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The Creeping Cruelty of Australian Crimmigration Law

Mary E Crock* and Kate Bones†

Abstract

This article examines the fraught relationship between international law and what has become known as ‘crimmigration law’ in Australia. The legal and policy framework for deportation of non-citizens on character grounds has become increasingly restrictive. It has also become confusing in its interface with obligations not to send back or refole individuals who engage protection obligations as refugees or on humanitarian grounds. We document and critique the treatment of long-term permanent resident non-citizens with particular claims to compassion as persons with disabilities and as refugees. We consider issues of both process — where formalistic administrative processes fail to make accommodations for disability — and substance. Law and policy give conflicting commands as to whether and how non-refoulement obligations must be considered in visa cancellation processes. Increasingly, the confusion plays out in indefinite detention. Amendments to the *Migration Act 1958* (Cth) reaffirming Australia’s commitment to non-refoulement have maintained a disconnect between domestic law and international law. We argue that it is critically important that non-refoulement obligations are considered in visa cancellation processes and that the human consequences of cancellation and removal are confronted.

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I State Sovereignty, Immigration Control and the ‘Purity’ Imperative

The ability of States to expel non-citizens who have committed serious crimes or who otherwise pose a security threat finds ready support in international law and political theory. Issues of law and even moral propriety become more complicated, however, when individuals targeted for expulsion have lived in a country for virtually all their lives; entered as refugees or others in need of protection; and/or have no safe country to which they can be removed. Add into the equation links between criminal acts and issues of physical and psychosocial disability and the complexities are complete. Such is the situation of many long-term non-citizens whom Australia continues to identify for deportation on character grounds.

This article examines the fraught relationship between international law and what has become known as ‘cimmigration law’¹ in Australia. The history and operation of this contentious area of law has been the subject of considerable research across the disciplines of history, law and criminology.² Our interest is not just in the general expansion that has occurred in Australian Government initiatives to rid Australia of undesirable non-citizens, including those convicted of serious crimes. As scholars and practitioners of refugee law, we have become increasingly concerned by the human impact of ‘purity’ measures that seem to ride roughshod over Australia’s international protection obligations — and, indeed, over basic notions of human rights and dignity.

According to Australia’s politicians, criminal deportation is supposed to do two things: it should protect the community from criminal non-citizens; and it should ensure ‘that Australia fulfills its international and humanitarian obligations towards these non-citizens and their families’.³ As a party to the *Convention on the Rights of Persons with Disabilities* (‘CRPD’),⁴ it is clear that Australia’s obligations with respect to persons with disabilities are not limited to citizens.⁵

The 2013 Federal Election was fought, in part, on border control and the primacy of national sovereignty in all aspects of the migration process. In 2014, the

¹ Popularisation of the term cimmigration law has been attributed to United States academic Juliet Stumpf: see Juliet Stumpf, ‘The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) 56(2) *American University Law Review* 367; Juliet Stumpf, ‘The Process is the Punishment in Cimmigration Law’ in Katja Franko Aas and Mary Bosworth, (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013) 59.

² Ibid. See also Peter Billings (ed), *Cimmigration in Australia: Law, Politics, and Society* (Springer, 2019).

³ Joint Standing Committee on Migration, Parliament of Australia, *Deportation of Non-Citizen Criminals* (Final Report, June 1998) iii.

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (‘CRPD’).

⁵ See, eg, United Nations (‘UN’) Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; UN Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [7]. See also Mary Crock, Christine Ernst and Ron McCallum, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2012) 24(4) *International Journal of Refugee Law* 735, 738–42.

newly-elected conservative Coalition Government wasted no time in amending the *Migration Act 1958* (Cth) ('*Migration Act*') and *Migration Regulations 1994* (Cth) ('*Migration Regulations*') to remove virtually all references to international legal instruments, including the United Nations ('UN') *Convention relating to the Status of Refugees* and its Protocol ('*Refugee Convention*').⁶ Yet it made no attempt to withdraw from any of the instruments in question. Instead, select elements of various Conventions were grafted into the Act, shaped to reflect the Government's favoured interpretation of relevant provisions. Amendments included s 197C, which provides that for the purpose of the power to remove an unlawful non-citizen from Australia, 'it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen'.⁷

The idea that a State should not send or 'refoule' a non-citizen back to a country where he or she faces persecution or serious abuse of human rights is a core obligation under both refugee and general human rights law.⁸ Ministerial Directions confirm that government policy is that individuals should not be removed in breach of non-refoulement obligations.⁹ Yet, as we explore in Part IV of this article, s 197C has generated a complex and sometimes inconsistent line of case law on the extent to which the Minister for Immigration is required to consider non-refoulement issues in the process of cancelling a visa on grounds of criminality or other bad conduct.

The confusion was such that the Government introduced legislation in March 2021 to 'clarify' that s 197C of the Act does not mean what it says. The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) passed both houses of parliament on 13 May 2021 with Labor Party support, following minimal debate. The amendments suggest that the Australian Government is not willing to cross the refoulement line. Nevertheless, the changes maintain a fundamental disconnect between domestic law and international law. This is because they do nothing to address the Kafkaesque practice of indefinitely detaining persons who fail the character test. As we will explain, the amendments perpetuate detention by separating out the criminal deportation process from the process of seeking asylum — without addressing the central question of the clash between deportation and international protection obligations.¹⁰

⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the attendant *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (hereafter referred to collectively as the '*Refugee Convention*'). See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ('*Legacy Caseload Act*'). See also the discussion of these amendments in Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime, Law and Social Change* 1.

⁷ *Migration Act 1958* (Cth) s 197C(1) ('*Migration Act*'), introduced by the *Legacy Caseload Act* (n 6) sch 5.

⁸ *Refugee Convention* (n 6) art 33; Penelope Mathew 'Non-Refoulement' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) ch 50.

⁹ See *Ministerial Direction No 90: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (8 March 2021) [9.1] ('*Ministerial Direction 90*').

¹⁰ See Satvinder S Juss, 'Detention and Delusion in Australia's Kafkaesque Refugee Law' (2017) 36(1) *Refugee Survey Quarterly* 146; Peter Billings, 'Refugee Protection and State Security in Australia: Piecing Together Protective Regimes' (2018) 24(4) *Australian Journal of Administrative Law* 222. See further the discussion in Part V.

In Part II, we outline the operation of the ‘character and conduct’ provisions in the *Migration Act*, tracing the incremental changes that have been made over the years and how these have played out in non-citizens spending increasingly lengthy periods in immigration detention. In Parts III–IV, we examine the extensive body of jurisprudence generated by the visa cancellation regime since 2014. Reflective of legislative changes, the cases display a growing dissociation between domestic and international law.

The extreme nature of Australia’s deportation practices came to international attention when the High Court of Australia limited attempts to remove non-citizens of Indigenous Australian heritage. The cases of *Love*¹¹ and others¹² have attracted a growing body of commentary,¹³ which we do not seek to replicate here. Rather, our focus is on the treatment of other long-term permanent resident non-citizens who engage protection obligations under international law. These are persons with disabilities who also have protection claims as refugees — in some cases persons from refugee backgrounds who have disabilities. It is this ‘creeping cruelty’ that we seek to document and critique in this article.

In Part III we outline issues of process that have alarming implications for all convicted non-citizens — but for people with disabilities and persons from refugee backgrounds in particular. These are the formalistic provisions governing notification that make no accommodations for vulnerability or for the lived experience of persons in penal custody. In Part IV, we turn to case law on the application of the character provisions to refugees, and the complex and unanticipated effects of s 197C of the *Migration Act*. In Part V we conclude by returning to the 2021 amendments to the Act, explaining the effect of the apparent attempt to require consideration of non-refoulement obligations separately from visa cancellation processes. We do not agree with this approach because it is confusing and leaves people in detention for far longer than any prison term served. Our specific concern is that the politicisation of crimmigration law has led to immigration detention centres becoming proxy ‘too-hard’ baskets for individuals who Australia does not want to accept, but who it would be unconscionable to return to abusive countries of origin. Decision-making in this politically charged area should involve ‘honest confrontation of what is being done to people’.¹⁴ We see this as a basic

¹¹ *Love v Commonwealth* (2020) 270 CLR 152.

¹² See, eg *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 (‘Hands’); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602; James Barrett, ‘Habeas Corpus, Jurisdiction, and Aboriginal-Identifying People in Immigration Detention: *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223’, *Australian Public Law (AUSPUBLAW)* (Blog Post, 10 February 2021) <<https://auspublaw.org/2021/02/habeas-corpus-jurisdiction-and-aboriginal-identifying-people-in-immigration-detention-mchugh-v-minister-for-immigration-citizenship-migrant-services-and-multicultural-affairs-2020-fcafc-223/>>.

¹³ See, eg Peter Gerangelos, ‘Reflections upon Constitutional Interpretation and the “Aliens Power”: *Love v Commonwealth*’ (2021) 95(2) *Australian Law Journal* 109, 113. See also Eddie Synot, ‘The Rightful Place of First Nations: *Love & Thoms*’, *Australian Public Law (AUSPUBLAW)* (Blog Post, 6 March 2020) <<https://auspublaw.org/2020/03/the-rightful-place-of-first-nations-love-thoms>>; Elisa Arcioni and Rayner Thwaites, ‘Indigeneity as a Basis for Constitutional Membership — Recent Developments in Australia’ (2020) 4 *Juridikum* 425.

¹⁴ *Hands* (n 12) 630 [3] (Allsop CJ).

requirement to restore a semblance of balance, restraint and respect for human rights and dignity.

II Expelling ‘Bad’ Migrants: The History and Operation of the ‘Character and Conduct’ Provisions

Section 501 of the *Migration Act*, and the ‘character test’ in s 501(6), is the centrepiece of Australia’s legislative scheme for the exclusion and removal of non-citizens considered undesirable.¹⁵ The content of this test and related procedures have become more restrictive and punitive over time. Although this history has been well documented,¹⁶ it is worthwhile to note briefly key developments, in order to give context to the provisions at the heart of the case law we will consider.

Australian immigration law has included provisions allowing for the removal and exclusion of persons deemed undesirable migrants since the inception of federal governance in this country.¹⁷ Section 3 of the *Immigration Restriction Act 1901* (Cth)¹⁸ included in its long list of ‘prohibited immigrants’:

(c) any idiot or insane person;

...

(e) any person who has within three years been convicted of an offence, not being a mere political offence, and has been sentenced to imprisonment for one year or longer therefor, and has not received a pardon.

Of course, the key to this provision was the word ‘immigrant’. In practice, most persons of Anglo-Saxon heritage were considered immune from any form of immigration control.¹⁹ Uncertainties around the precise date on which Australia became fully independent meant that issues around the constitutional power to deport British nationals persisted for more than a century.²⁰ On the one hand, the reluctance to move against British (and Irish) nationals seems to have played out over many years in a rather relaxed approach to Anglo-Saxon migrants convicted of

¹⁵ Note that there are other cancellation powers in the *Migration Act* relating to criminal charges, convictions or a person’s conduct, where a person is the holder of a temporary visa: see *Migration Act* (n 7) s 116; *Migration Regulations 1994* (Cth) (‘*Migration Regulations*’) reg 2.43. See Mary Crock and Laurie Berg *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) ch 15.

¹⁶ Michelle Foster, “‘An ‘Alien’ by the Barest of Threads”: The Legality of the Deportation of Long-Term Residents from Australia” (2009) 33(2) *Melbourne University Law Review* 483; Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (UNSW Press, 2007); Crock and Berg (n 15) ch 17; Michael Grewcock, ‘Reinventing “The Stain” — Bad Character and Criminal Deportation in Contemporary Australia’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 121; Peter Billings and Khanh Hoang, ‘Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 119.

¹⁷ See Mark Finnane and Andy Kaladelfos, ‘Australia’s Long History of Immigration, Policing and the Criminal Law’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 19. See also Nicholls (n 16) chs 1–2.

¹⁸ *Immigration Restriction Act 1901* (Cth) (Act No 17 of 1901), later renamed the *Immigration Act 1901* (Cth).

¹⁹ See the discussion in Crock and Berg (n 15) chs 2–3.

²⁰ See, eg, Foster (n 16).

criminal offences.²¹ On the other hand, the historical concern with the ‘purity’ of Australia’s migration program is equally long-standing.²²

The story of the increasing stringency of these provisions begins with the *Migration Amendment Act 1983* (Cth). This amended the deportation power then contained in s 12 of the *Migration Act* (now s 200) to apply to all permanent residents who had lived in Australia for less than 10 years. The change meant that ‘British subjects, Irish Nationals and Protected Persons’ lost their privileged status relative to migrants from non-Commonwealth countries. The legislation from that period reflects an understanding the Australian community should take some responsibility for long-term permanent residents, particularly those who arrived as children.²³ Before long, the ten-year limit was extended so that any period spent in correctional institutions would not count as ‘lawful’ residence in Australia. Individuals who had spent far more than 10 years in the country as permanent residents became vulnerable to deportation.²⁴

The exclusion of unwanted persons at point of arrival was initially dealt with separately.²⁵ This changed with the passage of the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth), which came into force on 1 September 1994. The deportation provisions remained (in s 200ff of the *Migration Act*) and the Administrative Appeals Tribunal (‘AAT’) was given the power to make final determinations on merits review applications. However, a new s 180A conflated the power to *exclude* unwanted non-citizens with the power to *expel* non-citizens. For the first time, reference was made to criminality, *character and conduct*. These provisions provided the basis for the modern s 501.

