volume 44 number 4
december 2022

the sydney law review

articles

The Erosion of Academic Freedom: How Australian Espionage Law Impacts Higher Education and Research
– *Sarah Kendall* 503

Precontractual Estoppel by Convention
– *Andrew Robertson* 537

The Constitutional Principle of Legality
– *Jamie Blaker* 559

before the high court

Vanderstock v Victoria: Are “True” Consumption Taxes Forbidden to the States by Section 90 of the *Australian Constitution*?
– *Anthony Gray* 591

Kept in Suspense: Supervening Illegality in Contract Law and the High Court Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*
– *Harrison Simons* 605

book review

The Automated State: Implications, Challenges and Opportunities for Public Law
– *Frank Pasquale* 619

Correspondence should be addressed to:

Sydney Law Review
Sydney Law School
Building F10, Eastern Avenue
UNIVERSITY OF SYDNEY NSW 2006
AUSTRALIA

Email: sydneylawreview@sydney.edu.au
Website and submissions:
sydney.edu.au/law/our-research/sydney-law-review

For hardcopy subscriptions outside North America:
sydneylawreview@sydney.edu.au
For hardcopy subscriptions in North America: info@gaunt.com

The *Sydney Law Review* is a refereed journal.

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

The Erosion of Academic Freedom: How Australian Espionage Law Impacts Higher Education and Research

Sarah Kendall*

Abstract

In this article, I assess the impact of Australia's espionage laws on higher education and research and, consequently, on academic freedom. I find that the espionage laws have the capacity to criminalise the legitimate work of particular academics, potentially chilling research into and teaching on certain areas. The criminalisation of legitimate academic teaching and research poses risks for the academics involved (who could face up to life imprisonment) and for the state of academic freedom in Australia. Not only does this undermine the pursuit and dissemination of knowledge for the benefit of society, but it is a threat to Australia's democracy. It is crucial, therefore, that the freedom of academics to research and teach is not unduly undermined by criminal laws. As such, I conclude the article with recommendations for how Australia's espionage laws can be reformed so that genuine espionage against the higher education and research sector is criminalised while protecting academics who pursue legitimate teaching and research endeavours.

Please cite this article as:

Sarah Kendall, 'The Erosion of Academic Freedom: How Australian Espionage Law Impacts Higher Education and Research' (2022) 44(4) *Sydney Law Review* 503.

 ISSN: 1444–9528

* PhD Candidate, Sessional Academic and Senior Research Assistant, The University of Queensland School of Law, St Lucia, Queensland, Australia.
Email: s.kendall@uq.net.au; ORCID iD: https://orcid.org/0000-0002-9320-9895.
I would like to thank Associate Professor Rebecca Ananian-Welsh and the anonymous reviewers for their invaluable feedback on earlier drafts.

I Introduction

In March 2022, the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') found that the higher education and research sector[1] had been (and continues to be) a target for espionage and data theft.[2] Specifically, foreign powers had been targeting the sector for research that could be commercialised or used for national gain purposes, including research on technologies with a military, energy, medical, agricultural and manufacturing application.[3] The Committee noted that, while sectors across Australia were being targeted by foreign adversaries, the higher education and research sector was a key target because of the high value it provides — in particular, '[u]niversities are at the cutting edge of sensitive research; hold large student populations from a variety of groups; and have strong access into both industry and government.'[4]

Just four years before the PJCIS released these findings in its report on the *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* ('PJCIS Inquiry'),[5] the Federal Government rushed a suite of new national security laws through Parliament.[6] These included new laws for espionage found in the *Criminal Code*.[7] At the time, Prime Minister Malcolm Turnbull claimed that these reforms were necessary because previous laws were 'unwieldy' and the threat of espionage had 'reache[d] unprecedented levels'.[8] Since their introduction, however, the espionage laws have been criticised by scholars for being overly broad

---

1 Defined as entities engaged in: 'tertiary teaching; research; the commercialisation of research with origins in the sector; grants and funding decisions in relation to the above activities; tertiary education-related representative bodies, coordination bodies or institutional groupings; and regulation of the above activities': Parliamentary Joint Committee on Intelligence and Security ('PJCIS'), Parliament of Australia, Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector (Report, March 2022) vii ('*PJCIS Report*'). In this article, I use 'research' to mean all aspects of the research process — from developing research questions, reviewing the literature, and designing the project to data collection and analysis, write-up of results, and dissemination of project findings.

2 Ibid 115, 125–6. For more on how (and why) foreign actors have been targeting research institutions and their staff, at least according to the Australian Security Intelligence Organisation ('ASIO') and the Australian Federal Police ('AFP'), see ASIO, Submission No 31 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (18 December 2020) 4 [10]–[11]; AFP, Submission No 49 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (January 2021) 3–4.

3 *PJCIS Report* (n 1) 125.

4 Ibid 126.

5 Ibid.

6 'National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018', *Parliament of Australia* (Web Page, 29 June 2018) <https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6022>. See *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

7 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') divs 91, 92A.

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13148 (Malcolm Turnbull).

and encroaching on fundamental rights and freedoms.[9] For example, they may criminalise good faith journalism[10] or legitimate social media use.[11]

Despite the growing body of literature on the 2018 espionage (and other national security) laws,[12] scholars have yet to examine how the laws impact on the work of academics and, as such, how the laws affect academic freedom. As will be explored below, the espionage laws target dealings with information, which is at the core of what academics do. Some of these dealings may, in fact, be illegitimate — that is, undertaken for criminal purposes. This would include dealings for the purposes of espionage against the higher education and research sector, whether by academics or those from outside the academy. The vast majority of dealings by academics are, however, engaged in for legitimate research and teaching endeavours (that is, not for the purpose of criminal activity, including espionage).

If legitimate academic work is criminalised, this poses a risk not just for the academics involved (who could face up to life imprisonment), but also for the state of academic freedom in Australia. Academic freedom is fundamental to democracy.[13] It protects the freedom of academics to teach, research and disseminate the results of their research (among other things), contributing to the development of new knowledge and teaching the next generation the skills to think democratically.[14] Criminalisation of legitimate research and teaching inherently erodes academic freedom by making it illegal to pursue — and potentially punishing people for pursuing — certain intellectual inquiries.[15] Not only does this undermine the pursuit of knowledge for the benefit of society, but it poses a risk to Australia's democracy.

In this article, therefore, I assess the impact of Australia's espionage laws on higher education and research, focusing on whether (and how) the laws pose a risk to legitimate research and teaching and, consequently, to academic freedom. This is not the first time that national security laws have had an impact on academic freedom. For example, the Australian Government has historically enacted laws and promoted policies that required university staff to suppress or monitor certain types

---

9 See, eg, Sarah Kendall, 'Australia's New Espionage Laws: Another Case of Hyper-Legislation and Over-Criminalisation' (2019) 38(1) *University of Queensland Law Journal* 125 ('Australia's New Espionage Laws'); Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review* 764; Rebecca Ananian-Welsh and Sarah Kendall, 'Crimes of Communication: The Implications of Australian Espionage Law for Global Media' (2022) 27(1) *Communication Law and Policy* 3.

10 Ananian-Welsh, Kendall and Murray (n 9); Ananian-Welsh and Kendall (n 9).

11 Sarah Kendall, 'You Could Break Espionage Laws on Social Media Without Realising It', *The Conversation* (online, 14 January 2021) <https://theconversation.com/you-could-break-espionage-laws-on-social-media-without-realising-it-151665>.

12 See, eg, Kendall, 'Australia's New Espionage Laws' (n 9); Ananian-Welsh, Kendall and Murray (n 9); Ananian-Welsh and Kendall (n 9); Sarah Kendall, 'How Australia's Foreign Interference Laws Undermine Press Freedom' (2022) 47(2) *Alternative Law Journal* 124.

13 See below Part II.

14 Ibid.

15 This argument has been made in the counter-terrorism context: see Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, 2010) ch 8.

of speech.[16] Whether Australia's espionage laws effectively capture genuine espionage against the higher education and research sector will not be examined, as this has been considered elsewhere.[17]

In Part II, I provide an overview of the principles of academic freedom. In Part III, I explain Australia's espionage framework and analyse how the laws impact academics who engage in legitimate research and teaching. My analysis finds that, concerningly, the espionage laws may criminalise the work of particular academics and, therefore, undermine academic freedom. In Part IV, I make recommendations for how the laws can be reformed so that genuine espionage against the higher education and research sector is criminalised, while protecting academics who pursue legitimate research and teaching endeavours.

II Academic Freedom

Academic freedom protects a university's function of independently and authoritatively advancing and disseminating knowledge.[18] It is related to, but distinct from, freedom of speech, which is a political freedom that is central to the proper functioning of democratic nations.[19] Because academic freedom protects activities related to university teaching and research (and anyone involved in those activities, including research assistants, PhD students and librarians), it applies in narrower circumstances than freedom of speech.[20] Despite this, scholars have argued that academic freedom is stronger than (and takes primacy over) freedom of speech: that is, academics should have more freedom than other university employees (and citizens generally) to discuss their work and criticise university governance because of their unique role in society.[21] Outside these areas, academics exercise their general right to freedom of speech and are subject to the same limitations as everyone else.[22]

According to scholars, there are two principal justifications for why universities — and academic freedom — are important. First, universities pursue and disseminate knowledge for the public good using independently developed research methods, and academic freedom safeguards their capacity to do so.[23] The research produced by universities benefits society immensely (take, for example, the development of new vaccines), but the advancement of knowledge requires the free inquiry and systematic testing of ideas.[24] Second, academic freedom is vital to a healthy democracy.[25] At the heart of the democratic ideal is the free flow of

---

16 Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) 18–24, 66. For more on how national security laws and policies (specifically those relating to counter-terrorism) have impacted freedom of speech more generally: see Katherine Gelber, *Free Speech after 9/11* (Oxford University Press, 2016).

17 See, eg, Kendall, 'Australia's New Espionage Laws' (n 9).

18 Evans and Stone (n 16) 12, 47, 51. For more on academic freedom, see Barendt (n 15).

19 Evans and Stone (n 16) 47; Barendt (n 15) 17–22. See also *Ridd v James Cook University* (2021) 394 ALR 12, 15 [5] ('*Ridd v JCU*').

20 Evans and Stone (n 16) 56, 63–4.

21 Ibid 12–3.

22 Ibid 13, ch 4.

23 Ibid 48–53.

24 Ibid 48, 52.

25 Ibid 53–4.

information and ideas, which fundamentally rests on the pursuit of truth and knowledge.[26] Not only does academic research produce the knowledge and ideas that are necessary for the rational exchange of information, but the academy trains the next generation to critically analyse, to question and to challenge established orthodoxies — crucial skills for democratic thinking.[27] Erosion of academic freedom, therefore, not only undermines the pursuit of knowledge that benefits society, but also threatens a core value of the democratic tradition.

Despite the central importance of academic freedom to the functioning of democracies and universities, it is not referred to in Australian human rights Acts,[28] nor is it protected in the *Australian Constitution* (unlike other national constitutions, such as Japan,[29] South Africa,[30] Spain[31] and Germany[32]).[33] Australian universities do, however, have a statutory obligation under the *Higher Education Support Act 2003* (Cth) ('*HESA*') to uphold 'freedom of speech and academic freedom'.[34] Prior to 2021, this was an obligation to uphold 'free intellectual inquiry',[35] a term which was often used interchangeably with academic freedom.[36] This statutory obligation has been met by universities in various ways, including by referring to intellectual inquiry and academic freedom in institution-specific legislation, enterprise agreements, university policies, and codes of conduct.[37] The High Court of Australia has found, however, that such protections for intellectual freedom can be curtailed by university codes of conduct and enterprise agreements.[38]

---

26 Ibid; Robert French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, March 2019) 102 ('*French Review*'); Fred D'Agostino and Peter Greste, 'Slippery Beasts: Why Academic Freedom and Media Freedom are so Difficult to Protect' (2021) 63(1) *Australian Universities' Review* 45, 46–7.

27 Evans and Stone (n 16) 53–4; Rob Watts, 'What Crisis of Academic Freedom? Australian Universities after French' (2021) 63(1) *Australian Universities' Review* 8, 15; D'Agostino and Greste (n 26) 47; Barendt (n 15) 50–63, 71.

28 See *Human Rights Act 2004* (ACT) ('*ACT HRA*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Vic HRA*'); *Human Rights Act 2019* (Qld) ('*Qld HRA*').

29 *Constitution of Japan* art 23.

30 *Constitution of the Republic of South Africa Act 1996* (South Africa) art 16(1)(d).

31 *Constitucion Española* [Constitution of Spain] art 20(1)(c).

32 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 5(3). For a comparative analysis of academic freedom, see Barendt (n 15).

33 Academic freedom can also be found in the *International Covenant on Economic, Social and Cultural Rights*, to which Australia is a party: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15.

34 See *Higher Education Support Act 2003* (Cth) s 19-115 ('*HESA*'). See also *Higher Education Standards Framework (Thresholds Standards) 2021* standard 6.1.4.

35 Evans and Stone (n 16) 33–5; see *Higher Education Support Amendment (Freedom of Speech) Act 2021* (Cth) sch 1.

36 *Ridd v JCU* (n 19) 22–3 [29]; Evans and Stone (n 16) 36–7. Although, at times intellectual freedom has been defined to be wider than academic freedom: Evans and Stone (n 16) 35–6; *Ridd v JCU* (n 19) 22–3 [29]; *James Cook University v Ridd* (2020) 278 FCR 566, 2588 [97] ('*JCU v Ridd*'). Additionally, the Federal Court of Australia has insisted that intellectual freedom and academic freedom are distinct: *JCU v Ridd* (n 36) 585 [90]; Evans and Stone (n 16) 36.

37 Evans and Stone (n 16) 37–40. See, eg, *Ridd v JCU* (n 19) 17–19 [11]–[16]; *National Tertiary Education Industry Union v University of Sydney* (2021) 392 ALR 252, 276–81 [104]–[106] ('*Anderson*').

38 See generally *Ridd v JCU* (n 19); *Anderson* (n 37).

In contrast to the nature of the protections for academic freedom, freedom of expression is protected under human rights Acts in Victoria, Queensland and the Australian Capital Territory (where each arm of government is required to act compatibly with the freedom).[39] However, the freedom is not absolute, but rather is subject to 'reasonable limits set by laws that can be demonstrably justified in a free and democratic society'.[40] While a general right to freedom of speech or expression is not protected in the *Australian Constitution*, a related freedom is: the implied freedom of political communication.[41] The implied freedom imposes limits on legislative power to prevent unjustifiable or disproportionate burdens on political communications.[42] Like the freedoms found in Australian human rights Acts, however, the implied freedom can be restricted where there is a legitimate objective for the law and the response is proportionate.[43]

Although the *HESA* now refers to 'freedom of speech and academic freedom' rather than 'free intellectual inquiry'[44] (a change that some scholars argued would better protect academic freedom),[45] these amendments still do not protect encroachments on academic freedom from outside the university (such as where Commonwealth laws criminalise certain research and teaching pursuits).[46] Although it could be argued that these kinds of encroachments would be better protected by including academic freedom in human rights Acts, those Acts suffer from their own limitations,[47] including that not all states and territories currently have such legislation.

As yet, academic freedom has 'no settled definition'.[48] Common elements can, however, be identified, with the scope of academic freedom flowing directly from its justifications.[49] Evans and Stone suggest that academic freedom consists of the freedom to research, the freedom to teach and learn, and institutional freedom.[50] These elements are reflected in the suggested definition of 'academic freedom' in the 2019 *French Review*'s proposed 'Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers':

---

39 *ACT HRA* (n 28) s 16; *Vic HRA* (n 28) s 15; *Qld HRA* (n 28) s 21. Freedom of expression is also protected under the *International Covenant on Civil and Political Rights*, to which Australia is a party: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

40 *ACT HRA* (n 28) s 28(1); *Qld HRA* (n 28) s 13(1). Similarly, see *Vic HRA* (n 28) s 7(2).

41 Derived from *Australian Constitution* ss 7, 24, 64, 128.

42 See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328.

43 Ibid.

44 *HESA* (n 34) s 19-115.

45 Evans and Stone (n 16) 36–7.

46 Indeed, the Australian Government has posed a significant threat to academic freedom in the past: ibid 31.

47 See, eg, Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of NSW Press, 2007); Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the *Victorian Charter of Human Rights and Responsibilities Act 2006*' (2008) 32(2) *Melbourne University Law Review* 422.

48 *French Review* (n 26) 18. See also *JCU v Ridd* (n 36) 588 [97].

49 *French Review* (n 26) 18; Evans and Stone (n 16) 54.

50 Evans and Stone (n 16) 54–6.

> - the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;
> - the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
> - the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
> - the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
> - the freedom of academic staff to participate in professional or representative academic bodies;
> - the freedom of students to participate in student societies and associations; and
> - the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.[51]

This definition of academic freedom (with the exception of 'the freedom of academic staff … to make lawful public comment') has been included in the recently amended *HESA*.[52] The High Court of Australia has also discussed the elements of academic freedom, noting that free inquiry and participation and discussion in university governance are considered to be essential elements.[53] In this article, I use the above *French Review* elements of academic freedom to assess whether, and how, Australia's espionage laws impact on academic freedom.

In addition to considering the elements of academic freedom, the High Court noted the *French Review*'s observation that intellectual freedom is 'a defining characteristic of universities and like institutions'.[54] Due to the 'instrumental and ethical foundations'[55] for the freedom — and its 'long-standing core meaning'[56] — the freedom is 'not qualified by a requirement to afford respect and courtesy in the manner of its exercise'.[57] Despite giving academic freedom legal weight, the Court did emphasise that the freedom could be limited.[58] Evans and Stone have agreed with this, but they suggest that any limits should be minimal because of the

---

51 *French Review* (n 26) 230–1. These elements of academic freedom have also been discussed in, for example, Watts (n 27) 12–13.

52 *HESA* (n 34) sch 1, s 1(1) (definition of 'academic freedom'). This element was not included as it was considered to fit more appropriately within the 'broader societal freedom' of 'freedom of speech': Explanatory Memorandum, Higher Education Support Amendment (Freedom of Speech) Bill 2020 (Cth) 10.

53 *Ridd v JCU* (n 19) 23 [30].

54 Ibid, quoting *French Review* (n 26) 114.

55 *Ridd v JCU* (n 19) 24 [33].

56 Ibid 31 [64].

57 Ibid. See also Evans and Stone (n 16) 59, and *Anderson* (n 37) 315 [250] in the latter of which it was agreed that academic freedom does not include a requirement to be courteous.

58 *Ridd v JCU* (n 19) 23–4 [32]–[33], 24 [35].

importance of academic freedom (compared to the general freedom of speech).[59] They argue, for example, that the freedoms of research and teaching should be limited to research and teaching that draws on disciplinary expertise, respects disciplinary standards, and relates to specialised research.[60] These limitations still give academics wide latitude to conduct research and teaching.

Another appropriate limitation would be to restrict the freedom to teaching and research that is legitimate (that is, not engaged in for the purposes of criminal activity, including espionage). Within the confines of legitimate research and teaching endeavours, however, academics should be free to exercise their academic freedom. If Australia's espionage laws capture legitimate research and teaching activities, they necessarily undermine academic freedom and must be reformed so that the freedom is upheld. In the remainder of this article, I consider the impact of Australia's espionage laws on legitimate research and teaching by academics.

III Australia's Espionage Laws and Their Impact on Academic Teaching and Research

Before engaging in an analysis of Australia's espionage offences and their impact on the legitimate work of academics, I first provide an introduction to and overview of Australia's espionage framework.

In 2018, the Federal Government overhauled the four existing espionage offences and replaced them with a complex scheme of 27 entirely new offences.[61] These consist of 'underlying', 'aggravated' and 'espionage-related' offences, with penalties ranging from 15 years' to life imprisonment. The 2018 espionage scheme also included three defences.

In summary, the underlying offences include: the 'Core Espionage Offence',[62] 'Communication Espionage',[63] 'Classified Information Espionage',[64] 'Espionage on behalf of a Foreign Principal'[65] and 'Trade Secrets Espionage'.[66] Some of these offences have alternative fault elements — either intention or recklessness as to certain national security consequences — creating sub-offences for each underlying offence and, ultimately, a total of nine different underlying offences. Four aggravating circumstances apply to four of these underlying offences, creating 16 aggravated offences.[67] The espionage-related offences include soliciting espionage (the 'Solicitation Offence')[68] and preparing for espionage (the 'Preparatory Offence').[69]

---

59 Evans and Stone (n 16) 12–13.
60 Ibid 54–5.
61 See *Criminal Code* (n 7) divs 91, 92A.
62 Ibid s 91.1.
63 Ibid s 91.2.
64 Ibid s 91.3.
65 Ibid s 91.8.
66 Ibid s 92A.1. For a table summarising these offences and the penalties prescribed by the legislation, see Kendall, 'Australia's New Espionage Laws' (n 9) 143.
67 *Criminal Code* (n 7) s 91.6.
68 Ibid s 91.11.
69 Ibid s 91.12.

All of the espionage offences (with the exception of Trade Secrets Espionage) apply to conduct or results of conduct that occur within or outside Australia.[70] Trade Secrets Espionage applies only to conduct that occurs within Australia or, if the conduct occurs outside Australia: (i) where the result of the conduct occurs in Australia, or (ii) at the time of the offence, the person was an Australian citizen or resident.[71]

In Part III(A)–(E) below, I consider each of the espionage offences and defences and their relevance to academics. My analysis shows that five offences — the Core Espionage Offence, Communication Espionage, Espionage on behalf of a Foreign Principal, the Solicitation Offence and the Preparatory Offence — are of particular concern to academics and could erode academic freedom because they have the capacity to criminalise legitimate research and teaching. Despite this, available defences are inadequate.

A *Underlying Offences*

As described above, nine underlying espionage offences were introduced in 2018. At their core, each of these offences criminalise 'dealing' with 'information or an article' on behalf of, or to communicate to, a 'foreign principal'. Some of the offences also require an intention or recklessness as to certain 'national security' consequences. For some offences, national security also refers to the type of information or articles dealt with. These four key terms — dealing, information or articles, foreign principal, and national security — are central to defining espionage in Australia and largely set the boundaries of the kind of behaviour that is criminalised. There has been no judicial consideration of the terms as yet, given there has only been one recorded espionage case under Australian Federal law and this dealt with the 1914 espionage offence.[72] Therefore, definitions must be sourced from the *Criminal Code* and interpreted using principles of statutory interpretation.[73] In this section, I explain the key terms before considering each of the underlying offences in detail.

'Dealing' with information or an article means collecting, obtaining, making a record, copying, altering, concealing, communicating, publishing and making it available.[74] 'Make available' means: placing it somewhere it can be accessed by another person; giving it to an intermediary to give to a recipient; and describing how to obtain access to it or methods that are likely to facilitate access to it (for example, setting out a URL, password, or name of a newsgroup).[75] More broadly, however, 'deal' also includes merely receiving the information or article, or possessing it.[76]

---

70 Ibid ss 91.7, 91.10, 91.14, 15.4.
71 Ibid ss 92A.2, 15.2.
72 *R v Lappas* (2003) 152 ACTR 7. See Kendall, 'Australia's New Espionage Laws' (n 9) for a discussion of Australia's historical espionage laws.
73 See *Acts Interpretation Act 1901* (Cth).
74 *Criminal Code* (n 7) s 90.1(1) (definition of 'deal').
75 Ibid (definition of 'make available').
76 Ibid (definition of 'deal').

'Information' means 'information of any kind, whether true or false and whether in material form or not' and includes an opinion or report of a conversation.[77] This means that for the purposes of Australia's espionage framework, information includes anything from digital data and physical documents to untrue information about someone's opinion and a misrepresented report of a conversation between two people. 'Article' extends the operation of the espionage framework further to include 'any thing, substance or material'[78] and would include, for example, a sample of a new vaccine or a prototype of new technology. Dealing with information or an article includes dealing with all or part of it or dealing only with the 'substance, effect or description' of it.[79] For simplicity, I refer to 'information' instead of 'information or an article'.

Dealing with information is at the heart of what academics do. We obtain, alter, communicate, publish, and engage in other dealings with information (including expressing our own opinions on research) on a daily basis. This means that by the very nature of our work, academics are vulnerable to being captured by Australia's espionage laws. This makes other elements of the offences central to determining whether a crime has been committed by an academic.

The third key term, 'foreign principal', means a foreign government or authority (including a local government body), foreign political organisation, terrorist organisation, or an entity owned, directed or controlled by any foreign principal.[80] However, it also means a public international organisation or a foreign public enterprise.[81] Foreign public enterprises are companies, bodies or associations that enjoy special legal rights, status, benefits or privileges under the law of a foreign country because of their relationship with the foreign government.[82] The directors or executive committee members must also be accustomed to act according to the directions of the foreign government, or the foreign government must be in a position to exercise control over the company, body or association.[83] Alternatively, for companies alone, the government of the foreign country must hold more than 50% of the company's issued share capital or 50% of its voting power, or be in a position to appoint more than 50% of the board of directors.[84] This essentially means that foreign-owned or controlled entities are foreign principals for the purposes of Australian espionage law, provided they have some connection with a foreign government, authority or political organisation, or meet the requirements of a 'foreign public enterprise'.

Foreign (non-Australian) public universities or research organisations could be foreign principals under Australian espionage law, as 'foreign public enterprises' or entities 'owned, directed or controlled by' a foreign government. Public universities and research organisations are owned or funded by the state, and therefore could also be 'controlled' by the foreign government or be accustomed to

---

77 Ibid (definition of 'information').
78 Ibid (definition of 'article').
79 Ibid s 90.1(2).
80 Ibid ss 90.2, 90.3.
81 Ibid.
82 Ibid s 70.1 (definition of 'foreign public enterprise').
83 Ibid.
84 Ibid.

act according to the directions of the foreign government.[85] Some of these universities and research centres might even enjoy special legal rights, status, benefits or privileges as a result of their relationship with government, such as tax offsets or funding for infrastructure or student scholarships. Foreign public universities and research organisations that could be 'foreign principals' include, for example, China's top two civilian universities, Peking University[86] and Tsinghua University[87] (both funded and supervised by the Ministry of Education, among other state agencies), the United States' National Institutes of Health (part of the United States Department of Health and Human Services)[88] and University of California (funded by state and federal governments),[89] the United Kingdom's University of Manchester (funded by government)[90] and National Nuclear Laboratory (owned by government),[91] India's University of Delhi (funded by government),[92] and New Zealand's Crown Research Institutes (owned by the Crown).[93] I am not claiming here that these entities are engaging in espionage, however — I am merely illustrating the types of entities that may be 'foreign principals' under Australian law.

'National security', the final key term, has been defined to mean defence of the country; protection of the country from activities such as espionage, sabotage, terrorism, and foreign interference; and protection of the country's territory from serious threats.[94] However, the legislation also extends the meaning of national security beyond traditional defence matters to include the 'carrying out of the country's responsibilities to any other country' in relation to national security and 'the country's political, military or economic relations' with another country.[95] This essentially draws a country's international relations within the meaning of national security. The breadth of this definition has been criticised by the Senate Environment and Communications References Committee, who considered in its *Inquiry into Press Freedom Report* that 'the definition of the term "national security" departs from generally accepted interpretations of that term, resulting in the capture of topics

---

85 In the United States see, eg, American Academy of Arts & Sciences, *Public Research Universities: Understanding the Financial Model* (Report, February 2016).

86 Australian Strategic Policy Institute, 'Peking University', *China Defence Universities Tracker* (Web Page, 20 November 2019) <https://unitracker.aspi.org.au/universities/peking-university/>.

87 Australian Strategic Policy Institute, 'Tsinghua University', *China Defence Universities Tracker* (Web Page, 21 November 2019) <https://unitracker.aspi.org.au/universities/tsinghua-university/>.

88 'Who We Are', *National Institutes of Health* (Web Page, 2021) <https://www.nih.gov/about-nih/who-we-are>.

89 'The UC System', *University of California* (Web Page, 2021) <https://www.universityofcalifornia.edu/uc-system>.

90 Research England, '2019-20 Grant Tables for HEIs', *UK Research and Innovation* (Web Page, 2020) <https://re.ukri.org/finance/annual-funding-allocations/2019-20-grant-tables-for-heis/>.

91 'Corporate Information', *National Nuclear Laboratory* (Web Page, 2021) <https://www.nnl.co.uk/about/corporate-information/>.

92 'University and Higher Education', *Department of Higher Education* (Web Page, 19 February 2021) <https://www.education.gov.in/en/university-and-higher-education>.

93 'Crown Research Institutes', *Ministry of Business, Innovation and Employment* (Web Page, 6 January 2021) <https://www.mbie.govt.nz/science-and-technology/science-and-innovation/agencies-policies-and-budget-initiatives/research-organisations/cri/>.

94 *Criminal Code* (n 7) s 90.4.

95 Ibid s 90.4(1)(d)–(e).

that would otherwise be central to public discourse and journalism'.[96] The Committee recommended that the definition be reviewed, with particular consideration of how it could be amended to conform more closely with international law and jurisprudence.[97]

Now that we understand what these four key terms mean, we can look at each of the underlying espionage offences and examine whether they could capture legitimate research and teaching by academics. As a reminder, the underlying offences include: the Core Espionage Offence, Communication Espionage, Classified Information Espionage, Espionage on behalf of a Foreign Principal, and Trade Secrets Espionage. I will now discuss each of these offences in turn.

1 *The Core Espionage Offence*

The Core Espionage Offence criminalises dealing with security classified[98] or national security information that results or will result in the information being communicated or made available to a foreign principal or person acting on its behalf (although it is not necessary that the person have in mind a particular foreign principal).[99] The first sub-offence requires that the person must also intend for their conduct to prejudice Australia's national security or advantage the national security of a foreign country.[100] This sub-offence carries a maximum penalty of life imprisonment.[101] Alternatively, the second sub-offence carries a maximum penalty of 25 years' imprisonment and arises where the person is only reckless as to this prejudice or advantage.[102]

We know that academics deal with information. For the Core Espionage Offence to be enlivened, however, the dealing must result in communication to a foreign principal. The end product of academic research is usually publication in some form. Indeed, the *French Review* defined academic freedom to include the freedom of academics to 'disseminate and publish the results of their research' and to 'contribute to public debate'.[103] Furthermore, grants by the Australian Research Council and other agencies generally require research outputs to be made publicly available. Publication in any form — whether this be a journal article, book, conference paper or other publication — effectively places the research in the public domain to be accessed by anyone, including foreign principals. Even if the publication is intended for a specific audience, publication by its very nature means the work is generally available to the public at large. Where the publication is behind a paywall, it may still result in 'communication to a foreign principal' because all that is needed is payment — by any person — for access.

---

96 Senate Environment and Communications References Committee, Parliament of Australia, *Inquiry into Press Freedom* (Report, May 2021) 118–19 [7.29].

97 Ibid 119 [7.31].

98 Security classified information is information with a security classification of secret or top secret: *Criminal Code* (n 7) s 90.5.

99 Ibid ss 91.1(1), 91.1(4)(a).

100 Ibid s 91.1(1)(c).

101 Ibid s 91.1(1).

102 Ibid s 91.1(2).

103 *French Review* (n 26) 230–1.

However, communication to a foreign principal by academics can occur in ways other than publication too. In its submission to the PJCIS Inquiry, Universities Australia submitted that in 2018, 29% of university students (412,567 students) were international students.[104] Communication to a person acting on behalf of a foreign principal could, in theory, occur through teaching international students in class or providing information to them via online learning platforms, especially as 'information' extends to opinions.[105] I am not suggesting here that all international students are 'acting on behalf of a foreign principal', rather, I seek to demonstrate the breadth of conduct that could amount to communications to a foreign principal.

Such communications could also occur where academics collaborate with researchers employed by a foreign public university. As submitted to the PJCIS Inquiry by Universities Australia, 78% of Australia's most highly cited publications are attributed to international collaborations.[106] Australia's top international partners include China, the United States, the United Kingdom, Germany, the European Union and Canada.[107] As discussed above, foreign public universities may be foreign public enterprises or 'entities owned, directed or controlled by' a foreign principal. If research is shared with collaborators from such universities, this may certainly fall under 'communications to a person acting on behalf of a foreign principal'.

Since academics 'deal with information' daily and this will likely (or is intended to) result in 'communication to a foreign principal', whether or not their conduct satisfies all elements of the Core Espionage Offence therefore depends on two factors. First, the type of information dealt with and, second, the fault element. The Core Espionage Offence only applies when the person deals with security classified or national security information.[108] Academics do not often deal with classified information, but those that do are usually funded by Defence.[109] In circumstances such as these, however, the researchers involved are often aware of their obligations under the research partnership and know not to share their research beyond the bounds of what is contractually permitted.[110] If they do deal with their research contrary to their contract, this would be strong grounds for establishing that the person had the requisite mens rea (or fault element). The fault elements for the Core Espionage Offence will be discussed below.

While most academics do not deal with classified information, the same cannot be said for national security information. As described above, national

---

104 Universities Australia, Submission No 26 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (December 2020) 3.

105 See above n 77 and accompanying text.

106 Universities Australia (n 104) 6.

107 Ibid 7; Group of Eight Australia, Submission No 34 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (18 December 2020) 4.

108 *Criminal Code* (n 7) ss 91.1(1)–(2).

109 See, eg, Universities Australia (n 104) 10; Department of Defence (Cth), Submission No 42 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (December 2020); CQ University, Submission No 3 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (December 2020) 3.

110 See, eg, La Trobe University, Submission No 4 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (December 2020) 2; Western Sydney University, Submission No 9 to PJCIS, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (16 December 2020) 5.

security not only includes defence and intelligence information, but also information on a country's economic and political relations.[111] The definition of national security is so broad that it would extend to all aspects of these areas, from current and historical organisational and governmental policies; national security laws; geopolitics, relations between states and actual or proposed treaties; and misconduct or corruption by defence, intelligence or government employees, through to defence and intelligence strategies, technologies, capabilities and training. This type of information is handled by academics from various disciplines, including political science, international relations, peace and conflict studies, law, criminology, history, geography and science, technology, engineering and mathematics ('STEM'). Any academic whose research involves this kind of information may therefore be at risk of committing the Core Espionage Offence. Whether or not they have in fact committed a criminal offence will, however, depend on proof of the fault element.

As described above, the Core Espionage Offence has two alternative fault elements, essentially creating two sub-offences. For the first sub-offence, the person must have *intended* either to prejudice Australia's national security or to advantage the national security of a foreign country.[112] For the second sub-offence, the person must have been *reckless* as to either of these things.[113] The *Criminal Code* defines intention to mean: the person means to engage in the conduct; they believe a circumstance exists or will exist; or they mean to bring about a result or are aware that it will occur in the ordinary course of events.[114] In contrast, recklessness criminalises a much lower level of personal culpability. A person is reckless if he or she is are aware of a substantial risk that the circumstance exists or that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.[115] Proving that an academic intended to prejudice Australia's national security, or to advantage the national security of another country, may be difficult owing to the relatively high level of personal culpability necessary to establish intention.[116] However, where an academic impermissibly dealt with classified information (a scenario posited above), this certainly may be sufficient to prove they meant for (intended) their actions to prejudice or advantage national security.

As a result of the legislative definitions of 'prejudice' and 'advantage', however, it is possible that an intention to prejudice or advantage national security could be established in other circumstances too. Prejudice and advantage have not been positively defined in the *Criminal Code*, making it unclear exactly what amounts to an intention (or recklessness) as to prejudice or advantage. 'Prejudice' has been defined to mean only that 'embarrassment alone is not sufficient to *prejudice* Australia's national security'[117] while 'conduct will not *advantage* the national security of a foreign country if the conduct will advantage Australia's

---

111 *Criminal Code* (n 7) s 90.4. See above nn 94–6 and accompanying text.
112 Ibid s 91.1(1).
113 Ibid s 91.1(2).
114 Ibid s 5.2.
115 Ibid s 5.4.
116 Ibid s 5.2.
117 Ibid s 90.1(1) (definition of 'prejudice') (emphasis in original).

national security to an equivalent extent'.[118] Prejudice, therefore, would encompass an intention to harm Australia's national security in some way, but may also extend to, for example, an intention to reveal government misconduct or portray Australia in a bad light on the international stage — so long as this is more than mere embarrassment.[119] The definition of advantage is equally perplexing. It could encompass an intention to advantage the national security of a foreign country but only have a neutral effect on Australia. Or, it could arise where the person intended their conduct to advantage Australia's national security to an extent, but not so much that it is equivalent to the foreign country's advantage.

The uncertainty of these terms has implications for the scope of the Core Espionage Offence (as well as other underlying offences which utilise these terms) — the fault elements may be wide enough to capture the legitimate work of academics. For example, it may be sufficient to prove an academic intended to prejudice Australia's national security — and therefore that they committed the Core Espionage Offence — where they engaged in a research project that resulted in criticism of Australian military or intelligence policies or practices, or that catalogued Australian Government misconduct in treaty negotiations or relations with other countries. Since the Core Espionage Offence only requires that the dealings 'will result in communication to a foreign principal',[120] any steps towards publication of this kind of information (and not just the publication itself) could also be a crime: that is, any part of the research process, including merely developing research questions (especially if these are framed to show the Government in a bad light). An intention to advantage another country's national security, on the other hand, could arise where, for example, an Australian academic collaborating with an academic from the University of Delhi publishes research on new technology that has a defence application, where Australia already has similar (but not quite as good) technology in use, but India does not have that technology at all. In this scenario, as foreign public universities can be foreign principals, even just communications with the academic's Indian counterpart about the project (prior to publication) could amount to the Core Espionage Offence.

The alternative fault element for the Core Espionage Offence — recklessness as to prejudice or advantage — will be easier to prove than intention and could significantly broaden the offence's scope. Where academics research topics that are clearly of a sensitive nature, such as dual-use technologies or projects, policies or strategies for national security organisations and/or national defence, this may easily be enough to show there is a 'substantial risk' of prejudice or advantage to national security. So, an academic working on the development of a new supersonic missile who shares information about the project on social media would certainly have been

---

118 Ibid (definition of 'advantage') (emphasis in original).

119 Arguably, Witness K's revelations about government misconduct during treaty negotiations would have satisfied this element. Witness K revealed to his security cleared barrister, Bernard Collaery, secret information that Australian Secret Intelligence Service agents had bugged the Timor-Leste government offices during oil and gas treaty negotiations: see, eg, Christopher Knaus, 'Witness K and the "Outrageous" Spy Scandal that Failed to Shame Australia' *The Guardian* (online, 10 August 2019) <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>.

120 *Criminal Code* (n 7) s 91.1(d).

reckless (and have committed the Core Espionage Offence). But so too might an academic who publishes an article on (or begins research into) the approach of the Australian Security Intelligence Organisation ('ASIO') to monitoring suspected terrorists or spies. Where the research involves less sensitive information, it may still be possible to prove recklessness because of the breadth of 'national security'. For example, an academic may be aware that there is a risk that a project investigating Australia's relations with Indonesia will benefit Indonesia's economy or military, or that research into Australian national security laws will result in criticism of those laws. In each scenario, the academics involved may well have broken the Core Espionage Offence. In all the scenarios described so far, the academics might even have committed a crime just by talking about their research in class (if international students were present) or by communicating with colleagues if they were collaborating with a foreign public university.

Ultimately, the Core Espionage Offence poses a real risk to academics working on projects involving sensitive or classified information, or anything related to traditional conceptions of national security, as well as academics working on international relations projects (especially where this could reveal something bad about Australia (beyond embarrassment) or benefit another country). What is important is not how the project is carried out (that is, the methods used), but the topic investigated and how it has been framed. By criminalising the work of these academics, important research may be avoided or stifled, contributing to the erosion of academic freedom.

2 *Communication Espionage*

Like the Core Espionage Offence, Communication Espionage criminalises dealings with information where this results or will result in communication to a foreign principal.[121] However, it places no limit on the type of information dealt with — the information may be of any kind — so it applies to a broader range of conduct. It is therefore limited only by its fault element. This makes Communication Espionage a greater threat to academics — and academic freedom — than the Core Espionage Offence.

There are two fault elements for Communication Espionage, creating two sub-offences: intention to prejudice Australia's national security (which carries a maximum penalty of 25 years' imprisonment),[122] or recklessness as to this (which carries a maximum penalty of 20 years' imprisonment).[123] Unlike the Core Espionage Offence, there is no alternative fault element prescribing an intention (or recklessness) as to advantaging the national security of a foreign country. As described above, each of the two fault elements has the potential to be proved in relation to the work of certain academics — those most at risk are academics working with classified, sensitive, national security or international relations information (especially where their research critiques Australia). However, because the offence is not restricted to classified or national security information, it could

---

121 Ibid s 91.2.
122 Ibid s 91.2(1).
123 Ibid s 91.2(2).

apply to any academic who is involved in a project that might prejudice Australia's national security (as broadly as it has been defined), even if they have only handled innocuous (non-classified/national security) information.

