure, recovery on the former basis should be limited to circumstances where the defendant cannot discharge any applicable *evidentiary* onus regarding the plaintiff's possible non-recoupment of the expenditure. Fourthly, if, alternatively, the broader interpretation of *Amann* is endorsed, some principled limits upon the availability of contractual reliance expenditure awards must be developed. Fifthly, the requirement that presumptively recoverable reliance expenditure must be reasonably incurred cannot plausibly be equivalent to asking whether it satisfies *Hadley*'s second limb. Sixthly, if the broader interpretation of *Amann* is adopted, it should be possible for the parties' agreement to expressly, impliedly, or perhaps even *implicitly*, restrict the scope of presumptively recoverable expenditure. Finally, and most tentatively, on the preferable interpretation of the parties' contract, this is what occurred in *Cessnock*.

II Background

The parties' dispute arose from Cessnock City Council's later abandoned proposal to develop Cessnock Airport. After an extended period of negotiations, the Council entered into a contract with the plaintiff ('Cutty Sark') in July 2007 under which it promised to grant Cutty Sark a 30-year lease over part of the airport following registration of the plan of subdivision. Cutty Sark proposed to construct an aircraft hangar to house previously acquired aircraft from which it would run a business conducting adventure flights and advanced flight aerobatic training, and to use the hangar as a venue for hire and an aviation museum. Significantly, the Council was also the relevant consent authority for approval of the subdivision plan and contractually promised to take all reasonable steps to apply for and register it by 30 September 2011 ('the sunset date').

The Council later notified Cutty Sark that it would not be proceeding with the proposed development because it could not afford to pay the costs of necessary sewerage work. In consequence, the plan was never registered, and the proposed lease was not granted. In the meantime, Cutty Sark had been granted a licence to occupy the subject lot and proceeded to construct the hangar at a cost of approximately $3.7 million. Notably, none of the businesses Cutty Sark had meanwhile commenced were successful and all ceased to operate prior to the sunset date. By mid-2012, Cutty Sark vacated the proposed lot, and was deregistered. The Council validly terminated the contract and, in accordance with one of its provisions, acquired the hangar for $1. Cutty Sark was later reinstated and commenced proceedings against the Council claiming, inter alia, damages for breach of contract.

At trial, the Council was found to have breached its obligation to take all reasonable steps to ensure registration of the plan by the sunset date,[11] but Cutty Sark's claim to recover expenses incurred in constructing the hangar was denied. According to Adamson J, the presumption established in *McRae* and *Amann* did not arise because the Council's breach did not make it 'impossible' to determine the position Cutty Sark would have occupied had the contract been performed.[12] Her Honour further held that, although Cutty Sark's claim for expenses incurred in constructing the hangar had not been expressly excluded, both the contract's terms and the 'surrounding circumstances' demonstrated that 'the commercial risk [of the venture not succeeding] was the plaintiff's'.[13] Additionally, Adamson J held that, even if a presumption of recoupment did arise, it had been rebutted by the Council because: (1) the Council made no promise to develop the airport and the development's progression depended on external factors outside the parties' control; and (2) Cutty Sark abandoned each of the three businesses it operated while a licensee prior to the sunset date, and turned down the Council's substitute offer of five consecutive five-year leases.[14] Finally, her Honour held that the relevant expenditure was not recoverable 'under either of the two limbs in *Hadley*'[15] because it was within the parties' reasonable contemplation that the agreement would be terminated on or after the sunset date without breach.[16]

III The Decision on Appeal

Cutty Sark successfully appealed to the New South Wales Court of Appeal and was awarded $3,697,234.41, plus interest.[17] Brereton JA, with whom Macfarlan and Mitchelmore JJA agreed, commenced by explaining why 'the presumption referred to in *McRae* and *Amann*' did arise on the facts.[18] Relevantly, his Honour held that, as regards any expenditure incurred in reliance upon the defendant's promise and 'subject to the rule in *Hadley*'

> a plaintiff who is unable *or does not undertake* to demonstrate whether or to what extent the performance of a contract would have resulted in a profit may … [recover such] expenditure … except to the extent that the defendant shows that the plaintiff would not have recouped its expenditure had the contract been performed.[19]

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11 *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329 ('*Cessnock Trial*') [179]. Additionally, it was conceded that this failure was 'an effective cause' of the plan's non-registration: at [180].

12 Ibid [207], [215]–[218].

13 Ibid [220].

14 Ibid [211], [214], [219], [221].

15 Ibid [225].

16 Ibid [223].

17 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 ('*Cessnock Appeal*').

18 Ibid 478 [49].

19 Ibid 487–8 [73] (emphasis added). Compare *Amann* (n 4) 162 (McHugh J): 'it is a mistake to speak of the plaintiff having a right to elect between expectation damages and reliance damages'.

Brereton JA identified '[t]wo relevant themes'[20] in Adamson J's reasoning to the conclusion that the presumption of recoupment did not arise, taking issue with each of them. The first theme was that the presumption's arising was subject to an 'impossibility prerequisite'. Brereton JA rejected this view on the basis that, when read contextually, none of Mason CJ and Dawson J, Deane J, Toohey J and Gaudron J adopted this precondition in *Amann*.[21] Adamson J ruled out this interpretation of *Amann* because it suggested 'the surprising and unorthodox proposition that there is no obligation on an injured party to prove loss since the wrongful party will, in any event, be liable for reliance expenditure'.[22] Brereton JA disagreed on the basis that the plaintiff will always have to prove that it 'incurred the expenditure, *in reliance* on the defendant performing its relevant contractual obligation',[23] which is 'of itself prima facie proof of loss'.[24] Moreover, according to his Honour

> it would be quite illogical that a presumption casting the onus on the defendant to prove that the plaintiff would not have recouped its expenditure would arise only where the plaintiff first established that it could not possibly prove the opposite.[25]

The second theme Brereton JA identified in Adamson J's reasoning was that the preferable construction of the parties' contract was that 'the risk of the future development occurring … was to be borne by Cutty Sark and not by the Council',[26] meaning that 'it was not reasonable for Cutty Sark to incur the expenditure it did'.[27] While Brereton JA accepted that the contract allocated certain risks to Cutty Sark, his Honour held that the various contractual exclusions of liability had 'no direct application' to the claim advanced. Brereton JA also considered that the absence of any promise to develop the airport was 'beside the point'[28] because '[t]he one risk that matters is that which eventuated — that the Council repudiated its obligations to take all reasonable action to procure registration of the Plan — and that risk was one which Cutty Sark did not accept'.[29]

As regards the limits on presumptively recoverable expenditure, Brereton JA held that the presumption of recoupment extends to 'any detrimental change of position by the promisee in reliance upon the defendant's promise' that falls within

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20 Ibid 491 [83].

21 Additional support was derived from the interpretation of *Amann* (n 4) adopted in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234 ('*Meetfresh*') [30]–[31] (Macfarlan JA, Bell P and Meagher JA agreeing). But, as Brereton JA recognised, the Court there relied upon Brennan J's reasons rather than those of Toohey J and Gaudron J: see *Cessnock Appeal* (n 17) 493 [91]–[92].

22 *Cessnock Trial* (n 11) [207].

23 *Cessnock Appeal* (n 17) 494 [94] (emphasis added).

24 Ibid.

25 Ibid 494 [93]. This is a perceptive observation that, as will be explained, suggests either that the defendant's onus should be merely evidentiary or that the presumption's arising must be limited on other grounds (for example, the kind of expenditure incurred or the nature of the unperformed promise).

26 Ibid 491 [84] (citations omitted).

27 Ibid 496 [100].

28 Ibid 497 [103].

29 Ibid.

the scope of *Hadley*'s second limb[30] and, further, that it was within the parties' reasonable contemplation that Cutty Sark's expenditure here would be incurred and wasted if the Council's promise was breached. Finally, again invoking *Hadley*, his Honour held that the Council had not rebutted the presumption here because a court may have regard to contingent, unpromised 'potential benefits that might have accrued to the plaintiff', provided these benefits were reasonably within the parties' contemplation at formation.[31]

IV Overview of the Issues

The most fundamental question regarding the recovery of expenditure incurred in reliance upon an unperformed contractual promise is when such recovery is justified. In *L Albert & Son v Armstrong Rubber Co*,[32] Learned Hand CJ famously observed that because, following contractual breach

> [it is] often very hard to learn what the value of the performance would have been … it is a common expedient, and a just one … to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other.[33]

But it is important not to misinterpret the intended meaning of this proposal. First, earlier in the same passage the Chief Justice also made clear that 'the promisor's default … [should not] make him an insurer of the promisee's venture'.[34] Secondly, his Honour's comments might plausibly be interpreted as requiring that the breach *itself* must be what makes determining the 'value of the performance' sufficiently difficult to justify reversal of the onus.[35] Thirdly, and most importantly, as Ng persuasively argues, the logic of Learned Hand CJ's reasoning is not directly transferable to the conception of contractual reliance expenditure awards adopted in *Amann* because, in the United States

> there is a discernible link between the shifting of the onus of proof to the defendant on the issue of recoupment … and the fact that reliance damages are there intended to put the plaintiff in the position that he or she would have been in *if the contract had not been made*.[36]

Under Australian (and now English)[37] law, the recovery of reliance expenditure in an action for breach of contract[38] must yield to the *Robinson v*

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30 Ibid 488 [73]. See text at above n 19.

31 Ibid 505 [126].

32 *L Albert & Son v Armstrong Rubber Co*, 178 F 2d 182 (2nd Cir, 1949) ('*Armstrong Rubber*').

33 Ibid 189 (citations omitted).

34 Ibid.

35 It is also unclear whether his Honour regarded contingent, consequential benefits that might result from performance as part of this value. As explained by McHugh J in *Amann* (n 4) 174, and by Treitel (n 8) 231, this extension of the scope of the presumption of recoupment is difficult to justify.

36 Gerald Ng, 'The Onus of Proof in a Claim for Reliance Damages for Breach of Contract' (2006) 22(2) *Journal of Contract Law* 139, 148 (emphasis added).

37 *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2011] Bus LR 212, 222–30 [34]–[66] (Teare J) ('*The Mamola Challenger*').

38 As explained below, recovery of reliance expenditure on some other basis might still be justified.

Harman principle.[39] Given this, alongside the preceding observations and certain problems with the broader interpretation of *Amann* outlined below,[40] it will be argued that, unless the plaintiff ultimately demonstrates the likelihood of recoupment on the balance of probabilities, recovering reliance expenditure as damages is only justifiable when the defendant cannot discharge an evidentiary onus in relation to the plaintiff's possible non-recoupment of the relevant expenditure. However, an important preliminary question arising on appeal is precisely what *Amann* establishes. In particular, the Court must decide whether there was majority support there for the proposition that proof that reasonable expenditure was incurred in reliance upon a contractual promise is itself sufficient to entitle the plaintiff to its recovery except to the extent that the defendant demonstrates the likelihood of non-recoupment.

A second critical issue raised by *Cessnock* concerns the appropriate limits on the recovery of reliance expenditure as damages for breach of contract, particularly under the broader interpretation of *Amann*. One question here is precisely what it means to say that presumptively recoverable reliance expenditure must be 'reasonably incurred'. Another is whether the parties' contract may impact the scope of any default presumption of recoupment, whatever its content may be. Presumably, the parties may expressly exclude or limit the plaintiff's default entitlement to recover.[41] But the extent to which the parties' contract may impliedly, or *implicitly*, modify the default position is unclear. As will be explained, this uncertainty partly derives from doubt regarding the content of, and justification for, the contractual remoteness rule more generally.

V The Nature of the Presumption in *Amann* and Its Application in *Cessnock*

As noted, the most significant point of controversy arising from *Amann* is whether there was majority support there for the proposition that proof of expenditure being reasonably incurred in reliance upon a contractual promise itself renders such expenditure presumptively recoverable unless the defendant establishes the likelihood of non-recoupment. One view is that majority support for this proposition derives from the judgments of Mason CJ and Dawson J, Brennan J, and Deane J.[42] However, in the immediate aftermath of *Amann*, Professor Lücke advanced a different view, arguing that Brennan J did not support the 'general version of the presumption' adopted by Mason CJ and Dawson J, and by Deane J, because Brennan J was clear that, without more, the defendant's breach and the plaintiff's

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39 *Robinson v Harman* (n 1). See *Amann* (n 4) 82, 85, 92 (Mason CJ and Dawson J). Cf Marc Owen, 'Some Aspects of the Recovery of Reliance Damages in the Law of Contract' (1984) 4(3) *Oxford Journal of Legal Studies* 393, 395–6.

40 See Part VI.

41 But see *Soteria Insurance Ltd (formerly CIS General Insurance Limited) v IBM United Kingdom Ltd* [2022] EWCA Civ 440.

42 See, eg, *Meetfresh* (n 21).

difficulty in quantifying its loss did not justify reversing the onus of proof.[43] It is also necessary, said his Honour, that the defendant's breach 'itself makes it impossible to undertake an assessment on the ordinary basis'.[44]

The appellant advances a similar proposition in its written submissions,[45] and it is suggested that this is the preferable position. As Lücke explains, 'the promise [in *McRae*] was of a rather special type and so was the breach'.[46] In particular, the Commonwealth did not promise to perform an act, but instead warranted the existence of a particular state of affairs; and, for a warranty, it has been argued that there is 'no promise except a promise to pay damages' if the warranted state of affairs does not exist.[47]

The distinction between promises and warranties provides one plausible basis for quarantining *McRae*. Alternatively, contrary to what *McRae* actually decided, it might reasonably be contended that an agreement to sell a non-existent tanker is void ab initio for 'common mistake', and it is certainly plausible that the case would be resolved differently today since the same relief could be granted either as damages for negligent misrepresentation,[48] or to satisfy the 'equity'[49] generated by the plaintiff's reasonable reliance upon the Commission's representation.[50] Regardless of this, Lücke convincingly explains that it is clear that Brennan J did not support the 'general version of the presumption' adopted by Mason CJ and Dawson J, and by Deane J, 'but one which had been forced in the straight-jacket of *McRae*',[51] with the consequence that 'any attempt to apply either the result or the reasoning of that decision to cases like *Amann* is bound to generate confusion'.[52]

In *123 259 932 Pty Ltd v Cessnock City Council* ('*Cessnock Appeal*'), the Court agreed with this interpretation of Brennan J's judgment.[53] Their Honours nevertheless endorsed the interpretation of *Amann* adopted in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd*,[54] relying upon the judgments of Toohey J and Gaudron J in *Amann*. This view is unsupportable because those Justices only upheld the existence of 'a practical or evidentiary onus'[55] on the defendant 'of the kind which arises because, in the absence of evidence to the contrary, some particular thing is

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43 See Lücke (n 8) 145.