The year 1994 also marked the entry into force of the first pt 8 of the *Migration Act*, which operated to confine the power of the Federal Court of Australia to engage in the judicial review of migration decisions.²⁶ The coincidence was no accident. The rise and rise of conflict between the executive government and the courts over who should control immigration did not just play out in the detention of asylum seekers arriving by boat. The conflict also extended to the early crimmigration cases.²⁷

The next turning point occurred in 1999 when Immigration Minister Ruddock disagreed vehemently with two AAT rulings overturning deportation orders made under s 201 of the *Migration Act*.²⁸ The Minister stepped in and re-cancelled the relevant visas using s 180A of the *Migration Act*. Although his actions were

²¹ Nicholls (n 16) ch 1.

²² Grewcock (n 16) 121–38.

²³ Ibid; Foster (n 16) 506–7; Crook and Berg (n 15) ch 3.

²⁴ See, eg, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

²⁵ See Crook and Berg (n 15) ch 6.

²⁶ See Mary Crook, ‘Judicial Review and Part 8 of the *Migration Act*: Necessary Reform or Overkill?’ (1996) 18(3) *Sydney Law Review* 267.

²⁷ See Crook and Berg (n 15) chs 3, 17.

²⁸ See *Gunner v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 507; *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 (‘Gunner’); *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87.

endorsed by the courts,²⁹ the conservative Government moved to tighten the law to confirm the ultimate power of the Minister. The *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) confirmed s 180A (re-numbered as s 501) as a mechanism for expulsion as well as exclusion. A complicated system was created that placed the onus of proving good character on the non-citizen — and gave the Minister power to decide whether or not the rules of procedural fairness would apply.³⁰ The scheme facilitated removal of those unable to persuade the Minister that they passed the character test.

Fast forward to the aftermath of the 2013 ‘border control’ Federal Election. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) went further — mandating visa cancellation without notice where non-citizens were deemed to fail the character test on designated grounds. A huge initial rise in the number of visa cancellations eventually levelled out at an annual rate more than 10 times higher than before the legislative change.³¹ In the 2020–21 financial year, this meant 946 people had visas cancelled on character grounds.³² With many New Zealand citizens included in this number, Immigration Minister Dutton incited anger when he referred to the removals as ‘taking out the trash’.³³ The 2014 amendments also saw burgeoning in immigration detention rates and length of time in custody. By 31 August 2021, well over half those in immigration detention had been detained in excess of 12 months, while 8.1% (117 people) had been detained more than five years.³⁴

Amendments to the *Migration Act* since 1994 have tried to create a system where legal entitlements are determined at the point of finalising a person’s immigration status: that is, deciding eligibility for a visa and/or deciding to cancel a visa. The consequences of refusal or cancellation are automated in that unlawful non-citizens must be detained and must be removed from the country as soon as practicable.³⁵ In theory, s 197C of the *Migration Act* should underscore the primal focus on visa entitlement where it states that Australia’s non-refoulement obligations are not to be considered in the process of removing a non-citizen from Australia. As we discuss in Part IV, the problem with this structure is that considerable confusion has been generated in cases involving individuals from refugee backgrounds.

Two sources of law are particularly important in navigating the complexities of this regime. The first is the legislation setting out the elements of bad character and conduct. The second is the Ministerial Directions issued by the Immigration

²⁹ See *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507. In this case, the High Court endorsed the reasoning of the Full Federal Court in *Gunner* (n 28): see 534–5 [84]–[85]. See Crock and Berg (n 15) 527–28 [17.23]ff.

³⁰ *Migration Act* (n 7) ss 501(2)–(3).

³¹ Department of Home Affairs (Cth), *Visa Statistics: Key Visa Cancellation Statistics* (4 April 2022) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.

³² *Ibid.*

³³ See Katharine Murphy and Elle Hunt, ‘NZ Politicians Attack Australian Minister Peter Dutton for Comparing Deportees to “Trash”’, *Guardian Australia* (online, 11 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/11/nz-politicians-attack-australian-minister-peter-dutton-for-comparing-deportees-to-trash>>.

³⁴ Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary* (31 August 2021) 12 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-august-2021.pdf>>.

³⁵ *Migration Act* (n 7) ss 189, 198.

Minister pursuant to s 499(1) of the *Migration Act*, which bind the Minister's delegates and the Tribunal (though not the Minister). These articulate key policies relevant to visa cancellations on character grounds.

A *The Character Test*

The key to all deportation processes is the character test set out in s 501(6) of the *Migration Act*. Section 501(2) gives the Minister discretion to cancel a visa if she or he 'reasonably suspects that a person does not pass the character test' and the person 'does not satisfy the Minister that the person passes the character test'.³⁶ Section 501(6) draws together all of the historical exclusionary elements in immigration and refugee law. In addition to the standard reference to a person's criminal record, it bundles together offences relating to escape or rioting in immigration detention;³⁷ and bad character based on the reasonable suspicion of the Minister. A person will fail the character test if the Minister 'reasonably suspects' that the person is or has been a member of, or has had 'an association with' a group, organisation or person involved in criminal conduct.³⁸ A similar formulation is used to capture persons suspected of involvement in people smuggling, human trafficking and international crimes ranging from genocide to slavery and other international crimes. It is not a requirement that the person be convicted of any of the listed crimes.³⁹ Section 501(6)(c) empowers cancellation having regard to past and present *criminal* conduct or *general* conduct. There follows a paragraph that groups together the various risk factors identified in the context of exclusions at point of entry.⁴⁰

The trend towards zero tolerance of sexual offences involving children is apparent in s 501(6)(e) of the *Migration Act*, where it is sufficient to be found guilty, or a charge proven, but discharged without conviction. The final three paragraphs capture serious international crimes, adverse security assessments and the existence of an adverse Interpol notice 'from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community'.⁴¹

'Substantial criminal record' is defined in s 501(7) of the *Migration Act* as having been sentenced to 12 months or more in prison. The 2014 amendments lowered the threshold where a person has two or more sentences of imprisonment, from a total of two years to 12 months or more.⁴² An individual may also engage the provisions where they have been found not guilty by reason of mental illness or being found unfit to plead.⁴³ Triggers include where 'the court has nonetheless found that on the evidence available the person committed the offence' and 'as a result, the person has been detained in a facility or institution'.⁴⁴

³⁶ *Migration Act* (n 7) s 501(1) provides a parallel power to refuse a visa on character grounds.

³⁷ *Ibid* ss 501(6)(aa)–(ab).

³⁸ *Ibid* s 501(6)(b).

³⁹ *Ibid* s 501(6)(ba).

⁴⁰ These were the rules used to exclude or expel controversial visitors: see *Migration Act* (n 7) s 501(6)(d) and the discussion in Crock and Berg (n 15) ch 6.

⁴¹ See *Migration Act* (n 7) ss 501(6)(f)–(h).

⁴² *Ibid* s 501(7)(d).

⁴³ *Ibid* s 501(7)(e)–(f).

⁴⁴ *Ibid* s 501(7)(f).

B *Mandatory Cancellation*

The mandatory visa cancellation provision in s 501(3A) of the *Migration Act* is engaged where the Minister ‘is satisfied’ that the visa holder does not pass the character test because the person has a substantial criminal record on the basis of s 501(7)(a)–(c) — relevantly a sentence of imprisonment of 12 months or more — or if the person is convicted of sexual offences involving a child.⁴⁵ The intended purpose of the provision was to enable cancellation of a person’s visa before the person is released from prison ‘to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued’.⁴⁶

If a person is sentenced to two or more terms to be served concurrently, the whole of each term is combined in calculating the length of the sentence.⁴⁷ The time actually served is irrelevant: a person sentenced to 12 months imprisonment with a six-month non-parole period will attract mandatory cancellation. The scheme is neither intuitive nor well-aligned from a sentencing perspective. Courts in different states have diverged on whether the potential for visa cancellation — and the consequential (permanent) exile — are permissible sentencing considerations.⁴⁸ The practical result is that disproportionate consequences can often flow from sentences for relatively minor offences. This resonates with Stumpf’s observation that ‘the principle of proportionality meant to constrain government criminal sanctioning power is all but absent from [US] crimmigration law’.⁴⁹

C *Revocation of Mandatory Cancellation*

As we explore in Part III below, the reverse onus scheme manifests in a system that mandates the cancellation of a visa, but then allows individuals to seek revocation of the cancellation. After considering representations on revocation, the Immigration Minister (or delegate) must revoke the original decision if satisfied that the person passes the character test, or that there is ‘another reason’ why the cancellation should be revoked.⁵⁰ Ministerial Directions made under s 499 of the *Migration Act* guide these determinations, identifying ‘primary considerations’ and ‘other considerations’ to be addressed. *Ministerial Direction 90*, made in March 2021, provides that primary considerations are: protection of the Australian community;

⁴⁵ Ibid s 501(3A)(a).

⁴⁶ Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014, 8 [34].

⁴⁷ *Migration Act* (n 7) s 501(7A).

⁴⁸ See Ellen Moore, ‘Sentencing “Crimmigrants”: How Migration Law Creates a Different Criminal Law for Non-Citizens’ (2020) 43(4) *University of New South Wales (UNSW) Law Journal* 1271; Mirko Bagaric, Theo Alexander and Brienna Bagaric, ‘Offenders Risking Deportation Deserve a Sentencing Discount — But the Reduction Should Be Provisional’ (2020) 43(2) *Melbourne University Law Review* 423.

⁴⁹ Juliet P Stumpf, ‘Crimmigration: Encountering the Leviathan’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 237, 246. See also Juliet Stumpf, ‘Fitting Punishment’ (2009) 66(4) *Washington & Lee Law Review* 1683.

⁵⁰ *Migration Act* (n 7) s 501CA(4)(b). See *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 (*Plaintiff M1*), discussed below at nn 221–7 and accompanying text.

the expectations of the Australian community; family violence committed by the non-citizen; and the best interests of minor children in Australia.⁵¹ ‘Other considerations’ include: non-refoulement obligations; ties to the Australian community; impact on victims; and the extent of impediments if the person is removed.⁵²

If a non-revocation decision is made by a delegate of the Minister, the non-citizen may seek review by the AAT. No such review is available for decisions made by the Minister or Assistant Minister personally. To reinforce the supremacy of the Minister’s power, a revocation decision by the AAT or a delegate can be overridden by the Minister acting personally, without affording procedural fairness if cancellation of the visa is deemed to be in the ‘national interest’.⁵³ As we explore in Part IV, this network of laws and policies is both confusing and intrinsically conflicted in the treatment of obligations assumed under international law. Although beyond the general ambit of this article, it is worth noting that criminality and security concerns are also matters considered in the context of determining whether Australia owes protection obligations to individuals who seek asylum in the country.⁵⁴ One of the points of confusion has been the fundamental relationship between s 501 visa cancellations and s 36 protection processes.

III Time Limits and Notification: Accommodating Disabilities versus Strict and Complete Legalism

As we turn to examine the case law, it is timely to recall that art 14 of the *CRPD* requires State Parties to ensure that persons with disabilities enjoy the right to liberty and security of the person on an equal basis with others.⁵⁵ Paragraph (1)(b) prohibits arbitrary detention and states that ‘the existence of a disability shall in no case justify a deprivation of liberty’.⁵⁶ Our concern is that s 501 of the *Migration Act* contravenes art 14 of the *CRPD* because it operates to actively discriminate against non-citizens with psychosocial and other disabilities by making them particularly susceptible to indefinite detention.⁵⁷

In creating a scheme for mandatory cancellation while a person is in prison, the regime presents a neat example of formalist justice, replete with barriers for

⁵¹ *Ministerial Direction 90* (n 9) [8].

⁵² *Ibid* [9].

⁵³ *Migration Act* (n 7) s 501BA(2).

⁵⁴ See, especially, *Migration Act* (n 7) ss 5H(2) and 36(1C) and the discussion at Part IV(C) below. For an overview of these provisions, see Billings (n 10).

⁵⁵ See Anna Lawson, ‘Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies’ (2012) 16(6) *International Journal of Human Rights* 845.

⁵⁶ *CRPD* (n 4) art 14(1)(b).

⁵⁷ The Committee on the Rights of Persons with Disabilities (‘CRPD Committee’) upheld a complaint against Australia that raised similar issues in a different context: see CRPD Committee, *Views Adopted by the Committee under Article 5 of the Optional Protocol, concerning Communication No 7/2012 in Noble v Australia*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (2 September 2016). The case involved an Indigenous man from Western Australia who was charged with sexual offences involving children. He was taken into custody after pleading unfit to plead and ended up spending over 10 years in custody — a much longer period than if he had been jailed.

vulnerable non-citizens. Where a visa is cancelled under s 501(3A), the Minister must provide notice of the cancellation and invite the person to make representations about revocation of that decision.⁵⁸ Relevant documentation typically comprises more than 90 pages in English.⁵⁹ In jail, a non-citizen's access to legal advice, linguistic or other assistance can be limited. Representations must be made in writing, in English, within 28 days of deemed notification.⁶⁰ As we will show, there is no ability to extend this period or to consider representations made out of time.