3 *Classified Information Espionage*

In contrast to Communication Espionage, Classified Information Espionage applies only to dealings with classified information.[124] In addition to the requirement that the person's conduct results or will result in communication of the information to a foreign principal, the person must deal with the information for the primary purpose of communication to a foreign principal.[125] There is no further fault element in relation to prejudice or advantage to national security.

In essence, the primary purpose of the job of academics is to generate and disseminate information. We do not just research — an important aspect of academic work is publication or dissemination in some way of the results of our research to the public and relevant stakeholders. As foreign principals are part of the wider public, the very nature of our work means it could be argued that academics have a primary purpose of communication to a foreign principal at every stage of the research process.

As such, Classified Information Espionage is limited by one factor alone — the type of information dealt with (classified information).[126] As discussed previously, not all academics' research involves classified information, but some does. These academics should already be well aware of their obligations regarding the handling of that information, including that they could commit an offence if they share details of their research in an unauthorised manner. As a result, it is unlikely that they will commit Classified Information Espionage inadvertently. This offence, therefore, poses less of a risk to academics, but those academics that do work with classified information should be aware that any unauthorised dealings may certainly constitute Classified Information Espionage, making them liable to up to 20 years' imprisonment.

4 *Espionage on behalf of a Foreign Principal*

Espionage on behalf of a Foreign Principal is a tiered collection of sub-offences whose maximum penalties are 15 years', 20 years' and 25 years' imprisonment.[127] For all sub-offences, the person must deal with information and this must be on behalf of, in collaboration with, or directed, funded or supervised by a foreign principal.[128] The person must also be reckless as to whether their conduct involves the commission of an espionage offence (by themselves or any other person).[129] This

---

124 Ibid s 91.3.
125 Ibid.
126 Ibid s 91.3(1)(c).
127 Ibid s 91.8.
128 Ibid ss 91.8(1), (2), (3).
129 Ibid.

is all that is required to prove the least serious of these sub-offences.[130] If the person is reckless as to whether their conduct will prejudice Australia's national security or advantage the national security of a foreign country[131] or, more seriously, they intend one of these national security consequences,[132] they will be liable to the higher maximum penalties.

The Espionage on behalf of a Foreign Principal offences are directed towards activities engaged in on behalf of a foreign principal, rather than dealings that result in communication to a foreign principal. The offences are therefore most applicable to academics collaborating with, or working for, foreign public universities or research organisations (where these constitute foreign public enterprises or entities 'owned, directed or controlled' by a foreign principal).[133]

Whether or not an academic has committed Espionage on behalf of a Foreign Principal depends on one, or potentially two, fault elements (reflecting which of the three sub-offences is being prosecuted). All three sub-offences require the person to have been reckless as to whether an espionage offence was being committed.[134] Thus, whether this element is established depends on proof that the person was aware of a substantial risk that they (or another person) would be committing espionage and acted despite it being unjustifiable to have done so.[135] This requires consideration of the circumstances of the case, including the type of information dealt with (for example, classified, sensitive or innocuous) and the organisation the person (or their collaborator) works for (for example, is it directed or controlled by a country that poses a threat to Australia or is an ally). If the academic was researching sensitive matters relating to Australia's national security policies or working on development of Defence capabilities and they were collaborating with someone working for China's Peking University, for example,[136] this may be sufficient to prove the person was being reckless as to the commission of an espionage offence. This contrasts with collaborative research into, for example, Australia's relations with New Zealand by academics from each of these countries, as these academics are unlikely to be aware that this would pose a risk of committing an espionage offence.

For the sub-offence carrying a maximum penalty of 15 years' imprisonment, this is all that needs to be established.[137] The other two sub-offences (carrying a maximum penalty of 25 and 20 years' imprisonment) have an additional fault element: the person must either intend to[138] or be recklessness as to whether they would prejudice Australia's national security or advantage the national security of a

---

130 Ibid s 91.8(3). This offence has a maximum penalty of 15 years' imprisonment.
131 Ibid s 91.8(2). This offence has a maximum penalty of 20 years' imprisonment.
132 Ibid s 91.8(1). This offence has a maximum penalty of 25 years' imprisonment.
133 See above nn 80–93 and accompanying text.
134 *Criminal Code* (n 7) ss 91.8(1)(c), 91.8(2)(c), 91.8(3)(b).
135 Ibid s 5.4.
136 While Australian security agencies have declined to name countries that pose a threat to Australia, many people think that China is one of the biggest threats: see, eg, Paul Maddison, 'Is China or Climate Change the Bigger Threat to Australia?', *The Strategist* (online, 2 December 2021) <https://www.aspistrategist.org.au/is-china-or-climate-change-the-bigger-threat-to-australia/>.
137 *Criminal Code* (n 7) s 91.8(3).
138 Ibid s 91.8(1)(b).

foreign country.[139] As discussed in relation to the Core Espionage Offence, both intention and recklessness could be proved in the context of academic research.[140] These two sub-offences are more likely to capture the conduct of academics researching sensitive, national security or international relations topics (particularly where this could show Australia in a bad light). So, the offences could arise where a project resulting in criticism of Australian intelligence alliances is engaged in by an Australian academic and their Chinese academic collaborator — as could any of the scenarios discussed so far where they involve a collaboration between an Australian academic and a foreign public university or research organisation (or employment by such organisations).

The Espionage on behalf of a Foreign Principal offences therefore create a real risk of criminalising the work of some academics who collaborate with or work for foreign public universities or research organisations. This may lead to the chilling of such international research collaborations and, ultimately, the stifling of academic freedom globally.

5 *Trade Secrets Espionage*

Trade Secrets Espionage carries a maximum term of imprisonment of up to 15 years[141] and criminalises the dishonest dealing with trade secrets on behalf of, in collaboration with, or where directed, funded or supervised by a foreign government principal.[142] While 'foreign principal' is defined to include 'foreign government principal', the latter term is slightly narrower than the former, encompassing only foreign governments and their authorities, foreign public enterprises, and entities owned, directed or controlled by a foreign government principal.[143] Despite this narrower application, like Espionage on behalf of a Foreign Principal, the offence still applies to academics collaborating with or working for foreign public universities or research organisations.

As with the Core Espionage Offence and Classified Information Espionage, Trade Secrets Espionage applies only to a certain kind of information: trade secrets.[144] Trade secrets arise where:

> (i) the information is not generally known in trade or business, or in the particular trade or business concerned;
>
> (ii) the information has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if it were communicated;
>
> (iii) the owner of the information has made reasonable efforts in the circumstances to prevent the information becoming generally known…[145]

---

139 Ibid s 91.8(2)(b).
140 See above nn 112–20 and accompanying text.
141 *Criminal Code* (n 7) s 92A.1.
142 Ibid s 92A.1.
143 Ibid s 90.3. See also above nn 80–1 and accompanying text.
144 Ibid s 92A.1.
145 Ibid s 92A.1(1)(b).

This could include, for example, the development of a new vaccine or quantum technology. It is not necessary for the trade secrets to be classified or relate to national security, which makes the offence applicable to a wider scope of information — and, therefore, to more academics — than some of the other underlying espionage offences.

To be Trade Secrets Espionage, however, the trade secrets must have been dishonestly received, obtained, taken, copied, duplicated, sold, bought or disclosed.[146] While the offence has no fault element as to national security consequences, this 'dishonest' element aims to ensure only improper conduct falls within the offence, and legitimate conduct is protected. The offence is therefore most likely to capture genuine espionage and does not pose much of a risk to academics (despite applying to a wider scope of research).

B *Aggravated Offences*

Aggravated espionage offences operate to increase the maximum penalty available where certain underlying offences are committed under circumstances of aggravation. The aggravations only apply to the Core Espionage Offence (where the fault element is recklessness), Communication Espionage (for fault elements of intention and recklessness) and Classified Information Espionage.[147] Aggravated circumstances include: dealing with information from a foreign intelligence agency; dealing with five or more security classified records; altering a record to remove or conceal its security classification; and at the time the information was dealt with, the person held an Australian Government security clearance.[148] Where these circumstances are made out, the maximum penalty available is increased from 20 years' to 25 years' imprisonment, or from 25 years' to life imprisonment.[149]

Of the four aggravations, only two are likely to apply to academics: first, the person dealt with five or more security classified records, and second, at the time they dealt with the information, the person held an Australian Government security clearance.[150] These aggravated circumstances will only apply to those academics working on security classified research. As already discussed, these researchers should be well aware of their obligations in relation to their research, making it less likely that they would inadvertently commit an espionage offence. If these academics do handle information contrary to what is permitted, however, this will be strong grounds for proving the requisite fault element of the Core Espionage Offence or Classified Information Espionage. Therefore, these academics should be warned that if they do mishandle information, not only are they at great risk of being prosecuted for an espionage offence, but they might also have committed an aggravated offence if they mishandled five or more classified records or held an Australian Government security clearance — making them liable to much higher maximum penalties.

---

146 Ibid s 92A.1(1)(a).
147 Ibid s 91.6(1)(a).
148 Ibid s 91.6(1)(b).
149 Ibid s 91.6(1).
150 Ibid ss 91.6(1)(b)(iii), 91.6(1)(b)(v).

C *Espionage-Related Offences*

The 2018 espionage reforms included, for the first time, two espionage-related offences: the Solicitation Offence and the Preparatory Offence. Both significantly widen the scope of conduct criminalised as espionage and carry maximum penalties of 15 years in prison.[151] Also, they both can be committed where an espionage offence is never committed or cannot be committed, and even if the person does not have in mind a particular dealing.[152]

1 *The Solicitation Offence*

The Solicitation Offence criminalises conduct engaged in with the intention of soliciting or procuring, or making it easier to solicit or procure, another person ('the target') to commit espionage.[153] It therefore focuses on the conduct of the person soliciting, not the person actually (or potentially) committing espionage. The conduct must, however, be done on behalf of, in collaboration with, or be directed, funded or supervised by a foreign principal or person acting on its behalf.[154] Therefore, like Espionage on behalf of a Foreign Principal and Trade Secrets Espionage, the offence would only apply to academics who collaborate with or are employed by foreign public universities or research organisations.

Despite this, the Solicitation Offence captures *any* conduct in relation to the target.[155] This makes the physical element of the offence exceptionally broad — it could apply to any aspect of the work of academics (including preliminary research, discussions with colleagues, and data analysis). It also means that the fault element (an intention to solicit or procure) is the crucial limiting factor when it comes to whether the offence captures academics, especially as it is not necessary for the target to actually or potentially be able to commit espionage.[156] Whether or not this intention can be proved turns on a range of contextual factors, including: the research area (does it involve classified or sensitive Australian information?); the foreign public university or research organisation involved (is it controlled/funded by a country that is considered a security threat to Australia?); and the type of information that the target (here, a potential or actual collaborator) has access to or researches (again, is this classified or sensitive Australian information?). For example, this offence could be engaged where an academic employed by Tsinghua University seeks to collaborate with or otherwise reaches out to an Australian researcher working on a project involving defence technologies, intelligence policies or Australia's economic relations with other countries (or vice versa).

Due to the breadth of conduct captured by the Solicitation Offence, the fault element is the only factor standing between the criminalisation — or protection — of genuine research collaborations on, and inquiries into, projects that may involve

---

151 Ibid ss 91.11(1), 91.12(1).
152 Ibid ss 91.11(3), 91.12(3).
153 Ibid ss 91.11(1)(a)–(b).
154 Ibid s 91.11(1)(c).
155 Ibid s 91.11(1).
156 Ibid s 91.11(3).

information on Australia's national security or international relations. In some cases, the circumstances of the collaboration may suggest that the academic/s seeking the collaboration had the requisite intention, enabling police to lay charges. Academics working for foreign public universities or research organisations must therefore exercise great caution when seeking to collaborate or work with academics who are working on Australian national security-related projects as they may find that their actions — from researching potential collaborators to drafting co-authored articles for publication — contravene the Solicitation Offence. Of all of Australia's espionage offences, the Solicitation Offence has the greatest potential to chill international research collaborations, contributing to the erosion of academic freedom in Australia and around the world.

2 *The Preparatory Offence*

The second espionage-related offence, the Preparatory Offence, is the most far-reaching of all of Australia's espionage laws. It makes it a crime for a person to engage in any conduct with the intention of preparing for, or planning, an espionage offence.[157] This offence effectively criminalises the earliest stages of a potential crime[158] — any 'preparations' (for example, Google searches, purchasing technology or telephoning a person) — when an espionage offence may never actually be committed or the conduct may ultimately have an innocent explanation.[159] The offence closely resembles the 'catch-all'[160] 'preparing for a terrorist act' offence found in s 101.6 of the *Criminal Code*, which has regularly been utilised in terrorism prosecutions.[161]

Like the Solicitation Offence, the Preparatory Offence criminalises *any* conduct.[162] The only limitation to this offence is the fault element — an intention to prepare for or plan an espionage offence.[163] The physical element of this offence ('conduct') is so broad that it could capture almost every aspect of the work of academics, from conducting preliminary research into potential projects, communicating with potential collaborators, and developing research questions, to collecting and analysing data, and drafting publications. Of course, engaging in the

---

157 Ibid ss 91.12(1)(a)–(b).

158 In the terrorism context see, eg, Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth, 2015) 31–4; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136, 1154; Edwina MacDonald and George Williams, 'Combatting Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 61(1) *Griffith Law Review* 27, 34.

159 *Criminal Code* (n 7) s 91.12(3).

160 Lynch, McGarrity and Williams (n 158) 29.

161 See, eg, Jessie Blackbourn and Nicola McGarrity, 'Prosecutions', *Australian National Security Law* (Web Page, 8 February 2017) <https://ausnatsec.wordpress.com/prosecutions/>; Williams (n 158) 1153. For more on the preparatory terrorism offence see Tamara Tulich, 'A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law' (2012) 21(1) *Griffith Law* Review 209; Tamara Tulich, 'Prevention and Pre-Emption in Australia's Domestic Anti-Terrorism Legislation' (2012) 1(1) *International Journal for Crime and Justice* 52. For a comparison of the preparatory terrorism and preparatory espionage offences, see Kendall, 'Australia's New Espionage Laws' (n 9) 153–6.

162 *Criminal Code* (n 7) s 91.12(1).

163 Ibid ss 91.12(1)(b), (3).

physical element alone will not be a criminal offence — there must be proof of intention. However, the Preparatory Offence is clearly broad, putting the work of academics at risk of being criminalised in the absence of added safeguards.

While 'intention' is meant to set a high bar for proving the fault element attached to this offence,[164] the type of research some academics do means that it may not be difficult to point to circumstances that could suggest the person had the requisite intention. These circumstances include: the area or topic that they research (intention is more likely to be proved where they research an area related to Australia's 'national security', as it is broadly defined); the tone of their research (for example, do they criticise the Australian Government or show Australia in a bad light?); and who they have had contact with (for example, have they contacted someone from a foreign public university (especially one located in a country which is not an Australian ally), or has a foreign researcher sought out an Australian working on a national security project?). An intention to prepare for espionage could be shown, for example, where an Australian academic plans to begin a project analysing suspect surveillance practices by ASIO and the Australian Signals Directorate. In this scenario, the Preparatory Offence could be engaged where the academic conducts preliminary research into the topic, even if they ultimately choose not to proceed with the project. The Preparatory Offence could similarly capture a foreign academic who takes any step towards collaborating with an Australian researcher on a project investigating practices of the Five Eyes Intelligence Alliance.[165]

In essence, the Preparatory Offence could capture the conduct of academics and researchers, like conversations or Google searches, far before commission of any act actually constituting espionage. Although the offence is useful for giving police the power to intervene before genuine espionage is committed, in the higher education sector it may stifle the freedom of academics to pursue what may be important intellectual inquiries.

3 *General Inchoate Liability and the Espionage-Related Offences*

The espionage-related offences are arguably the most far-reaching of Australia's espionage laws. However, the breadth of these laws is extended even further through application of general inchoate liability. In addition to substantive criminal offences, the *Criminal Code* contains inchoate liability provisions that extend criminal responsibility beyond the actual commission of a crime (therefore, they are named 'pre-crimes'[166]) — much like the espionage-related offences themselves. These provisions include: attempt;[167] aiding, abetting, counselling and procuring;[168] joint

---

[164] Ibid s 5.2.

[165] This alliance — forged through the UKUSA Agreement — requires Australia, the United Kingdom, the United States, Canada and New Zealand to share intelligence information: see, eg, Andrew O'Neil, 'Australia and the "Five Eyes" Intelligence Network: The Perils of an Asymmetric Alliance' (2017) 71(5) *Australian Journal of International Affairs* 529.

[166] See generally Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) ch 5.

[167] *Criminal Code* (n 7) s 11.1.

[168] Ibid s 11.2.

commission;[169] commission by proxy;[170] incitement;[171] and conspiracy.[172] Where found guilty of one of these inchoate offences (except incitement), the person is liable to the same punishment as if they had committed the actual offence (in the context of the espionage-related offences, 15 years' imprisonment).[173]

Each of these inchoate provisions (except attempt) applies to the Solicitation and Preparatory Offences.[174] This creates offences that are another step removed from the commission of a substantive crime (so they have been termed 'pre-pre-crimes'[175]). These kinds of offences are both complex and exceptionally broad. For example, it could be an offence to procure or incite someone to solicit someone else to commit espionage. This would criminalise conduct that occurs at least two stages prior to the commission of a possible espionage offence, and proof of such an offence would involve complex layering of different physical and fault elements.

Of the inchoate liability provisions, the attachment of conspiracy to the Solicitation and Preparatory Offences is most concerning as it has the capacity to criminalise the very early stages of a potential research project or collaboration.[176] Conspiracy arises where two or more people enter into an agreement, intending to commit an offence, and at least one person commits an overt act pursuant to the agreement.[177] Like the espionage-related offences, conspiracy can arise even where committing the offence is impossible.[178] It could effectively criminalise mere 'talk', where a precise plan has not yet been developed or attempted and the people involved never go on to commit an offence.[179] While conspiracy offences are useful because they give law enforcement the power to intervene far before a serious crime has been committed, they can be problematic where the substantive offence/s to which they attach are overly broad. This is because such offences criminalise agreements to engage in conduct that arguably should not be a criminal offence in the first place.

For example, two academics may have conspired to prepare for espionage if they discussed a potential research project on Australian military war crimes, even if they decided not to pursue the project. Conspiracy to solicit espionage may arise where those academics suggest reaching out to an expert on Australian military affairs, where one or both of the academics work for a foreign public university. In each of these scenarios, the academics involved could face up to 15 years in prison for engaging in routine research activities.[180] These offences may seem far-fetched,

---

169 Ibid s 11.2A.
170 Ibid s 11.3.
171 Ibid s 11.4.
172 Ibid s 11.5.
173 Ibid ss 11.1(1), 11.2(1), 11.2A(1), 11.3(1), 11.5(1). For incitement, the person is liable to up to 10 years' imprisonment: ibid s 11.4.
174 Ibid ss 91.11(4), 91.12(2).
175 See generally Ashworth and Zedner (n 166) ch 5; Williams (n 158) 1155.
176 In the terrorism context, see Lynch, McGarrity and Williams (n 158) 39.
177 *Criminal Code* (n 7) s 11.5(2).
178 Ibid s 11.5(3).
179 Lynch, McGarrity and Williams (n 158) 39.
180 *Criminal Code* (n 7) s 91.12(1).

but conspiracy to prepare has been used frequently in the terrorism context and been responsible for prison sentences of up to 28 years.[181]

Pre-pre-crimes not only create complex derivative offences, but significantly extend the criminal law beyond its traditional bounds, criminalising conduct that may only have the potential to cause harm in some other way or that is, in itself, harmless (such as the everyday work of academics).[182] While indirect harms can be legitimate targets for the criminal law, the scope of these espionage-related offences takes the espionage pre-pre-crimes far beyond other legitimate examples (such as conspiring to commit a terrorist act[183]). As a result, they are likely to undermine, not uphold or preserve, the constitutionally prescribed system of democratic government, including by eroding academic freedom.

D *Defences*

Three defences were included in Australia's 2018 espionage reforms, but not all apply to every espionage offence (and none apply to Trade Secrets Espionage — although this is not so problematic in the present context as this offence is less likely to apply to academics). The first defence — 'Lawful Dealing' — arises where the person dealt with the information according to a Commonwealth law or agreement, or in their capacity as a public official.[184] However, it is unlikely to arise in circumstances where academics have been caught by the espionage offences. While it might be relevant where an academic working on a classified project handled the information according to the terms of their contract, this conduct, in itself, would not be sufficient to trigger any of the espionage offences.

The second defence — 'Authorised Prior Publication' — protects persons who dealt with information that was already communicated to the public with the authority of the Commonwealth.[185] It applies to all offences except Trade Secrets Espionage and the espionage-related offences. This defence might be relevant where academics' research involves national security information provided to the public via government sources (such as ASIO's Annual Threat Assessment or the Australian Federal Police's Annual Report). Academics do not always rely on government-sourced information, however. Indeed, an important aspect of their job can be gathering research from independent sources, such as the media and relevant stakeholders. In these circumstances, even though the information might have been made public, if it was not authorised by the Commonwealth then the defence cannot apply.

---

181 Lynch, Williams and McGarrity (n 158) 94–7; Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34(2) *Criminal Law Journal* 92, 125–6.

182 See, eg, McGarrity (n 181) 114; Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 214, 216; Jude McCulloch, 'Human Rights and Terror Laws' (2015) 128 *Precedent* 26, 28–9; Daniel Ohana, 'Responding to Acts Preparatory to the Commission of a Crime: Criminalization or Prevention?' (2006) 25(2) *Criminal Justice Ethics* 23, 28.

183 *Criminal Code* (n 7) ss 101.6(1), 11.5.

184 Ibid ss 91.4(1), 91.9(1), 91.13.

185 Ibis ss 91.4(2), 91.9(2).

The third defence, while the broadest of available defences, has limited application. 'Unauthorised Prior Publication' applies only to Classified Information Espionage and the Core Espionage Offence (where the prosecution relies on the fault element of advantage to the national security of a foreign country).[186] The defence arises where the information was already communicated to the public — so might be relevant where the academic re-published information that was already in the public domain.[187] It does not, however, apply where the person obtained the information as a result of them being engaged to work for the Commonwealth (so would rule out any academics working with or for government departments), or where they were involved in the prior publication.[188]

For the defence to arise, it is also necessary that the person had reasonable grounds for believing that dealing with the information would not prejudice Australia's national security, having regard to the nature, extent and place of prior publication.[189] Whether or not this can be proved may turn on the nature of the information itself (for example, whether it is classified, sensitive, related to international relations, or innocuous) and where it was initially published. If classified information revealing Australian military war crimes was published on national media,[190] further re-publication of this information in an academic journal article may not reasonably prejudice Australia's national security, given any prejudice would have already occurred. In contrast, publication of such information in a leading Australian political science journal — where it was originally published on a blog with a small readership — may demonstrate an unreasonable belief with respect to further prejudice.

While the Authorised Prior Publication and Unauthorised Prior Publication defences may protect some academics, they only apply to selected espionage offences — neither defence applies to the Solicitation and Preparatory Offences, while only Authorised Prior Publication (which is limited in scope) applies to Communication Espionage, Espionage on behalf of a Foreign Principal and the Core Espionage Offence (for the fault element of prejudice to Australia's national security). Furthermore, there is no defence for academics that use research that was not previously published, such as data from interviews or surveys — yet this kind of research is frequently conducted. Ultimately, therefore, the defence framework inadequately protects academics, leaving them vulnerable to prosecution for pursuing academic endeavours that may be of great benefit to Australian society and beyond.

---

186 Ibid s 91.4(3).

187 Ibid.

188 Ibid.

189 Ibid.

190 This occurred in 2017 when investigative journalists Dan Oakes and Sam Clark published 'The Afghan Files', a report based on leaked classified information that alleged that members of the Australian Defence Force had committed severe human rights violations in Afghanistan: see Dan Oakes and Sam Clark, 'The Afghan Files', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?pfmredir=sm&nw=0>. These allegations have since been investigated and substantiated: see Paul Brereton, *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (Report, 10 November 2020).

E *Attorney-General's Consent*

It is worth noting here that proceedings for committing a person for trial for an espionage offence cannot be commenced without the Federal Attorney-General's consent.[191] This requirement is intended to act as a safeguard against prosecutions of non-genuine espionage. Indeed, Director-General of ASIO, Mike Burgess, has stated that 'we do not investigate journalists for their journalism, academics for their research or politicians for their politics'.[192] While the consent provision does provide an additional layer of protection for academics, it also raises a number of serious concerns. Most notably, the Government is essentially asking us to trust that it will not give its consent when legitimate conduct is concerned. If the laws capture such conduct, but the Government insists that it will not be prosecuted, then what is the point of having such over-expansive legislation? It is not hard to imagine that the Government might want to retain the wide-reaching laws just in case there ever comes a time when it thinks it would be appropriate to prosecute an academic (or other person engaged in legitimate activities, such as journalists). Even if this is not the case, the current Government cannot speak for future governments — there could be a time when a future Attorney-General consents to the prosecution of an academic for pursuing research simply because the Government does not want that research pursued.

This raises another problematic aspect of the consent provisions — they cannot help but politicise the prosecutorial process. Indeed, this was something that arguably occurred in the prosecution of Bernard Collaery and Witness K.[193] The Commonwealth Director of Public Prosecutions requested the consent of Attorney-General George Brandis to prosecute Collaery and Witness K in 2015.[194] This consent was not given until 2017, after Christian Porter was sworn in as Attorney-General.[195]

Furthermore, even though the Attorney-General's consent is needed to commit a person to trial, the *Criminal Code* still permits the person to be arrested and charged, and for a search warrant to be executed, without the Attorney-General's consent.[196] This in itself, as well as the uncertainty over whether the Attorney-General will in fact consent to prosecutions, may deter some academics from pursuing certain intellectual inquiries (like those that might result in criticism of the Government), chilling research into these areas and, ultimately, eroding academic freedom.

---

191 *Criminal Code* (n 7) s 93.1(1).

192 Mike Burgess, 'Director-General's Annual Threat Assessment', *ASIO* (Transcript, 17 March 2021) <https://www.asio.gov.au/resources/speeches-and-statements/director-generals-annual-threat-assessment-2021>.

193 See above n 119.

194 See Steve Cannane, 'Government Sat on Witness K Prosecution for Years Despite Advice', *ABC News* (online, 6 October 2018) <https://www.abc.net.au/news/2018-10-06/government-sat-on-witness-k-prosecution-for-years-despite-advice/10341994>.

195 Ibid.

196 *Criminal Code* (n 7) s 93.1(2).

IV Recommendations for Reform: How Can Academic Freedom Be Protected?

Academic freedom is crucial to the functioning of universities and democratic societies, and central to the production of knowledge and ideas for the public good.[197] The analysis in Part III demonstrates that Australia's espionage offences have the potential to significantly impinge on academic freedom (especially the freedom to teach, discuss, research, disseminate and publish research, engage in intellectual inquiry, contribute to public debate, and even express opinions), yet the framework does not include adequate defences for academics.

In coming to this conclusion, I do not disregard the importance of criminalising espionage. Offences for espionage are a crucial mechanism by which to punish and/or deter those who seek to harm, or gain a benefit over, Australia, including those who seek to do so by stealing valuable research. However, in creating espionage offences, as a nation we must be mindful of how they could apply to scenarios outside genuine espionage, and the consequences of them doing so. The criminalisation of certain research and teaching pursuits creates entire fields that academics are not legally free to pursue, even though such activities may contribute significantly to Australian society. This inherently has the potential to erode academic freedom. While no academic has yet been prosecuted for espionage in Australia,[198] the criminalisation of legitimate research and teaching (and therefore the granting of powers to police to arrest and charge, and to execute search warrants against academics) may certainly be chilling research into criminalised areas. Indeed, it has been argued that 'the mere existence of broad terrorism laws has a chilling effect' on academic freedom.[199] This may have widespread consequences, not just for the higher education and research sector, but also for Australia's democracy and the rule of law.

Therefore, the criminalisation of legitimate research and teaching — especially as a national security offence — is not reasonable or proportionate. The laws criminalise research areas that may be of importance to democratic society, yet penalties have the potential to be severe (depending on the nature of the offending) and the connection between the scope of conduct criminalised and any serious, tangible impact on national security may only be remote. In light of this, it is worth considering whether the espionage provisions could be read down (applying the principle of legality) or invalidated (as incompatible with the implied constitutional freedom of political communication) to protect academic freedom. This discussion will only be brief as these are complicated areas of law and an in-depth consideration of these issues is beyond the scope of this article.

The principle of legality is a common law interpretive technique that broadly operates to determine the legal meaning of statutory provisions by presuming that Parliament does not intend to interfere with fundamental common law rights,

---

197 See above Part II.

198 There has only been one reported prosecution under Australia's espionage laws since the laws were first introduced in 1914 and that was of a government intelligence analyst: see *R v Lappas* (n 72).

199 Barendt (n 15) 248.

freedoms and principles.[200] The principle can be relevant to statutory interpretation in two ways. First, when the ordinary construction of a provision engages a fundamental common law right (such that it is read down to comply with the right) and/or, second, when there is ambiguity in the statute (such that the ambiguity is resolved in favour of the protection of the right).[201] While the principle of legality was a dominant principle of statutory interpretation under the French High Court,[202] the current Kiefel High Court has tempered the strictness with which it is applied so it may be less likely to assist if the meaning of the espionage laws were to become an issue before the courts.[203]

Furthermore, there may not be sufficient ambiguity in the espionage laws for the principle of legality to become applicable, and there are also real doubts around whether academic freedom amounts to a 'fundamental common law right or freedom'. As yet, there has been no authoritative statement on which common law rights and principles are fundamental,[204] but rather this is something that is 'ultimately a matter of judicial choice'.[205] While the High Court recently gave legal weight to academic freedom (in the case of *Ridd v James Cook University*),[206] there was nothing in that case to suggest that the court considered the freedom to be fundamental. As such, it is unlikely that the courts will be able to use the principle of legality to read down the espionage laws so that they comply with academic freedom.

This contrasts with other freedoms, such as the implied constitutional freedom of political communication (which is derived from the *Australian Constitution*, but is also considered to be a fundamental common law freedom).[207] In constitutional cases, the principle of legality can be applied to determine the meaning of statutes by reading them down to ensure their compliance with constitutional principles.[208] While this could ultimately avoid the need to consider issues of constitutional compliance, it may not be sufficient to secure validity.[209]

There may be times when academic research and teaching (amounting to an espionage offence) falls within the scope of 'political communication',[210] given the espionage offences primarily target national security and international relations information. In such circumstances, there is a possibility that the constitutional

---

200 See, eg, Dan Meagher, 'On the Wane? The Principle of Legality in the High Court of Australia' (2021) 32(1) *Public Law Review* 61, 64 ('On the Wane?'); Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *Melbourne University Law Review* 401, 401, 404–5 ('The French Court'). See also Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329 ('The Principle of Legality').

201 Chen, 'The Principle of Legality' (n 200) 340–2.

202 See Chen, 'The French Court' (n 200).

203 See Meagher, 'On the Wane?' (n 200).

204 Chen, 'The Principle of Legality' (n 200) 343–7.

205 Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 459.

206 *Ridd v JCU* (n 19). See above Part II.

207 Meagher, 'On the Wane?' (n 200) 62–6, 76–8; Dan Meagher, 'Is There a Common Law "Right" to Freedom of Speech?' (2019) 43(1) *Melbourne University Law Review* 269, 272–3 ('Freedom of Speech').

208 Meagher, 'On the Wane?' (n 200) 63, 77; Chen, 'The French Court' (n 200) 418–22.

209 Ibid.

210 For a discussion of the meaning of 'political communication', see Dan Meagher, 'Freedom of Speech' (n 207) 280–2.

validity of the provisions could be challenged. However, previous cases before the High Court suggest that, in cases involving the implied freedom and national security considerations, national security can act as a trump over the implied freedom (and other constitutional values).[211] It is therefore questionable whether the High Court would in fact strike down the espionage provisions for invalidity (or indeed give them a legal meaning that favours the implied freedom, given it may be difficult to find an interpretation that would distinguish between the conduct of academics and genuine spies). As such, it is uncertain whether a challenge to the espionage laws on the basis of the implied freedom would succeed. Discussion of exactly how the laws could be challenged on this ground is beyond the scope of this article.

Even if the espionage provisions could be invalidated or read down (in accordance with either the implied freedom or academic freedom), to do this would require a relevant case to go to court, which may take a long time (or may never occur). In the meantime, the apparent scope of the laws has the potential to have a significant chilling effect on academic research and teaching, which, in itself, is detrimental to academic freedom. It is clear, therefore, that stronger protections for academics are needed.

What, then, can be done to uphold academic freedom while ensuring Australia's espionage laws still effectively address modern espionage (including espionage against the higher education and research sector, which might be conducted by people who use academic activities as a cover)? I make four recommendations for reform.

First, uncertain key terms used in the espionage framework must be clarified. In particular, greater legislative guidance should be given as to the meaning of 'prejudice' and 'advantage'. This could be achieved, for example, by explaining that prejudice 'includes harm, disadvantage and detriment'. 'Prejudice' and 'advantage' are central to proof of the fault element of certain underlying offences and current definitions mean that it is possible for academics to have satisfied that element. While academics might still satisfy the element with more clearly defined terms, these amendments may exclude academics whose conduct could currently be considered 'prejudicial' but not serious enough to warrant criminalisation (for example, where their research results in criticism of Australian intelligence policies or practices).

Additionally, the definition of 'information' should be amended so that it does not include opinions. Including opinions within the definition of 'information' extends the meaning of the term beyond what is necessary to capture genuine espionage, while also applying to a large proportion of 'information' dealt with by academics (who regularly express their opinions).

Second, sub-offences that criminalise recklessly prejudicing Australia's national security or advantaging the national security of a foreign country should be repealed.[212] Those offences risk criminalising academics who may not have specifically intended certain national security consequences, but who may still have

---

[211] Rebecca Ananian-Welsh and Nicola McGarrity, 'National Security: A Hegemonic Constitutional Value?' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 267, 274–7.

[212] See *Criminal Code* (n 7) ss 91.1(2), 91.2(2), 91.8(2).

been aware of a risk that their work might prejudice or advantage national security (for example, academics who research anything related to defence, intelligence or national security more broadly). Similarly, the Espionage on behalf of a Foreign Principal sub-offence that does not include any fault element in relation to national security should be repealed,[213] being even more far-reaching than the recklessness sub-offence. For example, that offence could apply to academics collaborating with colleagues from foreign universities in countries that are not close allies with Australia on projects broadly related to national security or defence. Repealing this sub-offence and the recklessness sub-offence would be a significant step towards protecting academics who collaborate with colleagues overseas.

Third, the Authorised Prior Publication and Unauthorised Prior Publication defences should be extended to all offences. Currently, neither defence applies to the Solicitation and Preparatory Offences and the Unauthorised Prior Publication defence does not apply to Communication Espionage, the Espionage on behalf of a Foreign Principal offences or the Core Espionage Offence (where the prosecution relies on the fault element of prejudice to Australia's national security). The espionage-related offences pose a significant risk to academics while the latter three offences might still have the capacity to criminalise academics whose research relates to national security (as broadly as it has been defined), even with the above reforms. This is because academics might still fall foul of an 'intention to prejudice Australia's national security or advantage the national security of a foreign country' (for example, where they intend to reveal Australian Government misconduct). The Authorised and Unauthorised Prior Publication defences would provide greater protection for academics by protecting dealings with government-published information and some dealings with non-government sourced information.

Even if these defences were extended, however, there would still be significant gaps in the protection framework. Specifically, academics would not be protected where their research relied on previously unpublished information (such as where they generated their own data through, for example, surveys). Nor would they be protected where they knew that re-publishing the information might prejudice Australia's national security.[214] This might arise where the information was initially published innocuously, or the academic drew together several pieces of less well-known information, and published this in an article with a major journal.

To remedy these gaps, a new defence should be introduced to protect academics engaged in legitimate research and teaching activities. This defence could be adapted from the news reporting defence to Federal secrecy offences.[215] The news reporting defence arises where the person dealt with the information in their 'capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media' and at the time they 'reasonably believed that engaging in that conduct was in the public interest' (or they were an administrative staff member acting on behalf of a journalist, editor or

---

213 Ibid s 91.8(3).

214 Ibid ss 91.4(3)(d)–(e).

215 See ibid s 122.5(6). For more on this offence and defence, see James Meehan, 'Protecting Public Interest Journalism in Australia: A Defence to Information Secrecy Offences' (2020) 23(4) *Media and Arts Law Review* 347.

lawyer who believed this).[216] While 'public interest' has not been defined in the *Criminal Code*, the Act provides that the person may not have reasonably believed their conduct was in the public interest if they published the identity of an Australian intelligence agency staff member or witness protection program participant, or where they engaged in the conduct for the purpose of assisting a foreign intelligence agency or military organisation.[217]

This kind of defence could be introduced to protect academics (and their associates) who might have contravened an espionage offence while engaging in legitimate academic activities. To avoid problems with determining who should be included within the defence, it should focus on the academic *activity* rather than the person's role, affiliation, employment or education. This is consistent with Evans and Stone who argue that academic freedom should protect activities that are part of the research and teaching mission of the university and, by extension, anyone who engages in those activities (such as laboratory assistants, librarians, research assistants, PhD candidates and, I would argue, even journal editors, book publishers and conference organisers).[218]

Applying this approach, the 'academic activities' defence should arise where the person deals with the information 'in the course of engaging in academic research and teaching activities'. Unlike the news reporting defence, which has been criticised for excluding journalistic sources as well as certain journalists,[219] this defence would apply to anyone engaged in legitimate academic teaching and research endeavours. Whether something amounts to an 'academic activity' would be for the court to determine.

Some might question whether the defence should extend to other researchers, such as those working for think tanks. Consideration of this issue is, however, beyond the scope of this article (which has focused solely on *academic* freedom). As Evans and Stone highlight, however, academics are distinct from other researchers as they adhere to independently developed research methods, which gives their research 'unrivalled breadth, authority and independence'.[220] This partly justifies why academics are deserving of such a strong freedom and could warrant an academic activities defence that applies only to academics.

To ensure genuine espionage is excluded from operation of the academic activities defence, it would also be necessary to include a limiting element like that included in the news reporting defence.[221] Such an element could specify that it is necessary that 'at the time the person dealt with the information they reasonably believed that engaging in that conduct was in the public interest'. 'Public interest' could be defined in a similar way as the news reporting defence — specifically, that the person may not have reasonably believed that the conduct was in the public

---

216 *Criminal Code* (n 7) s 122.5(6).
217 Ibid s 122.5(7).
218 Evans and Stone (n 16) 56. It has also been argued that this approach should be taken in relation to journalistic activities: see Peter Greste, *Define Journalism; Not Journalists* (Press Freedom Policy Papers Reform Briefing 3/2021, 2021).
219 See Meehan (n 215); Ananian-Welsh, Kendall and Murray (n 9) 810.
220 Evans and Stone (n 16) 51.
221 See *Criminal Code* (n 7) s 122.5(6)(a).

interest if they engaged in the conduct for the purpose of assisting a foreign intelligence agency or military organisation.[222] In this way, the defence would not be available to people who use academic activities as a cover to engage in espionage. Such a defence would go a long way towards ensuring that Australia's espionage laws still capture espionage against the higher education and research sector, while providing a mechanism to protect legitimate academic research and teaching activities more effectively.

V Conclusion

In this article I assessed the impact of Australia's espionage laws on legitimate academic research and teaching pursuits and, consequently, on academic freedom. My analysis showed that five of Australia's espionage offences pose a very real threat to academics. These offences are the Core Espionage Offence, Communication Espionage, the Preparatory Offence and, for academics collaborating with or employed by foreign public universities or research organisations, Espionage on behalf of a Foreign Principal offences and the Solicitation Offence.

The offences pose a risk to academics whose research and teaching involves in any way defence, military, intelligence, national security or international relations information (especially if it critiques Australia or could benefit the national security of another country), regardless of how that research is conducted. This means that the laws could apply to academics in the fields of political science, international relations, peace and conflict studies, law, criminology, history, geography and STEM, among others. Furthermore, because the offences are concerned with dealings with information, they could apply to any part of the research and teaching process, from preliminary research and communications with colleagues to publications, presenting research at conferences, and teaching students in class.