44 See *Amann* (n 4) 139 (Brennan J); ibid 146, where Lücke notes that this was also the interpretation of *McRae* (n 2) adopted by Hutchinson J in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, 38 ('*CCC Films*').

45 See Cessnock City Council, 'Appellant's Submissions', Submission in *Cessnock City Council v 123 259 932 Pty Ltd*, Case No S115/2023, 3 November 2023 [29], [35]–[40] ('Appellant's Submissions').

46 See Lücke (n 8) 146.

47 See John W Salmond and James Williams, *Principles of the Law of Contracts* (Sweet & Maxwell, 2nd ed, 1945) 44–7.

48 Such a claim was denied in *McRae* (n 2) itself due to the presently existing state of the law.

49 See, eg, *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 426 (Brennan J).

50 For some, admittedly tenuous, support, see *McRae* (n 2) 414 (Dixon and Fullagar JJ).

51 Lücke (n 8) 147.

52 Ibid 146.

53 *Cessnock Appeal* (n 17) 470 [91].

54 See above n 21.

55 See *Amann* (n 4) 156 (Gaudron J), where her Honour noted that in *McRae* this was described as 'a starting point': see *McRae* (n 2) 414 (Dixon and Fullagar JJ).

assumed to be the case',[56] rather than upholding a full shifting of the legal onus. The distinction between the two kinds of onus has salience in the present appeal because, even if the Council did not establish non-recoupment on the balance of probabilities, it is difficult to conclude that it did not adduce sufficient evidence to raise this as a serious possibility. Accordingly, if the arising of any presumption of recoupment rests upon the reasoning of Toohey J and Gaudron J in *Amann*, the onus cast upon the defendant must be 'evidentiary', meaning that Cutty Sark ultimately bore the burden of persuasion as to the likelihood of recoupment.

VI Difficulties with the Broader Interpretation of *Amann*

The narrow interpretation of Brennan J's judgment in *Amann* is not universally accepted. Professor McLauchlan has claimed that this interpretation is 'too literal' because 'it is difficult to accept that [his Honour] was saying anything all that different from … Mason CJ and Dawson J and Deane J'.[57] For reasons already outlined, this view is rejected here. However, even if one prefers McLauchlan's interpretation of *Amann*, it does not follow that any alleged presumption of recoupment upheld by Brennan J in the context of a claim to recover the necessary preparatory expenditure there incurred applies to a claim seeking recovery of the non-essential expenditure incurred by Cutty Sark.[58]

This distinction between 'essential' and 'incidental' reliance was famously made by Fuller and Perdue in 'The Reliance Interest in Contract Damages',[59] where those authors specifically included necessary preparatory expenditure within the former category.[60] Significantly, however, Fuller and Perdue's purpose in drawing that distinction was to determine when a plaintiff's claim for expenditure should be capped by its expected profits rather than whether adopting a presumption of recoupment is appropriate; and significantly, those authors appear to have been highly sceptical that it ever is.[61]

By contrast, after first explaining that Fuller and Perdue's dichotomy actually masks two distinctions — one between 'obligatory and non-obligatory' reliance, and one between 'direct … and consequential reliance'[62] — McLauchlan has recently

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[56] *Amann* (n 4) 156. Notably, Gaudron J's analysis appears to be broadly consistent with what was said recently in *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, 169–70 [29] (Bell, Keane and Nettle JJ), 188 [65]–[66] (Gageler and Edelman JJ) ('*Berry*').

[57] See David McLauchlan, 'The Limitations on Reliance Damages for Breach of Contract' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar, 2019) 86, 93.

[58] See further Appellant's Submissions (n 45) [39].

[59] LL Fuller and William R Perdue Jr, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52.

[60] Ibid 78.

[61] Ibid 75–80.

[62] McLauchlan (n 57) 96, invoking the insightful analysis in Robert E Hudec, 'Restating the "Reliance Interest"' (1982) 67(4) *Cornell Law Review* 704, 724–8. The former distinction differentiates between reliance 'required to comply with a contractual obligation owed to the defendant, and

suggested that it is critically important to distinguish between different kinds of reliance expenditure when applying the presumption of recoupment. Specifically, McLauchlan's claim is that while

> there is a strong case for placing a formal or strict onus on the defendant in the case of expenditure that is both obligatory and direct reliance … in the case of expenditure that is consequential reliance (whether obligatory or non-obligatory), the defendant should at most, with one possible exception, be subject to an evidential onus only.[63]

McLauchlan's apparent reason for imposing this restriction on a full shifting of the legal onus is the same concern previously identified by others that the defendant should not become 'the insurer of the plaintiff's enterprise'.[64] Although McLauchlan is correct in viewing an unfettered ability to recover (reasonable) expenditure incurred in reliance upon an unperformed contractual promise as problematic, and in identifying the distinction between obligatory and non-obligatory reliance as critically important, his proposal for when such expenditure should be presumptively recoverable is unsupportable. The preferable analysis was that adopted by McHugh J in *Amann*, who recognised the distinctness of the claim in *Amann* from that made in *McRae*.[65]

As McHugh J explained,[66] the essential problem with the broader interpretation of *Amann* is that it enables the presumptive recovery of reliance expenditure whenever a plaintiff's non-breach position depends upon a (non-remote) contingency that the plaintiff does not attempt to quantify. McLauchlan attempts to confine this untenable approach by proposing that a strict reversal of the onus of proof should be limited to cases where the expenditure is both obligatory and direct. But as Brereton JA recognised in *Cessnock Appeal*, the difficulty this view confronts is that it would 'not capture … [the expenditure incurred] in *McRae*, where the plaintiff's only obligation was to pay the purchase price, and the expenditure was incurred to enable the plaintiff to exploit the property it acquired under the contract'.[67]

As noted, *McRae* can be otherwise explained. Additionally, in *Yam Seng v International Trade Corporation*,[68] another case allowing recovery where the expenditure was neither obligatory nor direct, it was unnecessary for Leggatt J to decide whether the defendant's onus was legal or evidential since the defendant

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reliance … not so required'. The latter distinction differentiates between the two sources of *value* from which recoupment can occur: (1) that 'arising directly from receipt of the promised performance' by the defendant; and (2) that 'to be received from collateral or consequential transactions … [following] the defendant's promised performance': at 96–7.

63 McLauchlan (n 57) 97.

64 See *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3rd) 325 (Berger J) (Supreme Court of British Columbia) ('*Bowlay Logging*'); *Armstrong Rubber* (n 32) 189 (Learned Hand CJ); McLauchlan (n 57) 98, demonstrating the implications of such an approach by examining the decision in *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 (Gault, Thomas and Keith JJ) (Court of Appeal).

65 See *Amann* (n 4) 172.

66 Ibid 165.

67 *Cessnock Appeal* (n 17) 486 [68].

68 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

adduced no relevant evidence anyway.[69] It is less clear whether *CCC Films v Impact Quadrant Films*[70] is similarly equivocal. However, in *Amann* Brennan J did observe that Hutchinson J there recognised that *McRae* stands only for the proposition that there is a reversal of the plaintiff's usual onus 'where the breach itself makes it impossible to assess whether there would have been any returns sufficient to recoup the [relevant] expenditure'.[71]

Recognising the need to explain *McRae* and cases like *Yam Seng* and *CCC Films*, but also appreciating that a general reversal of the legal onus is untenable, McLauchlan proposes an exception to the general position that the defendant should be subject only to an 'evidential onus'.[72] The proposed exception is

> where the major part of the expenditure, though strictly speaking consequential reliance, was incurred in order to acquire and/or exploit the property or right granted by the defendant and from which, if all went well, the expenditure would have been recouped and profits made.[73]

As McLauchlan observes, recognising this exception would capture *McRae* and the English decisions just mentioned. Notably, it would also cover the claim in *Cessnock* itself. The critical problem, however, is that no normatively compelling justification for *why* this (potentially very broad) exception should be recognised is provided.

VII Distinguishing between Obligatory and Non-Obligatory Expenditure

Consistently with McHugh J's analysis in *Amann*, Professor Stevens has recently argued that, properly understood, certain claims to recover expenditure incurred by the plaintiff in performance of an agreement with the defendant are better understood as restitutionary in the sense of reversing a 'performance' rendered by plaintiff to defendant that, viewed retrospectively, has no legal justification.[74] A notable example of such an award is that made in *Planché v Colburn*,[75] a case that, while far simpler, bears some similarity with (as well as certain important differences from) *Amann*. Another example is the award made in *Whittington v Seale-Hayne*,[76] where the plaintiff entered into a lease on the basis of an innocent misrepresentation by the defendant's agent that the premises were in good sanitary condition and, after rescinding the contract, recovered an indemnity for the (ostensibly) obligatory expenditure incurred.

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69 Ibid [191].
70 *CCC Films* (n 44).
71 See *Amann* (n 4) 107. Notably, however, in *CCC Films* itself, Hutchinson J viewed '*practical* impossibility' as sufficient to satisfy this precondition (emphasis added).
72 McLauchlan (n 57) 97.
73 Ibid.
74 See Robert H Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 36–50, 132–3.
75 *Planché v Colburn* (1831) 5 Car & P 58; 172 ER 876.
76 *Whittington v Seale-Hayne* (1900) 82 LT NS 49, discussed in Stevens (n 74) 70.

Significantly, there was no breach of contract (or other wrong) in *Whittington*, meaning that the plaintiff's claim for damages was correctly denied. By contrast, a claim for damages was available in *Amann*. Thus, unless Australian law is willing to allow an alternative claim for necessary preparatory, but non-obligatory, expenditure reasonably incurred in reliance upon a contractual promise even where it is not impossible, 'as a matter of theory',[77] to determine the plaintiff's non-breach position, McHugh J's analysis in *Amann* remains correct.

VIII The Preferable Position Summarised

To summarise and recapitulate, the High Court should distinguish between two situations where expenditure incurred in association with the performance of a contract may be recoverable. One is where, as in *Planché*, incurring certain expenditure was obligatory under an agreement between the parties. This kind of claim is restitutionary and arises independently of any enforceable contract.[78] Accordingly, subject to the possible existence of a 'contractual ceiling' on recovery when the expenditure is also 'direct',[79] proof of the plaintiff's likely non-recoupment of the expenditure incurred would be irrelevant here.[80] The other situation is where, in response to an action seeking damages for breach of contract, the defendant fails to satisfy an *evidentiary* onus to put the plaintiff's possible non-recoupment of its (reasonably incurred) expenditure in issue.[81] As noted, although *McRae* is arguably capable of alternative explanation, this category potentially captures the award made there as well as the awards made in *Yam Seng* and *CCC Films*.[82]

Whether the defendant should *always* bear an evidentiary onus to raise the possibility of non-recoupment of expenditure reasonably incurred in reliance upon an unperformed contractual promise when such expenditure is claimed as damages for breach of that promise is not finally pursued here. However, generally speaking, if the defendant's breach deprives the plaintiff of a valuable commercial opportunity to make some consequential gain, the plaintiff should be required to establish this loss with sufficient certainty in accordance with orthodox principles.[83] Alternatively, the plaintiff may claim the value of the promised performance,[84] which sometimes

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77 See *Amann* (n 4) 89 (Mason CJ and Dawson J).

78 See Stevens (n 74) 132, relying upon *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428. Since the claim is non-contractual, it is also unnecessary here that the relevant expenditure is incurred *in reliance* upon a contractual promise, although it often will be.

79 See *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 600–7 [85]–[108] (Gageler J), 643–51 [201]–[216] (Nettle, Gordon and Edelman JJ).

80 If the availability of such claims is extended to non-obligatory, but implicitly necessary, expenditure, recovery might still be capped by the amount of the expenditure that would have been recouped by developing a better account of when expenditure is 'reasonably incurred'.

81 As explained, recovery of (reasonable) reliance expenditure is also justifiable where, after the defendant discharges this onus, the plaintiff persuasively establishes the likelihood of recoupment.

82 To the extent that *CCC Films* (n 44) upheld a full shifting of the legal onus, it should not be followed.

83 See *Berry* (n 56) 175 [37] (Bell, Keane and Nettle JJ); Cessnock City Council, 'Appellant's Reply', Submission in *Cessnock City Council v 123 259 932 Pty Ltd*, Case No S115/2023, 22 December 2023, [2]–[9].

84 See *Clark v Macourt* (2013) 253 CLR 1.

may be most appropriately measured by positing a hypothetical 'release' bargain between the parties at the date of breach.[85] The Australian law governing the availability of these 'negotiating damages' awards is underdeveloped, which might partially explain why the availability of reliance expenditure claims has been overextended.

Obviously, *Cessnock* does not fall within the first category of case identified above. Whether it falls within the second category depends (at least) upon whether this category extends beyond cases where valuing the promised performance was theoretically impossible and where the relevant expenditure was not 'essential'. But even if it does so extend, the evidence adduced by the Council at trial appears to have been sufficient to raise the possibility of non-recoupment, so the Council's appeal should succeed. If, contrary to the analysis just advanced, the broader interpretation of *Amann* is preferred and the presumption of recoupment is held to apply to non-essential expenditure, Cutty Sark's claim might still be denied through restriction of its prima facie claim. This, however, would require the Court to develop a fuller account of the proper limits on presumptively recoverable reliance expenditure, a topic to which the discussion now turns.