In this Part, we use a selection of cases to show that the exclusionary effect of these provisions falls hardest (though by no means exclusively) on people with mental illness or intellectual disability, and on people with limited English or literacy. This cohort typically encompasses people from refugee backgrounds.

The draconian effect of the 28-day time limit is illustrated in the case of BDS20, a young man from Sierra Leone.⁶¹ He fled this country aged 15 with his mother and siblings after witnessing his father beaten to death and his home burned to the ground. He entered Australia on a subclass 202 Global Special Humanitarian visa in 2009 after spending five years in refugee camps. In 2012, the young man was convicted on two serious sexual assault charges and sentenced to seven years in prison. This enlivened s 501(3A) of the Act. Aware that he had 28 days to lodge submissions, BDS20's mother had made substantial efforts to engage Legal Aid assistance and to compile material relating to the risks associated with the young man's return to Sierra Leone. However, through an oversight of his lawyer, the young man's submissions were lodged outside of the 28-day statutory period.

Stewart J accepted that the failure to lodge submissions in time was not the applicant's fault, a fact reflected in the Minister's initial acceptance of the material submitted.⁶² However, Stewart J found that the statutory time limit was a jurisdictional fact, such that the Minister was correct in arguing that s 501CA(4) had not been enlivened.⁶³ Stewart J observed that there was 'plainly a strong case to be made for the introduction of a discretion to extend time in appropriate cases', but that this was a matter for Parliament and not relevant to his task on review.⁶⁴ His Honour noted that, but for the conclusion on the threshold question of the 28-day time limit, he would have quashed the Minister's decision.⁶⁵ Stewart J noted in obiter dicta that the Minister had not considered whether any non-refoulement obligations were owed to the applicant under s 36(2) of the Act.⁶⁶ His Honour expressed his disquiet by ordering the Minister to pay the costs of the application, notwithstanding his finding against the applicant.⁶⁷

⁵⁸ *Migration Act* (n 7) s 501CA(3).

⁵⁹ *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508, 511 [3] ('*EFX17 (FCAFC)*').

⁶⁰ *Migration Regulations* (n 15) reg 2.52.

⁶¹ *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1176, [1]–[7].

⁶² *Ibid* [13]–[18]. See also the comments at [59] where his Honour ordered the Minister to pay the costs of the application in spite of a formal ruling against the applicant.

⁶³ *Ibid* [50]–[53].

⁶⁴ *Ibid* [51].

⁶⁵ *Ibid* [57].

⁶⁶ *Ibid* [55]–[56].

⁶⁷ *Ibid* [58]–[59].

BDS20 appealed to the Full Federal Court and was again unsuccessful.⁶⁸ This time, attention was focused on whether a letter sent to the applicant inviting comment on further material constituted a second invitation to make representations under s 501CA(3)(b) — and whether the Minister can issue such invitation.⁶⁹ Banks-Smith and Jackson JJ held that where a notice and invitation has been issued under s 501CA(3), there is no power to reissue or make a further invitation.⁷⁰ This relieved the majority from scrutinising the Minister's consideration of any non-refoulement claims. Their Honours noted that the Minister retained an overarching power to grant a visa under s 195A to address genuine changes in circumstances.⁷¹

In dissent, Rares J invoked s 33(1) of the *Acts Interpretation Act 1901* (Cth).⁷² His Honour ruled that there was no evident legislative purpose in construing s 501CA(3) to confine the Minister's power as the majority indicated. Rares J found that for s 501CA(3) to have 'an inflexible, once and for all' operation could lead to unfair and unjust consequences where further information subsequently came to light.⁷³ For example, it would fail to allow for the circumstance where a person's conviction was quashed after they had been notified of visa cancellation. His Honour noted that s 501CA(4)(b)(i) and s 501(10) contemplated that a person whose visa had been cancelled might then satisfy the Minister that they passed the character test.⁷⁴

The use of rigid time limits in the migration legislation has a long history. Cases like *BDS20* demonstrate that while time limits are ineffective when applied to judicial review processes,⁷⁵ they are very effective when used as jurisdictional requirements in administrative processes (at first instance and in merits review). As day follows night, this has generated litigation on the issue of the validity of *notification* of cancellation decisions. Here we select for discussion two cases that raise issues about the consideration that can (or should) be given to a person's cognitive functioning — and to their mental wellbeing given past experiences of severe misfortune. Both demonstrate a trend towards legal formalism that leaves little room for compassion — and raises questions about compliance with art 14 of the *CRPD*.⁷⁶ Successful arguments have had to be rooted in failure to comply with 'black letter' requirements in the legislation.

⁶⁸ *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 43 ('*BDS20 (FCAFC)*'). An application for special leave to appeal to the High Court was resolved by consent: Transcript of Proceedings, *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCATrans 41. It may be inferred that this followed from a concession that the initial invitation to BDS20 was defective on the basis of the judgments in *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173 ('*EPL20*'); *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174 ('*Sillars*'), discussed below at n 117.

⁶⁹ *BDS20 (FCAFC)* 48 [17], 58 [75].

⁷⁰ *Ibid* 58 [75]–[76].

⁷¹ *Ibid* 68 [117].

⁷² Section 33(1) provides: 'Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires.'

⁷³ *BDS20 (FCAFC)* (n 68) 56–7 [60]–[62].

⁷⁴ *Ibid* 52–3 [42].

⁷⁵ See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

⁷⁶ See above n 57.

The applicant in *Aciek v Minister for Immigration and Border Protection*⁷⁷ is a citizen of South Sudan who entered Australia on a Global Humanitarian visa in 2004 after spending years in a refugee camp in Kenya.⁷⁸ His experiences left him with psychiatric issues including chronic post-traumatic stress disorder ('PTSD').⁷⁹ Mr Aciek was convicted of a number of offences by the District Court of South Australia and sentenced to four years and 11 months' imprisonment.⁸⁰ After his visa was cancelled under s 501(3A) of the *Migration Act*, a cancellation notice was sent by departmental email to a number of email addresses at the prison. A copy of the notice was then handed to Mr Aciek by a prison officer.⁸¹ Mr Aciek refused to sign to acknowledge receipt of the documents. He did not make a request for revocation within 28 days. Approximately 18 months later he applied to the Federal Circuit Court, contending that the notice of cancellation was not a valid notice for the purposes of s 501CA(3) of the Act.⁸²

The Federal Circuit Court accepted that the tasks prescribed by s 501CA(3) must be performed by the Minister personally, or by a person holding delegation pursuant to s 496 of the Act. The Departmental Officer who issued the notice did not hold such delegation.⁸³ The Court declared the cancellation notice invalid and ordered the Minister to comply with s 501CA(3) in relation to the applicant.⁸⁴ The Minister issued a replacement notification of cancellation and Mr Aciek duly lodged representations on revocation. As we note in Part IV, Mr Aciek's request was ultimately unsuccessful, in large part because his mental health continued to deteriorate as his time in immigration detention dragged on.

The facts in *EFX17 v Minister for Immigration and Border Protection*⁸⁵ have many points of similarity with those of both *BDS20* and *Aciek (FCCA)*. EFX17 is a refugee from Afghanistan of the Hazara ethnic group, a persecuted minority. He arrived by boat in 2009 and was granted a permanent protection visa.⁸⁶ He was diagnosed with a schizophrenic illness arising from his traumatic experiences at the hands of the Taliban, PTSD and substance abuse.⁸⁷ He was illiterate in any language, and had 'extremely limited English-speaking capabilities'.⁸⁸ Convicted of a serious crime in December 2016, his protection visa was mandatorily cancelled while he was in prison. Again, a notice of cancellation was sent to the prison by email and was handed to him the next day. The package comprised some 90 pages of 'densely printed material'.⁸⁹ EFX17 spoke to a lawyer from the Prisoner Legal Service two days later with the assistance of an interpreter. He claimed that he had not received any letters about his visa. By the time the lawyer ascertained from the Department

⁷⁷ *Aciek v Minister for Immigration and Border Protection* (2017) 327 FLR 412 ('*Acieck (FCCA)*').

⁷⁸ *Aciek and Minister for Home Affairs (Migration)* [2018] AATA 2755, [1] ('*Aciek (AATA)*').

⁷⁹ *Aciek (FCCA)* (n 77) 421[35]–[36].

⁸⁰ *Ibid* 414 [7].

⁸¹ *Ibid* 415–17 [13]–[18].

⁸² *Ibid* 413 [2].

⁸³ *Ibid* 427–30 [56]–[63], 432–3 [73].

⁸⁴ *Ibid* 433 [76].

⁸⁵ *EFX17 (FCAFC)* (n 59).

⁸⁶ *EFX17 v Minister for Immigration* (2018) 341 FLR 286, 288 [6].

⁸⁷ *EFX17 (FCAFC)* (n 59) 512 [6], 533 [109].

⁸⁸ *Ibid* 512 [5], 533 [109].

⁸⁹ *Ibid* 549 [182]. See also 530–4 [100]–[111].

of Home Affairs that the applicant's visa had been cancelled, through documents obtained under Freedom of Information, the 28-day period for representations had long since elapsed.⁹⁰

EFX17's counsel pressed similar arguments to those made in Mr Aciek's case about whether the notice had been issued by someone with the formal delegated authority. A majority of the Full Federal Court upheld this ground.⁹¹ However, another critical issue was whether 'notification' required any form of accommodation for EFX17's evident cognitive and linguistic disabilities. EFX17's counsel noted that the Minister's duty under s 501CA(3) is to 'give the person, in the way that the Minister considers appropriate in the circumstances' a written notice of the cancellation decision and particulars of the relevant information, and to 'invite the person to make representations to the Minister' about revocation. He argued that this required the Minister to reach a 'state of *considered* "appropriateness"',⁹² which requires consideration of the characteristics and individual circumstances of the person receiving the notice. Specifically, the Minister should examine factors that might affect a person's capacity to read, understand and make representations in response to the notice, including literacy, English language ability, mental capacity and health.⁹³

The majority accepted these arguments, ruling that the applicant's characteristics required consideration in the giving of notice. Greenwood J held that the 'irreducible minimum standard'⁹⁴ of the statutory obligation is that the person, in fact, must have been 'given notice'.⁹⁵ The obligation in s 501CA(3)(b) to invite representations about revocation also 'must meet the statutory standard of a real and meaningful invitation'.⁹⁶ That standard was not met as 'the appellant was simply not capable of comprehending the suite of documents handed to him'.⁹⁷ Rares J found that notice and invitation must 'be in a form that is actually meaningful to its intended individual recipient' so that the recipient would understand it.⁹⁸ This requires the Minister to engage in 'active intellectual consideration' about what is appropriate in the circumstances.⁹⁹ Both judgments emphasised the circumstances that a person receiving notice will be a prisoner, 'a person deprived of civil rights and liberties' with no right to seek out or obtain assistance.¹⁰⁰ Greenwood J also highlighted that EFX17 was known to the Department; the Department had granted him a protection visa and it must have been apparent 'either actually or inferentially that the appellant suffered special disadvantage'.¹⁰¹

⁹⁰ Ibid 535–7 [116]–[128].

⁹¹ Ibid 525 [69]–[71], 545–6 [162]–[163] (Greenwood J); 548 [177]–[179] (Rares J).

⁹² Ibid 513 [13] (emphasis in original).

⁹³ Ibid.

⁹⁴ Ibid 528 [89].

⁹⁵ Ibid 538 [133].

⁹⁶ Ibid 528 [90] (Greenwood J).

⁹⁷ Ibid 539 [134] (Greenwood J). See also 538–9 [133], 540 [135] (Greenwood J).

⁹⁸ Ibid 548 [175] (Rares J).

⁹⁹ Ibid.

¹⁰⁰ Ibid 549 [182] (Rares J). See also 541 [139] (Greenwood J).

¹⁰¹ Ibid 541 [139] (Greenwood J).

On appeal, the High Court found for EFX17, but only on the narrowest and most formal of grounds.¹⁰² These went to the lack of clarity over timing in the notice, as we explain below. Of equal interest are the arguments that the Court rejected. In a short, unanimous judgment, the Court held that the capacity of a person to understand the written notice or invitation is not relevant to the task set out in s 501CA(3) of the *Migration Act*.¹⁰³ Preferring the ordinary meanings of ‘giving’ and ‘inviting’, the Court held that the Minister’s duty to give notice in the way considered ‘appropriate in the circumstances’ goes to the ‘method of delivery and request rather than the content’.¹⁰⁴ The High Court noted that the Full Federal Court had reached its conclusions by reference to matters subsequent to the issuance of the notice and of which the Minister ‘might not have been aware’.¹⁰⁵ It found that the Full Federal Court’s approach would ‘require consideration of the extent of the capacity of a recipient to understand material provided, identification of how limitations could be overcome, and the taking of steps to do so’.¹⁰⁶ This would create ‘administrative difficulties ... in tension with the [legislation’s] goal [to] “ensure that the government can move quickly to take action against noncitizens who pose a risk to the Australian community”’.¹⁰⁷ The High Court acknowledged the circumstances identified by the Full Federal Court that emphasise the ‘gravity of the consequences for a person who does not understand the notice’.¹⁰⁸ However, the Court did not find the matter identified a sufficient foundation for an implication contrary to the ordinary meaning of the statutory words.¹⁰⁹ In so doing, the High Court was continuing a line of jurisprudence suggesting judicial reluctance to enforce any form of duty to inquire into an applicant’s mental state or capacity.¹¹⁰

In the event, the Court upheld a narrow point that the Minister’s invitation did not correctly state the timeframe for making representations. It found that a notice must ‘crystallise the period either expressly or by reference to correct objective facts from which the period can be ascertained on the face of the invitation’.¹¹¹ The notice issued to EFX17 was dated 3 January 2017 and included a statement that representations had to be made within 28 days. It stated that he was ‘taken to have received [the letter] at the end of the day it was transmitted [by

¹⁰² *Minister for Immigration and Border Protection v EFX17* (2021) 95 ALJR 342 (‘EFX17 (HCA)’).