As such, the espionage laws have the potential to criminalise the work of certain academics — without the protection of adequate defences. This may lead to the chilling of research into areas that may benefit Australian society and democracy. In doing so, these national security laws may indeed threaten academic freedom. To ensure this freedom is upheld, I recommend several reforms be made. Significantly, these include a defence for legitimate academic research and teaching activities. Such a defence would be a significant step towards ensuring academic freedom is better protected in Australia, while allowing for the prosecution of genuine espionage.

---

[222] See ibid s 122.5(7)(d).

Precontractual Estoppel by Convention

Andrew Robertson*

Abstract

This article addresses the unresolved question as to whether estoppel by convention can arise from a precontractual understanding. Answering that question requires consideration not only of issues of fairness in contractual dealings and the need to protect the integrity of written contracts, but also the nature and history of estoppel by convention, the relationship between the common law and equity, and the need for consistency between analogous doctrines. I argue in this article that considerations of authority, justice and policy favour allowing estoppel by convention to arise from a precontractual understanding. An examination of the cases reveals an overlooked history: some of the foundational cases of estoppel by convention involved precontractual understandings. The difficult question is not whether estoppel by convention can arise from a precontractual understanding, but whether it can contradict a subsequent written agreement. Considerations of justice, including the need for consistency between analogous doctrines, favour allowing it to do so, while policy considerations do not provide a compelling case to the contrary.

Please cite this article as:

Andrew Robertson, 'Precontractual Estoppel by Convention' (2022) 44(4) *Sydney Law Review* 537.

* Professor of Law, University of Melbourne, Victoria, Australia.
Email: a.robertson@unimelb.edu.au; ORCID iD: https://orcid.org/ 0000-0001-7558-2568.

I Introduction

Whether estoppel by convention can arise from a precontractual understanding is currently unresolved.[1] Whether it should be allowed to do so raises important questions about the nature and history of estoppel by convention, the considerations of interpersonal justice underlying reliance-based estoppels, the need for consistency between related doctrines, the relationship between the common law and equity, and broader policy considerations. At stake is the balance to be struck between protecting the integrity of written contracts and ensuring fairness in contractual dealings. While Australian law appears to be moving towards the view that estoppel by convention cannot arise from a precontractual understanding, I argue in this article that the balance of considerations of authority, justice and policy favour allowing it to do so, even in the face of an inconsistent written agreement.

In Part II of the article, I assess the weight of authority for and against the proposition that estoppel by convention cannot arise from a precontractual understanding. In order to do so, it is necessary and instructive to examine closely both the facts and the reasoning in the key cases. The cases reveal a significant but overlooked history: some of the foundational cases of estoppel by convention involved precontractual understandings. The issue is not, therefore, whether estoppel by convention can ever arise from a precontractual understanding, as some English cases and commentary suggest. It clearly can. Rather, as the Australian cases indicate, the difficult question is whether an estoppel by convention can contradict a written agreement signed after the adoption of the convention. There are, in fact, three questions in issue: first, can estoppel by convention ever arise from a precontractual understanding; second, does the parol evidence rule prevent estoppel by convention arising from a precontractual understanding where the parties have reduced their agreement to writing; and, third, can estoppel by convention contradict a written agreement signed after the adoption of the convention.

In Part III of the article, I show that considerations of justice strongly favour a liberal approach to precontractual estoppel by convention, particularly when account is taken of the need for consistent treatment of analogous doctrines. An interesting question here is whether a common law doctrine, especially one that draws on equitable concepts and is closely analogous to equitable doctrines, should be given a more restrictive operation than its equitable counterparts.

In Part IV, I discuss policy considerations that might seem to favour the exclusion of evidence of precontractual estoppels by convention. That discussion concludes, however, that if the high evidentiary standard required for rectification is applied to estoppel by convention then there is a strong case — based on a weighing of considerations of justice on one side and considerations of policy on the other — for allowing precontractual estoppel by convention to contradict a written agreement.

---

[1] See, eg, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, 738 [577] (Campbell JA) ('*Franklins*'): 'The question of whether an estoppel by convention can arise from precontractual negotiations is not settled'; *Queenfield Pty Ltd v Gordon Finance Pty Ltd* [2020] VSCA 282, [47] ('*Queenfield*'): McLeish, Niall and Sifris JJA noting the conclusion of the primary judge that the issue was 'somewhat unsettled', but the predominant view was that precontractual communications may not be relied upon in support of an estoppel by convention.

II Authority: The Overlooked History of Estoppel by Convention

Before exploring the development of estoppel by convention, it is necessary to take note of the contemporary framework, understanding and relevance of the doctrine. Estoppel by convention is commonly raised in commercial litigation in relation to both pre- and post-contractual understandings as to the rights and obligations of the parties. It is an unusual form of estoppel. Like estoppel by deed, it is based on a common assumption or shared understanding between the parties, but like estoppel by representation of fact and promissory and proprietary estoppel, it is concerned to prevent harm resulting from reliance and requires a detrimental change of position. In short, its effect is that parties who mutually adopt an assumption of fact or law as the basis of a transaction are held to that assumption for the purpose of the transaction when it is necessary to do so in order to prevent detriment to one of the parties. More fully, where:

1. parties to a transaction or legal relationship adopt an assumption of fact or law (including an assumption as to the legal rights of the parties) as the basis of their transaction or relationship; and
2. the parties by words or conduct communicate that assumption in such a way that it can be said to be a shared assumption and to represent at least a tacit understanding between them; and
3. one party (the relying party) has acted on the assumption in such a way that departure from the assumption by the party against whom the estoppel is asserted would cause detriment to the relying party,

then the party against whom the estoppel is asserted will not be permitted to deny the correctness of the assumption or convention, and the rights of the parties will be determined on the basis that the assumption or convention is correct.[2]

As to the first element, it is important to note that the parties need not believe the correctness of the assumed state of affairs but 'may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs'.[3] Alternatively, the parties may not appreciate that their assumption involves a departure from the strict legal position.[4] The second element encapsulates what is distinctive about estoppel by convention among reliance-based estoppels. It arises from an understanding between the parties, rather than a representation or promise made by one to the other. It is not enough for the parties

---

2 See, eg, *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, 644–6 [194]–[203] (Tobias JA) ('*Ryledar*') and the authorities there cited, which include: *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674–7 (Dixon J) ('*Grundt*'); *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 121–2 (Lord Denning MR) ('*Texas Bank Case*'); *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244 (Gibbs CJ, Mason, Wilson Brennan and Dawson JJ); *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, 913–14 (Lord Steyn) ('*The Indian Endurance (No 2)*').

3 *Grundt* (n 2) 676.

4 *Moratic Pty Ltd v Gordon* [2007] Aust Contract Reports ¶90-255, 89,914 [33] (Brereton J), quoted in *Ryledar* (n 2) 645 [201] (Tobias JA).

to adopt the assumption independently; there must be some 'conduct crossing the line'[5] between the parties so that the party against whom the estoppel is asserted can be understood to have played a part in the adoption of the assumption by the relying party.[6] As Dixon J said in *Grundt v Great Boulder Pty Gold Mines Ltd*, central to the 'justice of an estoppel' arising from a detrimental change of position is the idea that '[b]efore anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were free to ignore it.'[7] It should finally be noted that, although it is not directly relevant to the issues discussed in this article, there may be a fourth element necessary to establish an estoppel by convention. It is sometimes also said that the parties must have intended the assumption to affect their legal relationship,[8] that each must have intended the other to act on the assumption,[9] or that the person against whom the estoppel is asserted must have intended the relying party to act on it.[10]

In a highly influential passage in *Thompson v Palmer*,[11] which was repeated in *Grundt*,[12] Dixon J set out the circumstances in which different reliance-based estoppels arise. His Honour described the different situations in which a party may, because of the 'part taken by him in occasioning its adoption', be required to abide by an assumption that another party has adopted 'as the basis of some act or omission which, unless the assumption be adhered to, would operate to that [other party's] detriment'.[13] Dixon J began that list with the observation that '[h]e may be required to abide by the assumption because it formed the conventional basis *upon which the parties entered into* contractual or other mutual relations, such as bailment'.[14] From the perspective of today, when precontractual estoppel by convention is controversial, it seems remarkable that Dixon J should describe estoppel by convention only in its application to the situation in which parties *enter into* contractual or other relations on the basis of the shared assumption or convention. It is striking that Dixon J should make no reference to what is today considered the orthodox application of the doctrine in relation to a convention arising in the context of a pre-existing relationship. But estoppel by convention was, in fact, founded on giving effect to precontractual understandings: in two foundational cases, discussed in Part II(A) below, estoppel by convention arose in precisely the circumstances Dixon J described, operating to give effect to an understanding which provided the basis on which parties entered into a transaction.

---

5 *Norwegian American Cruises A/S v Paul Mundy Ltd* [1988] 2 Lloyd's Rep 343, 350 ('*The Vistafjord*'). See also *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd* [1985] 2 Lloyd's Rep 28, 35 ('*The August Leonhardt*'); *Blindley Heath Investments Ltd v Bass* [2017] Ch 389, 411–12 [88]–[92] ('*Blindley Heath Investments*'); *Grundt* (n 2) 675; Michael Barnes, *The Law of Estoppel* (Hart Publishing, 2020) 369–74 [5.52]–[5.61].

6 See especially *The August Leonhardt* (n 5) 35; *Blindley Heath Investments* (n 5) 411–12 [88]–[92]; *Grundt* (n 2) 675; Barnes (n 5) 369–74 [5.52]–[5.61].

7 *Grundt* (n 2) 675.

8 Kenneth R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd ed, 2016) 129 [8-001].

9 *Ryledar* (n 2) 645 [200].

10 Barnes (n 5) 374–6 [5.62]–[5.66].

11 *Thompson v Palmer* (1933) 49 CLR 507, 547 ('*Thompson*').

12 *Grundt* (n 2) 676.

13 *Thompson* (n 11) 547.

14 Ibid (emphasis added).

A *Early English Authorities*

Perhaps the most important early case of estoppel by convention was *Ashpitel v Bryan*,[15] in which an estoppel gave effect to a fiction mutually adopted by the parties as to the nature of a transaction into which they were entering. After the death of John Peto, who died intestate, the deceased's clerk sold goods to the defendant, who by way of payment accepted a bill of exchange that purported to be drawn by the deceased and endorsed by him to his nephew James Peto. The defendant later denied liability on the basis that the bill had not in fact been endorsed by John Peto. It was true that John Peto had not endorsed the bill, since the transaction was conceived after his death and the bill was signed per procurationem by his clerk, but the plaintiff succeeded on the basis of estoppel at all levels. At first instance, Mellor J held that the plaintiff was estopped from raising the objection since he was aware of the facts at all times.[16] An appeal in the Court of Queen's Bench was unsuccessful. Drawing an analogy with estoppel by representation of fact, Crompton J held that 'when two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one, by acting on that agreement, is altered, the other ought not to be admitted to deny it'.[17]

In the Court of Exchequer Chamber, Pollock CB said that where, for the purpose of a transaction, parties agree that certain facts should form 'the basis on which they would contract', they cannot afterwards dispute those facts unless there has been fraud.[18] After John Peto's death, the defendant agreed to take the goods in a transaction that was in the nature of a sale from John Peto. Pollock CB said:

> The parties agreed that the transaction should have this character, viz, that the defendant should appear to have bought the goods of John Peto, and that therefore the bill should be drawn and indorsed in the name of John Peto, and it was afterwards accepted by the defendant on the basis of that agreement. The defendant having accepted the bill after it had been drawn and indorsed in that name, and having promised payment of it, now says that it was not drawn and indorsed by John Peto; but he is estopped from doing so.[19]

The estoppel that was upheld in *Ashpitel (Exchequer Chamber)* arose from a precontractual convention as to the nature and basis of the transaction between the parties. Since the estoppel was upheld by all judges at all three levels, including the Court of Exchequer Chamber, the case provides very strong authority for the proposition that estoppel by convention can arise from a precontractual understanding.

Very soon after *Ashpitel (Exchequer Chamber)*, the Court of Exchequer Chamber gave effect to another precontractual estoppel by convention in *M'Cance v London and North Western Railway Co*.[20] In that case, the defendant railway company carried the plaintiff's horses on their railway. Before doing so, the

---

15 *Ashpitel v Bryan* (1864) 5 B & S 723; 122 ER 999 ('*Ashpitel (Exchequer Chamber)*').
16 *Ashpitel v Bryan* (1862) 3 F & F 183; 177 ER 82, 84.
17 *Ashpitel v Bryan* (1863) 3 B & S 474; 122 ER 179, 185 ('*Ashpitel (Queen's Bench)*').
18 *Ashpitel (Exchequer Chamber)* (n 15) 1001.
19 Ibid.
20 *M'Cance v London and North Western Railway Co* (1864) 3 H & C 343; 159 ER 563 ('*M'Cance (Exchequer Chamber)*').

defendant asked the plaintiff to sign a declaration that the value of the horses did not exceed £10 per horse. The horses were, in fact, worth considerably more and were injured through the fault of the defendant. The defendant's liability under the contract was held to be limited by the declaration. In the Court of Exchequer, the plaintiff's declaration was held not to be part of the contract, but to constitute a representation of fact that induced entry into it. It therefore gave rise to an estoppel by representation of fact.[21] In the Court of Exchequer Chamber, *Ashpitel (Queen's Bench)* was cited in argument, and the stated value of the horses was treated as a convention mutually adopted by the parties as the basis on which they contracted.[22] Williams J, giving the judgment of the Court, held that the effect of the plaintiff's declaration as to the value of the horses 'was a mere declaration which formed the basis of the contract which the parties intended to make, and by which it was to be regulated and governed'.[23] The evidence established that 'the contract was to be regulated and governed by a state of facts understood by the parties', and so the parties were 'bound by the conventional state of facts agreed upon between them'.[24]

B *Contemporary English Cases*

Despite those origins, it is sometimes said in the contemporary English cases that an estoppel by convention can only arise from an assumption adopted by parties to an existing transaction. Without conducting a review of the doctrine, Lord Steyn observed in *The Indian Endurance (No 2)* that: 'It is settled that an estoppel by convention may arise where *parties to a transaction* act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other.'[25] More explicitly, in his book on estoppel Mr Michael Barnes KC insists that the assumption that founds an estoppel by convention 'must relate to a transaction or relationship into which the parties have already entered' at the time the assumption is made, and cannot relate to a transaction or relationship into which the parties 'are about to enter'.[26]

In support of that proposition, Barnes relies principally on the decision of the English Court of Appeal in *Keen v Holland*.[27] That case concerned a lease of agricultural land that attracted certain statutory protection for the tenant. The landlords had made it clear to the tenant that they were willing to grant a lease only on terms that would not attract the statutory protection. As a result of a mistake of law by the landlords, however, the lease they granted did attract the statutory protection. The landlords claimed that the tenant was estopped from taking advantage of the statutory protection. The Court of Appeal upheld the decision of the primary judge that the statutory provisions could not be overridden by an estoppel and that, in view of the purpose of the legislation, it could not be

---

21 *M'Cance v London and North Western Railway Co* (1861) 7 H & N 477; 158 ER 559, 564 (Pollock CB), 565 (Bramwell B), 567 (Channell B), 567 (Wilde B).

22 *M'Cance (Exchequer Chamber)* (n 20) 563.

23 Ibid 564.

24 Ibid.

25 *The Indian Endurance (No 2)* (n 2) 913 (Lord Steyn, with whom Lord Browne-Wilkinson, Lord Hoffmann, Lord Cooke of Thorndon and Lord Hope of Craighead agreed) (emphasis added).

26 Barnes (n 5) 345 [5.8].

27 *Keen v Holland* [1984] 1 WLR 251 ('*Keen*'); see Barnes (n 5) 348 [5.16].

unconscionable to assert the statutory protections.[28] While noting that that was sufficient to dispose of the estoppel claim, the Court observed that there were other insuperable obstacles to a successful plea of estoppel. The Court noted that this was not a situation in which the parties had, 'by their construction of the agreement or their apprehension of its legal effect', 'established a conventional basis upon which they have regulated their subsequent dealings as in the [*Texas Bank Case*]'.[29] Rather, '[t]he dealing alleged to give rise to the estoppel is the entry into the agreement itself in the belief that it would produce a particular legal result.'[30] The Court shared the primary judge's difficulty in seeing how 'a mere erroneous belief' that the form of the agreement would result in an unprotected tenancy 'can properly be described as the "conventional basis" for their dealings so as to give rise to an estoppel'.[31] It seems that Oliver LJ was saying that a mutual, erroneous belief that a contract has a particular effect cannot give rise to an estoppel by convention even if one of the parties establishes that they would not have entered into the contract had they understood its legal effect.

In *PW & Co v Milton Gate Investments Ltd*, Neuberger J considered that Oliver LJ was indicating in that passage 'that some course of dealing after the contract in question had been entered into was necessary' and that an estoppel by convention could not arise from negotiations.[32] In *Milton Gate*, a head lease contained a break clause that gave the head lessee the right to terminate the headlease on a certain date, 'subject to any permitted underleases'.[33] The headlease was negotiated and agreed on the basis that the general rule that a subtenancy comes to an end on determination of the head lease would not apply to any permitted subleases. Neuberger J held that, in view of *Keen*, such an understanding was not capable of giving rise to an estoppel by convention.[34] His Honour went on to find, however, that there was a sufficient course of dealing *after* the granting of the head lease to establish a common understanding, along with communication of that understanding between the parties, and reliance by the head lessee.[35] The estoppel by convention was therefore established.[36]

Barnes interprets *Keen* and *Milton Gate* as establishing a rule that the assumption that gives rise to an estoppel by convention must relate to an existing transaction and not the meaning or effect of a proposed transaction.[37] In *Keen*, however, the point was not clearly made and what Oliver LJ did say was offered as an alternative explanation for a conclusion that had already been reached. And in *Milton Gate*, Neuberger J went on to find that the estoppel was established in any case. Neither therefore provides strong authority. Moreover, the idea that 'some

---

28 *Keen* (n 27) 261 (Oliver LJ for the Court).
29 Ibid 261, referring to the *Texas Bank Case* (n 2).
30 *Keen* (n 27) 261.
31 Ibid 262.
32 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142, 185 [165] ('*Milton Gate*').
33 Ibid 152 [13].
34 Ibid 184–5 [162]–[169].
35 Ibid 190 [186].
36 Ibid.
37 Barnes (n 5) 365 [5.16], citing *Keen* (n 27) (Oliver LJ), 366 [5.45], citing *Milton Gate* (n 32) (Neuberger J).

course of dealing after the contract in question had been entered into'[38] is needed for estoppel by convention is contradicted by *Ashpitel (Exchequer Chamber)* and *M'Cance (Exchequer Chamber)*.[39]

The notion that estoppel by convention can only be founded on a post-contractual understanding is also arguably contradicted by the decision of the Court of Appeal in *The Vistafjord*,[40] where, as KR Handley notes,[41] the Court of Appeal upheld a precontractual estoppel by convention. In that case there was, however, a pre-existing contractual relationship between the parties so the matter is not entirely straightforward. The plaintiff owned two cruise ships and, in 1975, appointed the defendant as their London agent for the sale of passenger tickets. Under the terms of that agency agreement, the plaintiff agreed to pay the defendant a 15% commission on UK ticket sales. In 1979, the defendant facilitated the plaintiff's entry into an unusual arrangement involving a time charter of the plaintiff's vessel to a car maker for a series of promotional cruises. For reasons of cost, the car maker's entry into the transaction was conditional on a sub-charter of the vessel to the defendant, who planned to sell tickets on the delivery and re-delivery legs. That involved a financial risk for the defendant, which ended up making a loss on the sub-charter. Representatives of the plaintiff and the defendant entered into the charter and sub-charter transaction on the shared assumption that the defendant would be entitled to commission under the 1975 agreement. The defendant was not entitled to a commission under the terms of that agreement, but was held to have such an entitlement by way of an estoppel by convention.

It is possible to explain the decision in *The Vistafjord* on the basis that there was a pre-existing contract between the parties (namely, the 1975 agreement) and the parties subsequently adopted and acted on a convention as to their rights and obligations under that agreement (namely, that the defendant would be entitled to a commission on the time charter to the car maker). Bingham LJ, however, took the law on estoppel by convention to be as described by Spencer Bower and Turner in *Estoppel by Representation*, which required that an estoppel be founded on an assumption adopted by convention between the parties 'as the basis of a transaction into which they are *about to enter*'.[42] As Bingham LJ noted, that statement had been expressly approved by the English Court of Appeal in the well-known *Texas Bank Case*.[43] The plaintiff in *The Vistafjord* argued that the requirement set out by Spencer Bower and Turner was not satisfied because the parties were not 'about to enter' a transaction directly between them, but rather a transaction between each of them and the car maker (the charter and sub-charter).[44] Bingham LJ quoted and approved a passage in an unreported judgment of Peter Gibson J explaining why it was not necessary for an estoppel by convention that the parties be 'about to enter a

---

38 *Milton Gate* (n 32) 185 [165].
39 See above text accompanying nn 15–24.
40 *The Vistafjord* (n 5).
41 Handley (n 8) 141 [8-013].
42 Ibid 349 (emphasis added), quoting George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (Butterworths, 3rd ed, 1977).
43 *The Vistafjord* (n 5) 349, citing *Texas Bank Case* (n 2) 126A (Eveleigh LJ), 130G (Brandon LJ).
44 Ibid 349 (emphasis added), quoting Spencer Bower and Turner (n 42).

transaction when they made the common assumption'.[45] Rather, an estoppel by convention could arise from conduct after a contract has been made between the parties or, as in this case, from a situation in which parties enter into a transaction that does not involve a contract made directly between them.[46]

A final important point in relation to the English position is that in his Lordship's influential speech in *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann (with the concurrence of Lord Hope, Lord Roger, Lord Walker and Baroness Hale) expressed the view that an estoppel by convention could arise from precontractual negotiations and could contradict the meaning of a written agreement.[47] Lord Hoffmann said, by way of obiter dicta, that estoppel by convention lies outside the exclusionary rule relating to use of evidence of precontractual negotiations in the construction of a written contract:

> If the parties have negotiated an agreement upon some common assumption, which may include an assumption that certain words will bear a certain meaning, they may be estopped from contending that the words should be given a different meaning.[48]

In summary, there is a striking divergence of views in England as to whether an estoppel by convention can arise from precontractual negotiations. While one can point to cases in which the issue has affected the reasoning, there may be no case ever decided squarely on the basis that estoppel by convention cannot arise from a precontractual understanding. Moreover, the foundational cases in which estoppels by convention have arisen from precontractual understandings appear to have been overlooked.

C *Australian Cases*

As noted above, in his canonical exposition of the principles of estoppel in *Thompson* and *Grundt*, Dixon J described estoppel by convention as arising where an assumption 'formed the conventional basis upon which the parties *entered into* contractual or other mutual relations'.[49] Although that statement was consistent with the origins of estoppel by convention, it appears to have been overlooked in most of the recent Australian discussions of the doctrine. In the Australian cases, the issue in contention is sometimes framed as a question whether an estoppel by convention can ever arise from precontractual negotiations. It is, however, more commonly framed as a question whether the parol evidence rule prevents it from doing so where the contract between the parties is wholly in writing, or whether estoppel by convention can contradict a subsequent written agreement.

In *Johnson Matthey Ltd v AC Rochester Overseas Corporation*, McLelland J said: 'In my opinion the parol evidence rule operates to exclude evidence of an

---

45 *The Vistafjord* (n 5) 351–2, citing *Hamel-Smith v Pycroft & Jetsave Ltd* (High Court of Justice, Chancery Division, Peter Gibson J, 5 February 1987).

46 *The Vistafjord* (n 5) 351–3.

47 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 1122 [47].

48 Ibid.

49 *Thompson* (n 11) 547 (emphasis added); *Grundt* (n 2) 676 (emphasis added).

estoppel by convention alleged to arise from pre-contract negotiations.'[50] *Johnson Matthey* concerned a long-term contract for the supply of goods manufactured by the plaintiff seller. Article 13.3 of the agreement gave the defendant buyer a power to terminate the contract if the seller failed to be competitive with other suppliers of the product on, inter alia, price. The buyer purported to exercise the power to terminate under art 13.3 on the ground that the seller's prices were not competitive with those of suppliers in the United States. The seller disputed the purported termination on the basis of evidence of a pre-contractual understanding that: (a) the seller's prices would only be compared with those of other Australian producers for the purposes of art 13.3, and (b) modifications to an earlier draft would have the effect of giving the seller that protection.

McLelland J held that, since a comprehensive entire agreement clause made it clear that the agreement was wholly in writing, no parol evidence was admissible to add to, vary or contradict the language of the document.[51] His Honour therefore excluded the evidence of precontractual negotiations for the purpose of establishing an estoppel by convention.[52] Moreover, his Honour held that the entire agreement clause 'itself gives rise to an estoppel by convention which excludes any antecedent estoppel which might otherwise have had effect'.[53] The reasoning in relation to estoppel by convention did not affect the outcome, however, because McLelland J held that, as a matter of construction of the written agreement, a price comparison for the purpose of art 13.3 could only be made with another Australian supplier.[54]

A precontractual estoppel by convention was upheld, and the approach of McLelland J in *Johnson Matthey* not followed, by Rolfe J in *Whittet v State Bank of New South Wales*.[55] The defendant bank agreed to provide Mr Whittet with a $100,000 overdraft facility for his business on the security of a mortgage of the family home owned by Mr and Mrs Whittet as joint tenants. Mrs Whittet (the plaintiff) was reluctant to risk the family home and retained her own solicitor to ensure that the principal sum secured by the mortgage would not exceed $100,000. The solicitor made a verbal 'arrangement' with the bank to that effect before the mortgage was signed, but his attempts to have the arrangement confirmed in writing were unsuccessful. The mortgage signed by Mr and Mrs Whittet secured all present and future indebtedness to the bank and was unlimited in amount. For several years the bank treated the overdraft as limited to $100,000, but when the bank suffered substantial foreign exchange losses on Mr Whittet's behalf, the bank sought to recover those amounts under the mortgage. Rolfe J held that an estoppel by convention could arise from precontractual negotiations and did so on the facts.[56] His Honour found that the security of written instruments could adequately be maintained by requiring clear and convincing proof.[57]

---

50 *Johnson Matthey Ltd v AC Rochester Overseas Corporation* (1990) 23 NSWLR 190, 195 ('*Johnson Matthey*').
51 Ibid 194.
52 Ibid 195.
53 Ibid 196.
54 Ibid 196–7.
55 *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146 ('*Whittet*').
56 Ibid 154.
57 Ibid 153.

The approach of McLelland J in *Johnson Matthey* was followed by Bryson J in *Australian Co-operative Foods Ltd v Norco Co-operative Ltd*, but expressly by way of obiter dicta.[58] Norco claimed that a precontractual convention or promise allowed it to engage in co-branding without prior approval, which would otherwise have been in breach of a trade-mark licensing agreement made between Norco as licensee and Dairy Farmers as licensor. Bryson J held that there was no factual foundation for any estoppel because the conduct of the parties did not establish a convention adopted by the parties, and nor were any assurances made by Dairy Farmers. But his Honour found that the terms of the agreement, which included an entire agreement clause, showed that it was intended to be a comprehensive record of the parties' agreement, and so no estoppel by convention or promissory estoppel could be recognised even if there were a factual basis for it.[59] Bryson J said that the *Whittet* approach 'does not, in my respectful opinion, accord appropriate weight to indications of finality and completeness which the parties give when they adopt formal written expression'.[60]

The closest Australian courts appear to have come to a decision against the *Whittet* approach are the judgments of Miles CJ of the ACT Supreme Court in *Skywest Aviation Pty Ltd v Commonwealth*[61] and the Queensland Court of Appeal in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*.[62] In *Skywest*, Miles CJ held, following *Johnson Matthey*, that an estoppel claim relating to precontractual conduct could not, as a matter of law, succeed, and that evidence relating only to that issue was inadmissible.[63] Although the case was argued as one of estoppel by convention, Miles CJ said that was 'a type of promissory estoppel'.[64] The claim in fact involved an alleged assumption as to the future conduct of the Commonwealth (that it would compensate Skywest for the cost of certain aircraft modifications), which was an assumption that could only give rise to a promissory or equitable estoppel and not an estoppel by convention.[65] In any case, Miles CJ found, with reference to promissory estoppel cases, that 'the Commonwealth did not induce in Skywest any assumption upon which Skywest relied to its detriment' and there was 'nothing unconscionable in holding the parties to the terms of their contract'.[66]

In *Equuscorp*, investors purchased units in limited liability partnerships established to engage in crayfish farming. The units were purchased with loans provided by a company related to the promoter of the scheme. The investors claimed to have been told that the loans would be 'limited recourse' loans, which would primarily be repaid from income generated by the aquaculture business and would require investors to make just three payments. Loan agreements subsequently signed by the investors made the investors personally liable to the lender to repay the

---

58 *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267 ('*Norco*').
59 Ibid 279 [51].
60 Ibid 279 [52]
61 *Skywest Aviation Pty Ltd v Commonwealth* (1995) 126 FLR 61 ('*Skywest*').
62 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 ('*Equuscorp*').
63 *Skywest* (n 61) 106.
64 Ibid 102.
65 See, eg, Barnes (n 5) 355 [5.28]: 'The type of assumption which cannot give rise to an estoppel by convention is an assumption as to what one party is or is not to do in the future engendered by a promise.'
66 *Skywest* (n 61) 112.

principal sum lent with interest. A 'guarantee' later signed by the promoters of the scheme indemnified the investors against any liability to the lender beyond the three payments the investors claimed represented the limit of their liability. The scheme failed and the partnerships were dissolved. The loans were assigned to Equuscorp Pty Ltd, which sought repayment from the investors.

The investors' primary argument was that the oral 'limited recourse' agreement was binding on the lender as a matter of contract. That argument was ultimately rejected by the High Court of Australia.[67] The High Court doubted that the evidence established a sufficiently certain consensus between the parties that the loan was to be a limited recourse loan, but held in any case that: 'The oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement. If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed.'[68] The matter was remitted to the Supreme Court of Queensland to deal with issues that had not been decided by the primary judge in the original hearing.

The primary judge in the second hearing held that the investors were liable to repay the loans in full and that decision was upheld by the Court of Appeal.[69] Of interest is the question whether an estoppel by convention operated against the lender. McPherson JA held, following *Johnson Matthey*, that an estoppel by convention could not arise from a 'common assumption' that is at odds with the terms of an express contract subsequently entered into by the parties with knowledge of its terms.[70] Jerrard JA held that no estoppel arose because any assumption was fulfilled by the guarantee given by the promoters.[71] Holmes J was willing to assume that an estoppel by convention could arise from precontractual negotiations, but held that the evidence did not establish a common understanding sufficient to support such an estoppel.[72] Moreover, her Honour held that the pleaded common assumption was 'as to the effect of the loan agreement' and any such assumption could not stand in the face of evidence from the investors' representative that he had read the loan agreement and knew that it did not limit the borrowers' liability to repay.[73] That seems to leave open the possibility that an estoppel by convention could arise from a common assumption adopted by the parties as to their rights which, as in *Whittet*, the parties knew to be inconsistent with the contract terms, provided the assumption was not 'as to the effect of' the agreement. Only McPherson JA, then, would have decided the case on the basis that, as a matter of law, estoppel by convention cannot arise from a precontractual understanding that is contradicted by a written agreement subsequently signed by the parties with knowledge of its terms.

Whether the parol evidence rule prevents estoppel by convention or promissory estoppel arising from negotiations culminating in an inconsistent written agreement has been discussed by way of obiter dicta in several other cases in recent

---

67 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471.
68 Ibid 484 [36] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).
69 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2005] QSC 172, [39]; *Equuscorp* (n 62) [34], [90], [125].
70 *Equuscorp* (n 62) [30].
71 Ibid [84]–[90].
72 Ibid [116]–[117].
73 Ibid [116].

decades.[74] In some cases, it has not been necessary to distinguish between promissory estoppel and estoppel by convention, or between contracts that contain entire agreement clauses and contracts that do not.[75] Tobias JA discussed the issue in *Ryledar Pty Ltd v Euphoric Pty Ltd*, noting Handley's view that 'those authorities which decided that a pre-contract convention could not support an estoppel were contrary to both principle and authority'.[76] Since there was neither clear nor convincing proof of a convention adopted by the parties, however, it was unnecessary to resolve the issue.[77] In *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd*, the Victorian Court of Appeal noted its agreement with McLelland J in *Johnson Matthey* that the parol evidence rule excludes evidence of an estoppel by convention arising from precontractual negotiations, but found that no estoppel by convention arose on the facts of the case.[78] That view of the law was challenged by one of the parties in *Queenfield Pty Ltd v Gordon Finance Pty Ltd*, but again it was unnecessary to decide on the facts of the case.[79]

D *The Position in New Zealand*

In *Vector Gas Ltd v Bay of Plenty Energy Ltd*, three members of the Supreme Court of New Zealand accepted that an estoppel by convention could arise from precontractual negotiations, and did so on the facts of the case.[80] The Court found, however, that an objective interpretation of the agreement accorded with the precontractual understanding between the parties, so estoppel by convention provided only an alternative ground for the decision. Moreover, as Bunting has noted, the Court did not acknowledge or address the controversy in the English and Australian case law as to whether estoppel by convention could arise from a precontractual understanding.[81] That, along with the fact that estoppel by convention provided only an alternative ground for the decision, weakens the strength of the case as authority in support of a liberal approach.

E *Conclusions on Authority*

The above discussion of the case law shows that the idea that estoppel by convention cannot arise from precontractual dealings, and can only arise from a post-contractual

---

74 See, eg, the review of the authorities in *FJ & PN Curran Pty Ltd v Almond Investors Land Pty Ltd* [2019] VSCA 236, [213]–[226].

75 See, eg, *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, 543 [444]–[449] (Allsop J) ('*Branir*').

76 *Ryledar* (n 2) 648 [214], citing Kenneth R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 1st ed, 2006) 124 [8–012]. See now the second edition: Handley (n 8) 141 [8–013].

77 *Ryledar* (n 2) 650 [226]–[227].

78 *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* (2012) 37 VR 486, 522 [137]–[139] (Warren CJ, Harper JA and Robson AJA).

79 *Queenfield* (n 1) [100].

80 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, 461 [31] (Tipping J), 464 [43] (Tipping J), 472 [74] (McGrath J), 475–7 [84]–[97] (McGrath J), 482–3 [124] (Wilson J), 487–8 [140]–[145] (Wilson J) ('*Vector Gas*').

81 Kristina Bunting, 'Estoppel by Convention and Pre-Contractual Understandings: The Position and Practical Consequences' (2011) 42(3) *Victoria University of Wellington Law Review* 511, 527.

understanding, is not supported by the authorities. Foundational English cases upheld estoppels by convention arising from precontractual understandings, and it appears that no decision rests squarely on the proposition that an estoppel by convention cannot arise from a precontractual understanding. Of the Australian cases, only the controversial *Whittet* case involved a clear decision on the issue.[82] But the Australian cases raise a more significant concern, which is whether estoppel by convention arising from precontractual dealing can contradict a written agreement that is signed after the adoption of the convention. That concern raises questions of justice and policy that will be discussed below.

III Justice: Foundations, Consistency, Common Law and Equity

Barnes has suggested that it 'appears to be fundamental to estoppel by convention' that the founding assumption 'cannot relate to a transaction into which those who hold the assumption are about to enter … but must relate to a transaction or some legal relationship into which they have entered prior to the time at which the assumption is made.'[83] To say that a rule is fundamental to a legal doctrine suggests that the rule is constitutive of the doctrine or is one on whose existence the integrity of the doctrine depends. The expression is often used more loosely, however, to mean that the rule serves an important purpose or is particularly longstanding and well-accepted. A rule that estoppel by convention cannot arise from precontractual dealings could be argued to serve an important purpose, but is not sufficiently well-established to be characterised as 'fundamental'. It is certainly not constitutive of or essential to estoppel by convention.

Estoppel by convention rests on the same foundation as the other reliance-based estoppels: namely, estoppel by representation, promissory estoppel and proprietary estoppel by encouragement and acquiescence.[84] As Dixon J explained in *Grundt*, the 'basal purpose' of reliance-based estoppels is to avoid detriment to the relying party as a result of their change of position by 'compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting'.[85] The justice of the estoppel depends on the party against whom the estoppel is asserted having 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it'.[86] The participation required to make it unjust to depart from the assumption includes the entry into 'contractual or other mutual relations' on the conventional basis of the assumption.[87] An estoppel arises because the party against whom the estoppel is asserted bears sufficient

---

82 *Whittet* (n 55).

83 Barnes (n 5) 348 [5.16]. See also Barnes (n 5) 365 [5.44] ('fundamental rule').

84 Though note that 'estoppel by acquiescence' may encompass two distinct principles: one based on an induced assumption and detrimental reliance and another based on mistake and the conferral of benefit: see Andrew Robertson, 'The Form and Substance of Equitable Estoppel' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 249, 271–3.

85 *Grundt* (n 2) 674.

86 Ibid 675.

87 Ibid.

responsibility for creating the risk of detriment that it is considered unfair, unjust or unconscionable for them to behave inconsistently with the assumption.[88] At a deep level, the justice of estoppel by convention is not, therefore, dependent on the point in time at which the assumption is adopted or whether it arose before or after the entry into a contract.

In Australia, it is now commonly accepted that promissory estoppel can arise from precontractual dealings culminating in the execution of a comprehensive written contract but estoppel by convention cannot. A superficially attractive justification for that difference is that promissory estoppel is equitable, while estoppel by convention is a common law doctrine. Since precontractual promissory estoppel is now so well accepted in Australia, and precontractual estoppel by convention so controversial, the robustness of the distinction between the two doctrines is pivotal to the issue addressed in this article.

A *Precontractual Promissory Estoppel*

It is now well accepted that promissory estoppel can arise from a precontractual promise by one party that induces another to enter into a contract, even if the promise contradicts the written terms of the contract. In *State Rail Authority of NSW v Heath Outdoor Pty Ltd*, McHugh JA reasoned that promissory estoppel should be permitted to arise where a person promises, before a right is given, not to exercise the right when it is acquired.[89] His Honour reasoned that the case for applying promissory estoppel is particularly strong where one party is induced to confer a right on another by the second party's promise not to exercise that right or only to exercise it in limited circumstances.[90] McHugh JA concluded that it is unconscionable for a person to insist on their strict legal rights when those rights have been conferred on the faith of an assurance that they will not be enforced and the exercise of the rights would be contrary to the assurance.[91] In other words, when the act of reliance on a promise not to exercise rights involves the conferral *of those very rights* by the promisee on the promisor, the case for promissory estoppel is particularly strong.[92]

Although the matter has not been free from controversy,[93] there have been numerous cases, including several at the appellate level, upholding claims of promissory estoppel arising from precontractual conduct. Promissory estoppels have arisen in some cases from precontractual promises that commercial benefits would be provided in addition to those required by the contract terms.[94] Of greater interest in the present context are those cases involving promises that directly contradict the

---

88 Robertson (n 84) 253.

89 *State Rail Authority of NSW v Heath Outdoor Pty Ltd* (1976) 7 NSWLR 170 ('*Heath Outdoor*').

90 Ibid 193 (McHugh JA).

91 Ibid.

92 See also *Branir* (n 75) 542–4 [439]–[446] (Allsop J suggesting that this line of reasoning would also deny the capacity of an entire agreement clause to defeat an equitable estoppel claim).

93 See, eg, *Heath Outdoor* (n 89) 177–8 (Kirby P).

94 See, eg, *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v The National Mutual Life Association of Australasia Ltd* (2008) 21 VR 351, *Yarrabee Chicken Co Pty Ltd v Steggles Ltd* [2010] FCA 394 (equitable estoppel ruling not challenged on appeal: *Steggles Ltd v Yarrabee Chicken Co Pty Ltd* [2012] FCAFC 91).

contract terms. In *Wright v Hamilton Island Enterprises Ltd*, the Queensland Court of Appeal unanimously upheld promissory estoppels arising from promises of licence renewals for restaurant and bar concessionaires.[95] Two of the Justices held that the promises contradicted the holding-over clauses of subsequent written agreements and could not, for that reason, give rise to collateral contracts, but could give rise to promissory estoppels.[96] The third member of the Court found no contradiction, but mentioned in obiter dicta that his Honour would have upheld the promissory estoppel claim even if it directly contradicted the written agreement.[97] In *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd*, the Victorian Court of Appeal upheld a promissory estoppel that arose from a precontractual promise made by the buyer of shares not to exercise its power to terminate the contract under a due diligence clause.[98] Again, in that case the promissory estoppel directly contradicted the written terms.