IX Reasonableness, Risk Allocation, and the Relevance of *Hadley v Baxendale*

The need for some limit upon when expenditure incurred in reliance upon a contractual promise is presumptively recoverable was recognised in both *McRae* and *Amann* by general acceptance that presumptively recoverable expenditure must be 'reasonably incurred'.[86] In *Cessnock Appeal*, it was held that this requirement just expresses the rule in *Hadley v Baxendale*,[87] and therefore 'turns on whether it was the type of expenditure as might naturally be incurred in preparing for, performing or exploiting the benefit of the contract, or is or ought to have been contemplated by the defendant'.[88] Support for this view was derived from the adoption of this interpretation in *McRae*. On inspection, however, it does not withstand scrutiny.

The most obvious reason for scepticism regarding this view of what renders reliance expenditure 'reasonable' is that the Court in *Hadley* was simply unconcerned with this question. The principle there articulated was devised to identify which adverse consequences resulting from, and therefore *following*, the relevant breach are compensable in damages rather than being concerned with what pre-breach expenditure in reliance upon a contractual promise is recoverable under any supposed — and, as yet, unrecognised — presumption of recoupment. On reflection, at least on the broader interpretation of *Amann*, it is quite remarkable that

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85 Compare *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 689–90 [95] (Lord Reed) with *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655; [2018] SGCA 44, [177].

86 See, eg, *McRae* (n 2) 412–13 (Dixon and Fullagar JJ, McTiernan J agreeing); *Amann* (n 4) 81 (Mason CJ and Dawson J).

87 *Cessnock Appeal* (n 17) 486–7 [69].

88 Ibid 487 [70].

Hadley's second limb could be regarded as the sole determinant of presumptively recoverable reliance expenditure since the critical question in this context is whether the claimant was *justified* in incurring the expenditure.[89] On this view, the requirement that expenditure must be 'reasonably incurred' is more analogous to the avoidable loss rule of mitigation, albeit that the concern here is with the reasonableness of the claimant's *pre*-breach, rather than post-breach, conduct.[90]

This observation alone provides sufficient reason to reject the *McRae* view of when reliance expenditure is 'reasonably incurred'. But given the reputation of the Justices who propounded that view, albeit when considering a very different scenario from that in *Cessnock* or *Amann*, certain other deficiencies with the *Hadley* rule should be noted. One obvious problem is the rule's indeterminacy,[91] as is clearly demonstrated by the disagreement between Adamson J and the Court of Appeal in the present case as well as the disagreement between Webb J and the High Court majority in *McRae* itself.[92] A related problem,[93] recognised by Fuller and Perdue,[94] is that the *Hadley* rule does not accurately describe the justified restriction (or set of restrictions) that it purports to identify. A final problem is justifying the use of *Hadley* as the *sole* determinant of what adverse consequences of breach are compensable, particularly if contractual liability arises independently of fault.[95]

One response to this final concern is that the *Hadley* rule, at least in its application, just enforces an externally imposed norm of 'fairness' between the parties.[96] An alternative view, arguably adopted by a majority of the House of Lords in *The Achilleas*,[97] is that the *Hadley* formulation is best viewed 'as a rough-and-ready proxy for … the true [remoteness] rule', which, at least principally, involves determining whether 'the loss [was] within the purpose of the primary duty assumed'.[98] This view has much to recommend it, including its ability to explain

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89 See Lücke (n 8) 147; *Bowlay Logging* (n 64) 117 (Berger J); *C&P Haulage v Middleton* [1983] 1 WLR 1461, 1467 (Ackner LJ).

90 For further insights, see Hudec (n 62) 728, noting, in the context of analysing *Armstrong Rubber* (n 32), that 'claims for consequential reliance expenditures … raise many of the same concerns about remoteness and disproportion that lead courts to look for ways of limiting consequential damages generally'.

91 See, eg, Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 265–6.

92 The majority held that the expenditure incurred in preparing to salvage the non-existent tanker fell within *Hadley*'s second limb: see *McRae* (n 2) 412–13 (Dixon and Fullagar JJ, McTiernan J agreeing), while Webb J held that incurring this expenditure was not within the Commission's proper contemplation.

93 See Lord Hoffmann, 'The *Achilleas*: Custom and Practice or Foreseeability?' (2010) 14(1) *Edinburgh Law Review* 47, 53: '[This] degree of indeterminacy … is usually a symptom of other unexpressed factors operating beneath the surface'.

94 See Fuller and Perdue (n 59) 85, where it is said that 'it is clear that the test of foreseeability is less a definite test itself than a cover for a developing set of tests'.

95 See further Andrew Tettenborn, '*Hadley v Baxendale* Foreseeability: A Principle beyond Its Sell-by Date?' (2007) 23(1–2) *Journal of Contract Law* 120, 129.

96 See eg, Andrew Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28(2) *Legal Studies* 172.

97 See *Transfield Shipping Inc v Mercator Shipping Inc* [2009] AC 61 ('*The Achilleas*').

98 See Robert Stevens, 'Rights Restricting Remedies' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart, 2016) 159, 163–70.

certain difficult authorities.[99] Of greater present relevance, however, is that deciding whether the loss claimed was within the purpose of the primary duty assumed necessarily involves an exercise in construction to determine the objective purpose of the duty breached within the context of the parties' overall bargain.

Recall that at the trial, Adamson J held that the preferable construction of the parties' contract was that 'the risk of the future development occurring … was to be borne by Cutty Sark',[100] with the result that incurring the relevant expenditure was unreasonable.[101] Brereton JA's response was that because Cutty Sark did not accept the risk that the Council would breach its obligations to take all reasonable action to procure registration of the plan of subdivision, then, in the event of breach, the Council accepted responsibility for all 'reasonably contemplated' reliance expenditure Cutty Sark incurred, subject to proof that such expenditure would not in fact have been recouped. This view apparently assumes that if the particular risk that eventuated was not allocated to Cutty Sark, it must have been allocated to the Council. But it may be that, on its proper construction, the contract did not allocate the relevant risk to *either* party.[102] If so, one is forced back to deciding what the appropriate default rule should be.

More specifically, Brereton JA's conclusion is only valid if there is both a default rule that a presumption of recoupment arises in relation to all 'reasonably contemplated' reliance expenditure *and* the parties' contract did not alter this default position. It has already been explained why it is doubtful that the requirement that presumptively recoverable expenditure be 'reasonably incurred' is equivalent to asking whether such expenditure was 'reasonably contemplated'. But even if ('reasonably contemplated') non-obligatory and consequential expenditure of the kind incurred by Cutty Sark is presumptively recoverable, it remains possible that the parties' contract altered this default rule. Although the contract did not expressly have this effect and no such term could be implied, a plausible interpretation of the parties' bargain (and Adamson J's reasoning at first instance) is that the contract's other provisions and the background against which it was made affected the extent to which the Council assumed responsibility for the adverse consequences of non-performance of its promise.[103] This is essentially just to apply the approach (arguably) upheld by the House of Lords in *The Achilleas* to a reliance expenditure claim,[104] which it is within the High Court's authority to do.

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99 See, eg, *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd* [2006] NSWCA 334.

100 *Cessnock Trial* (n 11) [84].

101 Ibid [100].

102 This reveals the importance of identifying the agreement's 'domain': see further, Frederick Wilmot-Smith, 'Express and Implied Terms' (2023) 43(1) *Oxford Journal of Legal Studies* 54, 59.

103 A complication here is that, as the present column demonstrates, there is uncertainty as regards the relevant default rule against which the parties were contracting. But this does not prevent the Court from concluding that the preferable construction of the parties' contract is that it (implicitly) exempted the Council from liability to compensate Cutty Sark for the particular risk that eventuated.

104 If seeking to challenge the interpretation proffered, Cutty Sark might emphasise the Council's contractual right to acquire the hangar for $1 upon expiry or termination of the contract. However, it is not clear that this provision supports its preferred construction. Compare Gaudron J's reliance in *Amann* (n 4) upon the resale of the planes that would have been in Amann's possession upon

X Conclusion

The Australian law governing the recovery of expenditure incurred in reliance upon an unperformed contractual promise is presently unsatisfactory. The *Cessnock* appeal provides the High Court with an opportunity to rectify this. Hopefully, this opportunity is grasped. Most importantly, the Court should reject the proposition that a plaintiff has an unfettered choice, following breach of a contractual promise, to recover non-obligatory expenditure reasonably incurred in reliance upon that promise, subject only to the defendant positively establishing the likely non-recoupment of such expenditure. If, however, a more expansive view is taken regarding when contractual reliance expenditure is presumptively recoverable, the Court should make clear that the requirement that such expenditure must be 'reasonably incurred' is not equivalent to asking whether it satisfies the second limb of *Hadley v Baxendale*. Ideally, the Court should also provide some guidance in relation to what this requirement does entail, as well as whether — and when — the parties' contract may alter the scope of the applicable default rule.

completion of its contract with the Commonwealth in concluding that Amann's recoupment of its expenditure was likely.

Case Note

Bosanac v Federal Commissioner of Taxation: The Future of the Presumptions of Resulting Trust and Advancement

Cora Fabbri*

Abstract

This case note examines the decision of the High Court of Australia in *Bosanac v Federal Commissioner of Taxation*. Part II provides a case summary. Part III considers the future of the presumptions of resulting trust and advancement following *Bosanac*. Part IV discusses the judicial references in *Bosanac* to the presumptions being 'weak', and analyses whether these were an observation of the current state of the law or represent a change to it. Part V reviews the Court's clarification of an earlier case concerning the application of the presumption of resulting trust to married couples, *Trustees of the Property of Cummins (a bankrupt) v Cummins*. The case note concludes that *Bosanac* is significant because it has paved the way for the future development of the presumptions, developed the law by weakening the presumptions of resulting trust and advancement, and helpfully clarified the effect of *Cummins*.

Please cite this case note as:

Cora Fabbri, '*Bosanac v Federal Commissioner of Taxation*: The Future of the Presumptions of Resulting Trust and Advancement' (2024) 46(1) *Sydney Law Review* 103.

DOI: https://doi.org/10.30722/slr.19655

* Law Graduate, Allens, Sydney, Australia. Thank you to Adam Waldman and Professor Jamie Glister for their invaluable guidance and feedback. All errors are my own.

I Introduction

Bosanac v Federal Commissioner of Taxation concerned the application of the presumptions of resulting trust and advancement.[1] The presumption of resulting trust is an equitable presumption that 'a person who advances purchase moneys for property, which is held in the name of another person, intends to have a beneficial interest in the property'.[2] The presumption of advancement is an 'exception'[3] or 'counter-presumption'[4] to the presumption of resulting trust where, in the case of transfers from husband to wife, male fiancé to female fiancée, and parent (or person in loco parentis) to child, equity presumes the transfer was a gift.

Part II of this case note is a case summary, highlighting the key facts, litigation history and decisive reasoning in *Bosanac*. Part III then considers the possible future development of the presumptions. Part IV discusses the High Court's references in *Bosanac* to the presumptions being 'weak'. Part V reviews the Court's clarification of an earlier case concerning the presumption of resulting trust, *Trustees of the Property of Cummins (a bankrupt) v Cummins*.[5] Part VI concludes.

II Case Summary

A *Facts*

The appellant, Ms Bosanac, married Mr Bosanac in 1998. In 2006, Ms Bosanac purchased a home in Dalkeith, Perth (the 'Dalkeith property'). The couple paid a $250,000 deposit on the Dalkeith property from a pre-existing loan account in their joint names, and paid the balance of the purchase price from two additional joint loan accounts. The couple was jointly and severally liable for the loans. The bank took security over the Dalkeith property and other properties owned individually by Ms and Mr Bosanac. The Dalkeith property was only ever registered in Ms Bosanac's name. Around 2012, the couple separated; however, they remained living together in the Dalkeith property until September 2015. Mr Bosanac has never claimed any interest in the Dalkeith property.

The respondent, the Commissioner of Taxation (the 'Commissioner'), was a creditor of Mr Bosanac, having been awarded a judgment sum against him of $9,344,111.89 plus costs following a tax dispute.[6] The Commissioner sought a declaration that Mr Bosanac had an equitable interest in the Dalkeith property to facilitate recovery of the debt.

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1 *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 ('*Bosanac*').

2 Ibid 49 [8] (Kiefel CJ and Gleeson J), citing *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ) ('*Calverley*').

3 *Bosanac* (n 1) 49 [8] (Kiefel CJ and Gleeson J), citing *Napier v Public Trustee (WA)* (1980) 55 ALJR 1, 3 (Aickin J). See generally Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39.

4 *Bosanac* (n 1) 60–1 [52] (Gageler J).

5 *Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278 ('*Cummins*').

6 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74, 75 [1] (McKerracher J) ('*Bosanac No 7*').

B *Litigation History*

The Commissioner commenced proceedings in the Federal Court of Australia and argued that Ms Bosanac held half of the Dalkeith property on resulting trust for Mr Bosanac.[7] The Commissioner submitted that the presumption of resulting trust applied, but the presumption of advancement did not, because, following *Cummins*, the presumption of advancement no longer applied to the purchase of a matrimonial home.[8] Relevantly, *Cummins* concerned a matrimonial home registered in the joint names of a husband and wife. The husband and wife had contributed unequal amounts to the purchase price, yet the Court found that their beneficial interests as joint tenants were equal.