¹⁰³ *Ibid* 348 [25], 349–50 [31]. The Court also overruled the Full Federal Court on the delegation ground, holding that the matters in s 501CA(3) are ‘tasks’ not requiring specific delegated authority: 350 [36]–[37].

¹⁰⁴ *Ibid* 348 [25].

¹⁰⁵ *Ibid* 349 [28].

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 10327.

¹⁰⁸ *EFX17 (HCA)* (n 102) 349 [30].

¹⁰⁹ *Ibid*.

¹¹⁰ The High Court has found that the power of the migration tribunal to make inquiries ‘does not ‘impose any duty or obligation to do so’: see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 21 [43] (Gummow and Hayne JJ). SGLB’s counsel had argued that accommodations should be made for the applicant’s apparent psychosis born of PTSD, exacerbated by the conditions in Woomera Detention Centre. See also *SZJBA v Minister for Immigration and Citizenship* (2007) 164 FCR 14, 25 [46] (Allsop J); *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 277, [24].

¹¹¹ *EFX17 (HCA)* (n 102) 351 [42].

email]’,¹¹² when in fact it was delivered by hand the following day.¹¹³ On these facts the High Court ruled that the notice was invalid for want of clarity.¹¹⁴

The High Court ruling in *EFX17 (HCA)* leaves open a small window for other individuals who miss the 28-day timeframe for making representations, if they can establish that their cancellation notice was defective in stating the timeframe. Another narrow, though important, caveat emerged from the Full Federal Court judgment in *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, holding that representations are ‘made’ for the purpose of s 501CA(4) at the date they are ‘dispatched’, rather than when they are received by the Minister.¹¹⁵ This construction took into account the circumstances that a person will necessarily be in jail and so ‘at the mercy of their gaolers’ and the postal service.¹¹⁶ Two further recent judgments of the Full Federal Court found cancellation notices to be defective for incorrectly stating that representations had to be received by the Minister, rather than dispatched, within 28 days.¹¹⁷ As a general rule, however, the notification cases reinforce the dominance of form over substance in Australian crimmigration law.

It is our view that s 501CA of the *Migration Act* should be amended to allow for the extension of time for representations in compelling or exceptional circumstances. *Migration Regulations* reg 2.52 could also be amended to provide a longer period for representations to be made. Either change would increase the chance that vulnerable non-citizens will obtain access to legal assistance and be able to lodge revocation submissions. As a practical measure, where the Immigration Department is aware that an individual has impaired capacity to understand and respond to a notice, it could refrain from issuing the notice until the person recovers capacity or until there is a person placed to assist them.¹¹⁸ Putting to one side access to the key mechanism of seeking revocation, we turn now to consider whether and how Australia’s non-refoulement obligations are considered in the visa cancellation process.

¹¹² Ibid 351 [40].

¹¹³ Ibid 345 [8].

¹¹⁴ Ibid 351 [42].

¹¹⁵ *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 281 FCR 578, 588 [43].

¹¹⁶ Ibid 585 [24], 586 [35].

¹¹⁷ *EPL20* (n 68); *Sillars* (n 68). Special leave to appeal to the High Court in relation to both decisions was refused: *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*; *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCASL 9.

¹¹⁸ In *BDS20 (FCAFC)*, Banks-Smith and Jackson JJ observed that such circumstances could be accommodated within the duty to give notice ‘as soon as practicable’, through ‘an examination of whether it is indeed “practicable” to give notice to a person who is incapable of receiving it in any meaningful way’: *BDS20 (FCAFC)* (n 68) 68–9 [118].

IV Considering Australia's Obligations under International Refugee and Human Rights Law

A *Form and Substance in Australia's Non-Refoulement Obligations*

When the Minister issued a fresh visa cancellation notice to Mr Aciek, he made a revocation request that was duly refused by the Minister's delegate. The AAT affirmed that decision.¹¹⁹ The Tribunal decision records that Mr Aciek's psychological condition had deteriorated in immigration detention. By April 2018 he was in hospital with psychotic symptoms and had been diagnosed with schizophrenia.¹²⁰ The Tribunal declined to consider whether Australia owed the young man any non-refoulement obligations in spite of evidence of the fate that would befall him were he to be returned to South Sudan. Within the policy rubric of 'hardship in the event of removal',¹²¹ the Tribunal considered detailed information about the conflict and humanitarian situation in South Sudan, including that mental health treatment was 'extremely limited or unavailable'.¹²² It concluded that the situation was 'dire';¹²³ that he 'would face real difficulty in obtaining the basic necessities of day to day living';¹²⁴ and that 'his difficulties would only be compounded by his psychological conditions and the difficulties of obtaining treatment for them'.¹²⁵ Yet, the Tribunal reasoned that 'where there is very little evidentiary basis to permit a fully informed assessment, it is undesirable to embark on any consideration of Mr Aciek's potential protection entitlement under Australia's non-refoulement obligations'.¹²⁶ The ruling left Mr Aciek with no option but to lodge a separate application for a protection visa — always from within the detention centre that was continuing to damage his mental health.

It is no coincidence that the s 501CA mandatory cancellation framework was introduced at the same time as extensive amendments legislating 'Australia's interpretation'¹²⁷ of its international legal obligations. The measures are coordinated policy designed to maximise executive power over non-citizens considered to be of character concern. Because no attempt was made to withdraw from the *Refugee Convention* or other human rights instruments, the resulting scheme is at best confusing — and at worst, perverse.

In Part IV(B)–(D), we analyse the dizzying array of cases brought in the years following the 2014 amendments to the *Migration Act*. Conflicts between the text of the law and stated intent in government policy provided fertile ground for the courts to find jurisdictional error in visa cancellation decisions concerning refugees. This

¹¹⁹ *Aciek (ATA)* (n 78).

¹²⁰ *Ibid* [35]–[40].

¹²¹ *Ibid* [65]–[87].

¹²² *Ibid* [77].

¹²³ *Ibid* [86].

¹²⁴ *Ibid* [87].

¹²⁵ *Ibid*.

¹²⁶ *Ibid* [104].

¹²⁷ See Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 2.

is ironic if the meta-intention of Parliament was to emphasise and reinforce the absolute power of the immigration authorities in every aspect of crimmigration law.

B *Must Non-Refoulement Obligations be Considered?*

The first battle was to determine whether non-refoulement obligations must be considered in visa cancellation processes where the visa cancelled was not a protection visa. *Ministerial Direction 90* now suggests that where protection claims are raised, they cannot be ignored.¹²⁸ Although a welcome development, this Direction sits at odds with earlier cases in which the Minister maintained and directed decision-makers not to confront non-refoulement obligations at the visa cancellation stage.¹²⁹ A common feature of these cases was that applicants were long-term permanent residents from refugee backgrounds suffering from psychosocial disabilities.

The facts in *Minister for Home Affairs v Omar*¹³⁰ are not dissimilar to those of Mr Aciek. Orphaned and recruited as a child soldier in Somalia, Mr Omar spent six years in a Kenyan refugee camp before coming to Australia as the dependent child of his aunt. Mr Omar suffers from schizophrenia and intellectual disabilities. The young man was sentenced to 12 months in prison for breaching a community protection order. This triggered mandatory cancellation of his visa.¹³¹ Graphic evidence was submitted of the fate that awaited someone with his problems were he to be forcibly returned to Somalia, where he had no family or other support.¹³²

In refusing to revoke the cancellation of Mr Omar's visa, the Assistant Minister had assumed that non-refoulement obligations did not have to be considered in a s 501CA(4) process because the applicant was free to apply for a protection visa. In response to a split in the Federal Court jurisprudence on the issue, the Full Federal Court convened a bench of five to hear the Minister's appeal from a ruling by Mortimer J that the Minister *was* obliged to consider whether Mr Omar engaged non-refoulement obligations.¹³³ The Full Bench ruled simply that the Assistant Minister had failed to give 'proper, genuine and realistic consideration'¹³⁴ to Mr Omar's representations about the likely risk of harm should he be returned to Somalia. Examining risk of harm is distinct from the question of whether those circumstances engage international obligations.¹³⁵ Accordingly, the Assistant

¹²⁸ *Ministerial Direction 90* (n 9) [9.1].

¹²⁹ The preceding Ministerial Directions 65 and 79 stated that it was unnecessary for decision-makers to consider non-refoulement obligations unless the visa that was being cancelled or refused was a protection visa: *Ministerial Direction No 65: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (22 December 2014) [14.1]; *Ministerial Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 December 2018) [14.1] ('*Ministerial Direction 79*').

¹³⁰ *Minister for Home Affairs v Omar* (2019) 272 FCR 589 ('*Omar*').

¹³¹ *Ibid* 591–2 [6]–[7].

¹³² *Ibid* 591–2 [6]–[7], 593–4 [10].

¹³³ *Omar v Minister for Home Affairs* [2019] FCA 279, [81]–[82].

¹³⁴ *Omar* (n 130) 606–7 [36]–[37], citing *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352.

¹³⁵ *Omar* (n 130) 603 [34(f)], 610 [44], citing *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636. See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19*,

Minister had failed to perform his statutory duty. The Full Federal Court did not make a ruling on the central question of whether Australia's non-refoulement obligations in respect of Mr Omar were mandatory relevant considerations.¹³⁶

When a similar matter came before the High Court, the Court took a similarly minimalist approach on this issue. The applicant in *Applicant S270/2019 v Minister for Immigration and Border Protection*¹³⁷ was a Vietnamese national who had been brought to Australia as a 15-year-old in 1990 on a humanitarian visa. When his visa was cancelled under s 501(3A) of the *Migration Act*, the man sought revocation of the decision, but made no express protection claims in his representations to the Minister. This enabled the High Court to rule that, in the circumstances of the case, non-refoulement obligations were not a mandatory relevant consideration under s 501CA(4) of the Act.¹³⁸

These cases left hanging the question of whether decision-makers can proceed on the assumption that non-refoulement considerations can be deferred in cancellation cases such that an individual is forced to seek asylum at the conclusion of a cancellation process. In *Ali v Minister for Home Affairs*,¹³⁹ the applicant made claims in his request for revocation of the cancellation of his partner visa that he would be persecuted in Ethiopia on account of his Oromo ethnicity. In a unanimous judgment, the Full Federal Court held that the Minister had made three related errors in assuming that non-refoulement obligations would be 'fully assessed in the course of an application for a Protection visa'.¹⁴⁰ First, the Minister failed to consider the clearly articulated representations as required by s 501CA(4): '[H]e was not entitled to "carve off" a consideration of them for possible examination at a later stage'.¹⁴¹ Second, the Minister failed to consider the 'qualitative difference' in the manner that non-refoulement obligations would be considered under s 501CA(4) compared with a protection visa decision under s 65 of the Act.¹⁴² The Court held that the s 501CA(4) task is 'more diffuse and less categorical than the criteria of s 36(2)'.¹⁴³ Third, their Honours found that Australia's international obligations would not necessarily be fully considered in a protection visa application. This was because the criteria in s 36(2) of the *Migration Act* is narrower than the scope of protection provided by the *Refugee Convention* and other treaties.¹⁴⁴ This point echoes the earlier decision of *Ibrahim v Minister for Home Affairs* in which the Court noted the discrepancy between the internal relocation principle enshrined in the *Refugee Convention* and relevant amendments to the *Migration Act* made in 2014.¹⁴⁵ The Court also noted that reputational damage to Australia's standing as an international

where it was held that the Tribunal had failed to give genuine and realistic consideration to representations that the applicant would be harmed or killed if returned to Iraq: (2020) 280 FCR 178.

¹³⁶ *Omar* (n 130) 591 [3]–[5].

¹³⁷ *S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897.

¹³⁸ *Ibid* 899 [10].

¹³⁹ *Ali v Minister for Home Affairs* (2020) 278 FCR 627 ('*Ali*').

¹⁴⁰ *Ibid* 632 [6].

¹⁴¹ *Ibid* 663 [103].

¹⁴² *Ibid* 664–5 [110].

¹⁴³ *Ibid* 664 [110].

¹⁴⁴ *Ibid* 665 [114].