Most significantly, in *Saleh v Romanous*, the New South Wales Court of Appeal upheld a promissory estoppel arising from a precontractual promise made by sellers of land that they would allow the buyers to terminate the contract if the buyers were unable to negotiate a development joint venture agreement with the adjoining land owner.[99] Handley AJA, with whom Giles and Sackville JJA agreed, rejected arguments that the parol evidence rule and an entire agreement clause in the written contract precluded a precontractual promissory estoppel. The justification was framed in three different ways: first, that 'the legal rights trumped by equity include those protected by the parol evidence and entire contract rules';[100] second, that equitable remedies cannot be defeated by 'a common law rule about the construction of documents';[101] and, third, that 'equity would not permit an entire agreement clause to stultify the operation of its doctrines'.[102]

B *Distinguishing Estoppel by Convention from Promissory Estoppel*

If promissory estoppel can arise from precontractual conduct, can contradict a subsequent written agreement, and is unaffected by an entire agreement clause, then can estoppel by convention justifiably be given a more restrictive operation?

A superficially attractive justification is that mentioned above: that common law doctrines are restricted by common law rules about parol evidence, while equitable doctrines are not.[103] As we have seen, estoppel by convention developed as a common law doctrine in the Court of Queen's Bench, the Court of Exchequer and the Court of Exchequer Chamber in the second half of the 19th century. Although it is commonly suggested that estoppel by convention developed from estoppel by

---

95 *Wright v Hamilton Island Enterprises Ltd* [2003] Q ConvR ¶54-588.
96 Ibid [6] (McMurdo P), [13] (McMurdo P), [83] (Mackenzie J), [89] (Mackenzie J).
97 Ibid [54] (Jerrard J).
98 *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* (2004) 50 ACSR 679.
99 *Saleh v Romanous* (2010) 79 NSWLR 453 ('*Saleh*').
100 Ibid 461 [68].
101 Ibid, quoting *Branir* (n 75) 544 [446].
102 *Saleh* (n 99), quoting *Franklins* (n 1) 734 [554] (Campbell JA).
103 See *Franklins* (n 1) 621 [34] (Allsop P), 738–9 [577] (Campbell JA).

deed, the evidence given in support of that suggestion is not particularly strong.[104] In *Ashpitel (Exchequer Chamber)*, Pollock CB did draw on an analogy with estoppel by deed during argument,[105] but in the Court of Queen's Bench, Crompton J understood the applicable principle to be analogous to estoppel by representation.[106] Both Wightman J and Crompton J expressly distinguished the applicable principle from estoppel by deed and held that, unlike estoppel by deed, it did not need to be pleaded.[107] Estoppel by convention appears to owe something to both estoppel by deed and estoppel by representation, but to be much more closely related to estoppel by representation. It originates in a shared understanding, but requires a change of position and operates to prevent inconsistent conduct causing detriment.

Although estoppel by convention clearly developed as a common law doctrine, it is well-recognised that it is one that, like the action for money had and received, has been infused with equitable concepts and justifications.[108] The English Court of Appeal has observed that, although it developed in the common law courts, in recent decades 'its principles have largely been explained in equitable terms and expanded as another variant of equitable estoppel'.[109] In the *Texas Bank Case*, Lord Denning MR justified holding the parties to the convention they had adopted on the basis that it would be 'inequitable' to insist on the strict legal position 'having regard to dealings which have taken place between the parties'.[110] In *Keen*, the Court of Appeal held that no estoppel by convention arose because it could not be said to be unconscionable to rely on the statutory protections in question.[111] In *The Leila*, Mustill J held that, as in the equitable doctrines of estoppel by acquiescence and encouragement, the test for estoppel by convention 'is always whether it would be unconscionable to allow one party to assert the contrary of what he and his opponent had once assumed to be true'.[112] Mustill J justified the estoppel on the facts on the basis that 'it would not in all the circumstances be conscionable to allow the defendants to insist on' an arbitration clause when the parties had mutually assumed and acted on a mistaken assumption that the contract was governed by an English jurisdiction clause.[113] In *The Vistafjord*, Bingham LJ considered the requirements of estoppel by convention set out in the Spencer Bower and Turner text to be deficient because they were not qualified, 'as they should be, by *considerations of justice and*

---

104 See Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford, 2000) 29; Handley (n 8) 130 [8-002]; Barnes (n 5) 345 [5.8].

105 *Ashpitel (Exchequer Chamber)* (n 15) 1000.

106 *Ashpitel (Queen's Bench)* (n 17) 185–6.

107 Ibid 184–5, 185–6.

108 See Rory Derham, 'Estoppel by Convention — Part II' (1997) 71(12) *Australian Law Journal* 976, 981–4; Matthew NC Harvey, 'Estoppel by Convention — An Old Doctrine with New Potential' (1995) 23(1) *Australian Business Law Review* 45. The influence of equity on the action for money had and received is discussed extensively in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560.

109 *Blindley Heath Investments* (n 5) 407 [72] (Hildyard LJ for the Court).

110 *Texas Bank Case* (n 2) 121.

111 *Keen* (n 27) 261 (Oliver LJ for the Court).

112 *Government of Swaziland Central Transport Administration v Leila Maritime Co Ltd* [1985] 2 Lloyd's Rep 172, 179 ('*The Leila*').

113 Ibid 180. On the element of unconscionability in estoppel by convention, see further Barnes (n 5) 383–5 [5.82]–[5.84].

equity'.[114] Estoppel by convention is sometimes thought, incorrectly, but tellingly, to be a form of promissory estoppel.[115]

In view of developments such as these, Cooke has suggested that estoppel by convention 'seems to have moved house, from the common law tradition to equitable estoppel'.[116] Whether the doctrine should be regarded as a common law or equitable doctrine was expressly left open by the New South Wales Court of Appeal in *Franklins Pty Ltd v Metcash Trading Ltd*.[117] Campbell JA said that 'in considering the correctness of *Johnson Matthey* closer attention should be paid to whether estoppel by convention is a doctrine of the common law rather than of equity'.[118] His Honour said that was 'because it seems more in accord with principle that a common law doctrine like the parol evidence rule should restrict the operation of estoppel by convention if estoppel by convention were itself solely a common law doctrine'.[119] In the same case, Allsop P agreed that 'if the estoppel employed is equitable in character, [then] the common law parol evidence rule will not impede its proper operation'.[120]

A court could determine the limits of estoppel by convention by reference to whether the doctrine is a common law or equitable form of estoppel, as Campbell JA suggests, or by reference to whether it is 'equitable in character', as Allsop P suggests. But it would be preferable to determine the scope and limits of the doctrine on a more substantive and principled basis. Whether estoppel by convention should be given the same scope of operation as promissory estoppel should depend on whether it is analogous to promissory estoppel and is, as a matter of justice, indistinguishable. If estoppel by convention is driven by the same principle of justice as promissory estoppel, then justice demands that it be given the same scope of operation. Like cases must be treated alike, and it is a weak justification for different outcomes in analogous cases that one is governed by the common law and another equity.[121]

As Dixon J has explained, reliance-based estoppels share the 'basal purpose' of avoiding detriment resulting from a change of position.[122] In each case, the justice of the estoppel depends on the party against whom the estoppel is asserted having 'played such a part in the adoption of the assumption that it would be unfair or unjust' if they 'were left free to ignore it'.[123] It could perhaps be argued that estoppel by convention presents a weaker justice case than promissory estoppel on the basis that a party to a shared understanding bears less responsibility for the adoption of an assumption than one who has made a promise. To put it differently, it could be

---

114 *The Vistafjord* (n 5) 352 (emphasis added), referring to Spencer Bower and Turner (n 42) 157.
115 See, eg, *Vector Gas* (n 80) 472 [74] (McGrath J); *Skywest* (n 61) 102 (Miles CJ).
116 Cooke (n 104) 31, quoted with apparent approval in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, 27,643 [335].
117 *Franklins* (n 1) 621 [34] (Allsop P), 738–9 [577] (Campbell JA).
118 Ibid 145–6 [577].
119 Ibid.
120 Ibid 28 [34].
121 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1; Andrew Burrows, 'We Do This at Common Law but That In Equity' (2002) 22(1) *Oxford Journal of Legal Studies* 1.
122 *Grundt* (n 2) 674.
123 Ibid 674–5.

argued that behaving inconsistently with an assumption that one has induced in another is more reprehensible than behaving inconsistently with an assumption that was mutually adopted.

Three responses could be made to an argument along those lines. The first is that the requirement of a 'promise' in promissory estoppel is much weaker than it might seem, and may even be considered artificial, since promissory estoppel claims are commonly founded on promises that are implied in circumstances in which there is no evidence of a commitment having been made.[124] Like other forms of estoppel, it can arise from silence.[125] Second, in practice, estoppel cases do not divide neatly into the different categories.[126] In the *Whittet* case, for example, the assumption adopted by Mrs Whittet could be understood as a shared assumption as to the legal effect of the mortgage (that it secured only a principal sum of $100,000) or as an assumption induced by the bank as to its future conduct (that the bank would enforce the mortgage only to the extent of a principal sum of $100,000). In *ING Bank NV v Ros Roca SA*, Carnwath LJ applied estoppel by convention while Rix LJ took the view that 'the same solution can be found in the doctrine of promissory estoppel … supported by a duty to speak'.[127] Third, to the extent that the principle of justice underlying estoppel by convention can be distinguished from that underlying promissory estoppel, it is closely analogous to another equitable doctrine that operates in relation to precontractual understandings that are not reflected in written terms: namely, rectification for common mistake. As Campbell JA explained in *Ryledar*, the 'injustice or unconscientiousness' underlying rectification for common mistake lies in one party's insistence on terms set out in a written agreement that do not accord with the common but mistaken intention of both parties at the time they entered into that agreement.[128] Similarly, it has been observed that the basis for the finding of unconscionability that is 'fundamental to the availability of estoppel by convention' lies in one party's adoption of a position that is 'inconsistent with that which he had previously led the other party to believe was common ground' along with 'potential prejudice from that inconsistency'.[129]

In summary, estoppel by convention operates according to a principle of justice that underlies all reliance-based estoppels and is therefore shared with promissory estoppel. It ought not, therefore, be given a more restricted operation simply because it originated in the common law courts. The tendency of courts to import equitable justifications, concepts and requirements to estoppel by convention, and even to treat it as an equitable doctrine, reflect the fact that it is, as a matter of justice, closely analogous to equitable doctrines. To permit those equitable doctrines to operate in relation to precontractual conduct, while denying the capacity of estoppel by convention to do so on the basis that it is a common law doctrine, would be to allow form to triumph over substance.

---

124 See Robertson (n 84) 264–71.

125 See Andrew Robertson, 'Estoppels by Silence' in Elise Bant and Jeannie Marie Paterson (eds), *Misleading Silence* (Hart Publishing, 2020) 263.

126 Beale also notes that it can be difficult to distinguish between promissory estoppel and estoppel by convention: Hugh Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 33rd ed, 2018) 482 [4-108].

127 *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472, 492 [71] (Carnwarth LJ), 495 [85] (Rix LJ).

128 *Ryledar* (n 2) 665–7 [305]–[315].

129 *Crédit Suisse v Borough Council of Allerdale* [1995] 1 Lloyd's Rep 315, 367 (Colman J).

IV Policy: Maintaining the Reliability of Written Agreements

The strongest arguments for limiting estoppel by convention to post-contractual understandings lie not in considerations of justice or the relationship between common law and equity, but in policy. In *Johnson Matthey*, McLelland J gave four reasons for excluding evidence of an estoppel by convention that is claimed to have arisen from precontractual negotiations.[130] First, allowing estoppels by convention to arise from precontractual conduct would introduce uncertainty, would unduly shake the security of written contracts, and would threaten the stability of commercial relationships.[131] Second, evidence of oral statements made during negotiations is 'inherently less reliable' than the 'permanent written record', especially when it may be given 'many years after the event when witnesses may have become unavailable, and when memories may have faded or become distorted by subsequent occurrences and changing perceptions of self-interest'.[132] Third, investigation into 'the wilderness of pre-contract conversations' is time-consuming and unrewarding and leads to protracted and expensive litigation.[133] Fourth, holding parties to written terms and limiting the development of the law of estoppel promotes 'the adherence to bargains which are such an important feature of modern economic life'.[134]

Although they are essentially empirical claims that would be very difficult to prove or disprove, these arguments clearly carry some force. They underlie the broad contractual principle that favours 'giving effect to the formal, final and considered expression of the parties' contractual intention'.[135] Bryson J explained in *Norco* why he favoured the *Johnson Matthey* approach:

> My adherence to this view has been reinforced with the passage of time and accumulation of experience of this and many other forensic endeavours to set up estoppels out of the circumstances or terms of precontractual exchanges; the evidence offered is often extensive, discursive and inconclusive and, where it is of any value at all, clearly of less value than the considered written expression. Poorly based and incompletely considered forensic attempts to set up pre-contractual estoppels are unfortunately common, and in most cases they are quite unuseful and very wasteful of resources.[136]

In giving effect to a precontractual estoppel by convention in *Whittet*, Rolfe J imported the requirement of 'clear and convincing proof' from the law of rectification and considered that it provided adequate protection for maintaining the integrity of written agreements.[137] The requirement might be seen to address all but the third of the four arguments set out above. It helps to maintain certainty and the

---

130 *Johnson Matthey* (n 50) 195.
131 Ibid.
132 Ibid.
133 Ibid, quoting *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352, *Heath Outdoor* (n 89) 177 (Kirby P).
134 *Johnson Matthey* (n 50) 195, quoting *Heath Outdoor* (n 89) 177 (Kirby P).
135 *Norco* (n 58) 279 [52].
136 Ibid.
137 *Whittet* (n 55) 153 (Rolfe J).

security of written agreements. It ensures that there is a solid evidentiary platform before an estoppel by convention can be recognised. And by ensuring that estoppel by convention will arise only in exceptional circumstances, it minimises any undermining of adherence to bargains. It is noteworthy that in England it has also been held that, since estoppel by convention has the same effect as rectification, 'ie to change and contradict the true meaning of the written contract', the court should require the same standard of proof as for rectification, 'ie convincing proof of the allegedly shared or common assumption'.[138]

On the third of McLelland J's points mentioned above, it is difficult to see how allowing precontractual estoppel by convention would lead to time-consuming investigations and protracted and expensive litigation any more than rectification, promissory estoppel and claims of misleading or deceptive conduct already do. Indeed, the doctrines are so closely related that estoppel by convention is often pleaded as an alternative to rectification or promissory estoppel. In those cases, the relevant evidence is already before the court. At most, allowing precontractual estoppel by convention slightly broadens the range of fact situations in which precontractual negotiations need to be investigated for the purpose of giving legal advice and scrutinised in litigation. And since, as discussed above, estoppel by convention is based on the same principle of justice as promissory estoppel, and is based on a closely related principle of justice to rectification, it is difficult to see why the policy considerations mentioned should prevail over one and not the others. As Rolfe J said in *Whittet*, it would be strange if matters arising in the course of precontractual negotiations, 'which could be proved to the extent necessary to justify rectification, namely, by clear and convincing proof, could not also be relied upon to found an estoppel by convention'.[139]

V Conclusions

On balance, considerations of authority, justice and policy favour allowing estoppel by convention to arise from a precontractual understanding. They also favour allowing it to contradict a written agreement. While the issue has much more often been discussed than decided, the cases in which the issue was relevant to the decision clearly favour a liberal approach to precontractual estoppel by convention. We should pay more attention to the cases in which the issue was actually decided because it is only in those cases that acting on the policy concerns about precontractual estoppel by convention would have required the judges to allow a party to behave unconscionably and to deny justice to one of the parties before the court. Considerations of justice clearly favour allowing estoppel by convention to arise from precontractual dealings. Fairness requires that like cases are treated alike. Since estoppel by convention is based on the same principle of justice as promissory estoppel, and is closely analogous to rectification, it would be unjust to deny estoppel by convention the same scope of operation on the basis that it is a doctrine of the common law rather than equity. Policy considerations justify caution, but no more

[138] *T&N Ltd (in administration) v Royal & Sun Alliance plc* [2003] 2 All ER (Comm) 939, 974 [193] (Lawrence Collins J). See further Barnes (n 5) 362–3 [5.40].

[139] *Whittet* (n 55) 153 (Rolfe J).

so in relation to estoppel by convention than in relation to promissory estoppel or rectification. With the evidentiary safeguard of clear and convincing proof in place, precontractual estoppel by convention poses no greater a policy danger than promissory estoppel or rectification.

The Constitutional Principle of Legality

Jamie Blaker*

Abstract

The principle of legality is thought to have begun in Australia as a democratic principle. It did not. It began here as a liberal, constitutional principle. The implications for the *Constitution* are significant. In 19th century Britain, and in the High Court of Australia in the decades after Australia's Federation, the principle was conceived as an incident of the common law's protection of the 'liberty of the subject'. The 'liberty of the subject' was a constitutional concept. It denoted the frontiers of individual freedom past which state action — including democratically enacted legislation — would offend British constitutional principles of justice. To remember this is to remember what the principle of legality is. It is, most plausibly, an expression of constitutional principles of justice.

Please cite this article as:

Jamie Blaker, 'The Constitutional Principle of Legality' (2022) 44(4) *Sydney Law Review* 559.

* LLB (Monash), LLM (Cambridge). Email: jamieblaker@vicbar.com.au. The article has benefited greatly from the comments of Justice Jacqueline Gleeson, and from exchanges with Trevor Allan, Tiffany Gibbons, Julian Murphy, Duncan Wallace and the Editors and reviewers. The article challenges a position put or supposed by a number of authors who, I want to record here, are an inspiration to me. These authors include Lisa Burton Crawford, Jeffrey Goldsworthy, Brendan Lim and Dan Meagher. All views are my own.

I Introduction

In our law, there is a principle that 'the enactments of the Parliament [are construed] as to maintain ... fundamental freedoms'.[1] That principle — the principle of legality — is thought to have had a certain history. According to the accepted account, the principle of legality started its life in Australia as a presumption that the legislature, being steeped in a liberal political culture, would not intend to enact legislation that would infringe the fundamental freedoms of individuals. In other words (it is said), the principle of legality was once a genuine presumption as to what legislators — the wielders of democratic legitimacy — intended the law to be. I call this account the 'intentionalist origin story'.

The intentionalist origin story does not withstand any scrutiny. Even in those academic contributions where the story is most developed, the story is, perhaps surprisingly, found to rest narrowly upon one judgment of a single High Court Justice: the judgment of O'Connor J in *Potter v Minahan*.[2] The critical statement in that judgment was repeated once by Griffith CJ in 1915, and then not again in the High Court until 1976.[3] If O'Connor J's judgment weighs in favour of the intentionalist origin story (and for reasons later given, it may not), it is thoroughly outweighed by evidence of a different history — a history in which the principle of legality was received and practised in federated Australia as a liberal, constitutional principle. The principle of legality is, in its origins, not the servant of democracy or parliamentarianism,[4] but the servant of the liberal idea that there are frontiers of individual freedom that not even the democratic Parliament should cross without enhanced scrutiny and appropriate resistance.[5]

The discovery that the principle of legality is, in its origins, a purely liberal and not a democratic or parliamentarian principle, should not be surprising.[6] The principle of legality defends a distinctive set of rights that, as a matter of the history of ideas, belong to the liberal tradition. As these rights are understood in the liberal tradition, their essential purpose, in the context of a democracy, is to designate appropriate limits to popular sovereignty.

What is perhaps surprising is the liberal constitutional heritage that the principle of legality (as that evolving collection of judicial practices is now called) brought with it — from Victorian Britain, to federated Australia. In Victorian Britain, and then in early federated Australia, there was an understanding that the

---

1 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J) ('*Re Bolton*').

2 *Potter v Minahan* (1908) 7 CLR 277, 304 ('*Potter*').

3 See below Part II.

4 On the political tradition of parliamentarianism (as distinct from that of democracy), see William Selinger, *Parliamentarianism: From Burke to Weber* (Cambridge University Press, 2019).

5 Cf Isaiah Berlin, 'Two Concepts of Liberty' in Michael Sandel (ed), *Liberalism and its Critics* (New York University Press, 1984) 15, 17; David Strauss, 'Reply: Legitimacy and Obedience' (2005) 118(6) *Harvard Law Review* 1854, 1854–5.

6 A philosophic exploration of how liberalism and democracy come apart is found in Gordon Graham, 'Liberalism and Democracy' (1992) 9(2) *Journal of Applied Ethics* 149. The practical demonstrations of the same are, these days, all too frequent. As to which, see Marc Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30(1) *Journal of Democracy* 5; Francis Fukuyama, *Liberalism and its Discontents* (Macmillan, 2022).

principle of legality (*avant la lettre*) was not just any common law practice. It was a common law practice that conformed statutes to the requirements of liberal, constitutional principles of justice, collectively referred to as the 'liberty of the subject'. Therein lies the profundity of the principle of legality. The principle, it seems, tells of the neglected, liberal substratum of the *Australian Constitution*.[7]

Parts II–IV set out the history. Part V recalls, in light of the history, what the principle of legality is: an expression of constitutional principles of justice.

II The Intentionalist Origin Story

It is difficult to know where the intentionalist origin story was first told.[8] But it was told most influentially, and comprehensively, in a well-regarded article written by Brendan Lim.[9] In his article, Lim wrote that, in Australia, the principle of legality 'once was [a factual prediction]';[10] that, in Australia, the principle of legality

> was first articulated as a set of *positive* claims about the improbability of legislative abrogation of rights. The claims were 'positive' in the sense that they sought to describe authentic legislative intentions — that is, what the legislature actually meant or intended. … Founded upon a combination of political trust and forensic experience, the claims originally underpinning the clear statement principle [that is, the principle of legality] were addressed to what legislatures were in fact likely to have intended in relation to the displacement of the general law, including common law rights.[11]

The evidence that Lim cited for this historical proposition (what I've called 'the intentionalist origin story') was the judgment of O'Connor J in *Potter*.[12] That judgment contained the following passage, itself a quote drawn from the then current edition of a British textbook, *Maxwell on Statutes*. The passage (hereafter 'the statement in *Potter*') read: 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.'[13]

As Lim correctly observed, the principle of legality has, in recent times, been justified on a different basis. The principle's rationale, on this contemporary view, is that the principle ensures that a Parliament may only abrogate rights in a way that will be publicly recognisable, and so susceptible to democratic scrutiny.[14] One can

---

7 Cf Arthur Popple, 'Constitutional Liberties' (1917) 37 *Canadian Law Times* 639, 639 (where, in respect of the inheritance into Canada of the 'constitutional ... liberty of the subject', the author writes: 'lest we forget').

8 Although, the earliest intimation appears to be in *Malika Holdings v Stretton* (2001) 204 CLR 290, 304 (McHugh J).

9 Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372.

10 Ibid 373.

11 Ibid 374 (emphasis in original).

12 Ibid 378, 382–4.

13 *Potter* (n 2) 304 quoting Sir Peter Benson Maxwell and J Anwyl Theobald, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) ('*Maxwell on Statutes*') 121.

14 Lim (n 9) 389–94, and the authorities referred to there.

call this the 'democracy-forcing' rationale for the principle of legality.[15] In light of Lim's understanding of the earlier history of the principle, Lim described the emergence of the principle's democracy-forcing rationale as marking a 'transformation from fact to value'.[16] As to that, Lim wrote:

> [The principle of legality's] legitimating underpinnings shifted over the course of the 20th century. … The courts have transformed the principle's very constitutional justification. … [A]s the reach of the activist regulatory state expanded during the 20th century, th[e positive] claims [originally underpinning the clear statement principle] became increasingly implausible. … The courts have renovated the principle of legality to accommodate the sociological changes that accompanied the rise of the regulatory state.[17]

Since Lim's article, the intentionalist origin story has become pervasive. The intentionalist rationale for the principle of legality, apparently stated by O'Connor J in *Potter*, has been claimed as the principle's 'original rationale', and its 'traditional justification'.[18] These claims have underpinned the accusation, made by some, that the High Court has now departed from the principle of legality's 'traditional' justification so as to, conformably with an alternative justification, increase the force of the principle of legality, and thereby increase the judiciary's practical power to decide what the law will be.[19] Wherever the intentionalist origin story has been affirmed, the primary source cited for it (when a primary source has been cited) has been the famed statement of O'Connor J in *Potter*.[20]

---

15 To borrow an Americanism popularised by Neal Devins, 'The Democracy-Forcing Constitution' (1999) 97(6) *Michigan Law Review* 1971. Lim (n 9) discriminates between different species of democracy-forcing rationale: ibid 390, 392. For the purposes of this article, it suffices to identify the democracy-forcing rationale at a higher level of generality.

16 Lim (n 9) 373–4.

17 Ibid.

18 See, eg, Jeffrey Goldsworthy, 'Is Legislative Supremacy under Threat?' (2016) 60(11) *Quadrant* 56, 59 (referring to '[t]he traditional justification for this principle'); Lorraine Finlay, 'A Judicial Fiction? Retrospectivity and the Role of Parliament' (2019) 45(2) *Monash University Law Review* 435, 442 ('This traditional rationale was set out in 1908 by O'Connor J in *Potter v Minahan*'); Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 40 ('Historically, that rights protective approach was justified by reference to a presumed legislative intention'); Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 418 ('the ... justification for applying the principle of legality was, originally to ascertain the meaning of legislation as intended by the enacting Parliament.'); Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511, 514 ('the principle of legality was traditionally conceptualised as a heuristic for ascertaining parliamentary intention', citing French (n 18) and *Potter* (n 2)); Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 1 ('The traditional answers to this set of questions were clear. The rules of statutory construction, including what we now call the principle of legality, were justified on the basis that they were calculated to give effect to the intention of the legislature'); Bruce Chen, 'The Principle of Legality: Protecting Statutory Rights from Statutory Infringement' (2019) 41(1) *Sydney Law Review* 73, 76, 78.

19 See, eg, Goldsworthy, 'Is Legislative Supremacy under Threat?' (n 18) 59; Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46.

20 See the pages cited above at n 18.

The statement in *Potter* was the statement of a single Justice. And while the statement has been treated as establishing a rule of law ('the rule in *Potter*')[21], there is no basis in principle to suppose it did. In the 67 years after the statement was uttered by O'Connor J, the statement (or more accurately, the sentence from *Maxwell on Statutes* that was the substance of the statement) was quoted once in the High Court, in 1915 by Griffith CJ,[22] another single Justice, and in aid of interpreting a constitutional, and not a mere statutory, provision. In the State Supreme Courts, the statement in *Potter* was likewise apparently repeated only once and by a single Justice, during the same 67-year period.[23]

In apparent contradiction to the intentionalist origin story,[24] it was well into the second half of the 20th century, as the regulatory state rose precipitously, that the statement in *Potter* appears to have begun to be affirmed and quoted — albeit infrequently and sporadically, even then. In 1976, Murphy J ended the statement's 60-year quietude in the High Court[25] by quoting the statement approvingly.[26] The statement was next quoted in the High Court in 1983, by Brennan J.[27] These decisions of Murphy J and Brennan J also contained elaborations of the principle of legality that seemed in tension with the proposition that the principle is a genuine presumption as to legislative intent.[28] The statement in *Potter* was not otherwise repeated in the High Court in the 1970s or the 1980s. It was in these decades that the statement began increasingly (though still infrequently) to be affirmed in the State Supreme Courts.[29]

---

21 *Malika Holdings v Stretton* (n 8) 299 [31]; Lim (n 9) 380. See similarly JJ Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79(12) *Australian Law Journal* 769, 780; Dan Meagher, 'The Common Law Principle of Legality' (2013) 38(4) *Alternative Law Journal* 209, 209.

22 *R v Snow* (1915) 20 CLR 315, 322–3.

23 *Ex parte Grinham; Re Sneddon* (1959) 61 SR (NSW) 862, 875 (Walsh J) ('*Re Sneddon*'). Before this period, the substance of the statement in *Potter*, being the passage from *Maxwell on Statutes* (n 13), was quoted once in *Johansen v City Mutual Life Assurance Society* [1904] St R Qd 288, 322 (Rutledge AJ). See further the history set out at below n 29.

24 *Contra* Lim (n 9) 373 ('as the reach of the activist regulatory state expanded during the 20th century, [the positive] claims [originally underpinning the clear statement principle] became increasingly implausible. … The courts have renovated the principle of legality to accommodate ... the rise of the regulatory state').

25 The 60 years commencing from Griffith CJ's use of the statement in 1915.

26 *Johnson v The Queen* (1976) 136 CLR 619, 669 ('*Johnson*'). A part of a paragraph in *Maxwell on Statutes* (n 13), from which the statement in *Potter* is drawn, was quoted approvingly seven years earlier by Windeyer J in 1969. However, the text so quoted by Windeyer J did not contain the statement in *Potter* as I have identified it. That is, it did not contain an intentionalist justification for the principle of legality: *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 185.

27 *Sorby v Commonwealth* (1983) 152 CLR 281, 316 ('*Sorby*').

28 In *Johnson* (n 26) 669, Murphy J described the statement in *Potter* as describing an 'approach [that] attributes to' (rather, I interpolate, than identifies as existing in) 'the Parliament' the relevant intention. In *Sorby* (n 27) 322, Brennan J also spoke of the intention being 'attribut[ed]'.

29 The statement was affirmed for the first time (since Federation) in the authorised reports of South Australia in *Christie v Bridgestone Australia Pty Ltd* (1983) 33 SASR 377. In Victoria, the equivalent milestone was reached in 1978 in *Harrison v Lederman* [1978] VR 590. In Western Australia, it was in 2009 (*Western Australia v BLM* (2009) 40 WAR 414) and in Tasmania it was as late as 2016 (*Arnold v Hickman* (2016) 28 Tas R 152). In the authorised reports of the State of New South Wales, the statement appeared first in 1959 (see *Re Sneddon* (n 23)) and then the second time in *Balog v Independent Commission Against Corruption* (1989) 18 NSWLR 356. In the authorised reports of Queensland, there was a 106-year gap between the substance of the statement first appearing in 1904

It was then not until the year 1990, in the decision of *Bropho v Western Australia*,[30] that a majority of the High Court endorsed the statement in *Potter*.[31] In that sense, authoritative support for the statement in *Potter* — putatively the 'original justification' for the principle of legality — was first given in the year 1990, a little less than four years before the alternative, democracy-forcing rationale for the principle of legality received majority support (by a similarly composed Bench) in the case of *Coco v The Queen*.[32]

All that being so, in the years and decades leading up to the articulation of the principle of legality's contemporary rationale in *Coco*, the statement in *Potter* was not canonical. Its ascendance was new. And that is to notice one part of a larger, forgotten picture.

III A Liberal Constitutional Inheritance, from Victorian Britain

Upon a fresh look at the legal history, one finds that the principle of legality, as it existed in the decades either side of Australian Federation, was a liberal principle. It was not a democratic or parliamentarian principle. In the decades before Federation, the principle (*avant la lettre*) was understood in Victorian Britain as a bulwark of the 'liberty of the subject' — a renowned constitutional principle that tracked evolving ideas, within liberal thought, as to the moral limits of legitimate state action. That liberal and constitutional justification for the principle of legality was recommitted to by the early High Court, and by the Supreme Courts of the newly federated States. As to the idea that the principle of legality manifests the intentions of legislators, the intentionalist conceptions underlying that idea, and on occasions the idea itself, were rejected by the early High Court.

In forgetting this history (set out in this Part, and in Part IV), the profession has forgotten what the principle of legality is (see Part V).

A *Liberty in Victorian Britain*

The Victorian era in Britain was a century long.[33] In so many years of history, much changes. The era was the site of significant evolutions in Britain's society, and in the forms of Britain's public institutions.[34] One thing that unified the era, however, was

(see *Johansen* (n 23)), prior to *Potter*, and appearing for the second time in *Williams v Carlyle Villages* [2010] 2 Qd R 379.

30 *Bropho v Western Australia* (1990) 171 CLR 1 ('*Bropho*').

31 Ibid 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

32 *Coco v The Queen* (1994) 179 CLR 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

33 The era spanned 'the period between approximately 1820 and 1914': Susie Steinbech, 'Victorian Era': *Encyclopedia Britannica* (online at 12 March 2021) <https://www.britannica.com/event/Victorian-era>.

34 Britain's 19th century saw democratic, liberalising and welfarist reforms sometimes described collectively as the 'nineteenth-century revolution in government': Donald Winch, 'Review of Richard Bellamy, ed, *Victorian Liberalism: Nineteenth-Century Political Thought and Practice*' (1991) 3(2) *Utilitas* 326, 328. See also Angus Hawkins, *Victorian Political Culture: Habits of Heart and Mind* (Oxford University Press, 2015) 367 ('Victorian politics was about the management of

a diffuse commitment to a concept of liberalism, or 'British liberty', as providing the foundational principles of British government.[35] This foundational, liberal concept itself evolved throughout the 1800s, and different political parties and movements advanced different ideas of the concept over that time.[36]

The idea of British liberty had, however, a relatively stable core 'throughout the century'.[37] It was the idea that 'centralized institutions and statist interventions were [to be] curbed to preserve the self-governing liberties of individuals and local communities'.[38] Here, the concern was not simply that people be free to sell their goods and services, and to accumulate and exploit capital — although that was an aspect of the concern.[39] The larger concern was republican and classically liberal in character,[40] and 'obtained … its focus in opposition to the autocracy, militarism, and socialism that were perceived to flourish abroad',[41] as well as (socialism aside) in Britain's past.[42] The concern was that citizens' lives not be dominated by autocratic government, and that citizens retain such political liberties as are inconsistent with domination by autocracy.[43] The Victorian concept of liberty, as such, was the ability to plan and live one's life within the framework of 'stable and just laws',[44] as

change'). A general history of the constitutional and social changes occurring over the 19th century is contained in Simon Schama, *A History of Britain (Volume 3): The Fate of Empire 1776–2000* (Penguin, 2012).

35 Hawkins (n 34) 16 (writing that the 'political culture *mediated* the social and economic structural changes transforming Victorian Britain', emphasis added). As to the central place that a conception of liberty had in that culture, as well as in the projected ideals of British foreign affairs, see Hawkins (n 34) 1–2, 12, 34, 45; Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton University Press, 2016). For a mid-Victorian attempt at definition of 'British liberty', see the unattributed catechism annexed in DC Harvey, 'Education for Responsible Government' (1947) 27(3) *Dalhousie Review* 335, 338.

36 There was in this sense 'a variety of "liberalisms" that cohabited or succeeded one another in the history of the theory and practice of government in nineteenth century Britain': Winch (n 34) 326.

37 Lauren Goodlad, *Victorian Literature and the Victorian State: Character and Governance in a Liberal Society* (John Hopkins University Press, 2003) vii–viii.

38 Ibid.

39 For historiographical texts that trace Victorian attitudes to economic freedom, see, eg, GR Searle, *Morality and the Market in Victorian Britain* (Clarendon, 1998); WH Greenleaf, *The British Political Tradition, Vol 1: The Rise of Collectivism* (Methuen, 1983). In the mid-Victorian era especially, laissez faire dominated, so that perhaps '[n]o industrial economy can have existed in which the State played a smaller role': HCG Matthew, *Gladstone 1809–1874* (Oxford University Press, 1986) 169.

40 A partial history of the distinct republican and classical liberal threads of British political thought is found in Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press, 2014).

41 JP Parry, 'Liberalism and Liberty' in Peter Mandler (ed), *Liberty and Authority in Victorian Britain* (Oxford University Press, 2006) 73. Cf AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Liberty Fund, 2008) 58.

42 Robert Lowe, 'Imperialism' (1878) 24(142) *Fortnightly Review* 453, 463 ('the history of the English constitution is a record of liberties wrung and extorted bit by bit from arbitrary power').

43 Parry (n 41) 72 ('Suspicion of potential State oppression was fundamental to nineteenth-century liberalism'). As Parry explains, whereas historians had previously viewed ideas of economic freedom as being at the centre of the Victorian political ethic, that view of the history came to be largely discredited. 'Consequently, it is now more generally argued that Liberalism was at heart concerned with *political* relationships and *political* liberties': at 72 (emphasis in original).

44 ER Conder, *Liberty* (Hodder and Stoughton, 1879) 3–4. Cf Earl of Meath and Edith Jackson, *Our Empire: Past and Present* (Harrison and Sons, 1901) 92 (celebrating England's 'constitutional freedom and ... ordered liberty'); Dicey (n 41) 60 ('fixity of law is the necessary condition for the maintenance of individual rights and of personal liberty').

opposed to having one's life be subject constantly to the projects and whims of a despotic, extractive government.[45]

The anti-autocratic conception of British liberty pre-dated Victorian Britain.[46] But the conception became radiant in Victorian Britain because it achieved a broader expression in the forms and actions of Britain's main public institutions. As Dicey records in his history of the liberalisation of British law in the early to mid-Victorian period, the British Parliament of that period, dominated by the Whig Party (and its Liberal offshoot), enacted laws to extend the franchise, to enhance freedom of contract, and of marriage and dealings with property, and to remove constraints on religious freedom and freedom of speech, among other liberalising measures.[47] Dicey wrote of those reforms:

> The extension of individual liberty as an object of [the] … legislation include[d], no doubt, that freedom of person … protected by the Habeas Corpus Acts … but it include[d] also the striking off of every unnecessary fetter which law or custom imposes upon the free action of an individual citizen.[48]

The liberal mood of parliamentary government continued into the Gladstonian years of the latter Victorian period.[49]

The British judiciary was another institution that gave expression, in its practices, to the 'very wide'[50] and anti-autocratic conception of liberty, in the Victorian era. Among the most significant of those practices was a general practice of statutory construction that was described in varying ways and at varying levels of abstraction over the years, and to which a number of canons of construction were attributable. That general practice required statutes to be read strictly, or otherwise in favour of liberty, where the statute would on the alternative construction interfere more severely with the 'liberty of the subject'.[51] The practice was an expression of

---

45 See further the descriptions of Victorian Britons' 'hatred ... of the collective and autocratic authority of the state' (in Dicey's words) in Dicey (n 41) 125 and Walter Bagehot, *The English Constitution* (Kegan Paul, Trench, Trubner & Co, 6th ed, 1891) 387.

46 For the early parliamentary history, see, eg, JH Hexter (ed), *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War* (Stanford University Press, 1992). The Victorian conception of individual liberty also owed much to the earlier traditions of the common law, going back to Coke: Dicey (n 41) 125. A more encompassing intellectual history is Frederic William Maitland, *A Historical Sketch of Liberty and Equality: As Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge* (Liberty Fund, 2000).

47 Dicey (n 41).

48 Ibid 135, the reforms then being described at 135–49.

49 In the latter part of the Victorian era, there was (as it was conceptualised by reformers of the period) 'an overdue extension to the electoral arena of the liberty that existed in other areas of life': Gregory Conti, *Parliament the Mirror of the Nation: Representation, Deliberation and Democracy in Victorian Britain* (Cambridge University Press, 2019) 236; *Representation of the People Act 1867* (Imp); *Representation of the People Act 1884* (Imp). In other areas of legislation and governance, and into the years of Gladstone, '[a] persistent suspicion of the oppressive, morally degrading tendencies of government ... ensured that "intervention was resisted because of its feared political consequences"': Margot C Finn, 'Book Review of *Liberty, Retrenchment, and Reform: Popular Liberalism in the Age of Gladstone, 1860–1880* by EF Biagini' (1995) 67(1) *The Journal of Modern History* 148, 148, summarising and, in part, quoting that part of Biagini's history.

50 Dicey (n 41) 135.

51 That general practice (lengthily described in the rest of this Part) was sometimes described as one of interpreting laws in a way 'favourable to the liberty of the subject': as in, eg, *Henderson v Sherborne*

the liberal values with which Victorian judges, like other institutional actors, were 'imbued'.[52] An understanding of the practice begins with an understanding of the practice's core concept: the constitutional 'liberty of the subject'.