The trial judge, McKerracher J, dismissed the Commissioner's application. His Honour held that *Cummins* did not qualify the presumption of advancement.[9] Therefore, there was a presumed intention that Mr Bosanac's contribution to the purchase price of the Dalkeith property was a gift to Ms Bosanac.[10] His Honour also found that the couple did not typically share their matrimonial assets and, therefore, the evidence did not rebut the presumption of advancement.[11] As such, Ms Bosanac was the sole legal and beneficial owner of the Dalkeith property.[12]

The Commissioner appealed to the Full Federal Court and was successful.[13] In a unanimous judgment, Kenny, Davies and Thawley JJ found that 'the objective facts together with the inferences properly drawn from those facts, [led] to the conclusion that Mr Bosanac did not intend that his contribution to the purchase of their matrimonial home at Dalkeith be by way of gift to Ms Bosanac'.[14] The Full Federal Court thus held that Ms Bosanac held a one-half interest in the Dalkeith property on trust for Mr Bosanac.[15]

C *In the High Court*

In the High Court, the Commissioner argued that the presumption of resulting trust applied. Further, the Commissioner contended that the presumption of advancement was either rebutted by the facts, no longer part of Australian law because it was discriminatory, or no longer part of Australian law in relation to the purchase of the matrimonial home following *Cummins*.

In three separate judgments, the High Court allowed Ms Bosanac's appeal, holding that she was the sole legal and beneficial owner of the Dalkeith property.

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7 Ibid 75 [1] (McKerracher J).
8 Ibid 87 [70], 88 [72] (McKerracher J).
9 Ibid 121 [185], 131 [229].
10 Ibid.
11 Ibid 84 [57].
12 Ibid 131 [230].
13 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158.
14 Ibid [22].
15 Ibid [27].

1 *Kiefel CJ and Gleeson J*

(a) *The Presumptions*

Kiefel CJ and Gleeson J first discussed the nature of the presumptions of resulting trust and advancement, with a particular focus on the latter. Their Honours explained that the rationale for the presumption of advancement was originally that the relationships themselves were '"good consideration" for the conveyance, but a rationale has come to be found in the *prima facie* likelihood that a beneficial interest is intended in situations to which the presumption has been applied'.[16]

Kiefel CJ and Gleeson J hinted at the possible expansion of the presumption of advancement in future cases. Citing the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) and the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* (Cth), their Honours suggested that the presumption of advancement may now apply to transfers 'between spouses more generally given the recognition by statute of de facto relationships in proceedings concerning property and same-sex marriage'.[17] Their Honours did not express a concluded view on this point as it was not in issue.[18]

Their Honours observed that the 'strength of the presumptions will vary from case to case depending on the evidence', but suggested that, in modern times, it is unlikely a case will lack evidence capable of rebutting the presumptions.[19] They also stated the strength of the presumptions is 'weak' or 'diminished' under modern social conditions in the sense that the presumptions 'may readily be rebutted by comparatively slight evidence'.[20]

Finally, Kiefel CJ and Gleeson J rejected the Commissioner's contention that the presumption of advancement should no longer form part of Australian law. Their Honours took the view that abolishing the presumption of advancement would be contrary to the High Court's previous decisions in *Nelson v Nelson*[21] and *Calverley v Green*. In the former, Deane and Gummow JJ had described the presumptions as 'entrenched "land-marks" in the law of property' and observed that '[m]any disputes have been resolved and transactions effected' by applying the presumptions.[22] Kiefel CJ and Gleeson J found it 'difficult to disagree' with those reasons, but qualified this with the following:

> [T]hat is not to accept that the presumptions when applied will carry much weight. Much has changed with respect to the various ways in which spouses deal with property. When evidence of this kind is given, inferences to the contrary of the presumptions as to intention may readily be drawn.[23]

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16 *Bosanac* (n 1) 51 [14], quoting *Wirth v Wirth* (1956) 98 CLR 228, 237 (Dixon CJ) ('*Wirth*').
17 *Bosanac* (n 1) 52 [17]. But see *Gleeson (Trustee); Re Coster v Eggleton* [2024] FedCFamC2G 11, [101] (Manousaridis J) ('*Gleeson*').
18 *Bosanac* (n 1) 52 [18].
19 Ibid 53 [21].
20 Ibid 52–3 [19]–[22].
21 *Nelson v Nelson* (1995) 184 CLR 538 ('*Nelson*').
22 *Bosanac* (n 1) 55–6 [30] (Kiefel CJ and Gleeson J), quoting *Nelson* (n 21) 548.
23 *Bosanac* (n 1) 56 [31].

(b) *Cummins*

Kiefel CJ and Gleeson J rejected the Commissioner's contention that *Cummins* displaced or qualified the presumption of advancement. Their Honours clarified that the relevant discussion in *Cummins* was not a statement of principle,[24] *Cummins* turned on the actual intention of the parties, and the facts in *Cummins* were different to the facts in this case.[25]

(c) *Actual Intention*

Kiefel CJ and Gleeson J found that the intentions of both Ms and Mr Bosanac were relevant because they both contributed to the purchase price.[26] Since there was no direct evidence of intention, the question to be decided was what inference should be drawn from the evidence. Their Honours concluded that, 'in being a party to the loan accounts and using his property as security for them, Mr Bosanac intended to facilitate his wife's purchase of the Dalkeith property, which was to be held in her name'.[27] This was based on the couple's history of always holding substantial assets in their own names, not jointly.[28] The couple also had a history of using property held separately as security for joint loans.[29] Finally, Mr Bosanac's status as a 'sophisticated businessman' meant he would have understood the significance of who the registered titleholder was, and this weighed against an inference that Mr Bosanac intended to have a beneficial interest in the property.[30]

2 *Gageler J*

(a) *The Presumptions*

Gageler J outlined the presumption of resulting trust as 'an ancient presumption of equity' that 'arises where property was purchased by one or more persons using funds contributed in whole or in part by one or more others'.[31] His Honour described the presumption as 'akin to a civil onus of proof' that will 'yield to an actual intention to the contrary found on the balance of probabilities as an inference drawn from the totality of the evidence'.[32]

His Honour outlined the 'similarly ancient counter-presumption' of advancement that arises when a husband contributes to the purchase of property held in his wife's name.[33] Gageler J stated that the presumption of advancement is 'not really a presumption at all',[34] but is a 'circumstance of evidence' of being in a

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24 Ibid 54–5 [23]–[28].
25 Ibid.
26 Ibid 56 [32].
27 Ibid 58 [40].
28 Ibid 57 [35].
29 Ibid 58 [39].
30 Ibid 58–9 [42].
31 Ibid 60 [51].
32 Ibid 64 [64].
33 Ibid 60–1 [52].
34 Ibid 64 [64].

relationship in which it is presumed that no resulting trust arises.[35] If there is no other evidence of intention, the relationship alone gives a 'zero-sum' result that negatives the presumption of resulting trust.[36]

Unlike the other Judges, Gageler J did not refer to the presumptions as 'weak'.[37] However, he did observe that both presumptions will only be of 'practical significance where the totality of the evidence is incapable of supporting the drawing of an inference … on the balance of probabilities'.[38]

Like the other Judges, Gageler J rejected the Commissioner's contention that the presumption of advancement should not be part of Australian law because it is anachronistic and discriminatory.[39] His Honour seemed to concede that the presumption of advancement is anachronistic and discriminatory, but said it cannot be abolished without also abolishing the presumption of resulting trust, because the presumption of resulting trust is the 'root anachronism'.[40] Gageler J found that, '[f]or better or for worse, the weight of history is too great for a redesign of that magnitude now to be undertaken judicially'.[41]

(b) *Cummins*

Gageler J adopted a similar approach to Kiefel CJ and Gleeson J in considering the Commissioner's contention that *Cummins* required the Court to presume that the matrimonial home is held jointly.[42] Regarding the relationship between *Cummins* and the presumptions of resulting trust and advancement, his Honour remarked:

> The Commissioner's invitation to recognise a standardised inference arising where a husband and a wife each contribute to the purchase by one of them of a matrimonial home is in effect an invitation to create a counter-counter-presumption. The invitation must be declined. Stereotypes are best avoided. Old ones die hard. New ones should not be created judicially.[43]

(c) *Actual Intention*

Regarding the intentions of the parties in this case, Gageler J found the facts were capable of supporting an inference on the balance of probabilities that the parties intended that Ms Bosanac should be the sole legal and beneficial owner of the Dalkeith property.[44] His Honour looked to similar facts as Kiefel CJ and Gleeson J as well as the fact that Ms Bosanac was the sole contracting party and personally made the offer that was accepted by the vendor in circumstances that did not suggest she was 'put up to the purchase by Mr Bosanac'.[45]

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35 Ibid. See also Glister (n 3) 42–3.
36 *Bosanac* (n 1) 61 [53], 64 [64].
37 Cf ibid 53 [22] (Kiefel CJ and Gleeson J), 73 [99], 75 [103] (Gordon and Edelman JJ).
38 Ibid 65 [67]. Cf *Morse v Duarte [No 5]* [2024] FedCFamC1F 7, [54] (Harper J).
39 *Bosanac* (n 1) 61–2 [55]–[60].
40 Ibid 61 [56]–[57].
41 Ibid 62 [58].
42 Ibid 63 [61].
43 Ibid 63 [62].
44 Ibid 65–6 [71].
45 Ibid 67 [76]–[77].

3 *Gordon and Edelman JJ*

(a) *The Presumptions*

Gordon and Edelman JJ outlined the presumption of resulting trust and explained that it functions as a 'civil onus of proof and operates to resolve a factual contest when the relevant evidence is "uninformative or truly equivocal"'.[46] They discussed the presumption of advancement and remarked, like Gageler J, that it is not technically a 'presumption', but is a 'circumstance of fact in which the presumption of resulting trust does not arise'.[47]

Gordon and Edelman JJ acknowledged that it may be appropriate to expand the categories of relationship to which the presumption of advancement applies in future cases, 'as was at least started in *Nelson*, where the lack of any presumption of resulting trust … was extended to circumstances involving a transfer from a mother to a child'.[48] Their Honours did not elaborate on this as it was not necessary to decide the case.[49]

Similarly to Kiefel CJ and Gleeson J, Gordon and Edelman JJ referred to the presumption of resulting trust as 'weak',[50] and explained that 'the objective facts determine its position and significance (if any)'.[51]

Similarly to the three other Judges, Gordon and Edelman JJ stated that the presumption of resulting trust could not be abandoned by the judiciary because it is 'too well entrenched as a landmark in the law of property'.[52] Unlike Gageler J, their Honours did not consider the possibility of abandoning the presumption of advancement while maintaining the presumption of resulting trust.

(b) *Cummins*

Like the three other Judges, Gordon and Edelman JJ stated that *Cummins* did not create any standardised inference or presumption but, rather, was decided on the objective facts.[53]

(c) *Actual Intention*

Gordon and Edelman JJ considered the facts of the present case and, like Gageler J and Kiefel CJ and Gleeson J, concluded that the objective intention of the parties was inconsistent with a declaration of trust in favour of Mr Bosanac.[54] The determinative facts were the ways in which the couple had arranged their finances

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46 Ibid 75 [105], quoting *Calverley* (n 2) 266 (Deane J).
47 *Bosanac* (n 1) 78 [115]. See generally Glister (n 3) 42–3. See, eg, *Xin v Qinlang [No 6]* [2024] FedCFamC1F 8, [169]–[171] (Gill J) ('*Xin*').
48 Ibid 78–9 [116], referring to *Nelson* (n 21).
49 *Bosanac* (n 1) 78–9 [116].
50 Ibid 72 [98].
51 Ibid 75 [103].
52 Ibid 71 [95], quoting *Calverley* (n 2) 266 (Deane J).
53 *Bosanac* (n 1) 79–80 [117]–[120].
54 Ibid 80–2 [121]–[126].

in the past and a lack of evidence of any reason for Ms and Mr Bosanac not to have been registered as joint tenants if they had so intended.[55]

III The Future of the Presumptions

The presumption of advancement, as it currently operates, can be viewed as discriminatory.[56] In *Bosanac* and earlier cases the High Court has suggested that this status quo is undesirable.[57] This Part considers the future development of the presumptions of resulting trust and advancement, discussing first the most likely development, being expansion of the categories of relationship to which the presumption of advancement applies, then discussing abolition of the presumption of advancement alone, and, finally, abolition of both presumptions.

A *Expanding the Presumption of Advancement*

The High Court's view in *Bosanac* was that the presumption of advancement should be expanded in appropriate cases rather than abolished.[58] However, it was not necessary to actually expand the presumption in *Bosanac*. The leading Australian cases that have considered expansion of the presumption of advancement are *Calverley*, in which the High Court declined to extend the presumption to a transfer from a man to his de facto wife, and *Nelson*, in which the High Court extended the presumption to a transfer from a mother to her children.

1 *Logical Necessity and Analogy*

In *Calverley*, Deane J endorsed the approach of expanding the presumption of advancement by 'logical necessity and analogy and not by reference to idiosyncratic notions of what is fair and appropriate'.[59] His Honour considered that Mason and Brennan JJ in the same case gave 'convincing reasons for denying that either logic or analogy warrant the extension' of the presumption of advancement to de facto couples.[60] For example, Mason and Brennan JJ reasoned that there is a legal foundation of marriage,[61] and, because that legal foundation was missing from de facto relationships, it was wrong to extend the presumption of advancement.[62]

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55 Ibid 81 [124].

56 Ibid 53 [21] (Kiefel CJ and Gleeson J), [59] (Gageler J). The Parliament of the United Kingdom attempted to abolish the presumption of advancement in 2010; however, the abolition has never been brought into force: Explanatory Notes to the *Equality Act 2010* (UK).

57 *Bosanac* (n 1) 52 [17] (Kiefel CJ and Gleeson J), 62 [59] (Gageler J), 78–9 [116] (Gordon and Edelman JJ); *Calverley* (n 2) 269 (Deane J). See also Robert Chambers, *Resulting Trusts* (Oxford University Press, 1997) 30.

58 *Bosanac* (n 1) 52 [17] (Kiefel CJ and Gleeson J), 62 [59] (Gageler J), 79 [116] (Gordon and Edelman JJ).

59 *Calverley* (n 2) 268.