¹⁴⁵ *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12, 33–4 [90]–[95], 35–6 [101]–[104], 37 [113]–[114] (White, Perry and Charlesworth JJ) ('*Ibrahim*').

citizen will not be relevant to s 36(2) decisions, but may provide ‘another reason’ for revoking a visa cancellation.¹⁴⁶

The significance of weighing the potential breach of international law was expressed forcefully by Allsop CJ in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20*.¹⁴⁷ The executive government’s ratification of an international convention represents a ‘solemn assurance’ to the Australian people and the international community.¹⁴⁸ It is not only the consequences of a breach that warrant consideration. More fundamentally, ‘the violation of international law, *qua* law, is intrinsically and inherently a matter of national interest’.¹⁴⁹ The Full Federal Court held that, where the implications of Australia breaching international obligations arose squarely on the materials, it was unreasonable for the Minister not to consider Australia’s non-refoulement obligations in forming his state of satisfaction whether it was in the national interest to cancel CWY20’s visa under s 501(3) of the *Migration Act*.¹⁵⁰

C *Considering Consequences: Indefinite Detention or Removal?*

It is well established that in making a decision to cancel a visa, a decision-maker must consider the legal consequences of their decision.¹⁵¹ Where non-refoulement obligations are engaged, what are the legal consequences of a decision not to revoke a visa cancellation? This is where the apparent contradiction between the terms of s 197C of the *Migration Act* and government policy as articulated in the Ministerial Directions has confounded decision-makers. Government policy has been that Australia will not remove a person in breach of non-refoulement obligations.¹⁵² Yet s 197C(1) of the *Migration Act* states that the existence of non-refoulement obligations is irrelevant in removal processes. How these two elements can be reconciled is not immediately apparent. A complex line of cases has ensued, with courts finding legal error in visa cancellation cases where decision-makers have failed to confront the grave legal consequences mandated by the Act. Issues have arisen also around an applicant’s basic eligibility to make a protection claim after a s 501 visa cancellation. A related concern is what amounts to speculation on a future process and how far ahead a decision-maker should be required to look. The issue has seen quite dramatic differences in approach taken by different judges. The central question of the relationship between criminal deportation and protection

¹⁴⁶ *Ali* (n 139) 660 [91], quoting *Hernandez v Minister for Home Affairs* [2020] FCA 415, [63].

¹⁴⁷ *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 (‘CWY20’).

¹⁴⁸ *Ibid* [3].

¹⁴⁹ *Ibid* [15]. See also [5].

¹⁵⁰ *Ibid* [166], [172]–[173] (Besanko J; Allsop CJ agreeing at [1] and Kenny J agreeing at [21]).

¹⁵¹ *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 39 [177].

¹⁵² See *Ministerial Direction 90* (n 9) [9.1]. A preceding Direction, *Ministerial Direction 79* (n 129), was to similar effect, but this did not prevent counsel for the Minister in at least one case asserting that removal would be pursued. Counsel suggested that the Minister was ‘prepared to proceed on the basis that Australia would breach its non-refoulement obligations and return the appellant to Iraq, even though it had been accepted that he was likely to be harmed or killed there’: *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 283 FCR 525, 538 [61] (‘MNLR’).

obligations under international law remains complicated and we expect it will remain so, in spite of the 2021 amendments to s 197C.¹⁵³

Perhaps the most straight forward interpretation of the law is that of North ACJ in *DMH16 v Minister for Immigration and Border Protection*.¹⁵⁴ This case concerned a Syrian man who arrived in Australia in 2005 on a child visa. Faced with criminal deportation, the man claimed asylum. His protection visa application was refused personally by the Minister under s 501(1) of the *Migration Act*. The Minister stated that the applicant would not be removed from Australia if the visa application was refused, notwithstanding s 197C of the Act. The Minister acknowledged that the man may face indefinite detention.¹⁵⁵ North ACJ held that the decision was affected by jurisdictional error as the Minister had misunderstood the legal consequences of his decision. His Honour ruled that the legal effect of s 197C, read together with s 198 of the Act, was to require the applicant's removal to Syria.¹⁵⁶

Some two years later, the Federal Court held a decision of the Minister to be affected by similar error in *BAL19 v Minister for Home Affairs*.¹⁵⁷ This case involved a Sri Lankan man of Tamil ethnicity who had been held in detention for nine years by the time the case came before the Court. Refused a protection visa on the basis that he failed the s 501(6) character test, the man was both suffering from serious physical and psychosocial issues and was legally blind.¹⁵⁸

Rares J described the Minister's reasoning as a 'Catch-22'.¹⁵⁹ Having been refused a protection visa under s 501, the applicant could not apply for any other visa (with the exception of a Bridging Visa R, and then only at the Minister's invitation). The applicant could not be returned to Sri Lanka without breaching Australia's non-refoulement obligations, yet ss 197C and 198 of the *Migration Act* operated to require removal as soon as reasonably practicable. The Minister's reasons noted that he had a personal non-compellable power under s 195A to grant a visa if he considered it to be in the public interest.¹⁶⁰ Rares J said that the Minister's reasons

appear to be an attempt to lay the groundwork for keeping the applicant in indefinite immigration detention contrary to ss 197C and 198. That is why he simply referred to the possible grant of another substantive visa if he (the Minister) determined either to grant a visa under s 195A or, pursuant to s 48B, that s 48A would not operate to prevent an application for such a visa. Yet, that speculation about the possibility of the applicant being able to apply for another visa, did not begin to engage with the Minister's decision, under s 501(1), to refuse to grant the protection visa because of the risk that he found the applicant to pose to the Australian community were he to hold a protection visa. That risk and the Minister's concerns about it could not change if the applicant applied for any other visa.¹⁶¹

¹⁵³ See the discussion in Part V below.

¹⁵⁴ *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576.

¹⁵⁵ *Ibid* 579 [12].

¹⁵⁶ *Ibid* 581 [26]–[27], 582 [30].

¹⁵⁷ *BAL19 v Minister for Home Affairs* [2019] FCA 2189.

¹⁵⁸ *Ibid* [17].

¹⁵⁹ *Ibid* [43].

¹⁶⁰ *Ibid* [24].

¹⁶¹ *Ibid* [46].

Rares J ruled that the Minister had acted unreasonably and failed to consider the legal and practical consequences of his decision, being *refoulement*.¹⁶²

His Honour also ventured the more contentious holding that protection visa applications do not engage s 501 at all.¹⁶³ His Honour ruled that this is because the regime for determining protection claims in s 36 of the *Migration Act* includes bespoke provisions on the circumstances when criminal conduct may render a person undeserving of protection. It is a criterion for a protection visa in s 36(1C) that the Minister does not consider that the person, having been convicted of a particularly serious crime, constitutes a danger to the community. This provision reflects the exception to the prohibition on *refoulement* in art 33(2) of the *Refugee Convention*. *BAL19* had been determined to satisfy this criterion.¹⁶⁴

Some six months after the ruling in *BAL19*, eight justices sitting across two cases in the Full Court of the Federal Court overruled Rares J on this last point. They confirmed that the s 501 refusal power can be exercised in relation to a protection visa.¹⁶⁵ The cases underscore that the power to refuse a visa is much wider than the ‘exclusion criteria’ in the *Refugee Convention*. The *Migration Act* does not necessarily conform with international law, and the 2014 amendments did not alter that.¹⁶⁶

The Minister chose to ignore Rares J’s ruling in *BAL19*, despite being bound by the judgment. In the time between this case and the Full Court judgments overruling it, not one person facing character questions was granted a protection visa.¹⁶⁷ In two cases, Flick J was so frustrated that his Honour raised the prospect of instituting proceedings against the Minister for contempt of court.¹⁶⁸

An apparent side effect of the ruling in *BAL19* was to encourage greater use of s 36(1C) of the *Migration Act* to refuse protection visa applications. Cases emerged of decision-makers reconsidering s 36(1C) where an individual had previously been cleared of presenting a ‘danger to the community’. In *EPUI9 v Minister for Home Affairs*, an 18-year-old from Lebanon, whose non-*refoulement* claims had been accepted, was refused again on character grounds, reframed as s 36(1C) concerns.¹⁶⁹ The finding that the applicant was a danger to the Australian community was overturned on appeal to the AAT.¹⁷⁰ The increased use of s 36(1C) (and reassessment of criteria already satisfied) may prove to be a lasting legacy of the *BAL19* saga.

¹⁶² Ibid [48]–[54].

¹⁶³ Ibid [88].

¹⁶⁴ Ibid [3], [64].

¹⁶⁵ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475 (‘*BFW20*’); *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1.

¹⁶⁶ *BFW20* (n 165) 514 [149]–[150], 515 [154].

¹⁶⁷ Department of Home Affairs (Cth), ‘Freedom of Information Request FA 21/04/01042’ (data extracted on 5 May 2021) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210401042-document-released.PDF>>.

¹⁶⁸ *AFX17 v Minister for Home Affairs (No 4)* (2020) 279 FCR 170, 173 [8]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* (2020) 171 ALD 608, 626–7 [74].

¹⁶⁹ *EPUI9 v Minister for Home Affairs* [2020] FCA 541; *EPUI9 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1536, [21].

¹⁷⁰ *JGCD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1576, [34].

The Minister and the AAT have continued to look for ways to balance the legal effect of s 197C with practical or policy considerations that protect individuals against refoulement.¹⁷¹ In *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, the Full Federal Court found no error in an AAT decision not to revoke the cancellation of a humanitarian visa held by a Sudanese refugee.¹⁷² The Tribunal had found there was ‘**only a low risk** that Australia will breach its non-refoulement obligations,’ given the Government’s policy articulated in (then) *Ministerial Direction 79*.¹⁷³ The Court ruled that the Tribunal was entitled to take executive policy ‘at face value’, including the prospect of Ministerial intervention.¹⁷⁴ It found no necessary inconsistency between the Act and *Ministerial Direction 79* because ss 197C and 198 of the *Migration Act* do not preclude individuals from seeking the exercise of the Minister’s discretionary powers or from making a protection application.¹⁷⁵ The Court’s acknowledgement that a person could face indefinite detention as a result of a non-revocation decision is concerning, at very least. It is to this issue that we turn in Part IV(D).

D The Broadening Practice of Indefinite Detention

The confronting landing point in the cases we are examining is that indefinite detention has been accepted in policy, and law, as the primary means of managing refugees placed in the nebulous category of ‘character concern’. A common feature in many of the cases is that the individuals involved are persons with psychosocial and other disabilities. Obligations under art 14 of the *CRPD* and other human rights instruments have consistently been ignored. We offer another example here. The applicant in *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* is a Syrian asylum seeker who suffered a psychotic episode in January 2014 when he learned that his mother had been killed in a suicide attack.¹⁷⁶ The response was to detain him and to refuse his protection visa application under s 501 of the *Migration Act*. He had never been charged with or convicted of any offence, and was cleared of any security concerns. He had been in detention for over six years when a UN Working Group called for his release on the grounds that his incarceration was arbitrary.¹⁷⁷

¹⁷¹ See, eg, *XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 280 FCR 535.

¹⁷² *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 (‘*WKMZ*’).

¹⁷³ *Ibid* 498 [142] (emphasis in original).

¹⁷⁴ *Ibid* 499 [149].

¹⁷⁵ *Ibid* 492 [113], 495 [124], 497 [134], 500 [151]. An application for special leave to appeal to the High Court, on the question of the limits of the Tribunal’s ability to speculate on the future course of decision-making by the Minister, was refused in view of the subsequent legislative amendments and change to *Direction 90: WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 195.

¹⁷⁶ *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420.

¹⁷⁷ Human Rights Council Working Group on Arbitrary Detention, *Opinion No 28/2017 concerning Abdalrahman Hussein (Australia)*, 78th sess, UN Doc A/HRC/WGAD/2017/28 (16 June 2017) 6 [41].

The case that prompted the Government to amend s 197C of the *Migration Act* in 2021 was *AJL20 v Commonwealth*.¹⁷⁸ The applicant in that case was the same Syrian man who was the applicant in *DMH16*.¹⁷⁹ His permanent visa was cancelled in October 2014 under s 501(2) of the Act. He remained in detention until Bromberg J ordered his release in September 2020. The Minister accepted that AJL20 was a refugee who would face serious human rights abuses if returned to Syria. However, he declined to exercise his discretionary power under s 195A to grant him a visa permitting release from detention.¹⁸⁰ Although this should have enlivened s 198 of the Act to require the young man's removal, in fact he was left to languish in immigration detention.

Bromberg J responded by ruling that the detention of AJL20 became unlawful as soon as the Minister refused to intervene in the case. His Honour noted that s 197C of the Act 'required that Australia's non-refoulement obligations in respect of the applicant be treated as irrelevant for the purpose of his removal from Australia as soon as reasonably practicable in accordance with s 198 of the Act'.¹⁸¹ Citing the High Court's ruling in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, Bromberg J ruled that immigration detention only remained lawful when used for a purpose envisioned by the Act.¹⁸² The Commonwealth had taken no steps to remove AJL20 to Syria in spite of the ability to do so. This meant that the applicant's detention was no longer for the purpose of removal.¹⁸³ Bromberg J granted habeas corpus, commanding the Commonwealth to release the man from detention.¹⁸⁴

The High Court allowed the Minister's appeal against Bromberg J's decision in a narrow 4:3 ruling¹⁸⁵ that is more than a little reminiscent of the 2004 judgment in *Al-Kateb v Godwin*.¹⁸⁶ The case exposes deep differences in the judges' views on their role in overseeing executive power affecting individual liberty. The majority judgment (Kiefel CJ, Gageler, Keane and Steward JJ) construed the detention provisions in ss 189 and 196 of the Act as 'hedged about by enforceable duties ... that give effect to legitimate non-punitive purposes',¹⁸⁷ and as such are constitutionally valid 'in all their potential applications'.¹⁸⁸ Detention under s 189 must continue 'until the first occurrence of a terminating event specified in s 196(1)', meaning until the grant of a visa or removal *actually occurs*.¹⁸⁹ The remedy of mandamus is available to compel the performance of those duties, and by that means 'judicial power is exercised to give effect to the scheme of the Act, enforcing the

¹⁷⁸ *AJL20 v Commonwealth* (2020) 279 FCR 549 ('*AJL20 (FCA)*').