B *The Constitutional Liberty of the Subject*

The 'liberty of the subject' was a renowned principle of the English and (as it then became) the British Constitution.[53] By the Victorian period, the liberty of the subject had come to be regarded by the legal profession as a principle of Britain's 'constitutional law',[54] and (as one professor put it at the close of the Victorian

(1837) 150 ER 743, 744 (Lord Abinger). It was at other times described as requiring 'that any enactment dealing with [the liberty of the subject] must be construed strictly' as in, eg, *Re Marks* (1866) LR 1 Ch App 334, 335. Those two descriptions of the practice may have referred to distinct conceptions or modes of the practice. With respect to the former conception of the rule, it had sub-applications to statutes dealing with, among other things, liberty to sell one's labour, freedom of movement, freedom of commerce and of contract, and freedom of thought including on religious matters: see below nn 86–93. Regarding the latter conception, in his *Treatise on the Rules which Govern the Interpretation and Application of Statutes* (John S Voohries Booksellers and Publishers, 1857), the American lawyer Theodore Sedgwick (whose work was respected and cited in England's courts and leading cognate text: see Henry Hardcastle, *Treatise on the Construction and Effect of Statute Law*, ed William Feilden Craies (Stevens and Haynes, 3rd ed, 1901) 3–17, 114, 456; *Attorney-General v Sillem* (1863) 159 ER 178, 202) described the practice of interpreting certain statutes strictly as proceeding on the basis that 'the judiciary have a right to make distinctions between different ... classes of statutes; [so] ... that some are to be strictly construed and rigidly enforced' to the end of blunting 'provisions [that] are sweeping and arbitrary, and where its literal operation and application involve really innocent parties in great suffering' (Sedgwick at 291–2). On those pages, the author also described this as a 'power' in the judiciary. The classes of statutes to be so construed were nominated by Sedgwick (on the foundational basis of English authorities) to include the following classes relatable, on their face, to the liberty of the subject: statutes conflicting with a fundamental law (such as the right to trial by jury in England) (at 312–13); penal statutes (at 324); laws of taxation (at 334–5); laws affecting property rights (at 346); and statutes authorising summary judicial proceedings (at 347). A number of these practices have been justified as protecting the liberty of the subject. Regarding penal statutes, see below n 110. Regarding laws of taxation, see *Edgar v Greenwood* [1910] VLR 137, 144 (Madden CJ, justifying the courts' approach to taxation statutes as causing 'less interference with the liberty of the subject'). See similarly the discussion in Donald J Johnston, 'The Taxpayer and Fiscal Legislation' (1961) 8(2) *McGill Law Journal* 126, 131. The imputation of mens rea also came to be regarded as protecting the liberty of the subject (see below n 151).

52 Dicey (n 41) 142 ('The best and wisest of the judges who administered the law of England during the fifty years which followed 1825 were thoroughly imbued with Benthamite liberalism'). The Benthamite liberalism there referred to was, as Dicey wrote, opposed to legislative restraints upon liberty. It 'assaulted restraints imposed by definite laws': Dicey (n 41) 107.

53 Regarding the liberty's constitutional status, see, beyond the works of Amos and Dicey discussed in the coming pages: Popple (n 7) 640; Sir William Blackstone, *Commentaries on the Laws of England* (JB Lippincott, Sharswood edn, 1893) vol 1, 127. The liberty was very often described in and around the Victorian period as the 'constitutional liberty of the subject' or the 'constitutional liberties of the subject'. Representative examples are *Dawkins v Lord Rokeby* (1866) 176 ER 800, 811 (Willes J, describing 'the absolute necessity, of the maintenance of the constitutional liberties of the subjects of this country'); *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 614 (Earl of Birkenhead, referring to 'the evolutionary development of the constitutional liberty of the subject'); Sir John Walsh, *Chapters of Contemporary History* (John Murray, 1836) 12 (describing legislation said to 'infring[e] ... the constitutional liberties of the subject'). Reference was also frequently made to a 'constitutional liberty', as in, eg, William Edward Hartpole Lecky, *Democracy and Liberty, Vol 1* (Longmans, Green & Co, 1896) 256–7. See further below Part V.

54 *Gardner v Dymock* (1865) 5 Irvine 13, 35–6 (Lord Neaves describing an Imperial statute 'perilous to the liberty of the subject' as being, in point of that, 'opposed to our view of constitutional law';

period), within 'the Constitution', 'a third species of matter, besides positive law and the Conventions'.[55] More than other British constitutional principles of the time, the liberty's renown extended beyond the legal profession. As the jurist James Paterson wrote in 1877, the 'liberty of the subject' was then a principle latent in (or 'liv[ing] in') 'most of the departments of the law' of England, but also 'a sounding phrase and a watchword with which to conjure the multitude'.[56]

Among Victorian British lawyers, the principle of the 'liberty of the subject' was found stated at different levels of abstraction. At its lower level of abstraction, the liberty of the subject was taken to comprise that gamut of civil liberties, or 'popular rights', that were associated with British soil[57] — 'certain rights which a British subject [had]'.[58] According to one catalogue of these rights, they (the 'liberties of the subject') were:

> the right to personal liberty, secured by the writ of habeas corpus, except in case of a contravention of the law; the right of freedom of speech, subject to the law of libel, sedition and slander; the freedom of the Press; and the right of public meeting and public discussion.[59]

At a higher level of abstraction, the liberty was, in Victorian Britain, conceived not by reference to its constituent bundle of rights, but rather as a sphere of individual freedom girded by just law: 'the greatest protection extended to the body, the property, and ordinary pursuits … — the liberty of shaping one's conduct by laws confessedly just'.[60] The sphere of liberty denoted by the 'liberty of the subject' was, more particularly, a sphere of liberty from oppressive government, 'especially as …

Sheldon Amos, 'Law Lecture on the Liberty of the Subject' (1836) 2(25) *The Westminster Hall Chronicler and Legal Examiner* 65, 65 (describing the 'liberty of the subject' as a 'branch of [Britain's] constitutional law').

55 Sir Maurice Sheldon Amos, *The English Constitution* (Longmans, Green and Co, 1930) 30. The view was apparently assented to by Lord Hewart (the Lord Chief Justice of England) in his 'Introduction' to the book (at vi, viii).

56 James Paterson, *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person* (1877, Macmillan), xi, xii. See also at xiv ('the central idea involved in the English Liberty of the Subject becomes, on a complete analysis, the polar axis upon which all the municipal laws revolve'). As to the liberty's public face, see further below n 78.

57 William Henry Curran, *The Life of the Right Honorable John Philpot Curran, Late Master of the Rolls in Ireland* (WJ Widdleton, 1855) 172; Homersham Cox, *The Institutions of the English Government* (H Sweet, 1863) 431 (referring to 'those popular rights which are frequently designated "the liberty of the subject"'). For an attempt at a catalogue, see Michael Tugendhat, *Liberty Intact: Human Rights in English Law* (Oxford University Press, 2016).

58 Sir George Cornewall Lewis, *Remarks on the Use and Abuse of Some Political Terms* (Clarendon Press, new ed, 1898) 151 ('Thus we speak of the liberty of the British subject, meaning certain rights which a British subject may exercise').

59 Lord Chief Justice Hewart (n 55) vi. A partial (and overlapping) catalogue (from more squarely within the Victorian period) is found in AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889) chs 5–7 addressing, respectively, 'The Right to Personal Freedom', 'The Right to Freedom of Discussion' and the 'Right of Public Meeting'. Dicey considered these rights 'part of the law of the Constitution': at 25. For a more recent attempt at catalogue, see Tugendhat (n 57).

60 Paterson (n 56) 77. See similarly Sheldon Amos, *Fifty Years of the English Constitution, 1830–1880* (Longmans, 1880) 423 (referring to the liberty of the subject as being 'the independence guaranteed by the Constitution to every citizen'. Cf Blackstone (n 53) vol 1, 125 ('the absolute rights of man … are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature').

secured against arbitrary imprisonment, against confiscation of property, and against suppression of free speech and thought'.[61]

Significantly, the liberty of the subject was conceived as a liberty defined by its vulnerability not only to the actions of the executive, but also to the legislative choices of the increasingly democratic Parliament,[62] and indeed to courts in the exercise of their powers.[63] The liberty was treated as setting, for each of these organs, certain limits of constitutional propriety, if not of constitutional authority. It is a picture largely captured by Professor Sheldon Amos, by then retired from the Chair of Jurisprudence at the University of London, when he wrote in 1880:

> The liberty of the subject, when properly understood, is an independent principle in the [English] Constitution, and lies far deeper than any expression of it ... There is a limit not only to the rights of the Executive, but even to the rights of the Legislature itself, when the exercise of either class of rights threatens to encroach on the independence guaranteed by the Constitution to every citizen ... In the case of the legislature, the limits are incapable of being fixed by any legal standard.[64]

Amos's great contemporary, Albert Venn Dicey, recorded an analogous, albeit highly (and characteristically) distinctive, understanding in Dicey's magnum opus, *Introduction to the Study of the Law of the Constitution*.[65] There, Dicey described the Imperial Parliament's powers of legislation as being total,[66] but as also being potentially (that is, in some of the power's possible exercises) inconsistent with the 'liberties of this kingdom'.[67] According to Dicey, those liberties — the Victorian liberal 'right[s] to personal liberty ... [and] of public meeting, and many

---

61 Paterson (n 56) 77, and then see at 75 (describing 'the liberty of the subject' as a weapon 'against all evil designs tending to [bodily pain, imprisonment and deprivation of property], whether on the part of the subject or of the sovereign, *but more especially the latter as being the most powerful*', emphasis added). The same reasons of history were at play. See Popple (n 7) 640 (writing that '[t]he true origin' of the legal concept of the liberty of the subject 'may be found in oppression by those in authority').

62 That an Act of Parliament could be at odds with the liberties of the subject was, for example, contemplated in *Looker v Halcomb* (1827) 4 Bing 183; 130 ER 738, 740–1 (Best CJ) (referring to '[a]n Act of Parliament which ... abridges the liberty of the subject'); *Bows v Fenwick* (1874) LR 9 CP 339, 344 (Lord Coleridge CJ) ('This statute is ... an interference with the liberties of the subject'). Many similar judicial pronouncements are quoted throughout this article. See also, eg, the allegory told by Bagehot, concerning the supposed incursions of the liberty of the subject authorised by the *Census Act 1850* (Imp) 13 & 44 Vict, c 53: Bagehot (n 45) 387; Charles Bell Taylor and William Paul Swain, *Observations on the Contagious Diseases Act* (F Banks, 1869), which Act they said (in the extended title to the pamphlet) 'destroys the liberty of the subject'. To the extent that the liberty of the subject was framed as a general standard of political legitimacy, it, by reason of that framing, necessarily engaged all state action: cf *Bryce v Graham* (1826) 2 WS 481, 496 (Lord Balgray) ('The rights of personal liberty are to be guarded, and the right of everyone to manage his own affairs. Those are rights flowing from the law of nature, and are to be protected in every well-governed country').

63 Joseph Collinson, *Lawlessness on the Bench* (Humanitarian League, 1908) 2.

64 Amos (n 60) 423.

65 Dicey (n 59).

66 Ibid 38 (describing the Parliament's constitutional 'right to make or unmake any law whatever').

67 Ibid 40, quoting with approval Blackstone (n 53) vol 1, 160–1. In the passage that Dicey quotes, Blackstone adds that England's 'liberty ... w[ould] perish whenever the legislative power shall become more corrupt than the executive'.

other rights'[68] — were, despite their vulnerability to legislative abrogation, 'part of the law of the constitution'.[69]

Dicey, like Amos, did not treat the constitutional liberal rights as being constituted by the ordinary law. The rights were, in Dicey's view, independent from the ordinary law, so that they might be 'protected'[70] or indeed disappointed[71] by that law. On the other hand, Dicey (like Paterson) perceived a connectedness between England's ordinary laws — in particular, the general law administered by the courts — and the more specific content of the constitutional liberties. The 'so-called principles of the [English] constitution'[72] concerning basic rights were not, in Dicey's view, laid down as common law to be discerned by application of ordinary principles of *stare decisis*; but the principles were (as is a different thing) 'inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals'.[73] That whole apparatus of law and latent principle then itself expressed, in the Diceyan vision, a certain public 'spirit', involving notions 'of justice, and of the relationship between the rights of individuals and the rights of the government'.[74] The question, then, was whether the contemporary laws of England were reconcilable with the constitutional rights latent in the law's historic course. If they were, then Dicey apparently granted that the contemporary law, including statute law, was itself capable of fixing the more particular, variable contents of the liberal constitutional rights.[75]

---

68 Dicey (n 59) 25.

69 Ibid 25. On that page, Dicey relates 'most' of those conventional rights to one of the more concrete forms of Britain's constitutional law, being the 'general law or principle' of due process in criminal proceedings. This vision of Britain's constitutional morality as being nascent in the forms of its constitutional law — as being, one can say, the angel in the architecture, or (in Dicey's imagery) the 'principles on which [the constitutional] fabric is wrought' and which transcend that fabric (Dicey (n 62) 3 — was an ancient vision. Cf William Penn, 'The Excellent Priviledge of Liberty and Property Being the Birth-Right of the Free-born Subjects of England' (1687, pamphlet printed by William Bradford); Blackstone (n 53) vol 1, 127 ('The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government'), vol 1, 143 (describing 'political or civil liberty' as 'the direct end of [England's] constitution').

70 Dicey (n 59) 186 (speaking of certain rights being 'protected' under English law).

71 Ibid 185 (contemplating a scenario where, by reason of the content of English law, 'the rights of individuals are [not] really secure').

72 Ibid 185.

73 Ibid. The understanding reflected Dicey's position that the constitutional liberal rights are 'secured by the decisions of the Courts': at 184. While Dicey treated statutes such as the *Habeas Corpus Act* as guaranteeing liberties (at 187), he did not see those Acts as load bearing in constitutional terms: see, eg, at 189 '[t]he *Habeas Corpus Act* may be suspended and yet Englishmen may enjoy almost all the rights of citizens'. That discounting of Parliament's role in girding the constitutional rights distinguished Dicey's account. Cf *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 568 (Lord Parmoor) ('The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments.')

74 Cf Dicey (n 59) 130–1. And see at 175 (describing 'the habit of self-government, the love of order, the respect for justice and a legal turn of mind' as being 'intimately allied'). Dicey's deeper reflections on the relationship between 'public opinion', as he called it, and the content of the Victorian English law are given in Dicey's *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (n 41).

75 Dicey (n 59) 186 ('there runs through the English constitution [an] inseparable connection between the means of enforcing a right and the right to be enforced'). And regarding legislation, see further above n 73.

Around the writings of Dicey, Amos, Paterson and others, one traces the following, wide conception, which accommodates differences in description. The liberty of the subject, in sum, denoted what we would today describe as a set of basic liberal principles of justice that, in the public culture and in England's constitutional law, were understood to set the outer limits of legitimate state action. To the extent that legislation and the general law embodied a plausible conception of those principles, those positive laws were apt to be pointed to, by the Victorian lawyer, as sustaining the liberty of the subject. But where instead the law was irreconcilable with the concept of the 'liberty of the subject', that constitutional concept (which, disembodied from the ordinary law, was a thing of pure principle — in that sense an '"unknown quantity" of latent fire'[76]) provided the popular and constitutional standard against which the law fell to be censured.[77] Like contemporary liberal principles of justice, the liberal principles constituting the 'liberty of the subject' were publicly affirmed by the basic institutions of government, and in kind they were affirmed in the broader public discourse.[78] Because these liberal principles derived ultimately from the public culture, '[t]he origin, growth and development [of the liberty of the subject] coincided with the origin, growth and development of society'.[79]

C *The Liberty of the Subject and the Victorian British Courts*

Dicey, it was mentioned, saw the British courts as the prime protectors and, within moral bounds, the curators of the liberty of the subject. Regardless of whether one accepts that particularised vision, one sees in the British law reports (more closely visited later in this Part) that the principle of the liberty of the subject did have, in the hands of judges, a counter-majoritarian potential. In 'times when the ... liberty [was] ... disregarded by those' in Parliament or those responsible to Parliament, the understanding was that 'it ... remained for the judicial bench' to be the liberal check — 'to combat the ... forces which would have trampled ... the sacred rights of the people', which rights constituted the liberty of the subject.[80]

---

[76] Paterson (n 56) vol I, xi.

[77] That the 'liberty of the subject' was a thing of principle capable of being girded by positive laws was perhaps implied in Lord Ardmillan's statement: 'The sacredness of personal liberty is protected by law' (*HM Advocate v Keith & Milne* (1875) 3 Coup 125, 14). See similarly John Burridge, *A Concise and Impartial Essay on the British Constitution* (E Peall, 1819) 44 ('statutes were passed to preserve the inestimable liberty of the subject'); James W Wall, *Speeches for the Times* (J Walter & Co, 1864) 24–5 (describing the 'personal liberty of the subject' as a 'natural inherent right', 'coeval with the first rudiments of the English constitution' and then 'established' upon certain statutory and other landmarks in English law).

[78] Cf Paterson (n 56) vol I, xi ('[W]hether used in the senate and the courts, or shouted by the mob, this household phrase seldom fails to call up a crowd of noble associations.'); Amos (n 60) 422 ('There is no expression ... more familiar in the popular mouth, when adverting to ... the English constitution, than that of the liberty of the subject').

[79] Popple (n 7) 640. Then see *Secretary of State for Home Affairs v O'Brien* (n 53) 614 (Earl of Birkenhead) (referring to 'the evolutionary development of the constitutional liberty of the subject'); *Attorney-General v De Keyser's Royal Hotel Ltd* (n 71) (Lord Parmoor) (referring to '[t]he growth of constitutional liberties').

[80] Popple (n 7) 641. The Victorian British judiciary's methods, in that regard, are described in the remainder of this Part. Similar thoughts are expressed in *R v Vine Street Police Station Superintendent* [1916] 1 KB 268, 279 (Low J) ('this Court is specially charged as between the Crown and subject to

The liberty of the subject, in this of its applications, seemed often to take on the general form of a 'right' that was abstracted from positive law, and good against all elements of the British government[81] — albeit, the right was the traversable stuff of constitutional principle.[82] The liberty of the subject, as such, invited comparisons (made by Amos) to the constitutional protections of rights then existing in the constitutions of America and its constituent States.[83] And it reflected the experience of the time that 'legislative assemblies are not the less despotic for being democratised',[84] or not necessarily — a point made resoundingly in the period by John Stuart Mill.[85]

Consistent with this overall understanding, the British judicial practice of interpreting statutes in favour of the liberty of the subject was, in the Victorian period, a practice conducted not only for the protection of the 'personal liberty' of the individual[86] (a phrase that connoted freedom from arbitrary imprisonment).[87] The practice was also employed to protect other facets of the individual's liberty then and thereafter acknowledged within liberal thought as marking the frontiers of legitimate state action. These other facets of liberty, protected by the method of construction, included liberty to sell one's labour,[88] freedom of movement,[89] freedom of commerce[90] and of contract,[91] and freedom of thought including on religious matters.[92] Although there was apparently no occasion for the interpretive principle to be applied in conservation of the 'liberty of the press', the principle

---

exercise the greatest care in safeguarding the subject's liberty'); *Transcript of the Swearing in of Justice Dawson* (Adelaide, 16 August 1982) 10 (Shaw QC describing 'the historic function of the courts' as being 'to stand four-square between the subject and the State, sensitive especially ... to vindicate the liberties of the subject and sensitive to detect and disallow any abuse of power on the part of government and its officers'). Cf Dicey (n 59) 17 ('The fictions of the Courts have ... served the cause ... of freedom .... when it could have been defended by no other weapon').

81 Popple (n 7) 640–1. The 'liberty of the subject', in this of its applications, could be declared by courts to be 'put ... in danger', 'derogate[d]' from, 'abridged', or 'interfer[ed] with by legislation, without the court necessarily having identified a particular legal right that the legislation interfered with. See, eg, and respectively: *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ); *Macbeth v Ashley* (1874) LR 2 ScDiv 352, 359 (Brinsden J); *Looker v Halcomb* (n 62) 740–1 (Best CJ); *Butler v Turley* (1827) 2 CAR & P 585, 589 (Best CJ). Reflecting the 'liberty of the subject's' nature as a standard of legitimacy, even a statute that conferred 'unusual powers' over the individual could be adjudged not to be an 'infringement of the liberty of the subject', where the powers served 'a great good'. Or that was the approach in *Hope v Evered* (1886) 17 QBD 338, 340–1 (Lord Coleridge CJ, Mathew J).

82 With the consequence that judges could act on their 'jealous[y] to protect the liberties of the people, but if the legislation in derogation of those rights exists on the statute book, they [the judges] cannot do other than follow the law': Popple (n 7) 650. See similarly *Gardner v Dymock* (n 54) 35–6 (Lord Neaves, accepting that the *Summary Procedure Act* of the time 'is opposed to our view of constitutional law, and might be so administered as to be perilous to the liberty of the subject', but that 'still, the terms of the Act are clear, and the enactment must receive effect').

83 Amos (n 60) 422–3.

84 Ibid 424.

85 John Stuart Mill, *On Liberty* (Batoche Books, 2001) 8. See similarly Lecky (n 61) 256–60.

86 Though the practice was protective of personal liberty. See, eg, *Ex parte Martin* (1879) 4 QBD 212, 215 (Kelly CB, Pollock B agreeing).

87 Dicey (n 59) 194–5.

88 *Rex v Chase* [1756] 2 WILS KB 41, 41 (seemingly per Lord Mansfield).

89 *Butler v Turley* (n 81) 589 (Best CJ).

90 *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ).

91 *Scott v Avery* (1856) 10 ER 1121, 1138 (the Lord Chancellor).

92 *Bute v More* [1870] 1 Coup 495, 545 (Lord Neaves).

presumably could have been so applied in circumstances where the common law treated that liberty as 'no greater and no less than the liberty of every subject of the Queen'.[93]

Of some importance to the history of the principle of legality, the Victorian ancestor of that principle was justified, by the Victorian British courts, on liberal bases. It was not justified on the majoritarian basis that the practice somehow gave effect to the intentions of legislators.[94] The liberal justifications that were given might be categorised as being sometimes deeper, and sometimes shallow.

The deeper liberal justifications spelled out their premises, however curtly. In giving these deeper justifications, the British judiciary often explained the interpretive practice as being the upshot of attitudes of 'jealousy' and 'tenderness' toward the liberty of the subject.[95] These attitudes were variously attributed to the judiciary itself or to the common law generally (and notably not to the Parliament).

An early justification along those lines is in the decision of Lord Chancellor Eldon in *Crowley's Case*.[96] In that case, the Lord Chancellor had occasion to consider the 'course in which the Court of Common Pleas acquired the general power of issuing the writ [of habeas corpus]'.[97] In the Lord Chancellor's recounting of that course, the Court of Common Pleas read the *Habeas Corpus Act of 1640*[98] as conferring on that Court a general jurisdiction to issue the writ through a spurious line of interpretive reasoning which, without threshing its intricacies here, hung upon a reference in the statute to 'the ordinary fees usually paid'[99] for a writ of habeas, and the history of the Court of Common Pleas in charging such fees in exercising its historically limited jurisdiction to issue the writ. Lord Eldon justified this not as an accomplishment in discerning the Parliament's intention, but as '[a] remarkable example of the strength of the principle which our law has in it, that, with respect to the liberty of the subject, *the courts are to struggle to secure it*'.[100]

Justifications of that general kind were then given in Britain throughout the 19th century. In *Andrew v Murdoch*, Lord Holland referred to a judicial practice of 'construing every thing in the manner most favourable to the liberty of the subject'.[101] His Honour identified the motivation of that practice as being a 'bias which is generally enjoined by law' and capable of 'enforce[ment]' by individual judges.[102] In words that linked that bias to the Victorian guardedness against

---

93 *R v Gray* (1900) 2 QB 36, 40 (Lord Russell CJ).

94 That is not to say that the interpretive practice was oblivious to the apparent intended meanings of legislative texts. As with the modern-day principle of legality, there was an acceptance that where 'the terms of the Act are clear' in derogating from the 'liberty of the subject', those terms were to be given effect: *Gardner v Dymock* (n 80) 35–6 (Lord Neaves). Cf Lord Halsbury LC in *Cox v Hakes*, who might be read as having reached an interpretation favourable to the liberty of the subject on the purported basis of speculation (seemingly figurative) as to legislative intent: *Cox v Hakes* (1890) 15 App Cas 506, 519–20. See similarly *Washer v Elliott* [1876] 1 CPD 169, 174 (Archibald J).

95 See, eg, *Wilkins v Wright* (1833) 149 ER 728, 733 (Vaughan B); *Re Marks* (n 51) 335.

96 *Crowley's Case* (1818) 36 ER 514.

97 Ibid 533.

98 *Habeas Corpus Act of 1640*, 16 Car 1, c 10.

99 Ibid s 6.

100 *Crowley's Case* (n 96) (emphasis added).

101 *Andrew v Murdoch* (1814) 2 Dow 401; 3 ER 909, 921 [430].

102 Ibid.

autocratic rule, the Judge in the same passage criticised a 'contrary tendency' as liable to deprive the 'injured individual [of] the redress to which he is entitled against the arm of power exercised with oppression'.[103] In *Re Marks* — a case giving another example — Lord Cranworth LC is reported as having said 'that the Court was tender of the liberty of the subject'.[104] Lord Cranworth evidently understood that tenderness as motivating the principle stated immediately thereafter: 'that any enactment dealing with [the liberty of the subject] must be construed strictly'.[105] A further example is in *Dale's Case*, where the Queen's Bench had cause to consider the rule that statutory formalities preconditioning the issue of writs affecting liberty 'must', as a silk in that case put it, 'be literally and strictly enforced'.[106] In upholding the issue of a writ of habeas corpus by application of that principle, Brett LJ wrote of the interpretive rule: 'I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of her Majesty's subjects.'[107]

A related form of deeper justification seemed to explain the interpretive practice as giving force, in the law, not so much to the courts' own biases, but rather to the 'liberty of the subject' understood as a standard of political legitimacy widely endorsed as such among the British public. That kind of justification was given by Maul J in *Stead v Anderson*, where the Justice is reported as saying that '[t]here is no doubt that, in this country, the liberty of the subject is very much regarded and talked about, and that all statutes are to be so construed as to favour it, rather than otherwise'.[108] One finds in *Henderson v Sherborne*[109] a similar justification for what was a sub-principle of the more general principle that statutes be construed in favour of liberty. That sub-principle was '[t]he principle ... that a penal law ought to be construed strictly'.[110] There, Lord Abinger said that this sub-principle 'is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so.'[111] That passage was cited and approved on numerous occasions in the hundred years after it was written.[112]

A final species of deeper, liberal justification was to be found in judgments that justified their interpretive approach by reference to the particular harms that

---

103 Ibid.
104 *Re Marks* (n 51) 335.
105 Ibid.
106 *The Reverend Thomas Pelham Dale's Case* (1881) 6 QBD 376, 442 ('*Dale's Case*').
107 Ibid 463.
108 *Stead v Anderson* [1850] 9 CB 263, 264–5.
109 *Henderson v Sherborne* (n 51).
110 Ibid 744. As to the proposition that this was a sub-principle of the broader principle that a construction consistent with liberty is to be favoured, see *M'Leod v Buchanan* (1835) 13 S 1153, 1165 (treating the 'rules of strict interpretation' applicable to penal statutes as giving 'the benefit of the common principles which apply to the liberty of the subject'). See also *Liversidge v Anderson* [1942] AC 206, 263 (characterising the rule as a 'rule as to construing penal statutes in favour of the liberty of the subject'); *Birch v Allen* (1942) 65 CLR 621, 626 (Latham CJ, for the Court) ('penal Acts must be construed strictly, that is to say, that the Court is not to adopt an interpretation against the liberty of the subject unless the words are clear').
111 *Henderson v Sherborne* (n 51).
112 See, eg, *Attorney General v Lockwood* (1842) 152 ER 160, 166; *R v Norman* [1924] 2 KB 315, 327; *R v Templeton* (1875) 1 VLR (L) 55, 56.

would (in the judges' estimations) be visited upon the liberty of the subject were some alternative construction, perhaps more consonant with the plain meaning of the statute, to be given.[113]

Compared to the deeper liberal justifications, the shallower liberal justifications did not spell out their premises. They took the form of utterances such as, in *Butler v Turley*: 'an Act of Parliament which puts the liberty of the subject in danger, ought to receive a strict construction'.[114] Or in *Bows v Fenwick*: '[t]his statute is, no doubt, an interference with the liberties of the subject, and is therefore to be construed strictly'.[115] Utterances such as these were abundant in the British 19th century courts.[116]

Although shallow, these justifications for the interpretive practice could only reasonably be understood as resting upon unstated liberal (as opposed to majoritarian or otherwise intentionalist) premises. That is, first, because these shallow justifications always implicitly, but often explicitly, held out the statutory rule of construction as (to adapt a phrase) 'provid[ing] an impregnable foundation for its own observance'.[117] That legalistic conception of the rule leaves room for inquiry into the principles of justice that might explain the content of the rule. But it is at odds with an intentionalist conception of the rule. On an intentionalist conception, the rule of construction is not an 'impregnable foundation' for an interpretive practice, but rather a tenuous heuristic whose use must yield to the facts as known about the intentions of legislators.[118]

Second, the shallow justifications must be read in the context of the broader position taken by the Victorian British courts that the liberty of the subject is 'sacred'

---

113 *Macgregor v Somerville* [1889] 27 SLR 52, 52 (Clark LJ); *Looker v Halcomb* (n 62) 740–1 (Best CJ).

114 *Butler v Turley* (n 81) 589 (Best CJ).

115 *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ).

116 See, eg, *Re Leak* (1829) 3 Y & J 46, 55 (Vaughan B) ('being a formidable power, and one directed at the liberty of the subject, all agree it must be strictly pursued'); *Bowditch v Balchin* (1850) 5 Exch 378, 381 (Pollock CB) ('In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.'); *Looker v Halcomb* (n 62) 740–1 (Best CJ) ('An Act of Parliament which … abridges the liberty of the subject, ought to receive the strictest construction'). See further *Parker v The Great Western Railway Company* (1844) 7 M & G 253; 135 ER 107, 123 (Tindal CJ); *Nash's Case* [1821] 4 B & Ald 295; 106 ER 946, 947 (Abbott CJ); *The Speaker of the Legislative Assembly of Victoria v Hugh Glass* (1871) 17 ER 170, 172; *Re Ferrige* (1875) LR 20 Eq 289, 290 (Bacon CJ).

117 *Bropho* (n 30) 21 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). For the more explicit statements, see, eg, *Milnes v Bale* (1875) LR 10 CP 591, 597 (Denman LJ) (in reference to penal statutes, 'the courts have always held themselves bound to construe the statute strictly'); *Lewis v Carr* [1876] 1 ExD 484 (Cleasby B) ('I have come to this conclusion ... feeling bound to give a somewhat strict interpretation to the language'); *Ex parte Bardwell; Re Venables* (1834) 47 ER 157, 164 (Lord Chancellor) ('But where the matter in question is the power of commitment, it behoves us to enlarge whatever tends to throw guards around the liberty of the subject, and to take most strictly whatever confers the authority to imprison. That is the ordinary and sound rule of construction.)'; *Re Jones* (1852) 155 ER 1082, 1083 (Pollock CB) ('Where the liberty of the subject is concerned ... we are bound to take care that the important but very stringent power … is not exceeded').

118 That is because, if a factual 'assumption [as to legislative intent] be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed': *Bropho* (n 30) 18–21 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

and is to be protected by the courts.[119] That broader position informed a number of common law practices unrelated to the interpretation of statutes, and which (as was said of one of them) 'c[ould] only be accounted for by the tenderness of the Courts ... towards the liberty of the subject'.[120] These practices included: the manner in which the Courts exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully;[121] the principle that restrictive clauses in deeds of entail 'must receive a strict interpretation ... in favour of liberty';[122] the strict standards of validity applied to documents filed to procure the arrest of a defendant to a civil action;[123] and consideration of the liberty of the subject in the exercise by judges of discretionary powers,[124] in the development of the common law,[125] and in fixing the standard of proof.[126] These liberty-protecting practices were of the common law, and were emanations of the common law's conception of the liberty of the subject as being a constitutional principle of legitimacy explaining features of England's laws and constitution. The familial resemblance between, on the one hand, these practices and, on the other hand, the liberty-protecting canons, is so plain that the latter's common law parentage and liberal spirit can scarcely be doubted.[127]

Third and lastly, it is to be noted that the shallower statements of principle commenced not with a suggestion that the legislature generally intends to preserve fundamental liberties, but, often, with an almost opposite hypothesis. That hypothesis was that the legislation in question *does* 'put ... in danger', 'derogate' from, 'abridge', or 'interfer[e] with the liberties of the subject', it being that very interference which, in the courts' opinion, occasioned the application of the liberty-protecting canons.[128]

---

119 *Ex parte Reynolds; Re Reynold* (1882) 20 Ch D 294, 297 (Bacon CJ) ('the liberty of the subject is at all times a sacred matter'). See also *HM Advocate v Keith & Milne* (n 77) 14 (Lord Ardmillan) ('The sacredness of personal liberty is protected by law'); *Bryce v Graham* (n 62) 196 (Lord Balgary) ('The rights of personal liberty are to be guarded ... Those are rights flowing from the law of nature'). As to the British judiciary's traditional role of protecting the liberty, see, beyond the authorities on that matter already cited, *Butt v Conant* (1820) 129 ER 834, 849 (Dallas CJ); *Cox v Coleridge* (1822) 107 ER 15.

120 *Lee v Sellwood* (1821) 147 ER 106, 111 (Baron Garrow).

121 *Cox v Hakes* (n 94) 527 (Lord Herschell); *Dale's Case* (n 106) 442 (Brett LJ) ('the books [are] full of cases in which, in favour of the liberty of the subject, writs have been set aside on the most technical grounds').

122 *Earl of Kintore v Lord Inverury* (1863) SC 32, 33 (Lord Chancellor) ('It has been settled by a long series of decisions, that the restrictive clauses in deeds of entail must receive a strict interpretation, so that if the words taken per se admit of a grammatical construction which is in favour of liberty, that construction must be preferred.'). See also *Ogilvy v Airlie* (1855) 2 Macq 260.

123 *Lee v Sellwood* (n 120) 111 (Baron Garrow).

124 See, eg, *Price v Hutchison* (1870) LR 9 Eq 534, 536 (Malins VC).

125 See, eg, *John Banks v Malcolm M'Lennan* (1876) 4 R (J) 8, 9 (Lord Young).

126 See, eg, *Ex parte Langley* (1879) 13 Ch D 110, 119 (Thesiger LJ).

127 Cf Amos's association of the common law courts' 'interpretation of statutes and their announcement of the principles of common law' as both being areas in which the courts have enforced the constitutional principle of the liberty of the subject against 'the Executive at least': Amos (n 60) 423.

128 See respectively the four cases, and pinpoints, above n 81.

IV The Principle's Continued Liberalism in Federated Australia

In the decades preceding Australian Federation, the British courts understood the liberty-protecting canons of construction as manifesting the judiciary's concern to protect the liberty of the subject. The liberty of the subject, in turn, was understood as a constitutional concept denoting a sacred sphere of freedom from state interference. In the decades following Australian Federation (the focus of this Part), there was no break with that understanding, either in the High Court or in the Supreme Courts of the States. In the dawn of Australia's Federation, the principle of legality (*avant la lettre*) was understood as an expression of the constitutional liberty of the subject. The principle of legality today, most plausibly, remains an expression of that constitutional liberty (see Part V).

A *The Early High Court's Rejection of an Intentionalist Conception*

The beginning point in this history is the early High Court's seeming embrace of a negative proposition. It was that the liberty-protecting canons are *not* directed to effecting legislators' intentions. Or, as the unanimous High Court put an aspect of the position in *McLaughlin v Fosbery*: 'in the interpretation of a [s]tatute affecting personal liberty, supposition as to the intention of the legislature has no place'.[129]

Some of the High Court's first statements on this subject were given in 1904, in *Nolan v Clifford*.[130] One of those statements, given by Griffith CJ (with Barton J's agreement), approached an express denial that the principle of legality (*avant la lettre*) is a heuristic for ascertaining legislators' mental states. Read in the light of the intentionalist origin story, the apparently forgotten statement is (like the above-quoted statement in *McLaughlin*) extraordinary.

The case of *Nolan* concerned the power, contained in s 352 of a consolidating Act (the *Crimes Act 1900* (NSW)) to arrest without warrant: persons committing offences punishable 'by indictment, or on summary conviction' (s 352(1)(a)); persons that have 'committed a felony' (s 352(1)(b)); or person who 'with reasonable cause, [are] suspect[ed] of having committed any such crime' (s 352(2)(a)). The question was whether the words 'any such crime' in s 352(2)(a) referred, as the plain terms of s 352 suggested, to crimes punishable upon either indictment or summary conviction (the first construction), or whether the words should instead be read as referring only to crimes punishable by 'death or penal servitude' (the second construction).[131] The second construction gave the words the meaning that they had within a historical provision notionally consolidated within

---

[129] *McLaughlin v Fosbery* (1904) 1 CLR 546, 559 (Griffith CJ, delivering the opinion of the Court) ('*McLaughlin*'). See similarly *Lyons v Smart*, where Barton J referred to the same caution against 'conjecture' in the course of justifying the principle that '[i]f the legislature desire' to interfere with an individual's possession of goods, 'it must say so plainly' — a principle also justified on that page on the basis that '[t]he substratum of the British law is liberty': *Lyons v Smart* (1908) 6 CLR 143, 177.

[130] *Nolan v Clifford* (1904) 1 CLR 429 ('*Nolan*').

[131] Ibid 443. A crime punishable by 'death or penal servitude' had been the statutory definition of a 'felony': at 446.

the Act under interpretation.[132] Only the second construction was plausibly consistent with the common law on the subject.[133] The picture was then complicated by the existence of a note, written by the consolidating commissioner, apparently suggesting that the first construction revealed the provision's intended meaning.[134]

On the path to upholding the second construction, the Chief Justice wrote this — the important passage:

> If I were at liberty, speaking for myself, to conjecture what was the intention of the draftsman or legislature, merely from all the information that is in one sense at our disposal ... I should be inclined to think that it was intended that the word 'crime' should mean any offence whether punishable on indictment or on summary conviction. …
>
> [B]ut the common law and the Statute law should not be taken to be abrogated, especially on matters affecting the liberty of the subject, unless a plain intention on the part of the legislature to make so important a change was to be found. … [I]t is impossible, applying recognized rules of construction, to say that 'crime' is intended to mean 'misdemeanour'. It might be that, if I were left to my own speculation as to what the framers [of the statute] intended, I should come to a different conclusion, but, applying judicial rules of interpretation, I cannot do otherwise.[135]

Barton J was 'of the same opinion'.[136] In passages contained in Barton J's supplementary reasons, his Honour too proceeded to construe the statute 'in favour of the liberty of the subject'.[137] In those passages, Barton J expressly eschewed an intentionalist approach to the construction of the statute. Barton J disregarded the intentions of the draftsman, the approach being one of 'leaving out all questions about the draftsman, and confining oneself to the meaning of the terms used'.[138] Barton J also disregarded the note of the consolidating commissioner's intentions — which intentions were perhaps attributable, by extension, to the Parliament. As to that, Barton J wrote:

> We have been asked to refer to the brevier, the note of the consolidating commissioner, to find out what he meant. I do not think this reference is of any value, because we are not to consider what the commissioner thought, but what Parliament has said, and what it meant by what it has said.[139]

In passages that are remarkable for their coherence with the democracy-forcing rationale for the principle of legality that would be stated nearly a century later, Barton J justified the Court's liberty-promoting construction partly on the basis that 'an Act for th[e] purpose [of consolidation] is the last place in which you would look for a substantive change in the law imposing new liabilities on Her Majesty's

---

132 Ibid 445.
133 The position at common law was described by Griffith CJ: ibid 444.
134 Ibid 434.
135 Ibid 443, 447–8.
136 Ibid 448.
137 Ibid 448.
138 Ibid 451.
139 Ibid 449.

subjects'.[140] '[T]he public', his Honour said 'and the profession would not be in the least degree on their guard to look for it'.[141]

O'Connor J, in a concurring decision, acknowledged that, were the Court's construction 'urged anywhere outside of a court of justice ... it would be thought rather a straining of the English language'.[142] His Honour did not decide the question of construction by express application of a liberty-protecting canon. A year later in *Beath, Schiess & Co v Martin*,[143] however, O'Connor J did have occasion to acknowledge the cleavage between such canons and legislators' intentions. At a time when freedom of contract and commerce was thought 'essential to individual freedom',[144] and a matter affecting the liberty of the subject,[145] O'Connor J wrote:

> But, although we are bound to carry out the intention of the legislature in all respects in which we can reasonably infer it from the language used, at the same time *we cannot on that principle allow* the rights, which other persons have at common law to make their own contracts in their own way, to be infringed to any greater extent than the legislature has expressed by its language.[146]

There were then further occasions on which members of the early High Court seemed actively to demonstrate that the liberty-protecting canons were not tools for discerning legislators' intentions. Among them were the occasions on which the Court applied an approach of strict construction to taxation statutes (taxation statutes being understood, traditionally, as a species of statutes affecting the liberty of the subject).[147] The special approach to taxation statutes was, as Griffith CJ wrote in *Heward v The King*, that '[i]n the case of a taxing Act we have no right to conjecture what is meant ... Our only duty is to see what Parliament has done or said.'[148]

On other occasions, the High Court Justices' jealousy of liberty was openly described as motivating a mode of interpretation that was uncooperative with the legislature. In *National Mutual Life Association of Australasia Ltd v Godrich*, Isaacs J suggested that the presence in a statute of provisions 'work[ing] ... [an] invasion of liberty or property' would be a 'legal reason to apply a *grudging*

---

140 Ibid.

141 Ibid 452.

142 Ibid 453.

143 *Beath, Schiess & Co v Martin* (1905) 2 CLR 716.