60 Ibid.

61 Ibid 259–60.

62 Ibid.

(a) *Reasoning by Analogy to Statute*

Interestingly, in both *Calverley* and *Nelson* the High Court employed reasoning by analogy to statute to determine whether the presumption of advancement should be expanded.[63] In *Calverley*, Mason and Brennan JJ identified 'special rules' that allow courts to alter property rights between married couples where it is just and equitable to do so under the *Family Law Act 1975* (Cth).[64] That the 'special rules' in the *Family Law Act* indicated a clear policy distinction between married and de facto couples was cited as a reason to reject the expansion of the presumption to de facto couples.[65] Similarly, in *Nelson*, Dawson, Toohey and McHugh JJ in separate judgments noted that the *Family Law Act* imposed duties equally on mothers and fathers to maintain their children, and cited this as a reason for expanding the presumption to include transfers from mothers to their children.[66] Kiefel CJ and Gleeson J seemed to endorse this mode of reasoning in *Bosanac*, stating that *Nelson* raised the question whether the presumption of advancement ought to apply to same-sex married couples and de facto couples 'given the recognition by statute' of those relationships.[67]

Reasoning by analogy to statute 'is not quite as firmly established' in Australia as in other common law jurisdictions.[68] However, as demonstrated by the judgments in *Calverley* and *Nelson*, the equitable presumptions seem to be an area in which the Court is willing to employ this mode of reasoning.

2 *Which Relationships Will Be Included?*

It is likely that logical necessity and analogy dictate extending the presumption of advancement to include transfers from wives to husbands and between de facto spouses and same-sex spouses. In *Bosanac*, Kiefel CJ and Gleeson J cited Dawson J's observation in *Nelson* that there 'was no reason now to suppose that the probability of a parent intending to transfer a beneficial interest in property to a child is any less the case with respect to a mother than a father', and analogised that similar reasoning would apply in respect of wives, same-sex spouses and de facto couples.[69]

However, application of the presumption of advancement to de facto couples was specifically rejected in *Calverley* in 1984. The question whether the

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63 Adam Waldman and Michael Gvozdenovic, 'Development of the Common Law by Analogy to Statute' (2023) 97(12) *Australian Law Journal* 912, 926–7.

64 *Calverley* (n 2) 260–1.

65 Ibid.

66 *Nelson* (n 21) 574 (Dawson J), 586 (Toohey J), 601 n 240 (McHugh J).

67 *Bosanac* (n 1) 52 [17], citing the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) and the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

68 Sir Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Bloomsbury Publishing, 2016) 119, 124. See further Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 248–58; Jack Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247, 264–72; Waldman and Gvozdenovic (n 63).

69 *Bosanac* (n 1) 52 [17].

presumption applied to de facto couples arose again in 2012 in *Ryan v Ryan*.[70] In the intervening years since *Calverley*, de facto couples had been given the same 'special rules'[71] that apply to married couples under the *Family Law Act* giving courts a discretion to alter property rights where it would be just and equitable.[72] However, Ward J in *Ryan* was bound by *Calverley* and thus unable to conclude that the presumption extended to de facto couples.[73]

Expansion of the presumption of advancement to transfers from wives to husbands, between de facto couples, and between same-sex couples was mentioned as possible in *Bosanac*.[74] As social values continue to change in the future, will expansion of the presumption of advancement beyond these categories be required? It can be speculated that the question might arise in a case concerning spouses who are not husband and wife, but are also not same sex: for example, where one spouse is a woman and the other is a non-binary person. Even less predictable would be a case involving a throuple, which is 'a romantic relationship shared by three people'.[75] Consideration of these speculative categories demonstrates that, if the presumption is going to continue to operate, the categories of relationship to which it applies must remain open and flexible.

B *Abolishing the Presumption of Advancement Alone*

In *Bosanac*, the Commissioner argued that the presumption of advancement should be abolished because it is anachronistic and discriminatory and has no acceptable rationale.[76] The Court did not disagree,[77] yet all the Judges stated that reform or abolition of the presumption of advancement is only appropriate for the legislature.[78] There are certainly 'very powerful reasons' the court should be cautious when developing the common law.[79] However, contrary to the Court's view in *Bosanac*, there are several reasons abolition of the presumption of advancement alone might be considered in a future case.

First, judicial abolition of the presumption of advancement is appropriate because there is no indication that Parliament is likely to act on this issue. Certainly, the 'court is neither a legislature nor a law reform agency'.[80] Yet the lack of movement from Parliament on this issue — combined with Gageler J's recognition of the discriminatory operation of the presumption of advancement,[81] and the High

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70 *Ryan v Ryan* [2012] NSWSC 636 (Ward J) ('*Ryan*').
71 *Calverley* (n 2) 260–1 (Mason and Brennan JJ).
72 *Family Law Amendment (De Facto Matters and Other Measures) Act 2008* (Cth) s 90SM.
73 *Ryan* (n 70) [69], [74]. See also *Gleeson* (n 17) [101].
74 *Bosanac* (n 1) 52 [17] (Kiefel CJ and Gleeson J).
75 *Macquarie Dictionary* (online at 2 November 2023) 'throuple'.
76 *Bosanac* (n 1) 55 [29] (Kiefel CJ and Gleeson J), 61 [55] (Gageler J).
77 Ibid 62 [59] (Gageler J), 78–9 [116] (Gordon and Edelman JJ).
78 Ibid 55–6 [30] (Kiefel CJ and Gleeson J), 62–3 [60] (Gageler J), 71 [95] (Gordon and Edelman JJ), citing *Calverley* (n 2) 266 (Deane J) and *Nelson* (n 21) 602 (McHugh J).
79 *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633 (Mason J).
80 Ibid.
81 *Bosanac* (n 1) 62 [59] (Gageler J).

Court's recognition of the 'egalitarian nature of modern Australian society'[82] — suggests that departure from the presumption of advancement would not require extensive law reform enquiries and could therefore be appropriately done by the Court.

Second, expanding the categories of relationship to which the presumption of advancement applies based on reasoning by 'logical necessity and analogy',[83] as the High Court currently favours,[84] presupposes that a principle underlying the presumptions has been 'extracted and accurately stated'.[85] However, the Court in *Bosanac* recognised that the underlying rationale for the presumption of advancement is unclear.[86] Logical necessity and analogy may therefore dictate an incremental contraction, rather than expansion, of the categories of relationship to which the presumption applies.[87] Indeed, before *Bosanac*, some lower courts took this view.[88] This incremental contraction of categories of relationship to which the presumption of advancement applies would be less radical than complete abolition of the presumption, and may therefore be a path to bringing the law in line with contemporary social conditions while ameliorating the Court's concern that 'the weight of history is too great' for judicial redesign of the presumptions.[89]

In *Bosanac*, Gageler J reasoned that the presumption of advancement cannot be departed from without also departing from the presumption of resulting trust because the presumption of resulting trust is the 'root anachronism'.[90] His Honour also suggested that abandoning the presumption of advancement would bolster the anachronistic presumption of resulting trust.[91] While abolishing both presumptions may be a neater solution, there does not appear to be a principled reason why having two anachronistic presumptions is better than having one. The benefit of retaining the presumption of resulting trust but jettisoning the presumption of advancement is that the presumption of resulting trust would apply equally to all individuals, whereas the presumption of advancement, as it currently stands, discriminates.

On the other hand, it has been argued that the presumption of advancement, as it currently operates between husbands and wives, appropriately benefits women in reflecting the reality of their disadvantaged economic status.[92] However, this

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82 *Nelson* (n 21) 586 (Toohey J), quoting *Brown v Brown* (1993) 31 NSWLR 582, 600 (Kirby P) ('*Brown*').

83 *Calverley* (n 2) 268 (Deane J). See above Part III(A)(1).

84 *Bosanac* (n 1) 62 [59] (Gageler J), 78–9 [116] (Gordon and Edelman JJ).

85 Michael McHugh, 'The Law-Making Function of the Judicial Process: Part I' (1988) 62(1) *Australian Law Journal* 15, 27, quoting Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 31.

86 *Bosanac* (n 1) 53 [20] (Kiefel CJ and Gleeson J), citing *Calverley* (n 2) 248 (Gibbs CJ), 78–9 [116] (Gordon and Edelman JJ).

87 Canadian courts have begun to do this: see *Pecore v Pecore* [2007] 1 SCR 795.

88 See, eg, *Ryan* (n 70) [69] (Ward J).

89 *Bosanac* (n 1) 62 [57]–[58] (Gageler J).

90 Ibid 61–3 [56]–[60].

91 Ibid 62 [59].

92 See Cathy Sherry, 'Conveyancing and Property: Resulting Trusts after *Bosanac v Federal Commissioner of Taxation*' (2023) 97(8) *Australian Law Journal* 527, 529–30; Lisa Sarmas, 'The Resulting Trust and the Family Home in Australia: The End of the Road?' (2015) 9(3) *Journal of Equity* 264, 277; Emitis Morsali, 'An Exercise in Restraint: Amending the Presumption of

benefit does not justify the presumption of advancement's distinction between straight married couples and same-sex married couples. Further, expansion of the presumption of advancement to include transfers from wives to husbands, which seems likely,[93] would negative this possibly beneficial aspect.

C *Abolishing Both Presumptions*

Given the Court's reluctance to abolish the presumption of advancement alone, a position argued by the Commissioner in *Bosanac*,[94] it seems unlikely that the Court will take the more radical step of abolishing both presumptions in a future case. However, support for judicial abolition of both presumptions is not unprecedented. It is possible the Court will return to this view.

The most persuasive argument for judicial abolition of both presumptions is Murphy J's dissent in *Calverley*:

> If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardised inference. As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary.[95]

Murphy J took the view that common experience was contrary to the presumptions.[96] None of the other Judges in *Calverley*, nor any of the Judges in *Bosanac*, explicitly disagreed. Indeed, the Court in *Bosanac* seemed to agree that the presumptions do not 'accord with the societal expectations of contemporary Australia'.[97] McHugh J in *Nelson* shared this view, stating: 'it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift'.[98] Murphy J's approach would bring the law in line with community expectations.

Another important argument in support of judicial abolition of both presumptions is that the cases suggest that individuals do not structure their transactions by reference to the presumptions. In *Nelson*, McHugh J was reluctant to depart from the presumptions because 'it may be that many transfers of property have been made on the basis of the presumptions'.[99] However, courts treat evidence that an individual was financially savvy,[100] received legal advice,[101] or received

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Advancement' (2023) 29(4) *Trusts & Trustees* 299, 307. See also Jamie Glister, 'The Presumption of Advancement' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 313–14.

93 See above Part III(A)(2).

94 *Bosanac* (n 1) 61 [54] (Gageler J).

95 *Calverley* (n 2) 264. See also *Pettitt v Pettitt* [1970] AC 777, 824 (Lord Diplock) ('*Pettitt*'); *Brown* (n 82) 595 (Kirby P); *Stivactas v Michaletos [No 2]* [1994] ANZ ConvR 252 (Kirby P).

96 *Calverley* (n 2) 264.

97 *Bosanac* (n 1) 62 [57] (Gageler J), 78–9 [116] (Gordon and Edelman JJ).

98 *Nelson* (n 21) 602.

99 Ibid.

100 *Bosanac* (n 1) 58–9 [42] (Kiefel CJ and Gleeson J), 65–6 [71]–[72] (Gageler J).

101 *Cummins* (n 5) 303 [73] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

advice from a real estate agent[102] as indications that the individual would have understood the significance of who the registered owner of the property was, and *not* as evidence that they structured their transactions on the basis of the presumptions. This approach to evidence accords with Lord Upjohn's view in *Pettitt v Pettitt* that people 'do not give their minds to legalistic technicalities' and the presumptions were designed to reflect the 'common sense of the matter'.[103] If the presumptions no longer reflect the common sense of the situation, which Gageler J seemed to accept in *Bosanac*,[104] then the expectations of parties dealing with property may be defeated by continuing to apply the presumptions. Thus, this objection to judicial abolition of the presumptions falls away.

IV The Strength of the Presumptions

In *Bosanac*, Gordon and Edelman JJ referred to the presumption of resulting trust as 'weak'[105] and of 'debatable' worth,[106] and Kiefel CJ and Gleeson J considered that the presumption of advancement is 'especially weak today'[107] and of 'much diminished' strength.[108] These references to the strength of the presumptions could be either a practical observation or a development of the law by a weakening of the presumptions.

On one view, the Court has changed the law by weakening the presumptions. The notion that both presumptions are weak — in the sense that they are easy to rebut[109] — in response to contemporary social conditions was not new in *Bosanac*. In *Pettitt*, decided in 1970, Lord Reid stated that the strength of the presumption of advancement was diminished given that its rationales had 'largely lost their force' in contemporary social circumstances.[110] Kiefel CJ and Gleeson J agreed in *Bosanac*.[111] Gordon and Edelman JJ also stated that 'the presumption of resulting trust *should* be recognised as a weak presumption given that the circumstances justifying it have changed so much since the foundations of the presumption in the 15th century'.[112] These references to social changes and the underlying rationales of the presumptions suggest the Court is developing the law in response to changing social circumstances such that the relevant intentions are only weakly inferred.

Another view is that, rather than developing the law, the High Court simply observed that the presumptions are unlikely to be determinative in modern times.[113]

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102 *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 344 [163] (Edelman J).
103 *Pettitt* (n 95) 816. Cf *Nelson* (n 21) 548 (Deane and Gummow JJ).
104 *Bosanac* (n 1) 62 [57].
105 Ibid 72 [98], 75 [103], 77 [110].
106 Ibid 72 [97].
107 Ibid 53 [22].
108 Ibid 53 [20], quoting *Pettitt* (n 95) 793 (Lord Reid).
109 *Bosanac* (n 1) 53 [22] (Kiefel CJ and Gleeson J), citing *Pettitt* (n 95) 814 (Lord Upjohn); *Bosanac* (n 1) 74–5 [102] (Gordon and Edelmann JJ), citing *S v S* [1972] AC 24, 41 (Lord Reid).
110 *Pettitt* (n 95) 793. See also *Calverley* (n 2) 270 (Deane J), quoting *Shephard v Cartwright* [1955] AC 431, 445 (Viscount Simonds).
111 *Bosanac* (n 1) 53 [20], 56 [31].
112 Ibid 72 [98] (emphasis added).
113 See, eg, *Perkins v Carey* [2023] NSWSC 210, [41]–[42] (Peden J).