¹⁷⁹ *DMH16* (n 154).

¹⁸⁰ *AJL20 (FCA)* (n 178) 553 [5].

¹⁸¹ *Ibid* 554 [10].

¹⁸² *Ibid* 562–4 [38]–[46], citing *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219.

¹⁸³ *AJL20 (FCA)* (n 178) 580 [126]–[128].

¹⁸⁴ *Ibid* 589–90 [174]–[177].

¹⁸⁵ *Commonwealth v AJL20* (2021) 95 ALJR 567 ('*AJL20 (HCA)*').

¹⁸⁶ *Al-Kateb v Godwin* also saw a 4:3 ruling on the legality of detaining a man who could not be removed from the country: (2004) 219 CLR 562 ('*Al-Kateb*').

¹⁸⁷ *AJL20 (HCA)* (n 185) 580 [44].

¹⁸⁸ *Ibid* 581 [45].

¹⁸⁹ *Ibid* 581–2 [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

supremacy of the Parliament over the Executive'.¹⁹⁰ Provided that the detaining officer knows or reasonably suspects the person to be an unlawful non-citizen, that is sufficient to sustain detention until the occurrence of removal, and is unaffected by 'an unauthorised or prohibited purpose on the part of the officer in prolonging the period of detention'.¹⁹¹

In a compelling dissent, Gordon and Gleeson JJ stated that the consequence of such a construction

would enable detention of unlawful non-citizens at the unconstrained discretion of the Executive; the terminating event may never occur despite being reasonably practicable, yet detention would remain lawful. That would render the Ch III limits on Executive detention meaningless.¹⁹²

In a separate dissent, Edelman J expressed similar grave concern that [t]he effect of the Commonwealth's submission, if accepted, is that it would be lawful for the Executive, through Commonwealth officers, to continue the detention of an unlawful non-citizen for an objective purpose that is contrary to an express provision concerning the scope of the *Migration Act*.¹⁹³

The minority found that the plain text of the *Migration Act*, and the constitutional framework, define the lawfulness of detention not by the *event* of removal, but by expiry of the *time* by which removal is reasonably practicable.¹⁹⁴ That would not be to prevent the re-detention of a person if the Commonwealth resumed pursuing a lawful purpose.¹⁹⁵ While mandamus may be available, habeas is a distinct remedy and is the remedy concerned with liberty, remedying unlawful detention.¹⁹⁶ The Commonwealth had departed from the required purpose of detention, being his removal as soon as reasonably practicable, and from that point AJL20's detention was not lawful under the Act.¹⁹⁷

The majority ruling in *AJL20* endorses an alarming extension of executive power, embedding the Commonwealth's power to detain non-citizens indefinitely and with impunity. Where *Al-Kateb* held that the mandatory detention provisions are constitutionally valid even where removal is not reasonably practicable in the foreseeable future,¹⁹⁸ *AJL20* concerns not an inability to remove, but a choice by the executive not to remove despite the terms of the law. The majority's reasoning is difficult to reconcile with the foundational principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* that administrative detention must be for a purpose. In that case, the High Court ruled detention provisions are lawful because 'the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation' or to

¹⁹⁰ Ibid 582 [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

¹⁹¹ Ibid 586 [72] (Kiefel CJ, Gageler, Keane and Steward JJ).

¹⁹² Ibid 589 [83].

¹⁹³ Ibid 595 [106].

¹⁹⁴ Ibid 589 [84] (Gordon and Gleeson JJ).

¹⁹⁵ Ibid 590 [89] (Gordon and Gleeson JJ). See also 604 [149] (Edelman J).

¹⁹⁶ Ibid 591–2 [93]–[96] (Gordon and Gleeson JJ).

¹⁹⁷ Ibid 593–4 [102]–[103] (Gordon and Gleeson JJ).

¹⁹⁸ The majority noted that the correctness of that holding did not arise for consideration: *ibid* 577 [26] (Kiefel CJ, Gageler, Keane and Steward JJ).

enable a visa application to be made and considered.¹⁹⁹ It was accepted that AJL20's detention had continued longer than reasonably necessary for such a purpose. To sustain its conclusion, the majority placed great emphasis on the *Migration Act's* binary of lawful versus unlawful non-citizens.²⁰⁰ There is palpable discomfort at the notion that a person in the latter category might secure their release through habeas where that person otherwise lacked entitlement to be in the community.²⁰¹ It is a concerning posture towards the fundamental rights of non-citizens.

To conclude, we now turn to consider more closely the extent to which the 2021 amendments to s 197C of the *Migration Act* align with Australia's international legal obligations.

V Towards Compliance with International Law

There is much to disappoint in the current dilemma around the treatment of long-term permanent residents convicted of serious crimes. Perhaps most concerning is how little progress has been made in thinking about the human rights of persons with disabilities. The present day *Migration Act* may not contain offensive descriptors such as 'idiot' and 'insane person'. However, the case law we have considered in this article suggests that persons with psychosocial disabilities continue to be given little quarter in either criminal justice processes or immigration enforcement, notwithstanding Australia's ratification of the *CRPD* — and multiple criticisms from UN human rights mechanisms.²⁰² We repeat our observation that the practice of keeping 'crimmigrants' with disabilities in indefinite detention can place Australia in breach of art 14 of the *CRPD*.²⁰³

One positive development is that the Australian Government's commitment to observing the fundamental norm of non-refoulement was reaffirmed in the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). The Explanatory Memorandum states that the purpose of the legislation is to:

clarify that the duty to remove under the *Migration Act* should not be enlivened where to do so would breach *non-refoulement obligations*, **as identified in a protection visa assessment process**, including Australia's obligations under [the *Refugee Convention* and other human rights instruments].²⁰⁴

Of course, a simple 'fix' would have been to repeal s 197C of the *Migration Act* — a clear and direct way to reinstate non-refoulement obligations as a constraint

¹⁹⁹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33, cited in *ibid* 576 [23] (Kiefel CJ, Gageler, Keane and Steward JJ).

²⁰⁰ *AJL20 (HCA)* (n 185) 581–2 [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

²⁰¹ *Ibid* 582 [53] ((Kiefel CJ, Gageler, Keane and Steward JJ describing this result of Bromberg J's decision as a 'supreme irony').

²⁰² See, eg, CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Report of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019); Human Rights Committee, *Concluding observations on the Sixth Periodic Report of Australia*, 121st sess, CCPR/C/AUS/CO/6 (1 December 2017).

²⁰³ See the discussion above at note 55ff.

²⁰⁴ Explanatory Memorandum, *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021* (Cth), 2–3 (emphasis in italics in original; emphasis in bold added).

on removal. Instead the amendments retain the essence of this provision, but make an exception where a person has a ‘protection finding’ made in connection with a protection visa application that has been ‘finally determined’.²⁰⁵ This includes a finding by a Ministerial delegate or by the Migration and Refugee Division of the AAT on review of a protection visa application.²⁰⁶ The provision does *not* recognise protection findings made in granting a person a refugee or humanitarian visa to come to Australia. Nor does it include an AAT finding in a visa cancellation process that a person engages non-refoulement obligations. A new s 197D empowers the Minister to determine that a protection finding made on a protection visa application is no longer warranted.²⁰⁷

The amended provisions are crafted to maintain the disconnect between international law and ‘Australia’s interpretation of its protection obligations’²⁰⁸ as articulated in the *Migration Act*. They do this by confirming a protection visa application as the mechanism to establish protection needs. Two key issues arise from this. First, the amendments do nothing to address the ‘Catch-22’²⁰⁹ experienced by individuals such as applicants *BAL19* or *AJL20*. As their cases illustrate, a protection visa application following a visa cancellation is likely to be met by refusal on character grounds. As the Court observed in *WKMZ*, a separate protection visa application may well be ‘fruitless’:²¹⁰

it is difficult to see how any delegate acting rationally and reasonably, or the Minister herself or himself acting rationally and reasonably, could decide to *grant* a visa to a person who a) has had a different visa cancelled and b) has applied for the cancellation to be revoked but has been unsuccessful. To grant or restore a visa in such circumstances would be to return a person to free and lawful residence in the Australian community, an outcome which under a different provision has been determined to pose an ‘unacceptable’ risk to that same community ...²¹¹

Wigney J has made a similar point, noting that ‘it would be rather incongruous, if not somewhat bizarre, to think that there was a realistic possibility’ the Minister would decide to grant a visa in such circumstances.²¹² These observations are borne out in practice — departmental data released in May 2021 under a Freedom of Information Request revealed that no protection visas had been granted to individuals who had a previous mandatory visa cancellation that was not revoked.²¹³ As such, to require a ‘crimmigrant’ to apply for a protection visa to establish they engage protection obligations is only to perpetuate a vicious circle. It puts vulnerable individuals through a second complex administrative process, only

²⁰⁵ *Migration Act* (n 7) s 197C(3).

²⁰⁶ *Ibid* ss 197C(4)–(7), 36A.

²⁰⁷ Such a decision is reviewable by the Administrative Appeals Tribunal (‘AAT’) under the *Migration Act* (n 7) pt 7. This was the only substantive amendment negotiated by the Labor Party in agreeing to support the legislation.

²⁰⁸ Explanatory Memorandum, ‘Resolving the Asylum Legacy Caseload’ (n 127), 2.

²⁰⁹ See above n 159 and accompanying text.

²¹⁰ *WKMZ* (n 172) 495 [124].

²¹¹ *Ibid* (emphasis in original).

²¹² *MNL* (n 152) 536 [55] (Wigney J).

²¹³ ‘Freedom of Information Request FA 21/04/01042’ (n 167).

to reach the same end point, providing a mere semblance of justification for prolonging detention.

The 2021 amendments to the *Migration Act* bargained compliance with one international obligation (non-refoulement) against another (the right to liberty and freedom from arbitrary detention).²¹⁴ The Migration Amendment (Clarifying International Obligations for Removal) Bill's Statement of Compatibility with Human Rights asserted that compliance with art 9 of the *International Covenant on Civil and Political Rights* is achieved through the Minister's discretionary powers in ss 195A or 197AB of the *Migration Act*:

The Minister's powers to consider whether to grant a visa to permit an unlawful non-citizen's release from immigration detention, or to permit a community placement under a residence determination, until they are able to be removed from Australia consistently with *non-refoulement* obligations, means that the person's individual circumstances, and the risk they may pose to the Australian community can be taken into account.²¹⁵

The Parliamentary Joint Committee on Human Rights nevertheless expressed 'serious concerns', stating that 'it seems unlikely that these non-reviewable and non-compellable powers would operate as an effective safeguard in practice or offer an accessible alternative to detention'.²¹⁶ The Bill passed without answers to the Committee's requests for statistics on the exercise of Ministerial powers.

The Committee observed that the legislation may have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.²¹⁷ It is well established that immigration detention is harmful to mental health, exacerbating the impact of trauma and existing psychological conditions.²¹⁸ Australia's treatment of refugees subjected to indefinite detention has drawn repeated criticism from UN bodies.²¹⁹

In maintaining the disconnect between international law and the protection visa criteria, the amendments leave space for representations on non-refoulement obligations to be considered in visa cancellation processes. Counter-intuitively, this perpetuates some of the confusion that we have seen in case law. The legal consequence of a non-revocation decision is no longer necessarily removal in breach of international law. Rather, the likely consequence is *either* indefinite detention, or

²¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

²¹⁵ Explanatory Memorandum, 'Clarifying International Obligations for Removal' (n 204) 14 (Attachment A).

²¹⁶ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 5 of 2021, 29 April 2021) 26 [1.56].

²¹⁷ *Ibid* 25–6 [1.55].

²¹⁸ See, eg, M von Werthern, K Robjant, Z Chui, R Schon, L Ottisova, C Mason and C Katona, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18 *BMC Psychiatry* 382.

²¹⁹ See, eg, Human Rights Committee, *Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2233/2013 in FJ v Australia*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (22 March 2016) [10.6]; and Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 2094/2011 in FKAG v Australia*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) [9.8].

removal in breach of international law, owing to the protection gap between the *Migration Act* and international law.²²⁰ As such, the amendments elevate the importance and consequence of Australia's protection discrepancy. They leave decision-makers an unenviably complex legal landscape that is likely to fuel continuing litigation.