144 *R v Associated Northern Collieries* (1911) 14 CLR 387, 457 (Isaacs J) quoting approvingly a then recent decision of the US Supreme Court: *United States v American Tobacco Co*, 221 US 106, 178 (1911).

145 See, eg, *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ); *Re Bakers and Pastrycooks' Board* [1912] SALR 208, 215 (Murray J) and the authorities cited there.

146 *Beath, Schiess & Co v Martin* (n 143) 734 (emphasis added).

147 See above n 51.

148 *Heward v The King* (1905) 3 CLR 117, 123 (Griffith CJ). The Chief Justice went on to indicate that a departure from this approach to taxing statutes would 'be violating the rule of interpretation to which [his Honour] referred', being the rule that an 'intention to impose a charge on the subject must be shown by clear and unambiguous language': at 124–5. Barton J quoted approvingly a passage from Hardcastle's *Treatise on the Construction and Effect of Statute Law* (n 51) that treated the common law's strict approach to taxation statutes as being, in truth, nothing more than an application of the general interpretive approach in 'matters as to which rights are concerned': at 127–8. See similarly *R v Atkinson* (1906) 3 CLR 632, 639 (Griffith CJ, Barton and O'Connor JJ agreeing): 'In the construction of a taxing Act we have nothing to go by as to the intention of the legislature except what they have said. We are not at liberty to speculate'.

construction, or to place upon the words of the legislature a narrower interpretation than their ordinary sense requires'.[149] Another example appears in the judgment of Powers J in *Ferrando v Pearce*.[150]

A final point is that, often, the early High Court's justifications for the liberty-protecting canons were shallow in the sense described in Part III(C) above.[151] These shallow justifications (often citing Hardcastle's *Treatise on the Construction and Effect of Statute Law* — a text more favoured in the Griffith High Court than *Maxwell on Statutes*, and that advanced a black-letter conception of the interpretive canons that it described)[152] could only reasonably be understood as resting on unstated liberal, as opposed to majoritarian, premises. This is for the same reasons of context and form attending the equivalent justifications given by the British courts of the time, and discussed in Part III(C) above.[153]

B *The High Court's Original, Liberal Formulations of the Principle of Legality*

In the early High Court, the perceived disjunct between legislators' intentions and the liberty-protecting canons, was one thing. The early High Court's positive, liberal formulations of the liberty-protecting canons were another. As early as *Nolan*, there was found in High Court decisions the expressed understanding that the canons protected a liberty of the subject that transcended and was protected by statute and

---

149 *National Mutual Life Association of Australasia Ltd v Godrich* (1909) 10 CLR 1, 34 (emphasis added).

150 *Ferrando v Pearce* (1918) 25 CLR 241, 269–70, quoting passages from the speech of Lord Shaw in *R v Halliday* [1917] AC 276.

151 *Great Fingall Consolidated Ltd v Sheehan* (1905) 3 CLR 176, 186 (Griffith CJ) ('Now, it is a general rule, which we have had occasion to lay down more than once in this Court, that when a Statute interferes with the liberty of the subject ...'), then see similarly at 194 (O'Connor J); *Woodstock Central Dairy Co Ltd v Commonwealth* (1912) 15 CLR 241, 250 (O'Connor J); *Ferrando v Pearce* (n 150) 287 (Powers J); *Committee of Direction of Fruit Marketing v Collins* (1925) 36 CLR 410, 428 (Starke J); *Scott v Cawsey* (1907) 5 CLR 132, 141 (Griffith CJ); *R v Mahony* (1931) 46 CLR 131, 140 (Starke J). In giving these shallow justifications, the liberty-protecting canons were sometimes spoken of as placing upon the legislature what amounted to a manner-and-form requirement legitimated by judicial precedent affecting constitutional liberties; as in the statement: 'That can be done only by express words of the enactment or by necessary implication, as appears from the case of *Massey v Morriss*': *Ferrier v Wilson* (1906) 4 CLR 785, 794 (Barton J; where *Massey* was authority for the imputation of mens rea — a presumption considered 'of the utmost importance for the protection of the liberty of the subject': *Brend v Wood* (1946) 62 TLR 462, 473 (Lord Goddard CJ), approved in *Lim Chin Aik v The Queen* [1963] AC 160, 173 (Lord Evershed for the Court). Another example is in *Australian Tramway Employees Association v Prahran & Malvern Tramway Trust* (1913) 17 CLR 680, 687 (Barton ACJ).

152 Hardcastle explained his black-letter approach as being intended to help achieve intellectual clarity against the backdrop (as Hardcastle saw it) of the traditional use of the canons as strategic tools to improve the justice of the statutes, or to achieve just outcomes: Hardcastle (n 51) 14. See, eg, the rules stated in Hardcastle, quoted in *Smith v Watson* (1906) 4 CLR 802, 819 (Barton J); *Nolan* (n 130) 448–9 (Barton J); *Webb v McCracken* (1906) 3 CLR 1018, 1022 (Griffith CJ, Barton and O'Connor JJ agreeing). The editions of Hardcastle cited by the early High Court contained no statement like the statement in *Potter* (n 2).

153 The early High Court's commitment to defending constitutional liberty, which commitment informed these shallow justifications, is discussed in Part IV(C) below. The British legal history described in Part III(C) above can also be taken to have informed the High Court's shallow justifications, given the early 20th century context of empire.

common law. This tripartite relationship between statute, common law and liberty was implicit when the Chief Justice wrote in *Nolan* (with Barton J's agreement) that

> the common law and the Statute law should not be taken to be abrogated, especially on matters affecting the liberty of the subject, unless a plain intention on the part of the legislature to make so important a change was to be found.[154]

Other High Court decisions of the period similarly, and without much introspection, proceeded on the same basis as did the recent century of English precedents: that the liberty-protecting canons apply by force of the common law, to the end of upholding liberal, 'first principles of justice';[155] that it was for the courts to mind and say 'when a statute interferes with the liberty of the subject'[156] or 'abridges' it,[157] or 'inva[des]' it;[158] that certain statutes and common law rights 'affected' (as opposed to 'constituted') the liberties in question;[159] and that these were 'constitutional liberties'.[160] The abundant references in these authorities to the 'liberty of the subject' were, in light of the British history earlier recounted, references to a renowned principle in the British Constitution, evidently supposed by the Court to have been inherited into Australia's constitutional framework.

One of these High Court decisions — the decision in *Clancy v Butchers' Shop Employees' Union*[161] — was particularly significant, as it (unlike O'Connor J's statement in *Potter*) did state an authoritative rule of construction that was an ancestor of the modern-day principle of legality, and that was, in the years following its enunciation, applied on a number of occasions in the High Court[162] and in the Supreme Courts of the States.[163] The statement of principle in *Clancy* (hereafter 'the statement in *Clancy*') was:

> In construing the Act it should be borne in mind that it is an Act in restriction of the common law rights of the subject, and, though that is no reason why

---

154 *Nolan* (n 130) 448.

155 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 568 ('*Macfarlane*') (Higgins J, describing the liberty-protecting canons as being concerned with 'first principles of justice'). Indeed, at the High Court's opening ceremony, faith was placed in the Justices to 'spread the light of justice upon the ways of men': Speech of the Attorney-General, recorded in Address at the Opening Ceremony of the High Court of Australia at Melbourne on 6 October 1903, *The Argus* (7 October 1903) 9. Cf *Speech on the Retirement of Chief Justice Griffith, Brisbane, 25 July 1919* (1919) 26 CLR v, vii (message of Sir Edmund Barton).

156 *Great Fingall Consolidated Ltd v Sheehan* (n 151) 186 (Griffith CJ). See similarly: *R v Mahony* (n 151) 140 (Starke J).

157 *Woodstock Central Dairy Co Ltd v Commonwealth* (n 151) 250 (O'Connor J).

158 *Ingham v Hie Lee* (1912) 15 CLR 267, 273 (Barton J).

159 *McLaughlin* (n 129) 559 (Griffith CJ for the Court) ('a Statute affecting personal liberty'); *Nolan* (n 130) 443–4 (Griffith CJ) ('but the common law ... should not be taken to be abrogated, *especially* on matters affecting the liberty of the subject') (emphasis added). See similarly *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 140 (Starke J) ('*Re Yates*'). See further below n 216.

160 *Macfarlane* (n 155) 568 (Higgins J).

161 *Clancy v Butchers' Shop Employees' Union* (1904) 1 CLR 181 ('*Clancy*').

162 *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (1904) 2 CLR 94, 107 (Griffith CJ for the Court); *Trolly, Draymen and Carters Union of Sydney and Suburbs v Master Carriers Association of NSW* (1905) 2 CLR 509, 515 (Griffith CJ) ('*Carters Union*'); *Bishop v Chung Brothers* (1907) 4 CLR 1262, 1274 (Barton J); *Australian Tramway Employees Association v Prahran & Malvern Tramway Trust* (n 151) 687 (Barton ACJ).

163 See, eg, *Re Coultas* (1905) 7 WALR 276, 278 (McMillan J); *Re Bakers and Pastrycooks' Board* (n 145) 215 (Murray J); *R v Industrial Court (Qld); Ex parte Federated Metal Workers Union* [1967]

> the fullest effect should not be given to its provisions, it is a reason why the meaning should not be strained as against the liberty of the subject.[164]

This statement in *Clancy* was curiously framed. The statement associated 'the common law rights of the subject' with the constitutional 'liberty of the subject', but without defining that association.[165] The statement, moreover, provided no guidance beyond that given by ordinary approaches to statutory interpretation. After all, those ordinary approaches did not counsel the judge to 'strain ... against' the language of the statute, whether to the end of preserving liberty or to any other end. The statement in *Clancy* bore close similarities to, and was perhaps a simulacrum of, softening statements of the liberty-protecting canons made in the late 1800s in some decisions of the British judiciary.[166]

But the facial innocuity of the statement in *Clancy* — perhaps attributable to judicial statesmanship — belied the principle's strength. In its application, the statement was treated as conveying a substantive principle capable of applying 'strongly';[167] even 'very forcibly'.[168] The statement in *Clancy* was also, on more than one occasion, equated with simpler formulations of principle, such as that 'we must not ... strain the language of the Statute against the liberty of the subject',[169] or that '[s]tatutes ... in derogation of the liberty of the subject ... are, therefore, not to receive a strained construction against the pre-existing law'.[170]

As to the rationale underlying the statement in *Clancy*, it is significant that the statement, in its own terms, treats the fact that an 'Act [is] in restriction of the common law rights of the subject' as itself the operative 'reason why the meaning should not be strained against the liberty of the subject'.[171] That is, on the face of this statement, the interpretive practice that the statement describes is justified by the very constitutional liberty of the subject, correlated with certain common law rights, that the practice protects. Consistent with that understanding of the statement in *Clancy*, the statement was in one unanimous High Court decision associated with, not a principle of democracy, but English constitutionalism's liberal self-image: that the '[t]he great fundamental principle of our jurisprudence is liberty'.[172]

Over the years in which the statement in *Clancy* had currency in the High Court, and in the decades following, members of the Court, like the courts in England, affirmed 'the strict jealousy of the law in favour of personal liberty'.[173] The

---

Qd R 349, 356 (Stable J). See further *The Carpenters and Joiners' Case* (1917) 1 SAIR 170, 189 (President Brown).

164 *Clancy* (n 161) 201 (Griffith CJ, Barton and O'Connor JJ agreeing).

165 The relationship between the common law and the constitutional liberty, as understood around the time of Australian Federation, is addressed in Part V below: see especially pp. 589–90.

166 See *Pharmaceutical Society v London and Provincial Supply Association Ltd* [1880] 5 App Cas 857, 867; *Re Pookes Royle* [1881] 7 QBD 9, 10 (Lord Selborne); *Dean v Green* (1882) 8 PD 79, 89–90 (Lord Penzance); *Scott v Morley* (1887) 20 QBD 120, 129 (Bowen LJ).

167 *Bishop v Chung Brothers* (n 162) 1274 (Barton J).

168 *Re Coultas* (n 163) 277 (McMillan J).

169 Ibid 278 (McMillan J).

170 *Re Bakers and Pastrycooks' Board* (n 145) 215 (Murray J).

171 *Clancy* (n 161) 201 (Griffith CJ, Barton and O'Connor JJ agreeing).

172 *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (n 162) 107 (Griffith CJ for the Court).

173 *Re Yates* (n 159) 100 (Isaacs J).

Justices spoke of how the liberty of the subject was 'a matter of the very highest concern to the law'[174] — of 'the anxious care of the British Courts with regard to liberty of the subject'[175] — of 'the power of a Court to protect individual rights of liberty from unauthorized violation'.[176] This declared function of protecting the constitutional liberty of the subject informed the character of the liberty-protecting canons, even when the High Court's stated justifications for those canons were shallow.

The connections between those contextual statements, on the one hand, and the High Court's less developed statements of the principle of legality, on the other, were sometimes apparent from their proximity to one another on the page.[177] On other occasions, the common law's jealousy of liberty was seen manifested in apparent expressions, by Justices, of their own liberal dispositions when interpreting statutes.[178]

If the liberty-protecting canons were not presented as preserving a constitutional liberty, they were presented as licensing judicial resistance to already admitted invasions of rights associated with that liberty. An instance is this passage written by Latham CJ (Dixon and Evatt JJ agreeing), which describes an interpretive approach protective of the right to a jury. The passage implicitly justifies that practice on the lone basis that the right (traditionally understood as the 'palladium' of the 'liberties of England')[179] is 'one of the fundamental rights of citizenship', whose curtailment 'abridges the liberty of the subject':

> The right to a jury is one of the fundamental rights of citizenship and not a mere matter of procedure, and so the courts have said. In *Looker v Halcomb*, per Best CJ, it is said: 'An Act of Parliament which takes away the right of trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act'.[180]

In the Supreme Courts of the newly federated States, the overall position was the same.[181]

---

174 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 136 (Latham CJ).

175 *Macfarlane* (n 155) 566 (Higgins J).

176 Ibid 540 (Isaacs J). Cf Sir Garfield Barwick, Transcript of Speech, *On the Occasion of a Welcome to the Rt Hon Sir Garfield Barwick in Queensland* (2 June 1964) 3 ('When I say the work of the Court, I mean the protection of the citizens's [sic] rights and his liberties').

177 One of a number of examples is Higgins J's judgment in *Lyons v Smart* (n 131) 177, where his Honour wrote: 'The substratum of the British law is liberty … If the legislature desire to make unlawful the acquisition of unlawfully imported goods with the knowledge that they have been unlawfully imported, it must say so plainly'. Further examples are *Co-operative Brick Co Pty Ltd v City of Hawthorn* (1909) 9 CLR 301, 306 (Griffith CJ); *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464 (O'Connor J) ('*Progress Advertising*').

178 *Macfarlane* (n 155) 538 (Isaacs J) ('I am disposed to give the largest scope to the section, consistent with its express terms, that I can in favour not only of liberty but of all rights invaded'). See similarly: *Ingham v Hie Lee* (n 158) 273 (Barton J); *McArthur v Williams* (1936) 55 CLR 324, 331 (Latham CJ).

179 Blackstone (n 53) vol 4, 343–4.

180 *Newell v The King* (1936) 55 CLR 707, 711–12.

181 See *Woodcock v Woodcock* (1909) 9 SR (NSW) 630, 635. There the Full Court of the Supreme Court of New South Wales (Cohen J, Sly and Pring JJ agreeing) identified the rule that 'the Court should be satisfied beyond all doubt and by the clearest language that the Legislature has intended to interfere with [the liberty of the subject]' (at 635). It accounted for that rule, not on an intentionalist basis, but as springing from the fact that 'the liberty of the subject is so sacred' (at 635). The Supreme Courts

C *Revisiting the Statement in* Potter

It is amid all the foregoing history that, in 1908, the statement in *Potter* was made. The statement, to repeat it, was that: 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.'[182] The statement, borrowed from an English textbook, belonged to a small class of similar statements made around that time in England,[183] and made there in times since.[184] An evident purpose of these English statements is to achieve a level of congruity between two principles. The first is a principle frequently stated in the following, broad terms to reflect the breadth of its associated conception of unlimited British parliamentary sovereignty. It is that '[i]n all cases the object is to see what is the intention expressed by the words [of the statute]'.[185] The second principle is the principle of legality itself, comprising the liberty-protecting canons of construction, which, as a matter of both history and effect, are directed to the protection of liberty conceived as a constitutional principle incompatible with illiberal exercises of British parliamentary sovereignty. The accord between these principles, which the statement quoted in *Potter* and similar statements seek to strike, has proved unstable[186] and, some would say, unsustainable.[187]

The early High Court did not seek to reconcile the liberty-protecting canons to any conception of parliamentary supremacy that would have required the denial of those canons' liberal systemic functions. For that reason, the statement in *Potter* stands out as an anomalous transplant, inconsistent even with O'Connor J's own conceptions of the liberty-protecting canons, and of the legal meaning of 'legislative intention', communicated by him in other decisions.[188] The statement in *Potter* was

---

of the States otherwise gave shallow, and in context clearly liberal justifications for the liberty-protecting canons. As to which see, eg, *Potter v Black* (1902) 2 SR (NSW) 325, 331 (Simpson J) ('This is an Act of Parliament that seriously interferes with the liberty of the subject, and must therefore be strictly construed'). Then see similarly, eg, *Ex parte Eiffe; Newcastle Stevedoring Company* (1905) 5 SR (NSW) 118, 121 (Darley CJ, Owen and Pring JJ agreeing); *Ex parte Brown* (1914) 14 SR (NSW) 182, 188 (the Chief Justice); *Ex parte Brickmasters and Pipe Manufacturers' Union* (1904) 4 SR (NSW) 226, 229 (Darley CJ, Owen and Pring JJ agreeing); *O'Donnell v Heslop* [1910] VLR 162, 169 (Madden CJ).

182 *Potter* (n 2) 304 quoting *Maxwell on Statutes* (n 13) 121.

183 See, eg, *Re Boaler* [1915] 1 KB 21, 38–9 (Scrutton J). Another example may be (though the proposition there is so fantastic as to be of doubtful sincerity) *Cox v Hakes* (n 94) 518 (Lord Halsbury LC), quoting *Stradling v Morgan* (1560) 1 Plowden 199; 75 ER 305, 314. By the 9th edition of *Maxwell on the Interpretation of Statutes*, that text had come to endorse the liberal justification for the principle given in *Henderson v Sherborne* (n 51): *Maxwell on the Interpretation of Statutes* (Sweet and Maxwell, 1946) 288–9.

184 Cf Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55(1) *Cambridge Law Journal* 122, 136–7 ('Under our present constitution judicial review does not challenge but fulfils the intention of Parliament').

185 *River Wear Commissioners v Adamson* [1877] 2 App Cas 743, 763 (Lord Blackburn). A number of similar statements are collected in Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 39–40.

186 See, eg, the so-called 'ultra vires debate' detailed in Forsyth (n 184).

187 See, eg, John Laws, *The Constitutional Balance* (Hart, 2021).

188 In addition to the opinions of O'Connor J already referred to, see *Tasmania v Commonwealth* (1904) 1 CLR 329, 358-9 ('the only safe rule is to look at the Statute itself, and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of … "assum[ing] the province of

first stated authoritatively eight decades later at a time when the democratic spirit of the statement undoubtedly resonated with the unbridled democratic spirit of the time — a unique sense, coinciding with the fall of the Soviet Union, that democracy was the 'end of history'[189] — that democracies, once consolidated, would 'last forever'[190] — that liberal checks were not very load bearing.[191]

Whatever the reason for the statement's modern resurrection, it may be that, in its original context in 1908, the statement in *Potter* was not to be read as conceiving the principle of legality as any guide to legislators' actual intentions. The early High Court was sceptical of an approach to interpretation that involved conjecture as to the intentions of Parliament.[192] 'Courts', it was said, 'are not at liberty to speculate as to the intention of Parliament',[193] especially on matters affecting liberty.[194] Yet an intentionalist justification for the principle of legality supposes that judges do and may speculate in a most expansive way. Namely, by speculating as to lawmakers' knowledge of, and commitment to, fine-grained, indefinite and developing common law principles protective of a constitutional liberty.

Consistent with this aversion to intentionalist modes of statutory interpretation, the early High Court treated the notion of 'legislative intention' as a legal term of art, descriptive not of the actual intentions of legislators, but rather of the output of an interpretive process regulated by common law rules.[195] The resulting

---

legislation"); *Carters Union* (n 162) 522 ('Intention of the legislature is a common but very slippery phrase'); *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 279–80 (O'Connor J), quoting a literalist apothegm given by Jervis CJ in *Abley v Dale* (1851) 11 CB 377, 392; 138 ER 519, 525. Cf *Progress Advertising* (n 177) 464 (O'Connor J) (a certain liberty-protecting canon must be applied '[i]n ascertaining what was the real intention of the legislature'). However, the proposition that any substantive canon *must* be applied to discern the 'real intention' of the legislature seems so unreal on its face as to perhaps be a further indication of O'Connor J's conception of legislative intent as artifice.

189 Francis Fukuyama, 'The End of History?' (1989) 16 (Summer) *National Interest* 3, 18.

190 Adam Przeworski and Fernando Limongi, 'Modernization: Theories and Facts' (1997) 49(2) *World Politics* 155, 165.

191 Yascha Mounk, 'The End of History Revisited' (2020) 31(1) *Journal of Democracy* 22. It eventuated that they were, and are, load bearing: Larry Diamond, 'Democracy's Arc: From Resurgent to Imperilled' (2022) 33(1) *Journal of Democracy* 163.

192 See generally (a visibly undergraduate work of mine) Jamie Blaker, 'Is Intentionalist Theory Indispensable to Statutory Interpretation?' (2017) 43(1) *Monash University Law Review* 238, 258–62.

193 *Phillips v Lynch* (1907) 5 CLR 12, 27 (Isaacs J). See similarly Griffith CJ in *Bennett v Minister for Public Works (NSW)* (1908) 7 CLR 372, 378:

> It is suggested that that cannot have been the intention of the legislature ... No doubt that is extremely probable ... But that is mere conjecture, and there is no room for conjecture in construing Acts of Parliament ... We have to look at the language of the legislature, and ... we must give effect to that language, although we may conjecture that it was used through inadvertence'.

In a number of judgments, members of the Court affirmed the notion (first expressed in *Salomon v Salomon & Co* [1897] AC 22, 38) that the phrase, legislative intention, is a 'very slippery phrase'. See, eg (and further to *Sargood Brothers v Commonwealth* (n 188) 279–80 (O'Connor J)), *Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, 536–7 (Isaacs J); *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087, 1170 (Higgins J).

194 *McLaughlin* (n 129) 559 (Griffith CJ, delivering the opinion of the Court).

195 *Macfarlane* (n 155) 568 (Higgins J) ('There is the *highest authority, therefore*, for approaching this case with the prepossession that our Parliament did not intend to violate constitutional liberties')

conception of legislative intention was so artificial that it was acknowledged that there would be

> cases in which the intention of the legislature has to be decided according to principles which bind the Courts in the interpretation of Statute law, while they may be aware that it is very improbable that the intentions to be deduced from the words used were those which the legislature entertained when it adopted the course it did.[196]

In that light, the statement in *Potter*, as it appeared in the *Commonwealth Law Reports*, may be best understood as the mere continuation of a metaphor.

V What the Principle of Legality Is

To remember that the principle of legality was, in its origins, a liberal and constitutional principle, is, in a sense, to remember what the principle of legality is. In recent years, the principle has been placed upon a number of newly proposed justificatory footings that do not fit. Sometimes, these retrofitted justifications have 'not fitted' the principle of legality in the sense that the justifications (if taken seriously) would motivate a principle of a very different form. Sometimes, the retrofitted justifications have additionally 'not fitted' in the sense that the justifications have failed to supply a constitutional justification for the principle.

The first of these retrofitted justifications was, it turns out, that intentionalist rationale that was wrongly supposed to be the principle's 'original' justification. While that rationale is congruent with constitutional principles of parliamentary supremacy, it is, for reasons now well developed by Lim and Lisa Burton Crawford, incongruent with the form of the principle of legality. On the occasions of the principle of legality's application, judges become involved in an activity far removed from speculating as to the mental states of parliamentarians. The activity is instead a principle-governed activity that is continuous with the ordinary common law methods of adjudication.[197]

The second of the retrofitted justifications has been the democracy-forcing justification. According to that justification, the principle's justifying purpose is to ensure that statutes may only have illiberal legal effects that are clear on the faces of the statutes, where those effects are liable to attract due democratic scrutiny. This justification has a number of difficulties. They have recently been well surveyed by Burton Crawford.[198] The greatest among those difficulties is that the justification, when committed to, saps the principle of legality of a constitutional foundation. The *Australian Constitution* does not, in its terms, or as a matter of necessary implication, provide for a power in the judiciary to interpret statutes so as to force democratic scrutiny upon those statutes. As a matter of intellectual history, that conception of a

---

(emphasis added); *Progress Advertising* (n 177) 464 (O'Connor J) ('*as* every citizen is at liberty prima facie to carry on his business in his own way within the law*, it will not be held that* the legislature has intended …') (emphasis added). Cf *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341] (Hayne J).

196 *Ferris v Martin* (1905) 2 CLR 525, 540–1 (Barton J).

197 See Lim (n 9) 383–5, 394; Burton Crawford (n 18) 514–18.

198 Burton Crawford (n 18) 514, 519–26.

desirable judicial function owes much to the work of the American academic, John Hart Ely, published in the 1980s.[199] It would be an error of intellectual history to count it among the 'traditional conceptions'[200] that formed assumptions upon which the *Australian Constitution* was framed, and that might inform the scope of the judicial powers of the States and the Commonwealth.

Certainly, the judicial resolution of disputes may, from time to time, require the judicial interpretation of these 'traditional conceptions'.[201] Those interpretations in turn may specify, up to a point, the textures of these conceptions.[202] But no account has been given of how the democracy-forcing rationale might flow from this kind of permissible development in constitutional principle.[203] The development of such an account (if it is possible) would, in light of the principle of legality's liberal constitutional history, seem an odd, even gratuitous, exercise in restumping the principle of legality. The democracy-forcing rationale may one day be remembered as a contrivance embraced when the profession had forgotten what the principle of legality was.

A third retrofitted justification has recently been offered by Burton Crawford. It is, in Burton Crawford's own 'outline',

> that courts are permitted to treat existing common law rights and principles as weights on the interpretive scale, which influence the constructional choices they make. If a statute can be interpreted in a way that leaves the common law intact, then, all things being equal, this is the interpretation that the court should prefer. … [T]his approach reflects the institutional setting in which statutory interpretation takes place, and the dual constitutional role of the courts as both law-interpreters and lawmakers. ... [T]his justifies a version of the principle of legality …[204]

The essence of Burton Crawford's view, as it then emerges, is that the principle of legality is to be justified on the broad basis, alone, that all common law has a constitutionally legitimate influence upon the proper construction of statutes.

---

199 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). See further the discussion in Lim (n 9) 402–3.

200 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

201 That conceptual interpretation has most often occurred in connection with the enunciation of substantive implied constitutional doctrines (see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–41 (Mason CJ) ('*ACTV*')), and in ascribing meaning to the words of constitutional provisions that might be thought to express certain traditional conceptions (see, eg, *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 55–6 (Stephen J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)).

202 A matter well discussed in Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143.

203 See Lim (n 9) Part III(B)(2), where a worked-up account of the democracy-forcing rationale is advanced on the basis of (compelling and lucid) ideal theory, but not on the basis of elements of Australia's constitutional text and traditions. See also Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 16, where, having stated the principle's democracy-forcing rationale at 15 (and having earlier given a leading explanation of the concept of legislative intention), the author defends the principle of legality on the essentially ethical basis that it is 'hardly unreasonable'.

204 Burton Crawford (n 18) 513.

That justification goes some way, but is incomplete.[205] As Burton Crawford accepts, on that professor's pure common law account of the principle, 'the principle of legality almost loses its appearance as a standalone canon of construction'.[206] But as the dedication of so much attention to the principle accurately reflects, the principle is a singularly special canon that does stand out from the general influence of the common law upon statutes.[207] That is because the principle of legality gives effect to, and in that limited sense can itself be counted among,[208] constitutional principles.

The principles to which the principle of legality gives effect are, as Brennan J once wrote, 'fundamental freedoms which are part of our constitutional framework'.[209] The higher order concern of the principle of legality has historically been the conformity of statutes not to the common law, per se, but to what are fundamental liberal principles of justice — or in Sir Owen Dixon's locution, 'great precepts of constitutional liberty'[210] — affirmed in the public culture, and, in the history earlier recounted, recognised in our law as having a constitutional status. These constitutional principles, like any form of constitutional law, have accreted around them bodies of common law doctrine that specify aspects of the principles.[211] They have accreted around them 'common law rights' understood to be protective of the constitutional liberty of the subject.[212] In that way, the common law has given a degree of form to the liberty.[213] But to suppose that the principle of legality is principally concerned to place as a 'weight on the interpretive scale'[214] that common

---

205 Though incomplete as a justification for the principle, there is much in Burton Crawford's excellent article (n 18) to be learnt about the general relationship between common law and statute. Previously I have criticised Burton Crawford's broader jurisprudential outlook in terms that I now regard as having only some merit, and as being intellectually a little immature: Jamie Blaker, 'The Hard Problem of Legality' (2019) 46(1) *University of Western Australia Law Review* 1. There is much in that youthful (and frankly, bad) article that I would now disclaim.

206 Burton Crawford (n 18) 534.

207 Cf, eg, *Nolan* (n 130) 443–4 (emphasis added) (Griffith CJ) ('but the common law ... should not be taken to be abrogated, *especially* on matters affecting the liberty of the subject'); *Re Burton; Ex parte Coghill* (1866) 3 Wyatt W & A'B 3, 5 ('The Court is bound to hold that view which harmonises with the greatest body of law, *especially* when such a construction favors the liberty of the subject') (emphasis added); *Re Bolton* (n 1) 520–1 (Brennan J) ('The law of this country is *very* jealous of any infringement of personal liberty... and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right') (emphasis added).

208 Rupert Cross, *Statutory Interpretation* (Butterworths, 3rd ed, 1995) 166 (describing assumptions comprising the principle of legality as 'operat[ing] ... as constitutional principles').

209 *Re Bolton* (n 1) 523 (Brennan J). Cf *Momcilovic v The Queen* (n 195) 46 [42] (French CJ).

210 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 471 (writing there of certain 'great precepts of constitutional liberty' expressed in the terms of the *United States Constitution*, and that, in Australia, are in the nature of 'principles [that] govern our thinking … as the source of canons of interpretation').

211 See above Part III. With this has come some instability in the content of the principles as cognised by the common law. See, eg, the shifting views in respect of penal statutes: Hardcastle (n 51) 455–6. See further below n 216.

212 Burton Crawford (n 18) 520.

213 Amos (n 60) 423 (identifying the 'liberty of the subject' as an 'independent principle in the constitution', before writing, 'the Liberty of the Subject is [not] simply an indefinite claim to resist legislative or executive encroachments; since the Courts of Law, in their interpretation of Statutes and their announcement of the principles of the Common Law, have ... determin[ed] how far it can trespass on individual freedom').

214 Burton Crawford (n 18) 536–7.

law carapace,[215] rather than the constitutional principles from which the carapace extends, seems a category mistake.[216]

The better understanding, borne out by the history, is that the assumptions comprising the principle of legality operate 'at a higher level as expressions of fundamental principles governing civil liberties and the relations between Parliament, the executive and the courts'.[217] Or in the inverted imagery: the interpretive practice has an eye to the 'substratum of the … law'.[218] That substratum is a set of liberties inhering in an inherited 'principle in the Constitution',[219] referred to traditionally as the liberty of the subject. Where a common law right specifies or protects the constitutional liberty of the subject, the principle of legality *for that reason* will protect that common law right. The principle of legality's concern for these common law rights is, in that way, derivative, and second order: the common face, but not the deep animus of the principle.

The problems that attend the retrofitted justifications would be avoided by abandoning those justifications, and reuniting the principle of legality with its authentic raison d'être. The *Australian Constitution* 'is not an isolated document. It has been built on traditional foundations. Its roots penetrate deep into the past'.[220] Brought forward into the *Constitution* were 'principles of British ... government'.[221] One of those principles, it appears, was the liberty of the subject.[222] By the time Australia received that principle, the principle bore the affect of Victorian British liberalism — it being 'in [the] ... reign [of Queen Victoria that] we received the whole of our constitutional liberties'[223] — 'all those constitutional liberties which are our safeguards'.[224] The principle of legality was, and is today most plausibly, an expression of that constitutional inheritance — that is, the constitutional liberty described in Part III, possessing the same inherent

---

215 Ibid 548.

216 For the proposition that the principle of legality protects constitutional principles independent from, albeit cognised by, the common law, see the history in Part III above. The proposition is also contemplated in, eg, *Re Bolton* (n 1) 520 (Brennan J) ('Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes'); *R v Lawrence* (1878) 43 UCR 164, 175 (Harrison CJ, describing 'checks provided by the general law for the constitutional liberty of the subject'). Cf, eg, *Nolan* (n 130) 443–4; *Clancy* (n 161) 201. It also seems contemplated in this seminal modern statement of the principle by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131: 'Parliament can, if it chooses, legislate contrary to fundamental principles of human rights [which principles were later referred to as 'principles of constitutionality']. … But the principle of legality means that Parliament must squarely confront what it is doing'. Cf *ACTV* (n 201) 139 n 12 (Mason CJ) (drawing on the Canadian dictum, '"Freedom of expression is not … a creature of the Charter". It is one of the fundamental concepts that has formed the basis of the historical development of the political, social and educational institutions of western society'). I have put this point forcefully, reflecting my present certainty in it. But one expects to learn much from any further reflections Burton Crawford might give on the subject.

217 Cross (n 208) 166.

218 *Lyons v Smart* (n 131) 177 (Higgins J).

219 Amos (n 60) 423.

220 John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) vii.

221 Ibid.

222 See Parts III–IV above.

223 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1903, 5022 (Mr Reid).

224 Commonwealth, *Parliamentary Debates*, Senate, 21 July 1920, 2840 (Senator Pearce).

evolutionary potential that the principle was understood to have when the Commonwealth of Australia inherited it.

If that is what the principle of legality is, then understanding the principle's justification and proper scope ceases to be a creative exercise. The task then, instead, is to become better students of our own constitutional traditions.[225] That would involve a renewed attentiveness to how each of the coordinate arms of the governments in Australia give expression to the constitutional principle of liberty. And it would involve renewing our memory of the liberal and civic ideals of that traditional, cooperative project.[226]

To place the principle of legality on its traditional footing is — it remains to say — not to render the principle an anachronism. As Hannah Arendt once wrote, the 'cause of freedom versus tyranny', has, unfortunately, at no time since the beginning of history, been an anachronism.[227] The rediscovery, now, of the liberal nature of the principle of legality, seems timely.[228]

---

[225] As well as how those traditions inform the scopes of judicial powers. Cf *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).

[226] A compelling synthesis of liberal thought on this subject is John Rawls, *Political Liberalism* (Columbia University Press, 1996).

[227] Hannah Arendt, *On Revolution* (Viking Press, 1963) 1.

[228] See Diamond (n 191); Fukuyama (n 6).

Before the High Court

Vanderstock v Victoria: Are "True" Consumption Taxes Forbidden to the States by Section 90 of the *Australian Constitution*?

Anthony Gray*

Abstract

The High Court of Australia will soon consider a constitutional challenge to recent Victorian legislation that imposes a fee on the use of a zero or low-emission vehicle. The challenge argues that such a fee is an excise tax, prohibited to the States by s 90 of the *Australian Constitution*. The Court will need to consider the current orthodoxy that a consumption tax is not an excise, and its longstanding interpretation of s 90. This column submits the High Court should extend the existing definition of excise to include true taxes on consumption. This would be most consistent with the view of the purpose of s 90 accepted by the High Court since 1949, and would remove an anomaly from existing law.

Please cite as:

Anthony Gray, '*Vanderstock v Victoria*: Are "True" Consumption Taxes Forbidden to the States by Section 90 of the *Australian Constitution*?' (2022) 44(4) *Sydney Law Review* 591.

 ISSN: 1444–9528

* Professor, School of Law and Justice, University of Southern Queensland, Ipswich, Queensland, Australia. Email: Anthony.Gray@usq.edu.au; ORCID iD: https://orcid.org/0000-0001-9565-475X. Thanks to the anonymous referee for constructive comments on an earlier draft.

I Introduction

The Victorian Parliament enacted the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ('*ZLEV Act*'). As the name suggests, the legislation imposes a charge on those using a zero and low-emission vehicle ('ZLEV') on public roads. The charge paid depends on the extent of use of such roads in a given period. A current constitutional challenge, *Vanderstock v Victoria*,[1] argues that the *ZLEV Act* infringes s 90 of the *Australian Constitution*. Other Australian States and Territories have intervened to support Victoria, the Commonwealth has intervened,[2] and the Australian Trucking Association ('ATA') seeks to intervene as amicus curiae, to support the challenge.[3] Victoria defends the constitutionality of the legislation.[4] Section 90 prohibits States from imposing customs duties and excise taxes. The challenge argues the legislation imposes an excise. As outlined below in Parts III–IV of this column, the High Court of Australia has struggled to interpret the excise prohibition. There has been disagreement over the definition of excise, the purpose of the provision, and the correct approach. The High Court has not interpreted s 90 since 1997 in *Ha v New South Wales*, a 4:3 decision.[5]

The term 'consumption tax' can refer to different kinds of tax. A consumption tax may be intended to mean a simple sales tax,[6] like the Goods and Services Tax ('GST'). This is *not* how the term consumption tax is used here. The GST is Commonwealth-imposed. The fact that all revenue raised from it flows to the States is irrelevant to constitutional validity. It is constitutionally valid as a tax imposed by the Federal Parliament pursuant to s 51(ii) of the *Australian Constitution*.[7] Clearly, if the States sought to impose a tax on goods like the GST, this would offend s 90.[8]

The Victorian provision imposes a 'true' consumption tax because it is imposed on the act of consumption of something. This differs from a tax imposed on the sale of something. The High Court has only twice directly answered whether a true consumption tax is an excise, and each time reached a different conclusion.[9]

---

1 *Vanderstock v Victoria* (High Court of Australia, Case No M61/2021) ('*Vanderstock*').

2 Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Vanderstock v Victoria*, Case No M61/2021, 4 October 2022 ('Commonwealth's Submissions').

3 Australian Trucking Association ('ATA'), 'Proposed Submissions of the Australian Trucking Association', Seeking leave to be heard as amicus curiae in *Vanderstock v Victoria*, Case No M61/2021, 4 October 2022 ('ATA's Submissions').

4 Victoria, 'Defendant's Submissions', Submission in *Vanderstock v Victoria*, Case No M61/2021, 19 September 2022 ('Victoria's Submissions').

5 *Ha v New South Wales* (1997) 189 CLR 465 ('*Ha*'). *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 raised s 90, but it was decided on grounds that meant there was no substantive consideration of the section.

6 Eg, the mooted consumption tax of the mid-1980s was described as a 'sales tax': Treasury (Cth), *Reform of the Australian Tax System: Draft White Paper* (June 1985) [13B.1].

7 Justice Michelle Gordon 'The Commonwealth's Taxing Power and its Limits — Are We There Yet?' (2013) 36(3) *Melbourne University Law Review* 1037, 1039–44.

8 *Commonwealth v South Australia; Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 ('*Oil Refineries Ltd*').

9 The fee was held to be an invalid excise in *Oil Refineries Ltd* (n 8). The consumption tax was held not to be an excise in *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 ('*Dickenson's Arcade*').