That is, the Court seemed to imply that the presumptions are weak *because* it is rare that a modern case will lack evidence showing the actual intention of the parties.[114]

Importantly, these two views do not contradict each other. The Court's references to 'adapt[ing the law] to changing conditions'[115] suggest an actual weakening of the presumptions, separate from the point that the presumptions are less likely to be decisive today than in the past. Further, the Court using 'weak' to mean 'easy to rebut' suggests an actual change of the law, because an observation that the presumptions are unlikely to be decisive in modern times would not affect how easy they are to rebut. Thus, the Court in *Bosanac* changed the law such that the presumptions are now weaker than in the past.

One possible result of this change in the law is that it may open the door for judicial abolition of the presumptions. If the presumptions only create a weak inference that is easily rebuttable and are susceptible to becoming even weaker as social values change, judicial abolition of the presumptions may be viewed as less radical than when it was proposed by Murphy J in 1984.

V Clarifying the Effect of *Cummins*

While *Bosanac* left open questions about the future development of the presumption of advancement, it conclusively resolved the related question posed by *Cummins*. In *Cummins*, the High Court had to determine the beneficial interest of a bankrupt in the property that was previously his matrimonial home with his then wife.[116] In 1970, Mr and Mrs Cummins purchased a home and were registered as joint tenants,[117] with Mrs Cummins having contributed 76.5% of the purchase price and Mr Cummins contributing the balance. Later (but before they separated), Mr Cummins became bankrupt. Mr Cummins then attempted to transfer his interest in the property to Mrs Cummins. This transfer was found to be void against the trustee in bankruptcy.[118] The relevant question for the Court was whether, before the joint tenancy was severed by Mr Cummins' bankruptcy, (1) the equitable interest was at home with the legal title such that when the joint tenancy was severed, each of Mr and Mrs Cummins held a one-half interest in the property, or, alternatively (2) the Cummins were equitable tenants in common such that when the joint tenancy was severed, they each held an interest proportionate to their contribution to the purchase price.[119] The Court held that the equitable interest was at home with the legal interest and therefore Mr and Mrs Cummins each had a one-half interest in the property despite their unequal contributions to the purchase price.[120] Note it was not argued that the

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114 *Bosanac* (n 1) 53 [21]–[22] (Kiefel CJ and Gleeson J), 65 [67] (Gageler J). But see *Xin* (n 46) [169]–[171] (Gill J).

115 Ibid 53 [20] (Kiefel CJ and Gleeson J), quoting *Pettitt* (n 95) 793 (Lord Reid).

116 Family Court proceedings were pending; however, the interests in the property had to be determined at the time the joint tenancy was severed, which happened before the couple separated.

117 *Cummins* (n 5) 286–7 [13], 301 [66] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

118 Ibid 287 [14], 297 [54].

119 Ibid 297–8 [55].

120 Ibid 302–3 [71]–[73].

presumption of advancement applied to transfers from wife to husband in respect of Mrs Cummins' greater contribution to the purchase price.[121]

Until *Bosanac*, the decision in *Cummins* had been the source of ongoing confusion for courts dealing with disputes over matrimonial homes.[122] Confusion arose from the following passage in *Cummins*:

> The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted:
>
> > It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.
>
> To that may be added the statement in the same work:
>
> > Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them.
>
> That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses.[123]

In the 16 years between *Cummins* and *Bosanac*, one lower court took this as a statement of principle that effectively created an additional presumption that applied with the same force as the presumptions of resulting trust and advancement.[124] Other lower courts have considered the so-called '*Cummins* principle' in varying formulations. The narrower formulation was a presumption or inference that, where both parties to a marriage have contributed to the purchase price of the matrimonial home, the couple intended to have equal beneficial interests in that property regardless of the proportions they contributed.[125] Broader formulations have framed the decision in *Cummins* as authority for the proposition that 'ordinarily where property [is] held as joint tenants by husband and wife, it can be presumed that in equity they hold equal one-half interests', without the requirement that the property be the matrimonial home, or that each spouse contributed at least some money to the purchase price.[126] By contrast, other lower courts concluded that *Cummins* did not

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121 Ibid 280–2.

122 See, eg, *Weston v McAuley* [2017] FCCA 1, [52]–[53] (Judge Driver) ('*Weston*'); Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns' (2012) 36(1) *Melbourne University Law Review* 216, 230; Sarmas, 'The Resulting Trust and the Family Home in Australia' (n 92) 271.

123 *Cummins* (n 5) 302–3 [71]–[72] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting Austin Wakeman Scott, *The Law of Trusts* (Little, Brown, 4th ed, 1989) vol 5, 239 (citations omitted).

124 *Combis v Jensen [No 2]* (2009) 181 FCR 178, 195–6 [48]–[51] (Collier J).

125 See, eg, *Weston* (n 122) [51], [53] (Judge Driver).

126 *Van den Heuvel v Perpetual Trustees Victoria Ltd* (2010) 4 BFRA 802, 834 [197] (Young JA). See also *Commonwealth Bank of Australia v Lam* [2018] FCCA 1568, [43] (Lucev J).

create a new presumption or abolish the presumption of advancement but instead was decided based on the actual intention of the parties.[127]

Bosanac resolved the issue by confirming that *Cummins* did not create a new presumption or abolish the presumption of advancement in relation to matrimonial homes. The Court observed that the relevant passage in *Cummins* was not a statement of principle but rather a 'possible inference which might be drawn from particular circumstances',[128] stereotypes should be avoided,[129] and the starting point for analysis is the objective facts.[130]

VI Conclusion

The High Court decision in *Bosanac* is significant because it has helpfully clarified the effect of *Cummins* and has developed the law by weakening the presumptions of resulting trust and advancement. *Bosanac* is also significant because it hints at the future development of the equitable presumptions, suggesting that, although they may now be weak, they will continue to operate and the presumption of advancement will be expanded to include transfers between parties beyond those in the relationships to which the presumption has historically been applied.

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127 See, eg, *Silvia v Williams* [2018] FCA 189, [146] (Wigney J); *Bosanac No 7* (n 6); *Hua v Tuckerman* [2014] NSWSC 1426, [126]–[127] (Black J).

128 *Bosanac* (n 1) 54 [25] (Kiefel CJ and Gleeson J), 80 [119]–[120] (Gordon and Edelman JJ). See above Part II(C)(1)(b).

129 *Bosanac* (n 1) 63 [62] (Gageler J). See above Part II(C)(2)(b).

130 *Bosanac* (n 1) 80 [118] (Gordon and Edelman JJ). See above Part II(C)(3)(b).

Review Essay

The Other Things Said

The Intricacies of Dicta and Dissent by Neil Duxbury (2021) Cambridge University Press, 278 pp ISBN 9781108794886

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Abstract

The common view in legal education and practice has been that obiter dicta or 'the things said in passing' are not part of the corpus of legal reasoning that is binding, which then begs the question, 'If so, what is their value?' This review essay offers a detailed overview of Neil Duxbury's *The Intricacies of Dicta and Dissent*, highlighting the significance of Duxbury's contribution to the literature on this important subject. Against a backdrop of few book-length treatments of these commonly deemed 'subsidiary' forms of legal reasoning, Duxbury offers a comprehensive historical account of dicta and dissent in adjudication, and of their varied impacts on legal development. Though falling short of advancing a normative account, Duxbury's book nevertheless provides a nuanced and balanced description of the natures of dicta and dissent, engaging with the complexities of judicial reasoning beyond a conventional black-and-white approach. In so doing, this book sets the groundwork for any normative analysis of the role dicta and dissent can play in shaping common law principles. It is anticipated that this book will remain an invaluable contribution to the field of judicial interpretation, especially as a necessary, vital resource upon which future scholarship may build.

Please cite this review essay as:

Constance Youngwon Lee, 'The Other Things Said' (2024) 46(1) *Sydney Law Review* 119.

DOI: https://doi.org/10.30722/slr.19656

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I Introduction

The Intricacies of Dicta and Dissent provides a critical contribution to legal scholarship by offering a detailed examination of frequently overlooked forms of judicial reasoning. While acknowledging the abundance of scholarship on judicial reasoning more broadly, Neil Duxbury's book stands out for its sustained attention to two forms of reasoning which are often deemed subsidiary.[1] His central enquiry is whether the relegation of dicta and dissent to secondary sources of law should preclude a genuine examination of their potential to influence the development of common law. By discussing the ontology of dicta and dissent as distinct forms of reasoning, notwithstanding their embeddedness in a primary source of law (the judgment itself) Duxbury raises questions about their legal authority. It is this intentional emphasis on the inherent complexity of judicial reasoning which makes this work unique, opening the door for a more fruitful discussion of dicta and dissent. This book presents an insightful exploration of the potential value of dicta and dissent decidedly on their own terms and not as 'mere' offshoots of the *rationes* of the same judgment.[2]

As a sequel to Duxbury's previous work, *The Nature and Authority of Precedent*,[3] the principal value of this book is epistemic. This is apparent in the way the author explores various theories of interpretation, critically assessing the force and limitations of their arguments, and in how he reflects on the obstacles that the legal method habitually faces in distinguishing the ratio from other parts of a judicial decision. Duxbury's rigorous historical assessments offer the possibility of a more nuanced appreciation of the role of dicta and dissent in common law contexts. Using a wide lens, he captures the intricacies of dicta and dissent and the ways in which these two forms of reasoning have shaped legal discourse for centuries and continue to influence the evolution of common law.

Duxbury boldly accepts the challenge integral to any exploration of the nature of dicta and dissent, in terms not only of theoretical depth but also of epistemic scope. However, this expanse does not deter the author who insists that, like the nature of the judicial office itself, the task (however challenging) must be discharged. As Duxbury recognises, the vexed nature of these 'extra judicial statements' means that ignoring them would be as perilous as submitting to the inherent risks they pose. All this informs his multi-faceted approach, and he embarks on the exercise of historical exploration with the caution, reticence and hesitancy appropriate to the subject matter.

In this context, the sheer breadth of Duxbury's inquiry is impressive. Though his focus is understandably the English common law, his account is replete with references to comparative judgments from appellate courts in the United States, Canada and Australia. Nor is his inquiry limited to a certain area of law, spanning constitutional law, the law of contracts, torts and even property law. These comparative analyses enrich the author's account overall, strengthening his

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1 Neil Duxbury, *The Intricacies of Dicta and Dissent* (Cambridge University Press, 2021) Prologue.
2 Ibid 13.
3 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

theoretical observations with a degree of comprehensiveness. As such, Duxbury's thorough account has the potential to benefit both proponents and critics of the view that obiter dicta and dissent carry legal weight in and of themselves.[4]

The overall vision for the book is a constructive one: to provide an explanatory framework by which lawyers and judges might better understand the process of adjudication. To this end, Duxbury's intention is twofold: to describe what constitutes dicta and dissent, and to prescribe their practical and epistemic value for legal practice. Though Duxbury does not explicitly identify the supporters and critics of dicta and dissent, it can be inferred from his treatment of the topic that supporters may include legal scholars who appreciate the practical and epistemic value of these concepts in legal practice. These supporters may argue that dicta and dissent are essential for understanding both the reasoning underlying legal decisions and the trajectory of meaning. On the other hand, critics of these forms of juristic reasoning may argue that they pose inherent risks and uncertainties to the legal system and that placing emphasis on them may translate to confusion and uncertainty in legal practice.[5]

The book comprises two extended essays: the first dealing with obiter dicta, the second with dissenting judgments. Both essays are organised similarly and are informed by a historical perspective. This approach allows the author to provide a nuanced commentary on the nature of dicta and dissent while remaining sensitive to the evolving attitudes of the judiciary towards their value over time. On this point, Duxbury's focus on the integrity of the common law is reminiscent of FA Hayek's theory of the spontaneous order, in which a series of cases over time leads to a self-organising system.[6] This premise may well account for the author's interest in dicta and dissent as part of a broader system of legal communication, rather than just the ratio. This review examines the content of the book, critiquing it systematically according to the author's own structure, and considering first dicta and then dissent. It concludes with a few comments on the overall aim, and the strengths and weaknesses of the work.

II On Dicta

Duxbury begins the first essay by speculating on the ontology of obiter dicta. He acknowledges the fraught nature of the concept, and laments the lengths to which legal theorists have gone in debating it without reaching any definitive conclusions. He notes the prevalent view that dicta are not actual sources of law but secondary parts of the judgment. While the general view denies that dicta form part of the *stare decisis*, Duxbury questions how dicta can be dismissed when they are so intertwined with 'the [very] substance of the common law'.[7] In other words, in spite of its fraught nature, discussions of the value of dicta cannot be sidestepped. He admits that this is

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4 Duxbury (n 1) xxiv–xxv.

5 Ibid 14–17.

6 FA Hayek, *The Constitution of Liberty* (University of Chicago Press, 1978) ch 11. See also FA Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519.

7 Duxbury (n 1) 5.

a potentially complex issue and risks judicial adventurism given the unfettered discretion to delineate the boundaries between dicta and 'valid' law. Despite this risk, the author maintains the need for a sustained discussion of dicta's nature and value.

This noted, Duxbury embarks on an exploration through the centuries, across the English law reports, to trace dicta's development. Using an etymological lens, he begins with the definition of obiter dicta as 'judicial statements' made in the 'context of legal statements' that are not directly relevant to 'the matter at hand'.[8] In exploring the diachronic nature of obiter dicta, he notes that they are not identifiable by the original utterer but retrospectively by someone whose interests are impacted by the judgment at a later date ('ex post facto').[9] To structure this discussion, Duxbury divides dicta into functional categories and subcategories, including 'loose dicta', 'weighty dicta' and 'standard dicta'.[10] The classification system immediately highlights the breadth and gradation of the subject for enquiry. Additionally, the chronological approach draws attention to the scope and complexity of evaluating dicta, emphasising the significance of the simple act of engaging in conversations about them.