We return to the central problem with s 197C of the *Migration Act*. The provision was devised to underscore the automation of detention and removal processes — turning the focus on a person's entitlement to a substantive visa. As the punitive net of the evermore complicated crimmigration provisions has grown, individuals who would never have been considered for removal have suddenly found themselves without visas and in immigration detention. In practical terms, the cancellation/revocation process is more important than ever for individuals who engage protection obligations. In spite of the attempts through *Ministerial Direction 90* to deflect such considerations into a protection visa application, it is clear that revocation decisions must engage with the real, human consequences of visa cancellation. When the consequences of indefinite detention or refoulement are confronted honestly, these factors can lead to the restoration of a person's visa.

If the burgeoning body of crimmigration case law reveals anything, it must be that invocations of international legal obligation remain fraught. Resort to international human rights bodies has also yielded few domestic victories. Most challenges have succeeded through arguments grounded in close and careful interpretation of law and policy, aligned against relevant facts.

Subsequent to the cases discussed in Part IV, on 11 May 2022 the High Court delivered judgment in *Plaintiff M1/2021 v Minister for Home Affairs*.²²¹ The case reinforces the divide between international law and its domestic enactment, and deepens the predicament for refugees whose visas are mandatorily cancelled. Seeking revocation of the cancellation of his *humanitarian* visa, the plaintiff had made clear and detailed representations that he engaged non-refoulement obligations. He claimed that in South Sudan he would 'get killed, or persecuted then killed, or tortured then killed'.²²² A majority of the High Court held that it was open to a delegate of the Minister to defer assessment of non-refoulement obligations because the applicant was able to apply for a protection visa.²²³ Further, the majority held that 'Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration'.²²⁴ The swathe of Federal

²²⁰ See, eg, *YFTQ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*, where the AAT accepted that the Sri Lankan refugee applicant likely faced indefinite detention rather than refoulement, because he would receive a protection finding under the *Migration Act*: [2021] AATA 1792, [119]–[122]. See also *XTRG and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*, where the AAT found indefinite detention to be the likely consequence of non-revocation for a South Sudanese refugee with a psychosocial disability: [2021] AATA 3378, [130]–[132]. The AAT treated Australia's non-refoulement obligations, and the impediments to the applicant establishing a basic standard of living in South Sudan, as the weightiest factors and revoked the cancellation of his humanitarian visa: at [150]–[151]. (Disclaimer: an author represented the applicants in these cases).

²²¹ *Plaintiff M1* (n 50).

²²² *Ibid* [59].

²²³ *Ibid* [9] (Kiefel CJ, Keane, Gordon and Steward JJ).

²²⁴ *Ibid*.

Court and Full Federal Court decisions inconsistent with these propositions were overruled in footnotes.²²⁵ To say that the majority's abstracted formalism has the feeling of a Kafka play is an understatement. For the minority justices, Edelman J and Gleeson J, the delegate's perfunctory disposal of the plaintiff's representations that he would face grave harm in South Sudan was legally unreasonable and involved a fundamental denial of procedural fairness.²²⁶

While the decision in *Plaintiff M1* does not prevent consideration of representations about international law or the real consequences for an applicant after pursuing a 'doomed'²²⁷ protection visa application, it provides an easy way out for a decision-maker who is not inclined to do so. This makes detailed and persuasive submissions (and legal representation) in revocation matters all the more critical.

The hastily crafted amendments to s 197C of the *Migration Act* — which the Court did not have occasion to consider in *Plaintiff M1*²²⁸ — do little to clarify the law or to ensure Australia's compliance with non-refoulement obligations. Ultimately, the changes were not even required to overcome Bromberg J's decision in *AJL20*. The High Court did that work through the majority's perpetuation of the permissive attitude toward executive detention shown in *Al-Kateb*. The majority favoured a formalist reading of the law over acknowledgment of how Australia's mandatory detention laws work in practice.

Some comfort may be found in the fact that the Australian Government has pulled back from normalising the prospect of regular breaches to non-refoulement obligations in its policy documents. Yet it is of concern that Ministerial intervention has been embedded as the primary mechanism to ensure against arbitrary, indefinite detention. There is nothing unique in the challenges Australia faces in juggling international human rights obligations with questions of national security in the crimmigration context. Legislative protections, and not executive discretions, are crucial to end the injustice and creeping cruelty of Australia's detention practices — especially where they impact on non-citizens with disabilities.

²²⁵ Ibid [32]–[34]. This notably includes *Ali* (n 139) and *Ibrahim* (n 145).

²²⁶ *Plaintiff M1* (n 50) [97]–[101] (Edelman J); [108]–[116] (Gleeson J).

²²⁷ Ibid [91], [94] (Edelman J).

²²⁸ The decision under review was made long before the amendments: ibid [4], [13].

Constituent Power and the Commonwealth Constitution: A Preliminary Investigation

George Duke* and Carlo Dellora†

Abstract

The concept of constituent power — with its connotations of revolutionary political change — does not appear to be a natural fit with the Australian constitutional tradition. Recent discussions of constituent power, however, define it in broad terms as the power to create or fundamentally alter a constitution. This wide definition suggests that any constitutional settlement, inclusive of the *Commonwealth Constitution*, would involve both initial and potentially ongoing exercises of constituent power. It is in this context that public law scholars have started to introduce the concept, or close equivalents, into Australian constitutional discourse. In this article, we argue that the initial impression of lack of fit should nonetheless be taken seriously. At least currently, the concept of constituent power can only be applied to Australia's constitutional circumstances with significant caution and several qualifications.

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I Introduction

Constituent power — the power to create or fundamentally amend a constitution — is an increasingly prevalent concept in contemporary public law theory.¹ At least until recently, however, the concept has been notable mostly for its absence in Australian public law discourse.² Australia's British legal heritage is the most obvious explanation. At least since the Restoration and the 1688 Revolution, the proposition that a constitution is the product of an extra-constitutional constituent people has been distinctly alien to a British public law tradition structured around the common law and the sovereignty of the Crown-in-Parliament.³ In terms of its colonial history, Australia did not have a revolutionary founding moment of self-assertion akin to that in the United States, and indeed the *Commonwealth Constitution* of 1901 was legally enacted in 1900 as an Act of the United Kingdom Imperial Parliament.

The framers of the *Commonwealth Constitution* were nonetheless far from free of American influences.⁴ In addition, while there are obstacles to the application of constituent power to Australia's constitutional circumstances, the claim that the *Constitution* is grounded in popular sovereignty has some historical warrant and is now doctrinally orthodox. As we explore below, the process leading to Federation included popular election (for the time) of delegates to the Conventions, and subsequent endorsement of the constitutional text by the peoples of the colonies.⁵ At the textual level, the *Constitution* refers to the people of the various colonies in its Preamble, stipulates that members of the Senate and House of Representatives (ss 7 and 24) must be 'directly elected' by the people, and also requires the approval of electors as a decisive part of the constitutional amendment process (s 128). These provisions have, in turn, served as the textual basis for the High Court of Australia's conclusion, first developed in the implied freedom of communication cases of the early- to mid-1990s (following the *Australia Acts* in 1986), that the *Constitution* derives its ultimate authority from popular sovereignty. If constituent power is the constitutional manifestation of the idea of popular sovereignty, then it might seem but a short step to the conclusion that the concept applies to the *Constitution* after

¹ Important recent contributions include: Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolution* (Cambridge University Press, 2017); Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020); Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020).

² There are no references to constituent power, and only one reference to constituent peoples, in the index of Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018). Aroney's chapter refers to constituent states, peoples, and colonies; Nicholas Aroney, 'Design' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 727.

³ See Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 27. For recent advocacy of the reintroduction of constituent power into United Kingdom public law doctrine, see Alan Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2020) 18(4) *International Journal of Constitutional Law* 1166.

⁴ Aroney (n 2) 730, 745–6, 750; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 16.

⁵ Saunders (n 4) 11–12.

all. It is against this background that Australian public law scholars have started to introduce constituent power, or close equivalents of the idea, into their analyses.⁶

This article offers the first systematic and detailed examination of the applicability of constituent power to the *Commonwealth Constitution*. The interest of our analysis extends beyond the few recent tentative appearances of constituent power into Australian public law scholarship. Constituent power has an increasingly central place in debates about the foundations of public law worldwide, from Europe, the Middle East, Africa and Latin America.⁷ Advocates of constituent power point to its capacity to reawaken the democratic promise of constitutional settlements, which partly explains some of the renewed interest in the concept. If it should turn out there are reasons why there has been little uptake of the concept in Australia, then it is instructive to consider not only why this is the case, but also what this says both about the Australian constitutional tradition and constituent power itself.

Constituent power is undoubtedly a ‘liminal’ concept, in the sense that it traverses clear distinctions between politics and law, fact and norm, and extra-legality and legality.⁸ As a consequence, one could examine the concept from several points of view. One might, for example, assess the relevance and public acceptance of the concept within Australian political discourse. A further possibility would be to consider constituent power from an explicitly normative perspective, framing it as an evaluative guideline for the assessment of existing practice, regardless of its limited presence in Australian political and legal debates. Our primary concern here, however, is the juridical application of constituent power to Australia’s constitutional circumstances. This explains two aspects of our approach. First, after its theoretical contextualisation of the idea of constituent power, the article engages closely with High Court judgments, judicial opinion and Australian public law scholarship. Second, and precisely insofar as the High Court has not been inclined (or not had occasion) to discuss constituent power directly, the article frames its discussion of constituent power by reference to the closely-related — but conceptually broader — topic of popular sovereignty.

The structure of the article is as follows. Part II provides a brief critical overview of the history and theory of constituent power. This background is necessary for a proper appreciation of the status of constituent power in Australia, which is introduced in Part III. In Part IV, we then consider the concept of constituent power in relation to High Court jurisprudence on popular sovereignty, with close reference to the implied freedom of political communication and the franchise cases.

⁶ Elisa Arcioni, ‘The Core of the Australian Constitutional People: “The People” as “The Electors”’ (2016) 39(1) *University of New South Wales Law Journal* 421; Benjamin B Saunders and Simon P Kennedy, ‘Popular Sovereignty, “the People” and the *Australian Constitution*: A Historical Reassessment’ (2019) 30(1) *Public Law Review* 36.

⁷ For constituent power across jurisdictions, see Richard Stacey, ‘Constituent Power and Carl Schmitt’s Theory of *Constitution* in Kenya’s Constitution-Making Process’ (2011) 9(3–4) *International Journal of Constitutional Law* 587; Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012); Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, 2016).

⁸ Ernst-Wolfgang Böckenförde, ‘The Constituent Power of the People: A Liminal Concept of Constitutional Law [1986]’ in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, ed Mirjam Künkler and Tine Stein, tr. Thomas Dunlap (Oxford University Press, 2017) 169.

The conclusion of our argument is that — notwithstanding some recent attempts to give the notion greater prominence — constituent power currently remains an uneasy fit with the Australian constitutional tradition. Further, while it cannot be ruled out that this tradition will evolve, or that the High Court might at some stage adopt the language of constituent power, this would represent a significant shift.

II Constituent Power in Historical and Theoretical Perspective

Both the meaning and the normative implications of the concept of constituent power are contested. While some theorists have postulated an exercise of constituent power as a necessary condition for democratic constitutional legitimacy, others have argued for its reconceptualisation, and still others for its rejection altogether.⁹ In order to understand these debates, and their relevance to Australia's constitutional tradition, it is helpful to outline some key landmarks in the emergence and development of the concept of constituent power.

Despite anticipations in conciliarism, English civil war debates, early modern Huguenot writings on the right of resistance, and elsewhere, the idea of constituent power was first developed explicitly during the American and French Revolutions.¹⁰ Constituent power hence arose in conjunction with the modern achievement of constitutionalism, whereby a constitution is understood as the higher positive law — emanating from the people or the Nation — that establishes a comprehensive and universal regulation of legitimate political rule.¹¹ Histories of constituent power generally grant centre stage to Sieyès and Schmitt. Both theorists — writing against the background of the imminent French Revolution and the crisis of the *Weimar Constitution* respectively — underline the legally-unlimited nature of constituent power as a disruptive force that sits outside positive law.

Sieyès characterised constituent power (*pouvoir constituant*) as the fundamental power of the Nation to establish a constitution.¹² Recent scholarship has sought to correct one-sided interpretations of Sieyès as a proponent of constituent power as an arbitrary force of national will unbound by legal constraints. Sieyès, on this corrective reading, deployed constituent power ultimately in order to tame assertions of unlimited sovereignty and advocate for the limited and

⁹ For examples of these positions on constituent power, see (respectively) Colón-Ríos (n 7); Arato (n 1); David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 129.

¹⁰ Lee traces the idea to Monarchomach arguments from the late 16th century: Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press, 2016) 143. On the history of constituent power, see also Joel Colón-Ríos, 'Five Conceptions of Constituent Power' (2014) 130(Apr) *Law Quarterly Review* 306; Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218; Rubinelli (n 1).

¹¹ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016) 43.

¹² Emmanuel Joseph Sieyès, 'What is the Third Estate'?' [trans of: *Qu'est-ce que le Tiers-État*] in Sieyès: *Political Writings*, ed Michael Sonenscher (Hackett, 2003) 136.

representative government of the constituted powers.¹³ Rather than identifying constituent power with sovereignty, this reading suggests, Sieyès endeavoured to restrict the exercise of *pouvoir constituant* to representatives commissioned to make a constitution on behalf of the Nation. In his famous 1789 pamphlet written in the early stages of the French Revolution, ‘What is the Third Estate?’, Sieyès nonetheless argued that the Nation has the right to give itself whatever constitution it pleases. For Sieyès, a Nation is formed solely by natural law. From a juridical perspective, it ‘exists prior to everything’ and ‘is the origin of everything’.¹⁴ In this sense, a pre-constitutional Nation is unbound from all legal constraints and ‘can never have too many possible ways of expressing its will’.¹⁵ From the perspective of the will of the Nation, that is to say, every civil form is good.¹⁶ As merely constituted powers, by contrast, the legislature and the executive are a derivative product of ‘mere’ positive law.