Further, there is doubt whether the more recent of these two decisions remains good law, as will be shown below in Part III. In *Vanderstock*, the plaintiffs argue that the Victorian legislation imposes a consumption tax, and as such is an 'excise' and invalid.[10]

II Outline of the *ZLEV Act*

Section 7 of the *ZLEV Act* requires the registered operator of a ZLEV to pay a charge for using it on specified roads. 'Specified roads' is defined in s 3 of the Act mainly to mean Victorian public roads. Section 8(1) states the rate charged is 2.5 cents per kilometre travelled during a financial year for a ZLEV that is an electric vehicle or hydrogen vehicle, and 2 cents per kilometre travelled during that year for a ZLEV that is a hybrid plug-in electric vehicle. Rates are indexed for inflation (s 9). The registered operator will make a declaration 14 days after the financial year (earlier if they sell the vehicle) indicating with evidence their odometer readings, so the required fee can be calculated and charged (ss 10–11).

Clearly, (a) this legislation imposes 'a tax'; and (b) imposes it on consumption. The classic definition of a tax for constitutional law purposes is provided by Latham CJ in *Matthews v Chicory Marketing Board (Vic)* as a compulsory exaction of money by public authority for public purposes, and not a fee for services.[11] It is not exhaustive.[12] The charge in the *ZLEV Act* is compulsory for all who operate ZLEV vehicles on specified roads. Practical compulsion is sufficient; it is irrelevant a person could avoid the fee by not operating such a vehicle.[13] The fee is charged by the Victorian Parliament and payable to the Department of Transport, a public authority, and for public purposes. No particular services are provided by the Department in return. This is a tax.

It is a tax *upon consumption*. Consumption of something typically means its use — in the case of something that is inedible, it means use or enjoyment of something.[14] Thus, the Victorian legislation imposes a tax on consumption, because it is levied based on usage of a vehicle, reflected in kilometres travelled.[15] Victoria disputes this, arguing it is a tax on an activity (albeit relating to goods), rather than a tax on the goods themselves.[16] This is a technical and legalistic argument, given the activity relates directly to the use of goods, and the definition of 'consumption'. A tax based on the quantity of a good planted has been held to be an excise; that tax was not seen to be based on the activity of planting.[17] By similar reasoning, this tax is not a tax on activity, but in substance a tax on goods. As will be seen below in

---

10 Christopher Vanderstock and Kathleen Davies, 'Submissions of the Plaintiffs', Submission in *Vanderstock v Victoria*, Case No M61/2021, 19 September 2022, [3] ('Plaintiffs' Submissions').

11 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 ('*Matthews*').

12 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 (all members of the Court).

13 *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390, 400 (Latham CJ).

14 In *Dickenson's Arcade* (n 9), Barwick CJ (partly dissenting in the result) indicated that, in this context, consumption of goods meant 'using them or in destroying them by use': at 187.

15 Plaintiffs' Submissions (n 10) [3], [46].

16 Victoria's Submissions (n 4) [10]–[15].

17 *Matthews* (n 11) 281 (Rich J), 286 (Starke J), 303 (Dixon J).

Part V, the High Court now favours a substantive approach to questions regarding s 90 interpretation.

The remaining, much more complex question for the High Court is whether such tax on consumption is an 'excise' and constitutionally forbidden to the States. One way to make sense of the mass of case law concerning s 90 is to divide it according to the definition of 'excise' and the purpose of prohibiting States from levying excise duties, given most cases have discussed these issues. It is also how the plaintiffs' claim has been developed in *Vanderstock.* Of course, definitional and purposive angles are not mutually exclusive — the cases generally discuss *both* matters in resolving whether a given fee is an excise. Nor are the matters entirely independent — generally, those who have taken a broader view of the definition of excise have also taken a broader view of the provision's purpose; those who have taken a narrower view of the definition of excise have taken a narrower view of the provision's purpose. This is demonstrated by the most recent High Court decision of *Ha*.[18] The other issue addressed in the plaintiffs' submissions concerns whether a formalistic or substantive view should be taken to s 90 of the *Australian Constitution*, which will be addressed below.

III Excise Definition

In the first s 90 case, *Peterswald v Bartley*, the High Court defined an excise as a tax on production or manufacture of goods.[19] This view derives support from Quick and Garran,[20] authors of a noted early 20th century constitutional book and participants in the Convention Debates leading to the creation of the *Australian Constitution*, as well as from the surrounding context in which s 90 appears.[21] The *Peterswald* definition is narrow, minimising the extent to which s 90 curbs States' taxing power. At this time, the High Court applied 'reserved powers' reasoning, under which Commonwealth powers were read narrowly having regard to the position of the States. Clearly, s 90 concerns *State* power, but a narrow reading of the section effectively grants States more power. Reserved powers reasoning was abandoned by the High Court in 1920.[22] *The Engineers' Case* casts a long shadow over prior constitutional law decisions. It did not overrule them, but they are vulnerable to challenge on the basis they are irredeemably tainted by reserved powers reasoning, even if not explicitly.

---

18 In *Ha* (n 5) the majority (Brennan CJ, McHugh, Gummow and Kirby JJ) defined an excise broadly to include taxes on production, manufacture, distribution and sale and accepted the broad view of the purpose of s 90 first articulated in *Parton v Milk Board (Vic)* (1949) 80 CLR 229 ('*Parton*'): *Ha* (n 5) 499 Whereas the *Ha* minority (Dawson, Toohey and Gaudron JJ) defined an excise narrowly to include taxes on production and manufacture, and accepted a narrow view of the purpose of s 90 related to control of tariff policy: *Ha* (n 5) 507 and 514.

19 *Peterswald v Bartley* (1904) 1 CLR 497 ('*Peterswald*').

20 'The fundamental conception of the term is that of a tax on articles produced or manufactured in a country.': John Quick and Robert Randolph Garran *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 837. See also 838.

21 *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561, 606–8 (Dawson J dissenting) ('*Capital Duplicators*'); *Ha* (n 5) 505–6 (Dawson, Toohey and Gaudron JJ dissenting).

22 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*The Engineers' Case*').

There were other ways in which the early High Court view of excise was narrow. It required a direct relation exist between the fee charged and the quantity or value of goods produced or sold, to be considered a tax on goods.[23] Further, it considered an excise to be a tax on locally produced goods.[24] In this way, it was complementary to the concept of a customs duty, imposed on *imports*.

However, this narrow view of excise was eroded. In *Commonwealth Oil Refineries Ltd v South Australia*, the High Court determined taxes on *both* sale *and* consumption were excises.[25] This was contrary to the *Peterswald* definition that limited excises to taxes on production and manufacture. In *Matthews*, the need for a strict relation between the tax imposed and the quantity of goods produced or sold was loosened — a tax was held an excise there although imposed on land upon which a crop was planted.[26] There was no direct relationship between the tax and quantity of goods produced or sold, but a majority held the fee was an excise.[27] Further, it was suggested that an excise was not limited to taxes on domestic goods, as *Peterswald* had indicated.[28] Moreover, in *Matthews*, Dixon J held that a tax on consumption could be an excise.[29] Latham CJ agreed.[30] There was historical support for this, including Blackstone.[31]

However, after *Matthews*, the Privy Council in *Atlantic Smoke Shops Ltd v Conlon* considered an appeal from a Canadian decision that a consumption tax was not an excise.[32] Although the position is not entirely clear (see further below) *Atlantic Smoke Shops* was considered to stand for the proposition that a consumption tax was not an excise. At that time, the High Court considered itself bound by Privy Council decisions, a position that only changed in 1978.[33] Thus, as a result of *Atlantic Smoke Shops*, Dixon J believed he had to alter the view expressed in *Matthews.* In *Parton v Milk Board (Vic)*[34] and the unanimous *Bolton v Madsen*,[35] it was accepted that an excise was a tax on production, manufacture, sale or

---

23 *Peterswald* (n 19) 509.
24 Ibid 508.
25 Higgins J and Rich J defined excise duties to include taxes on sale and consumption: *Oil Refineries Ltd* (n 8) 435 (Higgins J), 437 (Rich J).
26 *Matthews* (n 11).
27 Ibid 281 (Rich J), 286 (Starke J), 287 (Dixon J). See also 279 (Latham CJ dissenting), 304 (McTiernan J dissenting).
28 Ibid 299 (Dixon J). See also Rich J in *Oil Refineries Ltd* (n 8) 437.
29 'There is no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption': *Matthews* (n 11) 300.
30 Ibid 277 (but dissenting in the result).
31 William Blackstone, *Commentaries on the Laws of England 1765–1769* (Clarendon Press, 1st ed, 1765) vol 1, 318–20.
32 *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 ('*Atlantic Smoke Shops*').
33 *Viro v The Queen* (1978) 141 CLR 88, 93 (Barwick CJ), 120 (Gibbs J), 129 (Stephen J), 135 (Mason J), 151 (Jacobs J), 166 (Murphy J).
34 *Parton* (n 18) 260 (Dixon J).
35 *Bolton v Madsen* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ) ('*Bolton*').

distribution. Dixon J removed consumption taxes from his definition of excise, expressly because of *Atlantic Smoke Shops*.[36]

This Canadian case therefore played a pivotal role in the constitutional question that the High Court of Australia will consider in *Vanderstock*. First, however, the different constitutional context in which the issue arose in *Atlantic Smoke Shops* must be acknowledged. Section 92 of the *British North America Act 1867* (UK) sets out matters over which provincial legislatures have exclusive power. One is direct taxation (s 92(2)). Provincial legislatures can enact direct, not indirect, taxation.[37] This distinction between direct and indirect taxation was important in the mid-19th century, under the influence of John Stuart Mill.[38] A direct tax was one demanded from the very persons whom it was intended would bear it. An indirect tax was one demanded from persons with the expectation that it be passed on to another. Mill noted an example of an indirect tax was an excise duty.[39] The Privy Council cited Mill and adopted this distinction in interpreting s 92.[40]

In *Atlantic Smoke Shops*, the Privy Council considered the constitutional validity of a retail sales tax on tobacco, and a consumption tax payable by a person who brought tobacco into the province, or received delivery of it for consumption.[41] It determined both were direct taxes, and valid. The Privy Council noted excise taxes were 'usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise is plainly indirect'.[42] This judgment has been read as having determined consumption taxes were not excises, because the consumption tax there was *direct* (imposed on the person expected to bear its incidence), and the Privy Council noted excise taxes were *indirect*. However, these comments were qualified with the word 'usually',[43] and an earlier Privy Council decision (also an appeal from Canada) had determined an excise tax *could* be direct.[44]

Dixon J interpreted *Atlantic Smoke Shops* as requiring that Australian law no longer regard consumption taxes as excises. Notably, although his Honour changed his position to that extent, he did not change it in light of other observations in the passage from Viscount Simon.[45] That is, Dixon J (and Australian law)[46] did *not* accept excises were confined to taxes on home manufactured articles, and did *not*

---

36 Ibid 261. In *Parton*, Rich and Williams JJ expressly adopted the wide definition, including consumption taxes, articulated by Dixon J in *Matthews* (n 11): *Parton* (n 18) 252–3.

37 This is subject to s 122 of the *British North America Act 1867* (UK), preserving provincial customs and excise duties in place at the time of confederation.

38 John Stuart Mill, *Principles of Political Economy* (John W Parker, 1848).

39 *Atlantic Smoke Shops* (n 32) 568.

40 *Attorney-General for Manitoba v Attorney-General for Canada* [1925] AC 561, 566, 568.

41 *Atlantic Smoke Shops* (n 32).

42 Ibid 565 (Viscount Simon for the Council).

43 Ibid.

44 *Attorney-General for British Columbia v Kingcome Navigation Co Ltd* noting that if a tax is demanded from the person intended to pay it, it was direct 'and that it is none the less direct even if it might be described as an excise tax … or collected as an excise tax': [1934] AC 45, 55 (Lord Thankerton, for the Council).

45 See above n 42 and text accompanying.

46 Obviously, Dixon J was (and is) an extremely persuasive figure on the High Court, especially in matters of constitutional law, where his Honour's view would typically (but not always) prevail: see, eg, John Eldridge and Timothy Pilkington *Sir Owen Dixon's Legacy* (Federation Press, 2019).

confine excises to taxes on articles 'in the course of manufacture'. Six years after *Atlantic Smoke Shops*, the High Court (with Dixon J in a leading role) reaffirmed taxes on the distribution of goods *were* excises,[47] contrary to the above passage. This position of the Court is the current orthodoxy.[48] His Honour did not resile from his previous position that excises were *not* limited to taxes on domestic goods. This position of the Court is also the current orthodoxy. Thus, of the three points made in the above passage by Viscount Simon, a majority of the High Court felt bound to accept only one.

It is regrettable that the High Court of Australia was so influenced by a decision (on one point) of the Privy Council on the interpretation of another nation's Constitution, particularly where it made a distinction with no parallel here. The *Australian Constitution* makes no distinction between direct and indirect taxes. By the 1890s, when the *Australian Constitution* was being drafted, dissatisfaction with the direct/indirect taxation distinction was evident, leading to the drafters avoiding it in favour of using the word 'excise'.[49] Though some s 90 decisions utilised the distinction,[50] hostility towards it grew over the years.[51] Economic discourse no longer favours the distinction.[52] The plaintiffs' submissions in *Vanderstock* refer to 'unwarranted deference' afforded to *Atlantic Smoke Shops*.[53] Notably, Victoria's submissions do not discuss the case or acknowledge its influence on the direction of the Australian jurisprudence.[54]

---

47 *Parton* (n 18).

48 *Ha* (n 5) 499.

49 Barry Gordon, 'What is an Excise Duty? Nineteenth Century Literature and the *Australian Constitution*' (1989) 11(1) *History of Economics Review* 22, 31.

50 *Peterswald* (n 19) 511 (Griffith CJ for the Court: 'it was contended for the respondent that the tax is in substance an indirect tax and *therefore* obnoxious to the restrictive provision in the *Constitution*' (emphasis added)); *Matthews* (n 11) 277–8 (Latham CJ held an excise was an indirect tax), 285 (Starke J noted the Canadian cases, but pointedly refused to accept that they meant an excise had to be indirect in nature).

51 'There can be no such justification for "the use of Mill's analysis", or for the use of Canadian precedents, when we come to interpret our own s 90, which was adopted in a quite different setting and employs much more specific terminology': *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 554 (Fullagar J) ('*Dennis Hotels*'). Clearly Mill's analysis includes his classification of taxation as being direct or indirect. In *Ha*, Dawson, Toohey and Gaudron JJ (dissenting in the result) concluded 'it is not possible to draw any practical distinction between direct and indirect taxes': *Ha* (n 5) (509). The majority made no use of the distinction.

52 See, eg, Gordon (n 49) 31: 'by the 1890s informed students of public finance were well aware of the ambiguities surrounding the terms 'direct' and 'indirect'. Their writings suggested … that the inclusion of such terms in the constitution … was not … recommended'; HW Arndt 'Judicial Review under Section 90 of the *Constitution*: An Economist's View (Pt 1)' (1952) 25(11) *Australian Law Journal* 667, 674:

> the distinction between 'direct' and 'indirect' taxes has .. been a source of endless confusion to lawyers and economists alike … As an aid to judicial interpretation, the classical distinction had the great disadvantage that … its application demanded an inquiry by the Court into the 'intentions' or 'desires' of the taxing authority [but because the distinction rested on ultimate incidence of the tax] the legislature usually did nothing to reveal its intentions or desires, for the simple reason that it was often indifferent as to who paid the tax. The inevitable next step for the Court was to try to gauge the 'intentions' of the legislature by trying to assess the probable economic effects of the tax … and with that step it plunged deep into purely economic analysis, and found itself floundering in the morass into which the classical distinction and its implicit theory of the 'incidence' of taxation had led public finance theorists.

53 Plaintiffs' Submissions (n 10) [16].

54 Victoria's Submissions (n 4).

Subsequently, the High Court considered legislation similar to that in *Atlantic Smoke Shops* in *Dickenson's Arcade*.[55] The majority applied the *Parton* and *Bolton* view that a consumption tax was not an excise.[56] Barwick CJ and McTiernan J dissented. Barwick CJ said there was 'no logical reason' for confining excise so as to exclude consumption taxes,[57] and the Canadian decision (*Atlantic Smoke Shops*) that apparently established this point was made in the context of a distinction between direct and indirect taxation not recognised in the *Australian Constitution*.[58] McTiernan J said the Canadian cases were descriptive, not definitive, of the nature of excise, and nothing in them required the High Court to alter its previous definition of excise including consumption taxes.[59] Mason and Gibbs JJ both noted the illogical nature of the exclusion of consumption taxes from the definition.[60]

Dickenson's Arcade was heavily influenced by then-prevailing 'criterion of liability' approach to s 90, an approach that would later fall out of favour (as discussed below in Part V(C)). The challenged legislation featured a backdating device, which at the time was accepted as compatible with s 90. Essentially, it involved charging a business owner licence fees based on turnover in a prior period. Members of the High Court accepted that such schemes did not impose excise — fees were imposed for the privilege of conducting a business, and calculation by reference to a prior period of trade broke the required connection between the tax and the quantity of goods produced or sold. As will be seen, neither aspect of the reasoning in *Dickenson's Arcade* is fully accepted today. While the High Court did not expressly overrule the decision in *Ha*, the Court essentially confined the decision to its facts.[61] Thus, the authority of the decision in *Dickenson's Arcade* is weak.[62] Submissions for both the plaintiffs and the Commonwealth in *Vanderstock* call for

---

55 *Dickenson's Arcade* (n 9).

56 Ibid 209 (Menzies J), 221 (Gibbs J), 231 (Stephen J), 239 (Mason J).

57 Ibid 185.

58 Ibid 186.

59 Ibid 200–2.

60 Ibid 238–9 (Mason J), 219 (Gibbs J). See also Commonwealth's Submissions (n 2) [29]: 'four of the six Justices who sat in *Dickenson's Arcade* recognised that the logic of the Court's authorities on s 90 meant that a consumption tax was not an excise'.

61 '[T]he decision of this Court is not to overrule *Dennis Hotels* or *Dickenson's Arcade*. They *may* stand as authorities for the validity of the imposts therein considered.': *Ha* (n 5) 504 (emphasis added) (Brennan CJ, McHugh, Gummow and Kirby JJ).

62 Cf '*Dickenson's Arcade* rests upon a principle carefully worked out in a significant succession of cases': Victoria's Submissions (n 4) [22], citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) ('*John*'). With respect, this statement does not acknowledge: the influence of *Atlantic Smoke Shops* on the High Court's views regarding consumption taxes; that a High Court decision prior to it (*Oil Refineries Ltd*) and significant obiter dicta in cases such as *Matthews*, were to the contrary of what was held in *Dickenson's Arcade*; that several members of the Court in *Dickenson's Arcade* expressed hesitation and/or dissatisfaction with the classification of consumption taxes being applied in the case; that the decision was infected with the criterion of liability approach that would fall into disfavour as an exclusive test; and that a majority of the High Court in *Ha* essentially confined the *Dickenson's Arcade* decision to its facts, which is surely very near to a complete overrule.

it to be overruled,[63] based on High Court guidelines for when an earlier case should be reconsidered as determined in *John v Federal Commissioner of Taxation*.[64]

Subsequent cases indicated it was unnecessary to decide whether it remained the case that consumption taxes were not excises.[65] However, three justices (dissenting in the result) in *Ha* called the carve out of consumption taxes from the definition illogically continued.[66] In addition, the position taken by two justices in *Hematite Petroleum Pty Ltd v Victoria*,[67] to the effect that the tendency of an impost to be reflected in the final price of the goods to the consumer points towards the impost being an excise, supports the view that a tax on consumption is an excise.

IV The Purpose of Section 90

Related to a divergence of views as to the definition of excise is a divergence of views as to s 90's purpose. The current orthodoxy is that espoused by Dixon J in *Parton*:

> In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon the manufacture or production.[68]

The High Court has noted that taxes on goods tend to increase the cost of the goods in the hands of the consumer, thus reducing demand for the goods.[69] Hanks has noted how the price of commodities can significantly contribute to inflation, and affect wages policy, credit and monetary conditions, and money supply.[70] Individuals often expect the Commonwealth to manage these policy areas. He concludes 'it is, at least, strongly arguable that the Commonwealth cannot discharge its responsibility for these policy areas unless it is conceded control over commodity taxation'.[71] The judgment of Mason J in *Hematite Petroleum* reflects acceptance of these economic management arguments.[72]

---

63 Plaintiffs' Submissions (n 10) [16]; Commonwealth's Submissions (n 2) [4].

64 *John* (n 62) 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). Guidelines included: whether the previous principle had been discerned over a significant number of cases; whether there is a difference of opinion in the reasoning of the majority justices in the relevant case; whether the earlier decision had achieved a useful result or caused inconvenience; and whether the earlier decision had been acted upon.

65 *Capital Duplicators* (n 21) 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (n 5) 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

66 *Ha* (n 5) 510 (Dawson, Toohey and Gaudron JJ).

67 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 632 (Mason J), 666 (Deane J) ('*Hematite Petroleum*').

68 *Parton* (n 18) 260; quoted with approval in *Ha* (n 5) 495 (Brennan CJ, McHugh, Gummow and Kirby JJ). Victoria challenges this orthodoxy: Victoria's Submissions (n 4) [49].

69 *Capital Duplicators* (n 21) 586 (Mason CJ, Brennan, Deane and McHugh JJ).

70 Peter Hanks 'Section 90 of the *Commonwealth Constitution*: Fiscal Federation or Economic Unity?' (1986) 10(3) *Adelaide Law Review* 365, 383.

71 Ibid.

72 *Hematite Petroleum* (n 67) 631–2.

On the other hand, others believe that s 90 has a narrower purpose — to secure Commonwealth control over tariff policy. To do so, the section merely prohibits States from enacting taxation that discriminates against Australian produced goods. In this way, excise duties are the opposite of customs duties. This view derives support from Quick and Garran,[73] may reflect the intention of (some) drafters,[74] was accepted in earlier cases,[75] and attracted dissenting justices in the most recent s 90 decisions.[76] It forms the main basis of the Victorian Government's argument in *Vanderstock*.[77] However, the High Court eventually discarded a requirement that a tax, in order to be an excise, had to be imposed on locally produced goods,[78] and the language of 'discrimination' against Australian goods in excise discourse has mainly appeared in the last two s 90 judgments, from dissentients.[79] The majority in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* claimed there had been 'little support' for this view since *Parton*.[80] Further, there was little discussion of 'excise' at the Convention Debates, and no agreement as to its meaning.[81] Removal of particular words at the 1897 Convention can suggest an intention that excises not be confined to discriminatory taxes.[82] Caleo notes this claimed narrow purpose of s 90 was 'never explicitly addressed' at the Conventions.[83]

V Critique

A *Incoherence in Application of the Two Aspects*

Both the broad and narrow views of definition and purpose are incoherent as currently implemented. The broad view is incoherent because, if one accepts that s 90 of the *Australian Constitution* is designed to give the Commonwealth control over commodity taxation for economic management, there is no logical reason to

---

73 Quick and Garran (n 20) 837–8.

74 Gordon (n 49) 37–8.

75 *Oil Refineries Ltd* (n 8) 426 (Isaacs J), 438 (Starke J); *Dennis Hotels* (n 51) 590 (Menzies J), 556 (Fullagar J).

76 *Capital Duplicators* (n 21) 606–8 (Dawson J), 624 (Toohey and Gaudron JJ); *Ha* (n 5) 506 (Dawson, Toohey and Gaudron JJ).

77 Victoria's Submissions (n 4) [38]–[50].

78 *Matthews* (n 11) 299 (Dixon J) (quoted with evident approval in *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ). Some of the tax that the majority invalidated in *Ha* fell on imported goods, and they were not carved out from the decision regarding invalidity. There is no mention of a requirement that the goods be locally produced in the definition of excise agreed to unanimously in *Bolton* (n 35) 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

79 *Capital Duplicators* (n 21) 629-630 (Toohey and Gaudron JJ); *Ha* (n 5) 511–12 (Dawson, Toohey and Gaudron JJ dissenting).

80 *Capital Duplicators* (n 21) 587 (Mason CJ, Brennan, Deane and McHugh JJ).

81 *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).

82 Ibid 495–6 (Brennan CJ, McHugh, Gummow and Kirby JJ). In an earlier draft of s 90, the Commonwealth's exclusive power with respect to excised duties was confined to goods upon which customs duties had been paid. That restriction was removed at the 1897 Convention. The majority in *Ha* concluded this precluded a view that the purpose of s 90 was confined to implementing tariff policy.

83 Chris Caleo 'Section 90 and Excise Duties: A Crisis of Interpretation' (1987) 16(2) *Melbourne University Law Review* 296, 307.

not apply this to consumption taxes,[84] as noted by Barwick CJ in *Dickenson's Arcade*,[85] Mason J in *Hematite Petroleum*,[86] and the dissenters in *Ha*.[87] This is also the view taken by the Commonwealth in its submissions in *Vanderstock*.[88] A consumption tax can have just as much impact on the economy as a tax earlier in the supply chain. It increases prices in the hands of the consumer, just as a tax on production, manufacture or distribution does.[89] For example, by taxing the consumption of ZLEV, a government reduces demand for them, just as a tax on the production of such vehicles would, as noted by the plaintiffs and Commonwealth in *Vanderstock*.[90] Further, adherents of the broad view insist that the terms 'excise' and 'customs' exhaust the categories of taxes on goods.[91] A tax on goods must be one or the other. The ZLEV charge is a tax on goods. It is not a customs duty; logically then, it must be an excise.

The narrow view is also incoherent. It insists only taxes discriminatory against Australian produced goods can be excises. Clearly, such a tax could be imposed at the production or manufacture stage, or at distribution or sale. However, this view also seeks to confine excise taxes to taxes on production or manufacture. It is possible that a tax imposed at distribution or consumption could discriminate on the basis of the origin of the goods.[92] Thus, there is a misalignment between the purpose of the section as espoused by the adherents of the narrow view and the definition they apply to the word 'excise' in the section. One way or the other, this incoherence should be resolved.

Assuming the purpose of s 90 accepted by the High Court since 1949 continues to prevail, involving Commonwealth real control over commodity taxation, that incoherence will most likely be resolved by extending the excise definition to include consumption taxes. This would mean the Victorian ZLEV

---

84 Ibid 304–5:

> Logically, the one reason for excluding consumption taxes from the reach of s90 is that indirectness of the tax is an essential requirement. But we have seen that this position is no longer tenable … Once this is conceded, the coherence of the reasons for extending *Peterswald* can scarcely be maintained if consumption taxes are made an exception. Principle is thus compromised.

85 *Dickenson's Arcade* (n 9) 185.

86 *Hematite Petroleum* (n 67) 631.

87 *Ha* (n 5) 510 (Dawson, Toohey and Gaudron JJ).

88 Commonwealth's Submissions (n 2) [4], [21].

89 *Dickenson's Arcade* (n 9) 218–19 (Gibbs J); similarly 230 (Stephen J).

90 Plaintiffs' Submissions (n 10) [16]: 'the exclusion from s 90 of taxes imposed on the consumption of goods is anomalous, because it is inconsistent with the proposition that s 90 exhausts the categories of taxes on goods and undermines the purpose of s 90'; Commonwealth's Submissions (n 2) [22]: 'a tax on the use or consumption of goods equally tends to increase the costs to the consumer of goods over their life cycle (which is apt to reduce the demand for, and the level of production of those goods)'. This is equivalent reasoning to the position of the majority in *Capital Duplicators* that 'a tax on distribution, like a tax on production or manufacture, has a natural tendency to be passed on to purchasers down the line of distribution and thus to increase the price of, and to depress demand for, the goods on which the tax is imposed': *Capital Duplicators* (n 21) 586 (Mason CJ, Brennan, Deane and McHugh JJ). Similarly, see *Capital Duplicators* (n 21) 602 (Dawson J). See also Anthony Gray, 'Excise Taxation in the Australian Federation' (PhD Thesis, University of New South Wales, 1997) 280: 'there is no economic justification for the High Court's distinction, in excise cases, between consumption taxes and other taxes on goods'.

91 *Capital Duplicators* (n 21) 590 (Mason CJ, Brennan, Deane and McHugh JJ).

92 Cf ibid 617–18, where Dawson J claimed it was not possible.

charge would be struck out as invalid. As the ATA's submissions note, the Victorian charge impacts on the Commonwealth's control over the taxation of road users.[93] Illogicality in the current law would be removed if the definition of excise was extended to include consumption taxes.

B *Improper Influence of Privy Council Decision*

The High Court of Australia erred in believing *Atlantic Smoke Shops* required it to abandon its previous position that the definition of excise could include consumption taxes. That case was itself contrary to earlier Privy Council decisions. It was based on a constitutional provision without equivalence in Australia. The High Court is no longer bound by Privy Council decisions, and to continue to accept that precedent would maintain an anomaly in the law. In terms of the grounds for reconsideration of decisions espoused in *John*, the view a consumption tax was an excise was not worked out over a series of cases — rather, there was an abrupt change in Australian law as a result of a Privy Council decision. States have not relied on the decision, because true taxes on consumption are rare.

C *Other Aspects*

The High Court has insisted in the past that, to be an excise, a tax must bear some relationship with the quantity or value of goods produced or sold. This was when excise taxes were confined to production, manufacture, sale or distribution. If the definition of excise were extended to consumption, the question would be whether the tax bears some relationship with the quantity or value of goods produced, *sold or consumed*. This requirement would be met here — as noted in Part II above, the tax is calculated by direct reference to the extent to which the vehicle is used.

The plaintiffs' submissions in *Vanderstock* refer to the criterion of liability approach to s 90 of the *Australian Constitution*.[94] That approach focused on the form of the challenged provision, rather than its substance.[95] It permitted circumvention of s 90, assisting States in defending the constitutional validity of licence fee/permit type schemes relating to business, enabling the High Court to conclude the imposed tax was not 'on goods', but for the privilege of running a business, including where the fee was based on a prior period's turnover (the 'backdating device'). This loophole was substantially utilised.[96] The criterion of liability approach was eventually discarded as an exclusive test in favour of a practical approach focused

---

[93] ATA's Submissions (n 3). After noting at [20] that the Commonwealth fuel excise and *ZLEV Act* tax are 'functionally equivalent', the submissions state at [25] that

> [t]he ability of the Commonwealth Parliament to execute any policy whereby *all* road users are required to pay some form of distance-based tax would be hampered or defeated if the [Victorian legislation] is valid. In that event, Parliament would be attempting to execute a policy that affects all road users in a context where a subset of those road users would already be subject to State taxes calculated by reference to distance travelled. For that reason, it would not have 'real control over the taxation of commodities', as it would not have the same control with respect to ZLEVs as it has with respect to fuel powered vehicles.

[94] Plaintiffs' Submissions (n 10) [49]–[50].

[95] *Bolton* (n 35) 271 (all members of the Court).

[96] *Dennis Hotels* (n 51); *Dickenson's Arcade* (n 9).

on substance.[97] Given the challenged ZLEV charge is clearly imposed on use of a good, even the criterion of liability approach would be unlikely to be availing to Victoria. That the fee charged relates to a period of use ending two weeks prior to the due date for payment of the fee does not sever the connection between the fee and activity relating to the goods being taxed. The proximity of the due date for payment and the relevant period is close.[98] It is not really a backdating device, and anyway this loophole was closed in *Ha*, with cases that created or perpetuated it effectively confined to their statutory contexts.[99] Given how the tax is calculated, based directly on usage, it is not a fee for the privilege of driving a vehicle, as might be a flat fee or a fee calculated in a more obscure way, which the plaintiffs in *Vanderstock* note.[100] Nor is it part of a regulatory scheme.[101]

I do not consider in this column financial implications for the States if the High Court were to extend the definition of excise to consumption taxes. Given these taxes are rare, such implications are likely limited. Though the Australian federal tax system is characterised by high vertical fiscal imbalance,[102] involving mismatch between revenue-raising ability and expenditure responsibilities, this has typically not figured (expressly) in reasoning in s 90 cases.[103] It was not discussed by (dissenting) adherents of the narrow view of excise in *Ha*. The financial implications for the States of a broad view were noted by the majority, but this did not affect their decision.[104]

VI Conclusion

The High Court of Australia should better align the definition of excise with the purpose of the constitutional provision referring to it. It should do this by extending the definition to include consumption taxes like the one imposed by the *ZLEV Act*. This would return Australian law to the position taken prior to *Atlantic Smoke Shops*. Australian law took a wrong turn by accepting that Privy Council precedent in a different constitutional context, and itself contrary to its earlier comments on point in *Matthews*. The tax imposed by the *ZLEV Act* bears a close relation to consumption of a good, and ought to be regarded as an excise.

---

97 *Capital Duplicators* (n 21) 583 (Mason CJ, Brennan, Deane and McHugh JJ). All members of the High Court embraced a practical approach in *Ha* (n 5): 498 (Brennan CJ, McHugh, Gummow and Kirby JJ), 514 (Dawson, Toohey and Gaudron JJ).

98 This was considered relevant to a tax being held to be an excise in *Ha* (n 5) 501–2 (Brennan CJ, McHugh, Gummow and Kirby JJ).

99 Ibid 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

100 Plaintiffs' Submissions (n 10) [50]: 'the amount of the ZLEV charge is linked to the amount that the ZLEV is used. It is not a fixed amount, nor calculated by reference to some external factor — those being factors that might tend towards a charge being characterised as a "fee for a privilege" or "fee for service"'.

101 This was considered relevant in *Ha* (n 5) 501–2 (Brennan CJ, McHugh, Gummow and Kirby JJ) and noted in the Commonwealth's Submissions (n 2) [49].

102 Anne Twomey and Glenn Withers, *Federalist Paper I: Australia's Federal Future* (Report for The Council for the Australian Federation, April 2007) 37–8.

103 A notable exception is Gibbs CJ (dissenting) in *Hematite Petroleum* (n 67) 617–18.

104 *Ha* (n 5) 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

Before the High Court

Kept in Suspense: Supervening Illegality in Contract Law and the High Court Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*

Harrison Simons*

Abstract

In *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*, the High Court of Australia must consider the nature and effect of supervening illegality on an executory contract for the sale of land and a business. The appeal is an opportunity for the High Court to provide clear guidance as to how government regulation affects executory contracts entered into before the regulation comes into force. This column explores whether supervening illegality can suspend or sterilise particular obligations in the executory contract, while leaving other obligations unaffected.

Please cite as:

Harrison Simons, 'Kept in Suspense: Supervening Illegality in Contract Law and the High Court Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*' (2022) 44(4) *Sydney Law Review* 605.

 ISSN: 1444–9528

* Solicitor; Sessional Lecturer, The University of Sydney Law School, Sydney, New South Wales, Australia. Email: harrison.simons@sydney.edu.au.
My thanks to Professor the Hon William Gummow AC and Emeritus Professor John Carter for their helpful feedback on an earlier draft. All errors remain my own.

I Introduction

The appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*[1] raises a difficult question concerning the effect of supervening illegality on an executory contract for the sale of a hotel business and the land on which the business operates. The illegality in question arose from the terms of an order made by the New South Wales ('NSW') Minister for Health in response to the COVID-19 pandemic. The Minister's Order prohibited licensed premises from opening to members of the public except to sell food and beverages to persons to consume off-premises. It came into conflict with the appellant vendor's obligation under the sale contract — entered into before the Order came into effect — to carry on the hotel business in the usual and ordinary course as regards its nature, scope and manner. The issue of supervening illegality assumed importance when the vendor served on the respondent purchasers a notice to complete the contract. The purchasers, in turn, contended that the contract had been discharged by frustration due to the Minister's Order or that the Order prevented the vendor from being ready, willing and able to complete the contract.

The vendor succeeded before the primary judge who held that the contract had not been frustrated, nor was the vendor in breach of the contract in a way that precluded service of the notice to complete. In their successful appeal to the NSW Court of Appeal, the purchasers did not challenge the primary judge's conclusion that the contract was not discharged by frustration. However, the majority considered that the supervening illegality merely 'suspended' the vendor's obligation to carry on the business in the usual and ordinary course in such a way that the obligation was inoperative for some purposes, but operative for other purposes. The Court concluded that the vendor could rely on the illegality brought about by the Minister's Order as a defence to any claim for damages by the purchasers, but not to the extent that the obligation was relevant to the vendor's duty to be ready, willing and able to complete when it served the notice to complete. The central issue on the vendor's appeal to the High Court is whether this application of supervening illegality was correct in the circumstances of the case.

II Background Facts

The Quarryman's Hotel, a pub in Sydney, was owned and operated by Laundy Hotels (Quarry) Pty Ltd ('the vendor').[2] It served food and alcohol to customers on premises under a liquor licence and operated several gaming machines. On 31 January 2020, the vendor entered into a bespoke contract for the sale of land and hotel business with Dyco Hotels Pty Ltd and Quarryman Hotel Operations Pty Ltd ('the purchasers').[3] The contract contained the Law Society/Real Estate Institute standard form contract terms, together with 35 'Additional Clauses'.[4] The purchase

---

1 *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (High Court of Australia, Case No S125/2022).

2 *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41,403, 41,412 [26] ('*Laundy Trial*').

3 Ibid 41,412 [33]. The purchasers' obligations were secured by two guarantors who were also parties to the contract: ibid 41,405 [1].

4 *Laundy Trial* (n 2) 41,407 [11].

price for the land and the hotel business was $11,250,000, with $9 million of that sum apportioned to the land and associated licences and the rest to the business assets.[5] A deposit of $562,500 was paid by the purchasers on execution of the contract.[6]

Additional Clause 50.1 is central to the dispute. Entitled 'Dealings Pending Completion', it relevantly provides that 'from the date of this contract until Completion, the Vendor must carry on the Business in the usual and ordinary course as regards its nature, scope and manner'.[7]

Additional Clause 63.7 is also important. It provides:

> If it is held by any court of competent jurisdiction that:
>
> (a) any part of this contract is void, voidable, illegal or otherwise unenforceable; or
>
> (b) this contract would be void, voidable, illegal or otherwise unenforceable unless any part of this contract is severed from this contract,
>
> then that part will be severed from this contract and will not affect the continued operation of the rest of this contract.[8]

The contract was to be completed on 30 and 31 March 2020.[9] However, just before completion, the COVID-19 virus became widespread in the Sydney metropolitan area. In response, on 23 March 2020, the *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW) ('the Order') was made by the NSW Minister for Health under s 7 of the *Public Health Act 2010* (NSW).[10] Clause 5 of the Order relevantly prohibited pubs and registered clubs from opening to members of the public, except to sell food and beverages to consume off-premises.[11] Under s 10 of the *Public Health Act 2010* (NSW), a person committed an offence if they were subject to, and had notice of, a direction made by the Minister under s 7 and failed to comply with that direction without reasonable cause. Following the issuance of the Order, the vendor operated the hotel business on a scaled-down basis, offering food and beverage to customers to consume on a takeaway basis.[12]

On 28 April 2020, the vendor served on the purchasers a Notice to Complete, calling for the completion of the contract on 12 and 13 May.[13] The purchasers did not attend either day to complete the contract.[14] On 21 May 2020, the vendor served a Notice of Termination on the purchasers.[15] On 23 May 2020, the purchasers' solicitors sent a letter stating, in terms, that it considered the vendor's Notice of

---

5 Ibid 41,411 [24(c)].
6 Ibid 41,412 [33].
7 Ibid 41,408 [15].
8 Ibid 41,410 [21].
9 Ibid 41,406 [3], 41,411 [23].
10 Ibid 41,406 [5], 41,413 [39].
11 Ibid 41,413 [39].
12 Ibid 41,413 [40].
13 Ibid 41,416 [58].
14 Ibid 41,416–17 [62].
15 Ibid 41,417 [66].