Duxbury's discussion reflects a historical approach, focusing on dicta's etymological development against the backdrop of legal and social progress. He notes the emergence of *stare decisis* in line with the growth of judicial power in the 16th century. This growth, in turn, elevated the production of dicta to the status of 'a recognisable function of the judiciary',[11] though it was not until the 17th century that dicta were deemed to have legal authority in a more formal sense, with the possibility that some dicta might even be 'binding'.[12]

The author then asks whether dicta ought to be conceived as more than mere observations made in passing.[13] As well as tracing the historical evolution of dicta, he explores their epistemic potential in aiding legal interpretation. Duxbury directly challenges the notion of dicta as redundant commentary, suggesting that it can be used to clarify ambiguities in expression caused by human error in statutory interpretation,[14] or to tidy up the loose ends falling outside a court's ruling.[15] This idea clearly draws on HLA Hart's concept of the 'penumbra' which describes where legal terms fall outside the core of settled meaning.[16] And it is dicta's explanatory function as a guide to judges and lawyers which gives them their normative value.

However, Duxbury's jurisprudential acumen while evident is also narrow. Where he diversifies, he does so without clear explanation. His selective use of legal theories outside the British jurisprudential tradition without enunciating the reasons

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8 Ibid 3.
9 Ibid 26.
10 Ibid 28–9.
11 Ibid 24.
12 Ibid.
13 Ibid 43–5.
14 Ibid 38–9.
15 Ibid 39.
16 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 607.

for the selection might expose him to accusations of cherry-picking the normative positions that best favour his case. For example, the author appeals to Aristotelean philosophy to dismiss arguments that dicta are not adequately supported by public opinion, but does not explain this jurisprudential choice. By importing Aristotle's concept of *communis opinio*,[17] the author is able to argue that dicta must be considered in light of public opinion to ensure they align with the community's values and norms.[18] Moreover, by leveraging Aristotle's dialectical method, the author effectively defends the value of dicta as an essential tool for judges to uphold the rule of law while also recognising the need to balance their authority with the collective conscience.[19]

Another example of arbitrary jurisprudential selection is the author's invocation of Lon Fuller's functional natural law concept of the law's internal morality.[20] Fuller emphasised the importance of legal systems producing legal rules that people can realistically follow. In considering the need for legal rules to be realistically tractable, Duxbury presents a practical argument for the preservation of dicta in legal precedent. This use of Fuller's ideas adds depth to Duxbury's analysis, providing a cogent theoretical framework to justify considerations of dicta. Duxbury's theoretical insight, in turn, offers a platform for deeper discussion of the potential dangers of dicta. In this sense, the author's attempts to diversify the grounds of his normative evaluation reflect a conscious effort to adopt a more panoramic perspective.

The author then turns his attention to the risks and potential dangers of an unbridled use of dicta by judges. These arise from the indiscriminate use of dicta, which may have unintended consequences for the rule of law. With this cautionary note, Duxbury weighs these risks against dicta's potential to act as a safeguard against ultra vires lawmaking. He argues that the dicta in question must be retained within the common law precedent to maintain the appearance of judicial independence.[21] In other words, the normative value (in both function and perception) of dicta in preserving the rule of law and maintaining the balance of power must be carefully considered when assessing their true value in the legal system.

In addition, the author anticipates potential criticism of the argument that dicta serve to advance constitutional norms.[22] While acknowledging the attendant risks of indiscriminate dicta in allowing judges to overstep their roles, Duxbury also highlights the important role dicta can play in shaping and refining legal norms. As noted, dicta can act as a check on ultra vires lawmaking, especially in cases where

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17 Aristotle, *The Art of Rhetoric*, tr Robin Waterfield, ed Harvey Yunis (Oxford University Press, 2018) bk 1, ch 2. See also Aristotle, *Politics*, tr Ernest Barker (Oxford World's Classics, 2009).

18 Duxbury (n 1) 10–11.

19 Émile Durkheim, *De la division du travail social* [The Division of Labour in Society] (Presses Universitaires de France, 2nd ed, 2004) 46.

20 Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) ch 2.

21 Duxbury (n 1) 100. See further on this point, Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36(1) *Melbourne University Law Review* 175.

22 The author later notes the reasons for his differentiation. In constitutional law, the observation of the rule of binding precedent appears weaker than in other areas of law: Duxbury (n 1) 185.

the legislature has failed to address an issue adequately.[23] To mitigate the risks of excessive judicial power through dicta, Duxbury proposes[24] a Dworkinian approach that considers the 'weight of opinion', which is grounded 'in reason' and bounded by sound constitutional structures.[25] By approaching dicta with a reasoned and structured methodology, judges can ensure that their pronouncements retain normative value and contribute to the ongoing development of the common law.[26]

The author concludes the first essay by considering the implications of taking dicta too seriously. There is a fear that the complex nature of judicial reasoning may facilitate the undermining of judges' perfunctory role in *most* cases.[27] The assertion is that, given the complexity of judicial reasoning, conferring more weight to dicta will necessarily increase unfettered judicial discretion. This is reminiscent of what Julius Stone referred to as the risk of increased 'leeways of choice'.[28] Duxbury asks whether this would be the result in *all* cases. To his mind, what critics fear is already true to some extent — judges are not simply deducing and applying the law based on a set of determined facts but are, rather, making choices based on their personal value commitments.[29]

In so doing, Duxbury concedes that judicial reasoning generally encompasses the risk that judges might rely on their personal commitments in service of making judgments. However, he questions whether the threat of increasing judges' discretionary powers through dicta is always problematic. Certainly, the risk is greater in terms of 'binding dicta', but he argues that to avoid considering *all* dicta on these grounds, especially where judicial discretion is already unavoidable, would be throwing the baby out with the bathwater. He thus concludes that the value of dicta might warrant the acceptance of some risk. This evaluation of the potential risks and benefits of dicta demonstrates the nuanced nature of Duxbury's assessment of precedent. Through a multi-dimensional engagement with complex concepts, oscillating between theoretical and practical considerations, while giving heed to diachronic factors, the essay represents a critical and reflective approach to legal reasoning.

III On Dissent

In his second essay, Duxbury expands on his analysis of dicta, highlighting the ways in which it can be a useful tool for legal professionals. He argues that dissent — which is, technically, obiter dicta — can play an important role in shaping legal discourse, as well as fostering a more robust and dynamic understanding of the law. In particular, he suggests that dissent can be valuable in situations where the law is in flux or where there is significant disagreement among legal experts about how to

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23 Duxbury (n 1) 9.
24 Ibid 100.
25 See Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986). See also Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999) ch 1.
26 Duxbury (n 1) 76.
27 Ibid 100.
28 Julius Stone, *Precedent and Law: The Dynamics of Common Law Growth* (Butterworths, 1985) 168.
29 Duxbury (n 1) 106.

interpret a particular legal principle or precedent. At the same time, Duxbury acknowledges that dissent can be problematic, particularly when it is used as a means of challenging well-established legal principles or is employed for strategic purposes. He notes that some judges may use dissent as a way of signalling their ideological leanings or their willingness to push the boundaries of legal interpretation, rather than as a genuine attempt to engage in reasoned debate about the law. In such cases, dissent may serve to undermine the authority of the judiciary and to create confusion or uncertainty in legal decision-making.

As with his discussion of dicta, Duxbury prefaces his critique of dissent by examining its lexicology. He starts by isolating the definition and ordinary meaning of the term 'dissent'. Viewing it in broader terms than simply as a species of dicta, he acknowledges the pitfalls of adopting a narrow conceptualisation. As to the descriptive question, Duxbury cites the American legal realist Oliver Wendell Holmes to expose the underlying complexities and controversies around dissent's definition. Holmes noted that it would be foolish for someone ('a bad man') to rely on dissents as a defence.[30] Using this realist account as a springboard, Duxbury first interrogates the ordinary meaning of dissent by distinguishing it from plain disagreement.[31] Dissent is a position taken against another, as opposed to disagreement which is opposition to another's arguments. This broader framing of dissent highlights the importance the author places on dissent's context dependency in a relational context. Duxbury follows by contending that success in terms of using dissent in future cases is contingent not only on the judge's favoured ideological position but also on whether the position itself was feasible in the first place.

Duxbury observes that the term 'dissent' carries associations beyond the simple act of taking a different position. While the relationship between the dissenter and the dissented perspective is always asymmetrical, with the dissenter at the bottom, this does not necessarily mean that the dissenter's underdog status is favourable per se. On the other hand, it would be equally misguided to assume that dissenters are always to be cast in an adverse light, as merely argumentative or contrarian.[32] The truth is far more nuanced. A person who takes a differing position is not necessarily right or wrong in all contexts, and their perspective must be evaluated on its merits. The author thereby debunks at the outset a few misleading stereotypes associated with the term. Once again, he labours over the importance of critically examining these legal concepts in light of their associations in order to fully appreciate their implications.

In his effort to broaden the concept of dissent, the author explores the idea in legal systems beyond English law courts. The reason for this appears epistemic. Judicial dissents are not uniform; nor are they unique to English law, and can vary across legal systems. A thorough treatment would therefore warrant examining their variations as influenced by the various contexts (and the various legal systems) in which they occur. The author approaches the subject matter open to delving into the

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30 Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 460, quoted in Duxbury (n 1) 127.

31 Duxbury (n 1) 131–2.

32 Ibid 127.

complexity of the topic and meticulous in his attention to detail. His aim of providing a more nuanced understanding of these concepts made evident in the essay on dicta becomes even clearer in his essay on dissent.

In Section 6 of the second essay, Duxbury highlights the influence of judicial culture in English appellate courts on the acceptance of dissenting opinions. He observes that unanimity has historically been highly valued in English courts, and that this can be attributed to the lack of written records in medieval English courts. The absence of a written record meant that any disagreement among judges had to be worked out through discussion, and unanimity was seen as a way of maintaining a cohesive and authoritative judgment. However, over time, this pull towards unanimity weakened and dissenting opinions have become more acceptable in English courts. Despite this, the author believes that the temptation to conform to the majority view still exists. There is plenty of evidence to support Duxbury's view that the pull towards unanimity remains strong. For example, in the Australian High Court, the (now retired) Chief Justice Susan Kiefel was vocal in extolling the benefits of 'fewer individual judgments' on the grounds of clarity, stability and public confidence in the High Court's decisions.[33] As Duxbury suggests, this 'judicial approach' is not uncommon and unanimity is still seen as the ideal to strive for[34] — something reflected in the way judgments continue to be written and presented.[35]

Moreover, Duxbury highlights the importance of historic, cultural and community contexts in understanding the role of dissent in judicial decision-making. While unanimity may be less of a priority than it once was, it continues to affect the way judges approach their work, and the way their judgments are perceived.[36] The author's nuanced analysis of the influence of judicial culture on the acceptance of dissent underscores the complexity of the topic and highlights the need for careful consideration of the various factors at play.

Duxbury also argues that, even on a minimalist view, dissents play an essential role in the legal reasoning process as formulations of legal principles.[37] He dismisses criticisms that Hart's 'rule of recognition'[38] denies dissent's status as a source of law. Duxbury concedes that the rule of recognition might fail to establish which dicta carry special epistemic weight.[39] But he clarifies a notion attributed to Hart that dissent has no legal significance: the argument that 'rights and duties are not altered by dissent' does not 'deny the possibility of rights and duties altering' when 'new law is created in response to … dissent'.[40] In the first essay, Duxbury illustrated this point by identifying that, in certain jurisdictions, dicta have been

33 Justice Susan Kiefel, 'The Individual Judge' (2014) 88(8) *Australian Law Journal* 554, 557.
34 Duxbury (n 1) 200–4.
35 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *UNSW Law Journal* 1134.
36 See Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).
37 Duxbury (n 1) 185.
38 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 94–5.
39 Duxbury (n 1) 100.
40 Ibid 162–3.

recognised and given weight even when the rule of recognition has been modified.[41] He builds on this point when he suggests that the test to assess dissent's value is not as straightforward as simply reverting to 'the rule of recognition'. There are clearly other factors at play in determining dissent's epistemic value.

Duxbury goes on to maintain that statements of general legal principle which do not form part of the legal reason for the decision can, nonetheless, hold significant sway, even to the point of becoming the case's legacy. To dismiss dissenting judgments would be to weaken 'law as a science', in the expression of Lord Atkin.[42] He refers to Lord Atkin's own opinions in landmark decisions such as *Liversidge v Anderson*[43] and *Donoghue v Stephenson*[44] whose dissenting judgments assumed 'iconic' status and were accorded precedent-like authority.[45] Duxbury notes that in the 19th century, judges even began to consider the possibility that some dicta might be binding in the same way as ratio decidendi.[46]

Once again, the author's pattern of reasoning involves closely examining the semantics of legal concepts to gain a better understanding of their basic attributes and the implications that follow. As in his earlier exploration of dicta, Duxbury looks beyond narrow legal definitions to explore wider effects. Through this, he demonstrates his legal expertise as well as the complexity of the legal concepts he is treating. Through such careful examination, he offers legal professionals a more sophisticated understanding of how dissent operates within the broader legal system.

In this way, Duxbury's discussion of dissent raises important questions about the role of judges and the extent to which they should be allowed to depart from established legal principles in pursuit of their own ideological agendas. Again, the author recognises the potential benefits of dissent, while conscious of its limitations and risks. His analysis will interest legal scholars and practitioners, but also appeal to anyone with an interest in the relationship between law, politics and society.

IV Comments

Ultimately, *The Intricacies of Dicta and Dissent* is a valuable contribution to the ongoing conversation about the role of dicta and dissent in shaping the common law. The author makes a compelling case for the proposition that dicta can have significant impact on the development of common law principles. Duxbury contends that dicta, although not part of the legal reasoning of a decision, can still become a case's legacy. Borrowing the words of Lord Devlin: 'A judge-made change in the law rarely comes out of a blue sky. Rumblings from Olympus in the form of *obiter*

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41 Ibid 102.

42 Lord Justice Atkin, 'Appeal in English Law' (1927) 3(1) *Cambridge Law Journal* 1, 9, cited in Duxbury (n 1) 235.

43 *Liversidge v Anderson* [1942] AC 206. See at 242 where Atkin JA describes the Court of Appeal as being 'infected with the "subjective virus"'.

44 *Donoghue v Stephenson* [1932] AC 562.

45 Duxbury (n 1) 236–7.

46 Ibid 237.

dicta will give warning of unsettled weather.'[47] The dormant potential of dicta can signal what course the law should take.

In addition to shedding light on the elusive nature of dicta and dissent, the author aims to provide a practical framework for lawyers and judges to better understand the process of adjudication. To that end, the book serves both as a descriptive exercise (to explain the nature of dicta and dissent) and a prescriptive one (to outline their practical and epistemic value for legal practice). Through his comprehensive analysis, Duxbury makes a significant contribution to the field of legal scholarship, offering valuable insights that will be of interest to anyone who engages with common law jurisprudence. Ultimately, the book provides a constructive payoff, equipping readers with a deeper understanding of the intricacies of judicial reasoning and the potential impact of dicta and dissent on the development of common law.

Moreover, in examining these impacts, Duxbury does not hold back on addressing dicta's potential to inhibit or disrupt the growth of common law principles.[48] He acknowledges that their nature is double-edged. The same force that enables dicta to contribute to the growth of common law principles can also be a drawback. For instance, a judge's statement in dicta that a certain principle should not be applied in a certain way can hinder the development of the law by discouraging future courts from exploring that principle in greater detail.

Standing in a rather short line of legal theorists in studying these concepts on their own terms, Duxbury's contribution is valuable partly because he dares to accept the challenge. Indeed, what sets this work apart is his willingness to engage in discussions about the complexities and mysteries of judicial reasoning, and his recognition that contrary opinions can be productive in advancing our understanding of legal concepts. In this undertaking, he proves successful. Through his use of jurisprudential and historical insights, Duxbury offers a comprehensive and nuanced account of the theoretical and practical potentials of dicta and dissent, while accounting for jurisdictional idiosyncrasies and the realities of legal practice.

To the extent that the author adopts a descriptive methodology, he remains safe from accusations of parochialism. This means that insofar as his assertions remain observational — for example, where he uses case law precedents solely to demonstrate the evolution of judicial attitudes towards dicta and dissent — he manages to maintain a neutral stance on normative issues. However, a possible weakness of Duxbury's account might be found in an omission here. Where judicial interpretation remains strictly legal, it cannot appeal to normative claims for its authority.[49] Traditionally, theories of judicial interpretation rarely reach out to moral philosophy, anthropology or epistemology to resolve their immediate concerns.

It follows that such an insular purview in discussions of judicial reasoning has had the general effect of making the judicial task appear elusive, shielding it

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47 Ibid 42, quoting Patrick Devlin, 'Judges and Lawmakers' (1976) 39(1) *Modern Law Review* 1, 10.
48 Ibid 43.
49 Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 37–52.

from wider scrutiny, but also diminishing its perceived authority over time.[50] In other words, this type of esotericism facilitates too quick a transition from descriptive characteristics to prescriptive demands, without addressing the latent normative issues. Duxbury's shying away from conversations about the reasons for judicial interpretation means that his discussion reaches a limit at the point where his analysis turns prescriptive. In a time when it is widely accepted that the 'disembodied judicial officer' is a myth,[51] the need for transparency about his choice of normative reasons and his precise methodology for discussions of dicta assumes greater urgency. In this context, Duxbury's book may have benefitted from a simple recognition of the normative silences that characterise discussions on dicta and his thoughts on the best direction for future conversations.

[50] See Harold J Berman, *Law and Language: Effective Symbols of Continuity*, ed John Witte Jr (Cambridge University Press, 2013) 65.

[51] Erika Rackley, 'Representations of the (Woman Judge): Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22(4) *Legal Studies* 602. See also Mike McConville and Luke Marsh, *The Myth of Judicial Independence* (Oxford University Press, 2020) ch 10.

Book Review

Judging and Emotion: A Socio-Legal Analysis by Sharyn Roach Anleu and Kathy Mack (2021) Routledge, 213 pp, ISBN 9781138893023

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Please cite this book review as:

Terry A Maroney, 'Book Review: *Judging and Emotion: A Socio-Legal Analysis* by Sharyn Roach Anleu and Kathy Mack' (2024) 46(1) *Sydney Law Review* 131.

DOI: https://doi.org/10.30722/slr.19657

Judging and Emotion: A Socio-Legal Analysis is an important — one is tempted to say indispensable — resource for legal theorists and practitioners, sociologists, and anyone who cares about judging as it is practised in the real world.[1] Sharyn Roach Anleu and Kathy Mack have distinguished themselves as the foremost experts on the everyday lives and work of Australian judicial officers, with a particular focus on the human elements of judging. Their work is meticulous in method, grounded in theory, and sweeping in its implications, reaching well beyond the Australian context while remaining deeply rooted in it.

In this tight volume, Roach Anleu (a sociologist) and Mack (a law professor) draw on their extensive empirical data to push against traditional Western legal characterisations of judges' emotions as improper and incompatible with impartiality. Rather, they argue, not only do judges inevitably experience a wide variety of emotions in the course of their work, but they strive to shape those experiences and their expressions — as well as the emotional experiences and expressions of others, such as litigants and lawyers — to uphold both the image and the reality of impartiality. Rather than block emotions out, good judges selectively and strategically integrate them into their lives and work. This is an argument the authors have made before, including in their excellent *Performing Judicial Authority in the Lower Courts*.[2] Similar arguments also have been made by other scholars, myself included; it is impressive how seamlessly Roach Anleu and Mack draw on

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1 Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) ('*Judging and Emotion*').

2 Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan, 2017).

that broader body of work on judicial emotion while maintaining a firm centre of gravity in their own data.

Those data are compelling. As detailed in their methodological Appendix, since the early 2000s Roach Anleu and Mack have administered a series of national surveys of Australian judges and magistrates; conducted in-depth interviews with those judicial officers; and directly observed court proceedings. This three-legged-stool aspect of their work gives it particular solidity. Judges in Anglo-American systems work under what I have called the persistent cultural script of judicial dispassion.[3] That misguided script complicates research into the emotionally infused aspects of judging, as emotions are 'formally disavowed'.[4] Roach Anleu and Mack's consistent, careful and diversified approach enables them to get a good distance past that barrier. They make visible judges' own conceptions of their work-related emotional experiences, how they see the script of dispassion (spoiler alert: none of them endorses it), and how they negotiate any tension between the two.

Judging and Emotion has a tidy structure. The authors begin by plainly stating their inquiry ('to identify the place(s) of emotion in judicial work and to understand how emotion relates to the core judicial value of impartiality'), their argument (that 'emotion is integral to judicial work' and compatible with impartiality), and their empirical métier (concrete demonstrations of how judges 'understand, experience, display, manage and deploy emotion as part of their everyday work' in an attempt to achieve that compatibility).[5] Emotion here is conceptualised as both internal (that is, something judges experience subjectively and conceive of as inside themselves) and interactional (that is, patterns of relating that develop between people in specific situations). Judicial emotions are shaped by the structures and goals of courts, as well as by concepts of the judicial role, as those unfold within diverse contexts — for example, trial versus appellate proceedings, family, commercial or criminal cases, and the background emotion norms of local and national cultures. While (as Roach Anleu and Mack commendably acknowledge) there is no consensus definition of emotion on which to rely, this conception is well within the Venn diagram of interdisciplinary agreement. After introducing the reader to core concepts such as *emotional labour* and *emotion regulation*, Roach Anleu and Mack provide a helpful and data-driven overview of how judicial work plays out on the ground in Australia, covering such topics as case load and time pressures, types of case and court, and the various other dramatis personae with whom judges interact (for example, jurors, witnesses and lawyers).

The following chapters form the heart of the book, weaving together theory and data to show how judges conceptualise their emotions, impartiality and the relationship between the two. The authors canvass the range of judges' self-reported and observed emotions and emotional displays, as well as the strategies with which they seek to manage them; they also highlight the ways in which judges seek to affect emotional experience and expression among the dramatis personae. These chapters are detailed, rich, and the most important contribution of the volume. Before

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3 Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99(2) *California Law Review* 629.

4 *Judging and Emotion* (n 1) 61.

5 Ibid 1.

concluding, though, the book takes a turn of sorts, exploring how systems of judicial professionalisation, discipline and education implicate emotion. By the conclusion of *Judging and Emotion*, even the reader with little or no prior knowledge of the area will have a strong understanding of the major issues, a detailed understanding of some particularly important debates (for example, over the utility of judicial empathy), and — one hopes — a far deeper appreciation of the reality of judicial work and the emotional sophistication it requires.

Not all readers, of course, will be satisfied. Those who are looking for crisp, statistically expressed conclusions about the impact of various discrete emotions on concrete legal decisions will be particularly disappointed. This is simply not what Roach Anleu and Mack do. There are statistics, to be sure — for example, about the degree to which Australian judicial officers assess the importance of empathy, broken down by gender. (Second spoiler alert: both men and women tend to think it's important, and Roach Anleu and Mack show that while gender matters to questions of judicial emotion, it does not always follow the neat logic of stereotype.) But this inquiry is fundamentally qualitative, seeking to expand our knowledge rather than reduce it to a small set of variables. It seeks not to model whether an angry or sad judge might impose higher or lower sentences but, rather, to discern how judges experience cases involving serious crimes against children. It explores when, how and why they try to control their faces and bodies to project a particular demeanour (often despite a contrasting inner experience). It illuminates how they attempt to create boundaries between home and work, and details how they treat people who can be frustrating, scared or disruptive, or whose lives are terribly sad. In a typical statement, one of the interviewed judges describes handling people who come before her with 'compassion' and 'empathy', but then states that '[i]t may well be that the decision is just the same as you [would have made] otherwise'.[6] Another describes being open to difficult emotions when in the presence of enormous loss, 'allow[ing] them to come through you … a little bit like letting the silt settle', and then 'mov[ing] them to one side' when reaching one's decision — leaving a critical ambiguity as to whether that silt leaves a trace.[7]

To those who find such ambiguities frustrating, or who think they skirt the 'real' (or only truly important) issue, I suggest having a more open mind. (After all, that is what Roach Anleu and Mack's judges say they try to do.) Judging is far more than choosing an ultimate legal outcome among the available options. Cases and court proceedings, too, are far more than their outcomes. Journeys are more than the end point. The procedural justice literature shows us that how people are treated matters, sometimes as much as winning or losing. *Judging and Emotion* shows us the concrete steps judges take that determine whether people feel treated well: acknowledging a litigant's anxiety, explaining an intimidating process, calling a break, or letting them go 'on and on' if that is what it will take for them to feel heard. We also see instances in which people are bound to feel poorly treated, such as being barked at to take one's hands out of their pockets, or addressed condescendingly as 'Miss'. The sum total of these interactions drives how a polity thinks about their courts. In that way, it *is law*. *Judging and Emotion* also gives us a front-row seat to

6 Ibid 78.
7 Ibid 75.

judges' efforts to uphold public expectations even in challenging scenarios. They engage in self-talk about their oaths, unload and vent with colleagues and subordinates, and use breathing exercises to both be calm and appear calm. This is judging, just as much as interpreting a statute is. Further, in this volume we do see outcome effects. Fines are forgiven; adjournments are denied. Hopefully readers will not scan through simply to catalogue those effects but will take in the entire complex landscape.

Even one who buys fully into Roach Anleu and Mack's project might raise some constructive criticisms. The volume is, as noted, tight, and to a certain degree, formulaic. In each chapter, the authors delineate a theoretical frame; present highly curated survey, interview and observation data that fill out the frame; and then draw conclusions. Every time they quote a judge or present an observation transcript they immediately interpret it, which entails insight but also repetition. The reader is led through each section at a steady clip that becomes predictable in its flow. There are many advantages to these choices. Chief among these is clarity; one always knows precisely where one is and what Roach Anleu and Mack are arguing and why. Another advantage is accessibility to diverse academic readers, who can take in the material without an enormous investment of time or schooling in jargon and side-trips. A disadvantage, though, is that the narrative sometimes would benefit from more story and flavour. It will not naturally appeal to the broader public interested in issues of judging and courts. Judges, too, might sometimes find the style alienating, though they hopefully will be propelled forward by its many insights of direct relevance to their lives and work. I found myself wanting even more accounts straight from the judges' mouths. These first-person moments, so rare in our world, were uniformly interesting and instructive. I would happily have seen the page count expand, and the formula loosen, if we could have heard more of these judicial voices Roach Anleu and Mack worked so hard to capture.

Of course, this is a good criticism to have: better that the reader wants more rather than less. I also await with anticipation Roach Anleu and Mack's continued work on judicial discipline, performance evaluation, and education. This was to my mind the least effective part of the book, not because it is not important (it is, and vitally so) but because this is where the authors are still building the kind of rich data that underlie the remainder of the volume. There's a tea-leaf-reading aspect to this chapter that I look forward to seeing more fully developed.

Judging and Emotion: A Socio-Legal Analysis is both an impressive achievement and a valuable resource. It offers a rare window into the human realities of judging and courts, particularly the role of emotion, historically so maligned and undervalued. The book does not achieve everything in this space; nor could it. But no-one who cares about judges as people and professionals, and about the role of courts as a site of democratic engagement, should pass it by. Rather than purport to draw a straight line between isolated emotional states and narrowly conceived legal impacts, Roach Anleu and Mack's deep dive offers something far more grounded and nuanced. It will stay at the top of my reference pile, looking just the way it does right now: bristling with sticky notes and tabs, full of highlighting and underlines, its margins bursting with commentary.