Termination to be a repudiation of the contract, which it accepted and that all parties were discharged from further performance.[16]

III Procedural History

In proceedings commenced in the NSW Supreme Court, the purchasers contended that the contract had been discharged by frustration around the time the Order was made as it was impossible for the vendor to perform its obligations under cl 50.1.[17] The result was that the purchasers would be entitled to their deposit back. Alternatively, the purchasers contended that the vendor was in breach of cl 50.1 and was therefore not 'ready, willing and able to complete' the contract when it served the Notice to Complete on 28 April 2020.[18] It followed that the vendor repudiated the contract by its Notice of Termination on 23 May 2020, with such repudiation being accepted by the purchasers.[19]

By its cross-claim, the vendor contended that it was entitled to serve the Notice to Complete and, when the purchasers failed to attend the dates for settlement, serve the Notice of Termination.[20] It claimed declarations to the effect that the contract was terminated and that it was entitled to the deposit, in addition to loss-of-bargain damages.[21]

Before the primary judge (Darke J), it was common ground that the vendor's operation of the business at the time of entry into the contract would have been contrary to the Order.[22] The primary judge held that the vendor did not breach cl 50.1 when it scaled down the hotel business after the Order came into effect. His Honour construed the reference in cl 50.1 to 'carry[ing] on the Business in the usual and ordinary course' as meaning that the hotel business would operate in a lawful manner. His Honour said:

> [the vendor's] obligation to carry on the Business would not extend to carrying on the Business in any manner contrary to law… [T]he obligation would be to carry on the Business in the usual and ordinary course (as regards its nature, scope and manner) as far as it remained possible to do so in accordance with the law.[23]

Accordingly, as it was not in breach of cl 50.1, the vendor proved it was ready, willing and able to complete the contract at the time of serving the Notice to Complete.[24]

---

16 Ibid 41,417–18 [68].
17 Ibid 41,406 [7].
18 Ibid 41,406 [9].
19 Ibid. The purchasers pleaded further alternative claims for an order under s 55(2A) of the *Conveyancing Act 1919* (NSW) for the return of the deposit (see 41,406 [7], 41,431 [140]), and claims based on estoppel by convention and equitable estoppel (see 41,431–2 [141]–[147]). As the appeal to the High Court does not turn on these claims, it is not necessary to discuss them in any detail.
20 *Laundy Trial* (n 2) 41,406 [8].
21 Ibid.
22 Ibid 41,418 [73].
23 Ibid 41,420 [84].
24 Ibid 41,426 [113].

Turning to the issue of frustration, the primary judge held that the contract was not frustrated.[25] Central to this conclusion was that the contract was for the sale of land and a business which, at its core, involved the transfer of title to the parcel of land and business assets from vendor to purchasers.[26] The vendor's obligation under cl 50.1 (which the primary judge held was not breached) was only incidental to the sale of both.[27] Thus, the primary judge concluded that the terms in the contract were wide enough to contemplate the change in circumstances brought about by the Order, having regard to the construction of that clause and the absence of any warranties in the contract that governed future profits that the vendor would receive after entry into the contract.[28]

As the Notice to Complete was otherwise valid, the primary judge concluded that the vendor was entitled to terminate the contract by its Notice of Termination.[29] A declaration was made that the contract was terminated, the purchasers' deposit was forfeited to the vendor, and loss of bargain damages payable to the vendor were assessed in the amount of $900,000.[30]

In their appeal to the NSW Court of Appeal, the purchasers did not challenge the primary judge's conclusion on frustration.[31] The focus was on the primary judge's construction of cl 50.1. The purchasers contended that the primary judge erred in construing that clause as subject to a limitation that the vendor operate the business in the usual and ordinary course 'according to law'.[32] They submitted that no such lawful limitation could be read into that clause.[33] If that was correct, the vendor was in breach at the time of serving the Notice to Complete and was not entitled to serve the Notice of Termination.

The majority of the NSW Court of Appeal accepted these contentions and allowed the purchasers' appeal. Chief Justice Bathurst and Brereton JA (the latter, while agreeing with the former's reasons, also wrote separately) held that the primary judge's construction of cl 50.1 was erroneous. Neither judge accepted that cl 50.1 was subject to a limitation that the business operate only in a lawful manner.[34] It followed that when the Order came into force, the vendor's scaled-down business operation was in breach of cl 50.1, as it was not operating in the 'usual and ordinary course' based on how the hotel business was understood to operate at the time of entry into the contract. The departure from the primary judge on this point gave rise to the issue of importance before the High Court: if the hotel business was not limited to operating lawfully, what was the impact of the Order on the vendor's breach of cl 50.1 and the vendor's ability to serve a Notice to Complete?

---

25 Ibid 41,425–6 [110], [112].
26 Ibid 41,424–5 [104]–[105].
27 Ibid.
28 Ibid 41,425–6 [110].
29 Ibid 41,426–7 [115].
30 Ibid 41,432 [148]–[150]. The primary judge also dismissed the purchasers' alternative claim for the return of the deposit under s 55(2A) (see 41,431 [140]) of the *Conveyancing Act* and the estoppel claims (see 41,432 [147]).
31 *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340, 351 [60] ('*Laundy Appeal*').
32 Ibid 347 [34].
33 Ibid.
34 Ibid 349–50 [45]–[52] (Bathurst CJ), 373–6 [153]–[161] (Brereton JA).

Chief Justice Bathurst relied on several authorities, discussed further below, which held that supervening illegality did not always result in the discharge of a contract by frustration.[35] His Honour referred to *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*, where Marcus Smith J observed that supervening illegality in a contract might invite a range of responses.[36] For instance, one such response was that the illegality 'renders the contract unenforceable by one party or the other but leaves the rest of the contract standing and enforceable'.[37] Applying these principles, the Chief Justice held that the vendor may have been able to rely on the Order to be excused from any liability in damages for breach of cl 50.1.[38] But the Order did not excuse the vendor from complying with cl 50.1 for the purposes of proving that it was ready, willing and able to complete when it called for completion.[39] The Notice to Complete was therefore ineffective, and the purchasers could successfully rely on the Notice of Termination as the vendor's repudiation of the contract.[40] The Chief Justice also held that cl 63.7 did not assist the vendor because it required a court to declare a clause to be void or unenforceable, where no such relief was sought by either party; the clause did not apply to illegality that might temporarily affect a particular clause; and that, in any event, cl 50.1 could not be severed from the contract as a whole.[41]

The separate reasons of Brereton JA are consistent with the reasons of the Chief Justice. In addition, his Honour held that the breach of cl 50.1 disentitled the vendor from serving the Notice to Complete based on the wording of cl 51.7, which relevantly provided that if completion did not occur by the dates stipulated by the parties, then a party could serve a notice to complete on the other if they were ready, willing and able to perform and not in default.[42] Brereton JA construed the words 'not in default' to mean *any* default under the contract and not necessarily one connected with the completion of the contract.[43] His Honour also held that cl 63.7 did not apply because that clause was directed to illegality at the time of contract formation, not supervening illegality, and the contract had provided for the consequences of supervening illegality by allocating the risk of such occurrence to the vendor, who could not then rely on it to escape its consequences.[44]

In his dissenting reasons, Basten JA upheld the primary judge's construction of cl 50.1.[45] Given that there was no challenge to the primary judge's conclusions on

---

35 See *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] AC 495 ('*Arab Bank*'); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 ('*Libyan Arab Foreign Bank*').

36 *Laundy Appeal* (n 31) 352 [65], quoting *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), [41]. See also *Laundy* Appeal (n 31) 376–7 [163] (Brereton JA).

37 Ibid.

38 *Laundy Appeal* (n 31) 352 [66], 353–4 [73]. See also *Laundy Appeal* (n 31) 352–3 [67], [69], quoting *Gerraty v McGavin* (1914) 18 CLR 152, 162 (Griffith CJ) ('*Gerraty*'); *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, 233 (Lord Russell of Killowen).

39 *Laundy Appeal* (n 31) 353–4 [73].

40 Ibid.

41 Ibid 350 [53]–[57].

42 Ibid 371–2 [145]–[146].

43 Ibid 372 [146].

44 Ibid 376–7 [162]–[165].

45 Ibid 368 [126].

the frustration issue, this was sufficient for Basten JA to dismiss the appeal.[46] His Honour alternatively held that if the majority was correct in their construction of cl 50.1, any breach of that clause was not a condition precedent to the completion of the contract or an essential term such that a breach of that clause would prevent the vendor from being ready, willing and able at the time it served the Notice to Complete.[47]

IV Overview of the Issues

The principal ground relied on by the vendor in their Notice of Appeal to the High Court is that the majority of the NSW Court of Appeal erred in holding that the vendor's obligation to complete was suspended during the period in which the supervening illegality brought about by the Order remained in force.[48]

The application of this so-called 'suspensive nature' of supervening illegality is said to be illustrated by *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)*,[49] a decision on which Bathurst CJ relied.[50] In that case, the Arab Bank Ltd, which had a branch located in Jerusalem, entered into a contract of current account payable on demand with Barclays Bank's Jerusalem branch in 1939. At that time, Jerusalem was governed under a British mandate. When the mandate ended in 1948, the Arab–Israeli War broke out, resulting in the Arab Bank's Jerusalem branch residing in an area occupied by enemy forces. The Arab Bank sued to recover the balance in the current account with Barclays Bank's Jerusalem branch, which was situated in friendly territory. In the House of Lords, it was not disputed that as a matter of general principle, the outbreak of the war made the further performance of the contract illegal as the contract between the two banks involved intercourse with a person or entity resident in enemy territory.[51]

In the *Laundy Appeal*, Chief Justice Bathurst summarised the decision as holding that 'the liability to pay the monies held on the current account had been suspended [by the outbreak of the war], not terminated'.[52] Bathurst CJ also referred to *Libyan Arab Foreign Bank v Bankers Trust Co*,[53] a case concerned with the recovery of a large sum of money in circumstances where the recovery would have been contrary to an executive order from the President of the United States. In that case, Staughton J held that the 'suspension' principle in *Arab Bank* was of general application to contract law and not limited to contracts affected by the outbreak of war.[54]

In its appeal to the High Court, the vendor denies that supervening illegality has the effect of suspending rights and obligations in the contract such that the rights

---

46 Ibid 368 [127].
47 Ibid 368–370 [128]–[139].
48 Laundy Hotels (Quarry) Pty Ltd, Notice of Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*, S125/2022, 31 August 2022, [2].
49 *Arab Bank* (n 35).
50 *Laundy Appeal* (n 31) 351 [62].
51 *Arab Bank* (n 35) 522 (Lord Morton of Henryton); 530 (Lord Reid); 537 (Lord Cohen).
52 *Laundy Appeal* (n 31) 351 [62].
53 Ibid 351 [63], citing *Libyan Arab Foreign Bank* (n 35).
54 *Libyan Arab Foreign Bank* (n 35) 772.

and obligations affected by illegality are ineffective for some purposes, but not others.[55] The vendor accepts that supervening illegality might have a range of applications to a contract,[56] but argues that any illegality is limited to the vendor's performance of cl 50.1 and does not affect the primary obligations of conveying the land and the business assets.[57] If the illegality results in cl 50.1 becoming void or unenforceable, then cl 50.1 could be severed from the contract as contemplated by cl 63.7.[58] If it is severed, it follows that the vendor was ready, willing and able to complete the contract at the time of serving the Notice to Complete and could rely on the subsequent Notice of Termination.

V The Dimensions of Supervening Illegality

A frustrating event may include a change in the law or the imposition of a court order that affects the manner in which the parties are to perform their obligations under a contract that was entered into before the intervening event. Where the change in the law or the imposition of the court order renders the performance of the contract illegal, the contract may be discharged by frustration.[59] These cases are treated in the same way as other cases where the performance of the contract is rendered impossible or significantly more difficult (but not illegal) by some supervening event.[60]

But *Gerraty v McGavin*, a decision relied on by Bathurst CJ,[61] shows that supervening illegality may have a wider application outside of the frustration context.[62] In that case, a tenant occupied certain premises under a lease that required him to operate a bakery on the land. Legislation was then passed prohibiting the tenant from operating the bakery. When the landlord sought to re-enter for the tenant's breach of the covenant to run the bakery business (which covenant the tenant had not observed for some time), the High Court held that the change in the law made compliance with the covenant impossible and that the landlord was not entitled to rely on it to establish his right to re-enter.[63] Supervening illegality framed in this way may have answered Brereton JA's conclusion that the vendor was in default for the purposes of cl 51.7 and therefore not entitled to serve the Notice to Complete

---

55 Laundy Hotels (Quarry) Pty Ltd, 'Appellant's Submissions', Submissions in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*, Case No S125/2022, 7 October 2022, [2], [67]–[68] ('Appellant's Submissions').

56 Ibid [60].

57 Ibid [59], [63]–[64].

58 Ibid [52], [66].

59 See, eg, *Arab Bank* (n 35) (discharge of a banking contract due to the outbreak of war where the contract involved intercourse with a person residing in enemy territory); *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (discharge of construction contract where an injunction obtained against contractor made it unlawful to complete the construction works in the manner contemplated and within the time required by the construction contract).

60 See, eg, *Taylor v Caldwell* (1863) 3 B & S 826; 22 ER 309 (discharge of contract to use a garden and music hall where the music hall was destroyed by fire); *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (discharge of time charter where ship requisitioned by the United Kingdom Government for war purposes).

61 *Gerraty* (n 38), quoted in *Laundy Appeal* (n 31) 352–3 [67].

62 See JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 7th ed, 2018) 1058 [33-22], citing *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 163 (Lord Simon LC).

63 *Gerraty* (n 38) 162.

pursuant to that clause. But Bathurst CJ held that the Order did not excuse the vendor from proving it could comply with cl 50.1 so that it was ready, willing and able to complete at the time of serving the Notice to Complete.

VI The Statutory Consequences of Supervening Illegality

In the NSW Court of Appeal, the Chief Justice assumed that the Order would have legal consequences for the vendor's performance of cl 50.1.[64] But was this assumption correct? For the most part, the decisions relied on by Bathurst CJ all preceded significant recent developments in the role of statutory illegality in contract law. As the High Court of Australia has said in more recent times (in the context of illegality subsisting at the time of contract formation), the consequences of statutory illegality are always determined as a matter of statutory construction.[65] Those consequences, however, depend on the interaction between the statute and the particular contract in question.

In its written submissions, the vendor seeks to restore the primary judge's construction of cl 50.1, requiring the vendor to carry on the business in the usual and ordinary course 'in a lawful manner'.[66] Put another way, the vendor contends that the clause should be read as requiring activity by the vendor that was not illegal, not as obliging the vendor to breach the law. If the vendor succeeds in this contention, there is no statutory illegality and the appeal should be allowed. There is some force in this contention. The primary judge's construction focused on the 'manner' in which the vendor was obliged to operate the business. The contract itself did not prescribe the 'manner' of business operation, although cl 48.8 contemplated that the vendor would observe legal requirements imposed on it as the holder of a licence under the *Liquor Act 2007* (NSW).[67]

The Chief Justice noted that the word 'manner' in cl 50.1 referred to 'how the [hotel business] is carried on'[68] and acknowledged that cl 50.1 did not require the hotel business to 'be carried on between the date of contract and the date of completion in an identical manner to the way it was carried on pre-contract'.[69] His Honour also acknowledged that cl 50.1 contemplated variations brought about by changes to the regulatory environment in which the hotel was operating.[70] It is difficult to see how the imposition of the Order was not such a relevant regulatory change. Indeed, the terms of the Order were not of general application, but specifically directed to premises licensed under the *Liquor Act 2007* (NSW). But the Chief Justice said, notwithstanding these considerations, the scaled-down operations brought about by the Order did not resemble the 'Business' as that term was understood to refer to the business operated by the 'Quarryman's Hotel'. With respect, it is somewhat difficult to reconcile the conclusion that cl 50.1 contemplates

---

64 *Laundy Appeal* (n 31) 353 [72]–[73].
65 *Gnych v Polish Club Ltd* (2015) 255 CLR 414, 425 [36] (French CJ, Kiefel, Keane and Nettle JJ) ('*Gnych*').
66 Appellant's Submissions (n 55) [38]–[51].
67 *Laundy Appeal* (n 31) 345 [23].
68 Ibid 348 [42].
69 Ibid 348 [43].
70 Ibid.

changes in the 'manner' in which the hotel business can operate with the view that there are *a priori* assumptions about the operation of the Quarryman's Hotel business. There is no doubt that the Order required the hotel business to make significant operational changes to comply with the terms of the Order, but the vendor was still running a hotel business wherein it sold food and beverages to customers for consumption. The vendor was not carrying out some completely different trade or business undertaking.

If the vendor is unsuccessful in restoring the primary judge's construction of cl 50.1, the supervening statutory illegality becomes relevant. As a matter of principle, there is no reason why Bathurst CJ's conclusion concerning the effect of statutory illegality on cl 50.1 is not an available statutory consequence of the illegality. As Gageler J said in *Gnych v Polish Club Ltd*:

> An implied statutory consequence determined in accordance with the ordinary principles of statutory construction — if a statutory consequence is implied at all — need not always go so far as to render an agreement made in breach of an express or implied statutory prohibition 'void' or 'vitiated' or 'nullified' or 'invalid', in the sense of being 'devoid of legal consequences'. There is no reason why an implied statutory consequence cannot stop short of rendering an agreement made in breach of a particular statutory prohibition wholly unenforceable by all parties in all circumstances. *An implied statutory consequence might be limited, for example, to rendering an agreement unenforceable by a contravening party in the occurrence or non-occurrence of particular events*.[71]

But the threshold question remains: are *any* statutory consequences intended to apply to private contracts or particular contractual obligations made or performed in breach of the Order? In the present case, it is certainly arguable that no statutory consequences should apply. The most important consideration that informs this argument is that the Order was intended to be temporary in nature. It was introduced to provide a provisional charter of conduct to navigate an immediate crisis. It would be contrary to legislative intention for an order or regulation not designed to endure for an indefinite period to interfere with ongoing and executory contractual obligations between individuals in the absence of express words or by necessary intendment.

However, if the High Court concludes that no statutory consequences apply to cl 50.1, this does not necessarily assist the vendor. In fact, it significantly weakens their case on appeal. This is because the vendor is relying on the consequences of illegality to sterilise the operation of cl 50.1 so that it may escape the finding that it was in breach of that clause such that it was disentitled from serving the Notice to Complete.

VII A 'Suspensory' Doctrine?

If the High Court concludes that statutory illegality has some effect on cl 50.1 it becomes necessary to consider Bathurst CJ's conclusions on supervening illegality more closely.

---

[71] *Gnych* (n 65) 432 [65] (emphasis added; citations omitted).

The Chief Justice relied on the *Arab Bank* decision to justify the conclusion that particular contractual rights can be 'suspended' because of supervening illegality without affecting the balance of the obligations under the contract.[72] At a superficial level, various passages from the speeches of the Law Lords certainly support Bathurst CJ's summary of that decision. For instance, Lord Reid said:

> Many kinds of contractual rights are totally abrogated by the outbreak of war and do not revive on its termination. *On the other hand, there are other kinds of contractual rights which are not abrogated; they cannot be enforced during the war, but war merely suspends the right to enforce them and they remain and can be enforced after the war*.[73]

Several observations may be made about this passage. First, Lord Reid is discussing the enforcement of contracts involving trade or intercourse with the enemy. Second, his Lordship accepts that some contractual obligations affected by the outbreak of war are 'totally abrogated', meaning that the parties are discharged from further performance of those obligations. Third, his Lordship states that 'other kinds of contractual rights' survive the outbreak of war, but the war 'suspends the right to enforce them'. At first blush, the level of generality with which this passage is written may give rise to some tension between the second and third propositions. How is it that 'many kinds of contractual rights' are abrogated by the outbreak of war but 'other kinds of contractual rights' survive, but are merely suspended? For the following reasons, however, Lord Reid's meaning is clear in its proper context. That context shows Lord Reid is not propounding any general doctrine of 'suspension' of contractual rights that can be applied to contracts outside of contracts affected by an outbreak of war.

Arab Bank is an example of illegality in the frustration context. As noted above, contracts with persons residing in enemy territory are discharged from further performance on the declaration of war.[74] One exception to this rule is that the discharge does not affect rights accrued to the parties before the declaration of war.[75] In context, this is what Lord Reid means when he refers to 'other kinds of contractual rights which are not abrogated'.[76] The precise issue in *Arab Bank* was whether monies held in a current account payable on demand could be characterised as an 'accrued right' in circumstances where demand for payment had not been made before the territory became occupied by enemy forces. The House of Lords characterised the right as an accrued debt — a property right that survived and was enforceable post-discharge.[77] So far, none of this reasoning is controversial; it is consistent with the doctrine of frustration applied in other contexts.

But why is it that these accrued rights 'cannot be enforced' and are 'suspended' during the war? The answer is not found expressly in any of the

---

72 *Laundy Appeal* (n 31) 351–4 [62], [64], [72]–[73].

73 *Arab Bank* (n 35) 530 (emphasis added). See also 528–9 (Lord Morton of Henryton); 535 (Lord Tucker); 540–1 (Lord Cohen).

74 See *Esposito v Bowden* (1857) 7 E & B 763; 119 ER 1430; *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 260 ('*Rio Tinto*').

75 *Rio Tinto* (n 74) 269 (Lord Dunedin).

76 See above n 73 and accompanying text.

77 *Arab Bank* (n 35) 529 (Lord Morton of Henryton); 534 (Lord Reid); 537 (Lord Asquith of Bishopstone); 540 (Lord Cohen).

speeches in *Arab Bank*. But Lord Reid clearly distinguishes between the discharged contract and the *enforcement* of rights accrued under it. There is a good reason for this distinction. English courts have long recognised that an alien enemy of England could not seek the assistance of English courts to *enforce* rights against an English subject without permission given by royal licence. This rule was approved by a specially constituted panel of the English Court of Appeal in *Porter v Freudenberg*[78] and the House of Lords in *Sovfracht (V/O) v Van Udens Scheepvaart En Agentuur Maatschappij (NV Gebr)*,[79] two important decisions that predate *Arab Bank*. Under this rule, the enemy alien suffers from a legal disability affecting their capacity to sue, not the underlying legal right.[80] In *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd*, another war case, Lord Sumner explained the relationship between the discharged contract and the legal disability as follows:

> …the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. … *Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property*.[81]

This line of reasoning is consistent with the Australian decision in *Hirsch v Zinc Corporation Ltd*.[82] In that case, the High Court accepted that an English company could recover payments accrued to it under an ongoing contract to supply zinc concentrates to metal merchants based in Germany following the outbreak of the First World War. The Court held that although the outbreak of war discharged executory obligations under the contract of supply, it did not affect the right of the English company to recover outstanding payments accrued before the war.[83] In contrast to the *Arab Bank* decision, it was the English company seeking to vindicate its accrued rights, not the German metal merchants who, after the declaration of war, were considered enemy aliens. As such, the High Court held that the English company's right to recover the payments was not 'suspended' until the end of hostilities.[84] It follows that the *Arab Bank* decision does not propound any general doctrine of 'suspension' of contractual rights as a result of supervening illegality.

VIII A Proper Place for Supervening Illegality?

The question remains whether there is a principled basis to support Bathurst CJ's conclusion that cl 50.1 was suspended (or inoperative) for some purposes, but not others. Two lines of reasoning underpin this conclusion. The first is that the supervening illegality may operate to excuse the vendor from liability in damages for breach of the obligation. The second is that the obligation is not otherwise

---

78 *Porter v Freudenberg* [1915] 1 KB 857.
79 *Sovfracht (V/O) v Van Udens Scheepvaart En Agentuur Maatschappij (NV Gebr)* [1943] AC 203.
80 Ibid 212 (Viscount Simon LC).
81 *Rio Tinto* (n 74) 289 (emphasis added).
82 *Hirsch v Zinc Corporation Ltd* (1917) 24 CLR 34.
83 Ibid 48 (Barton J); 65–6 (Isaacs J); 79–80 (Higgins J); 82–3 (Gavan Duffy J); 84 (Powers J).
84 Ibid 48 (Barton J); 64–5, 68–72 (Isaacs J); 79–80 (Higgins J); 83–4 (Gavan Duffy J); 84 (Powers J).

discharged, but is suspended during the illegality.[85] As discussed above, the second line of this reasoning is difficult to justify based on the decision in *Arab Bank*. But is it justified on some other basis? And what does it mean for the vendor to be 'excused from liability' because of the Order?

The answer to both questions might be found in *Gerraty*, where it was accepted that the tenant could rely on an intervening statute as a defence to a re-entry attempt by the landlord. Chief Justice Griffith held that as '[p]erformance of the covenant had become impossible by law … the '[lessor] cannot take advantage of the failure of the [lessee] to resume the business of baking as a breach of the covenant.'[86] While no authority was cited for this conclusion, his Honour might have had in mind *Brewster v Kitchell*,[87] a decision of Holt CJ in the Court of King's Bench, which was discussed at length in another decision of the Court of Queen's Bench, *Baily v De Crespigny*.[88] *Baily* was relied on by Isaacs J in his separate concurring judgment in *Gerraty*.[89]

In *Brewster*, Chief Justice Holt said:

> where H covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: so if H covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed.[90]

It is unclear what Holt CJ meant when referring to the 'repealing' of covenants. Does it mean the complete or temporary discharge of a promise? And is any discharge limited to particular promises, or does it apply to the entire contract? The factual context in which *Brewster* was decided — concerning the nature, scope and enforceability of a freehold covenant affecting certain land — suggests that Holt CJ had in mind whole obligations, not *particular* obligations. If so, the passage in *Brewster* is simply an earlier, more rudimentary formulation of the law regarding the discharge of contracts by frustration. In *Baily*, however, the Court applied the passage above in *Brewster* in concluding that a lessor was not bound to continue observing a singular covenant in a lease.[91]

If *Gerraty* is an application of Holt CJ's passage as understood in *Baily*, the application in those cases suggests that supervening illegality is more than an excuse (or a defence) to liability for damages in a particular instance. Rather, the obligation is discharged. If this is correct, then in the present case, the vendor could not be required to prove it was ready, willing and able to perform an obligation that the vendor is disabled from performing at the time of serving the Notice to Complete, at least while the Order remained in force.[92]

---

85 *Laundy Appeal* (n 31) 353–4 [72]–[73].

86 *Gerraty* (n 38) 162.

87 *Brewster v Kitchell* (1697) 1 Salk 198; 91 ER 177 ('*Brewster*'). The decision is more satisfactorily reported as *Brewster v Kidgil* (1702) 5 Mod 368; 87 ER 711.

88 *Baily v De Crespigny* (1869) LR 4 QB 180 ('*Baily*').

89 *Gerraty* (n 38) 165.

90 *Brewster* (n 87) 178. The 'H' in this passage appears to be a reference to 'heirs'.

91 See *Baily* (n 88) 187, 189. In *Matthey v Curling*, Lord Buckmaster was of the view that the outcome in *Baily* turned only on the construction of the terms of the lease: [1922] 2 AC 180, 227–8.

92 See also Sir Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 2nd ed, 2004) 389 [8–048].

But this conclusion also gives rise to difficult questions of degree. If the principle is that the discharge of the obligation is only temporary, at what point in time does the contract become frustrated? If, like the present case, the obligation affected by the illegality is important to the performance of an executory contract, the inherent uncertainty caused by the intervening legislative regime in the performance of the contract may operate to discharge it.[93] A similar difficulty arises if the discharge is permanent, for it may be that the purchasers are receiving something radically different from what for which they contracted.

It is likely for these reasons that the vendor relies on the severance clause in cl 63.7 (which by its terms appears to be directed to the consequences of both illegality and frustration) to sever cl 50.1 from the contract to avoid these difficult issues. But the vendor's written submissions do not fully develop how the severance clause would assist in this regard.[94] Those submissions also do not address the reasons Bathurst CJ and Brereton JA gave as to why the clause is inapplicable.

In the result, while a pathway exists for the vendor to succeed on appeal, there are considerable obstacles in its way. For one, there is a real possibility that if the High Court determines that cl 50.1 is discharged or inoperative, the contract may be discharged by frustration.

IX Conclusion

The appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* is an opportunity for the High Court of Australia to provide authoritative guidance on the proper role of supervening illegality in contract law. The above analysis shows that the *Arab Bank* decision does not support a general doctrine in contract law to the effect that obligations are suspended due to illegality. The decided cases also indicate that supervening illegality affecting the performance of particular obligations in an executory contract discharges or disables those obligations. To that extent, the vendor may be able to successfully argue that it was relieved from having to prove it was ready, willing and able to perform under cl 50.1 at the time of serving its Notice to Complete. However, if that is the case, the High Court will need to consider whether this kind of discharge in an executory contract (whether permanent or temporary) is coherent with the principles governing the discharge of a contract by frustration.

---

93 See *Metropolitan Water Board v Dick, Kerr and Co Ltd* [1918] AC 119.

94 Appellant's Submissions (n 55) [52], [66].

Book Review

The Automated State: Implications, Challenges and Opportunities for Public Law (2021) by Janina Boughey and Katie Miller (eds) Federation Press, 296 pp, ISBN 9781760022952

Frank Pasquale*

Please cite this book review as:

Frank Pasquale, 'Book Review: *The Automated State: Implications, Challenges and Opportunities for Public Law* by Janina Boughey and Katie Miller (eds)' (2022) 44(4) Sydney Law Review 619.

At present, the commercial appeal of automated legal systems rests on three pillars: speed, scale, and preference satisfaction. The proto-smart contracts evident in algorithmic stock trading, for example, are deemed superior to text-based contracts directly agreed by persons because they can be executed more quickly, across a wider range of space, satisfying more traders' preferences for trading than could ordinary contracts.[1] There are, of course, larger purposes of the financial system, which should be weighed against these desiderata. But few would say there is a core essence of financial transactions at risk of being derailed by computation.

However, for many other parts of the legal system, there is a common sense that their translation into computation would be inappropriate. Terms of imprisonment meted out computationally, without mediation by a human, are unthinkable. Nor does civil judgment by robot seem wise, though 'regulation by

* Jeffrey D Forchelli Professor of Law, Brooklyn Law School, New York, USA. Email: frank.pasquale@brooklaw.edu; ORCID iD: https://orcid.org/0000-0001-6104-0944.

1 On the critical distinction between text-driven and code-driven law, compare Mireille Hildebrandt, 'The Adaptive Nature of Text-Driven Law' (2022) 1(1) *Journal of Cross-Disciplinary Research in Computational Law*, and Mireille Hildebrandt, 'Code-Driven Law: Freezing the Future and Scaling the Past' in Simon Deakin and Christopher Markou (eds) *Is Law Computable?: Critical Perspectives on Law and Artificial Intelligence* (Hart Publishing, 2020) 67.

robot' has been proposed for narrow and discrete arenas of state administration.[2] As these spheres begin to expand, there is a critical need for insightful commentary on the virtues and limits of automated decision-making ('ADM').

The Automated State helps address this pressing demand,[3] as an important landmark for the study of predictive analytics, artificial intelligence ('AI'), machine learning ('ML'), and other statistical and computational methods for assisting administrators (and perhaps even taking on some of their work). The book includes much material of deep interest to judges, public servants, practitioners, and law and technology academics. By combining theoretical insights and practical references to national security, social security, immigration, health, and other contexts, the contributors both illuminate the present and suggest fruitful paths for further investment in (and control of) automation.

Following Justice Duncan Kerr's thoughtful foreword,[4] Justice Melissa Perry's chapter is a perfect opening for the main text of the volume.[5] It discusses the many virtues of ADM, including the possibility of reducing the burden of repetitive and obvious work on those who staff immigration and customs offices. Perry's chapter then goes on to cover both legal and normative limits on the growth of automation. This survey nicely sets up the many reformist and critical interventions that come later in the volume.

Guzyal Hill continues this mapping project, though from a more legislative perspective.[6] One core of the chapter is the exploration of the use of plagiarism detection software to identify similarities between sets of Uniform Acts, to then sort them via a similarity index. This type of software-driven comparison does suggest new ways of engaging in a distant reading of legal texts to discover opportunities for harmonisation. Expect future legal scholars to continue to dig deeply into unexpected points of convergence and divergence among legal systems exposed by the brute force of computational comparison of strings of words of varied lengths.

In a quite far-seeing chapter, Lyria Bennett Moses, Janina Boughey and Lisa Burton Crawford identify some ways in which AI and ML can assist statute drafters in navigating 'the legislative labyrinth that is modern government'.[7] They note that the *Social Security Act 1991* (Cth) has been amended roughly 10 times per year between 2013 and 2017, and the *Income Tax Assessment Act 1997* (Cth) was

---

2 Cary Coglianese and David Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era' (2017) 105(5) *Georgetown Law Journal* 1147.

3 Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) ('*The Automated State*').

4 Justice Duncan Kerr, 'Foreword' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) v.

5 Justice Melissa Perry, 'iDecide: Digital Pathways to Decision' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 1.

6 Guzyal Hill, 'Untapped Opportunities for the Use of Artificial Intelligence in Comparing Legislation for National Reforms' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 215.

7 Lyria Bennett Moses, Janina Boughey and Lisa Burton Crawford, 'Laws for Machines and Machine-Made Laws' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 232, 253.

amended over 18 times per year in the same period.[8] In such a context, automatic, triggered notifications based on the specific concerns of an advocate could be quite useful, particularly with respect to more obscure provisions unlikely to be covered by a reliable secondary source. Internal cross-referencing and technical provisions help create webs of statutory meaning where the alteration of the scope of one term may have unexpected second- and third-order effects. The authors are particularly adept at identifying and elaborating on the opportunities and challenges posed by efforts to move from machine-readable to machine-consumable law. The latter term covers digital renditions of law that can enable a computer to automatically perform a task. While such a move may expand access to justice by bringing scale efficiencies to law enforcement (as noted in the Administrative Review Council Report of 2004),[9] it also raises concerns about due process, transparency, and human rights, which are expertly addressed in other chapters.

For example, Maria O'Sullivan forcefully observes that automation 'means that legal errors that may ordinarily be limited to a small cohort of affected individuals tend to be amplified and become *systemic* in nature'.[10] Her chapter's exploration of effective remedies for such wrongdoing demonstrates the importance of a deontologically informed, rights-focused perspective. All too many considerations of ADM are dominated by utilitarian analysis, where efficiency gains are likely to outweigh error costs. However, when an error denies a fundamental right, deeper cautions are advisable. One practical response that O'Sullivan explores would be to grant the Administrative Appeals Tribunal the prerogative to complete 'group-based review of claims which involve a common algorithm or data matching system'.[11] Such a plenary review authority would save both the legal system and adversely affected parties a great deal of time and effort, while more quickly vindicating meritorious rights claims.

Marc Cheong and Kobi Leins complement O'Sullivan's chapter well by further exploring the question of how to modernise regulation and review of Australian ADM, focusing on requirements for algorithmic explainability.[12] Explainability here means that a decision 'must be comprehensible not only to data scientists or controllers, but to the lay data subjects (or some proxy) affected by the decision'.[13] Robust legal requirements for explainability may limit the types of ML

---

8 Ibid 233.

9 Administrative Review Council (Cth), *Automated Assistance in Administrative Decision-Making: Report to the Attorney General* (Report No 46, November 2004) vii:

> Expert systems can play a significant and beneficial role in administrative decision making, particularly in areas where high volumes of decisions are made. Their potential to offer cost savings and improve efficiency and accuracy means it can be expected that the systems will become increasingly important tools of government.

10 Maria O'Sullivan, 'Automated Decision-Making and Human Rights: The Right to an Effective Remedy' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 70, 70 (emphasis in original).

11 Ibid.

12 Marc Cheong and Kobi Leins, 'Who Oversees the Government's Automated Decision-Making? Modernising Regulation and Review of Australian Automated Administrative Decision-Making' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 174.

13 Ibid 189, quoting Brent Daniel Mittelstadt, Patrick Allo, Mariarosaria Taddeo, Sandra Wachter and Luciano Floridi, 'The Ethics of Algorithms: Mapping the Debate' (2016) 3(2) *Big Data & Society*, 17 n 26.

and AI that are deployed in ADM. Thus, Cheong and Leins's chapter is particularly notable for its careful review of the technical details of the varied types of ML and expert systems that may be at the core of distinct ADM systems, since addressing these 'technicalities' (to evoke Annelise Riles's research)[14] clarifies the limits of computation in legal proceedings. This is an important clarification in part because it helps vindicate Joe McIntyre's and Anna Olijnyk's claim (in 'Public Law Limits on Automated Courts') that AI's 'role should never extend to the core business of judicial determinations'.[15]

To assure that ADM is properly limited and guided, transparency will be essential. This collection includes three strong chapters presenting the threats to transparency posed by outsourcing of ADM to the private sector,[16] the 'need for greater transparency' to evaluate automation,[17] and how parliamentary committees may play a more significant role in scrutinising actions of an increasingly automated executive branch.[18] As O'Donovan shows, freedom of information law exceptions may be exploited by agencies seeking to shield their automated systems from public scrutiny. The problem is compounded, as Boughey demonstrates, when corporate actors with a deep interest in trade secrecy deflect requests for accountability by asserting their commercial interests in keeping their products' methods of operation proprietary. She presents a compelling case for legislative reform to require more transparency and explainability from ADM systems, while also presenting pathways for agencies and courts to realise these values under current law.

A final set of chapters supplements proposed transparency requirements, by articulating the principles of fairness that should animate ADM policy going forward. Joel Townsend's treatment of Robodebt thoughtfully demonstrates how merits review of agency action failed 'to provide an appropriate check on this high volume, technology-assisted decision-making process'.[19] In short, a poorly designed, multi-tiered merits review process effectively 'insulated Robodebt from public scrutiny',[20] while many citizens suffered unfair accusations and debt claims.

---

14 Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53(3) *Buffalo Law Review* 973, 975:

> [T]he technicalities of law are precisely where the questions that interest us actually are played out. Humanists should care about technical legal devices because the kind of politics that they purport to analyze is encapsulated there, along with the hopes, ambitions, fantasies and day-dreams of armies of legal engineers.

15 Joe McIntyre and Anna Olijnyk, 'Public Law Limits on Automated Courts' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 89, 89.

16 Janina Boughey, 'Outsourcing Automation: Locking the "Black Box" inside a Safe' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 136.

17 Darren O'Donovan, 'Evaluating Automation: The Need for Greater Transparency' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 31.

18 Sarah Moulds, 'Holding an Automated Government to Account? The Role of Parliamentary Committees' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 110.

19 Joel Townsend, 'Better Decisions? Robodebt and the Failings of Merits Review' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 52, 52.

20 Ibid 69.

Perhaps the only 'silver lining' of the Robodebt fiasco is the motivation it should give to senior administrators to closely consult and follow work like Townsend's, as well as Matthew Groves's application of general principles of fairness in ADM to the Australian context.[21] Sarah Crossman and Rachel Dixon present practical proposals for ensuring future government procurement and project management better reflects values of fairness, transparency, and equity.[22] And Miller's proposals for keeping 'citizens in the loop' of ADM procedures also provide a rich source of insight on how to humanise the use of computation in state administration.[23]

Book review space limitations do not permit extended engagement with the conclusions of *The Automated State*, but a few key points may be developed here. First, this is a volume that should be of great interest both within Australia, and in many other jurisdictions (both common and civil law). The chapters demonstrate that Australia has long experimented with the automation of administration, with concomitant experience of its advantages and shortcomings. This sophisticated legal discourse on ADM has much in it to instruct, say, European and Californian authorities as they implement rules on the right to meaningful information about corporate profiling of data subjects. Even though the European Union's *General Data Protection Regulation*[24] and the *California Privacy Rights Act of 2020*[25] are primarily focused on the private sector, the Australian public law discussions developed in this book feature a sophisticated understanding of computational methods and legal principles that are relevant to data protection and ADM generally.

Second, the chapters in this volume illuminate the need for more sociolegal research on the place of AI and big data in legal systems. While rationalising reformers may model the law as a code to be translated from natural to computer languages, the life of the law is experience. Careful attention to citizen-users of ADM systems (and the fate of those whom these systems profile) should be built into their implementation budgets. That is one important way to ensure that policymakers have the data necessary to continually improve systems, or, where improvement is impossible and serious errors persist, to limit or phase out their application.

Third, *The Automated State* suggests that there will be continuing opportunities for legal educators to collaborate with and learn from technical experts — and vice versa. We may reach the point soon where some understanding of computational thinking is part of lawyers' duty of technological competence.

---

21 Matthew Groves, 'Fairness in Automated Decision-Making' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 14.

22 Sarah Crossman and Rachel Dixon, 'Government Procurement and Project Management for Automated Decision-Making Systems' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 154.

23 Katie Miller, 'Retaining the Citizen in the Loop — The Role of the Citizen in Digital Government' in Janina Boughey and Katie Miller (eds) *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 197.

24 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC* [2016] OJ L 119/1, corrected by [2018] OJ L 127/2 ('*General Data Protection Regulation*').

25 *California Privacy Rights Act of 2020*, Cal Civil Code §1798.81.5.

Similarly, computation is now informing so many aspects of daily life that it may well become incumbent upon Departments of Computer Science to give their students a clear sense of when a consultation with a lawyer is necessary for the proper development and deployment of software. I expect more cross-disciplinary courses in both law and computing to address these issues. And I hope to see books like *The Automated State* assigned in them, as exemplars of fair-minded, practical, and insightful inquiry into the opportunities and pitfalls of using AI in administration.