Sieyès’ extravagant revolutionary rhetoric informed Schmitt’s influential Weimar period account of constituent power (*verfassungsgebende Gewalt*). Schmitt defines constituent power as ‘the political will (*politische Wille*), whose power or authority (*Macht oder Autorität*) is capable of making the concrete, comprehensive decision (*Gesamtentscheidung*) over the type and form of its political existence’.¹⁷ Like Sieyès, Schmitt foregrounds the capacity of a unified people or Nation to make a free political decision unbound from any determinate constitutional forms and normative or abstract conception of justice.¹⁸ Importantly, Schmitt does not restrict exercises of constituent power either to liberal-democratic constitutional regimes as outcomes or to the people as bearers. For Schmitt, indeed, constituent power remains popular (and democratic in his sense as based on the identity of ruler and ruled) when it establishes a Caesarist or a populist authoritarian regime. In such kinds of regime, a charismatic individual or elite might better represent the will of the people than an elected legislature.¹⁹

An exclusive focus on the theories of Sieyès and Schmitt could nevertheless paint a distorted picture of constituent power. For while it is always possible for constituent power to be exercised in an arbitrary manner, it is now more often associated with democratic theories of constitutional legitimacy. As Rubinelli has argued, the apparently uncontroversial thesis that the modern state rests on the principle of popular sovereignty has no uniform meaning, or is at least subject to several competing interpretations. Constituent power, according to Rubinelli, provides a ‘language’ for articulating the principle of popular power.²⁰ This framing of the distinction between popular sovereignty and constituent power is instructive,

¹³ See Lucia Rubinelli, ‘Taming Sovereignty: Constituent Power in Nineteen-Century Political Thought’ (2018) 44(1) *History of European Ideas* 60; Lucia Rubinelli, ‘How to Think Beyond Sovereignty: On Sieyès and Constituent Power’ (2019) 18(1) *European Journal of Political Theory* 47.

¹⁴ Sieyès (n 12) 136.

¹⁵ Ibid 138.

¹⁶ Ibid.

¹⁷ Carl Schmitt, *Constitutional Theory*, ed and tr Jeffrey Seitzer (Duke University Press, 2008) 125.

¹⁸ Ibid 136.

¹⁹ Hence Schmitt’s notorious claim that the ‘natural form of the direct expression of a people’s will is the assembled multitude’s declaration of their consent or their disapproval, the *acclamation*’: *ibid* 131 (emphasis in original).

²⁰ Rubinelli (n 1) 1, 17.

and we assume a similar explanatory model in what follows. Rubinelli's analysis suggests that popular sovereignty should be understood in terms of the broad proposition that all legitimate public power ultimately derives from the agency of the people. Constituent power, by contrast, is a specific application of the idea of popular sovereignty to the creation or fundamental amendment of a constitution. This approach ties constituent power directly to its status as a contested tenet of modern constitutionalism, distinguishable from the more general idea that public power ultimately has a popular or democratic origin.

Our approach is hence consistent with important recent work arguing that constituent power — despite its continued association with extra-legal revolutionary political change — is readily amenable to juridical analysis.²¹ As Colón-Ríos has argued, constituent power may be channelled through law in its exercise and often serves to limit the power of ordinary law-making institutions through the distinction between constituent and constituted powers.²² It is nonetheless also important, we argue, to distinguish between the descriptive and normative dimensions of constituent power.²³ An acknowledgment that constituent power is amenable to a 'juridical'²⁴ analysis does not, of course, mean that it is invariably exercised in conformity with the standards of modern liberal constitutionalism. The same point applies to Colón-Ríos' attempt to distance constituent power from voluntaristic theories of sovereignty and his restriction of constituent power to exercises of constitution-making that respect the express terms of the people's commission, the rule of law, and the separation of powers.²⁵

If one grants that popular sovereignty is the normative foundation of modern liberal democracies, then the obvious question is why some constitutional traditions have adopted the language of constituent power, while others have preferred alternative conceptualisations. On a broader definition, any constitutional settlement can be said to involve an exercise of constituent power. Constituent power is not only, as suggested above, amenable to juridical analysis, it is also generally exercised through elected representative bodies — such as conventions or assemblies, which are themselves established within a legal framework. These points certainly suggest the need to look beyond the more extravagant rhetoric of Sieyès and Schmitt. Yet, and notwithstanding the suitability of constituent power to a

²¹ Prominent examples of a radical-democratic approach to constituent power are Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999) and Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) *Constellations* 223.

²² Colón-Ríos (n 1).

²³ See George Duke and Elisa Arcioni, 'Between Constituent Power and Constituent Authority' (2022) 42(1) *Oxford Journal of Legal Studies* 345.

²⁴ Colón-Ríos (n 1) 8–12.

²⁵ In this sense, Rubinelli and Colón-Ríos employ different historical-analytic approaches. Rubinelli restricts her analysis to constitutional theories that explicitly employ the phrase *pouvoir constituant*, *verfassungsgebende Gewalt*, or equivalents, starting with Sieyès' 1789 pamphlet *Qu'est-ce que le Tiers-État* (n 12). Colón-Ríos, by contrast, assumes that constituent power can be identified in 'any [modern] juridical order', leading to a broader notion of constitution-making that traverses the distinction between original and derivative exercises to encompass the power to change fundamental legal norms: Colón-Ríos (n 1) 1. The latter approach is prevalent in recent comparative constitutional work that engages with constituent power, but is questionable in relation to some constitutional traditions, for the reasons discussed in this article.

constitutional analysis, the association of constituent power with more robust or radical democratic theories of popular sovereignty that derive constitutional legitimacy from the unified extra-constitutional will of the people or Nation retains some plausibility.

Vinx has distinguished usefully in this context between stronger and weaker theories of popular sovereignty and their divergent treatment of the more specific concept of constituent power. For stronger theories of constitutional legitimacy grounded in popular sovereignty, '[t]he people as constituent power is taken to exist prior to and apart from all law, including constitutional law, and is taken to have the right to give itself whatever constitution it pleases.'²⁶ What is definitive for stronger theories of popular sovereignty is not so much the 'spontaneous' political action valorised by radical-democratic theories, as the idea that we can conceive of the people — and their agency — as 'external' or 'prior' to both coordination under political and legal procedures and constitutional incorporation.²⁷ Weaker theories of popular sovereignty, by contrast, tend to forgo talk of constituent power altogether and understand popular sovereignty as 'immanent in a framework of constitutional rules that make political leadership elective and gives equal rights of democratic participation to all citizens'.²⁸ The existence of a people, such theories suggest, is a function of its political and legal organisation, with the popular will always already mediated by representative institutions. Accordingly, for weaker theories of popular sovereignty the people is itself 'constituted' in the sense that it emerges through constitutional and political arrangements, such as the establishment of law-making, administrative and judicial bodies, and the enactment of rules for citizenship and voting.

Vinx's categorisation is broadly consistent with Loughlin's identification of three main approaches to constituent power. The first 'decisionistic' approach, associated with Schmitt, asserts that the people exist as a pre- or extra-constitutional unity and that its will is the ultimate source of constitutional authority.²⁹ The second 'relational' approach, advocated by Loughlin, argues that constituent power is 'dynamic' and postulates a dialectical interplay between the self-determining nation and its constitutional form.³⁰ For Loughlin, following Lindahl, an exercise of constituent power should be understood reflexively, so that 'those who claim to exercise constituent power act as an already constituted power' (that is, 'a constituent assembly or convention authorized to draft a constitution is an already

²⁶ Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11(1) *International Journal of Constitutional Law* 101, 102.

²⁷ For similar claims regarding the status of an extra-constitutional people, see Philip Pettit, 'Popular Sovereignty and Constitutional Democracy' (2022) 72(3) *University of Toronto Law Journal* 251 <<https://muse.jhu.edu/article/823098>>.

²⁸ Vinx (n 26) 102. Vinx attributes this weaker view of popular sovereignty to John Rawls, *Political Liberalism* (Columbia University Press, 1993) and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (MIT Press, 1996): Vinx (n 26) 102 n 1. For arguments suggesting that a focus upon 'founding' moments and the temporal precedence of a unified people can lead the constitutional theorist astray, see Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) 292.

²⁹ Martin Loughlin, *The Foundations of Public Law* (Oxford University Press, 2010) 227–31.

³⁰ *Ibid* 229.

constituted governmental institution’).³¹ In this sense, constituent power does not simply involve the exercise of power by the people, ‘it simultaneously constitutes a people’.³² Loughlin’s resolution of the ‘paradox’ of constituent power hence denies the need for an ‘extra-constitutional’ people, while retaining an emphasis upon constitution-making agency. The third ‘normativist’ approach either denies the explanatory usefulness of constituent power altogether, or restricts it to a founding constitutional moment.³³ This third view thus has affinities with weaker theories of popular sovereignty, which tend either to ignore constituent power or subsume it within an existing framework of representative democracy.

For all the sophistication of the ‘reflexive’ or ‘relational’ view, public law theories that ascribe a central explanatory significance to constituent power also tend to articulate stronger theories of popular sovereignty, which regard the people as the bearer of an extra-constitutional agency to create or fundamentally amend a constitution.³⁴ This tendency is best understood by reference to what is plausibly the central motivation for ascribing a central role to constituent power. A large part of the appeal of constituent power is that it can appear to address perceived democratic deficits of liberal constitutionalism.³⁵ Many prevailing theories of democratic legitimacy associate ‘rule by the people’ with either the proceduralist constraint of representative parliamentary decision-making, or the substantive constraint of a guarantee for fundamental political rights. From a democratic perspective, these theories are at least vulnerable to the objection that they focus excessively on the ‘ordinary’ level of ‘daily governance’, and often neglect to ask whether a constitution is the result of a democratic process and can subsequently be altered through democratic means.³⁶ For some democratic theorists, then, constituent power offers a way of enlivening the popular potential of constitutional settlements, reawakening the power of the people that lies dormant under strongly entrenched written constitutions, and the defaults of both negotiated decision-making by elected representatives and delegated administrative law-making.³⁷ Yet it is important to note that there are alternative ways of seeking to address democratic deficits in

³¹ Ibid 227. See also Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 9.

³² Loughlin (n 29) 227. While Loughlin rejects the idea of a pre-constitutional people as a fixed unity, however, his view remains close to Schmitt in its derivation of constitutional law from ‘real’ politics and its contingencies.

³³ Ibid 227–331.

³⁴ This statement appears to remain true for both Colón-Ríos and Roznai, for example, even though their respective theories are certainly neither as ‘decisionistic’ as that of Schmitt, nor as radical-democratic and ‘populist’ as that of Negri. For representative statements, see Colón-Ríos (n 1) 284, 299–300; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of the Amendment Powers* (Oxford University Press, 2017) 105–6.

³⁵ In his earlier work, Colón-Ríos defines constituent power more expansively as ‘the power of those living under a constitutional regime to reformulate its content democratically, free from any restrictions found in positive law’: Colón-Ríos (n 7) 110. On this view, ‘constituent power cannot be correctly attributed to an individual or elite’: at 111.

³⁶ Colón-Ríos (n 7) 35–7.

³⁷ See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2015). The concern discussed here is particularly pressing if one accepts a ‘democratic dualism’ of extraordinary founding constitutional moments and ordinary politics: see Bruce Ackerman, *We The People Volume 1: Foundations* (Harvard University Press, 1991).

contemporary constitutionalism that do not rely so heavily, or even at all, on the concept of constituent power. Two obvious examples are theories of democratic deliberation, which seek to increase communication between the public sphere and representative procedures and institutions, and contemporary republican theories, which advocate, by reference to the principle of non-domination, increased democratic control of governments by their citizens.³⁸

In sum, and despite recent attempts at broad definitions and partial domestications, constituent power remains strongly associated at the normative level with a commitment to the idea of an extra-constitutional agency of the people, and often advocacy for ‘some sort of challenge to the constitutional status quo’.³⁹ Even if one adopts a wide definition of constituent power, moreover, it matters what language a legal tradition employs to describe popular sovereignty. From this perspective, it is telling that the High Court of Australia has generally avoided the concept of constituent power and articulated a weaker view of popular sovereignty, one grounded firmly in specific constitutional provisions interpreted as expressing commitment to elective democracy and representative and responsible government. The Australian approach, we argue in what follows, is hence best associated with a weaker (and normativist in Loughlin’s sense) theory of popular sovereignty. While this, of course, does not rule out the future adoption of constituent power by the High Court, it is important to appreciate the extent to which this would represent a significant departure for the Australian constitutional tradition.

III Constituent Power in Australia

For the historical and doctrinal reasons elaborated below, explicit references to constituent power are absent from the *Official Record of the Debates of the Australasian Federal Convention* (‘*Convention Debates*’) prior to Federation, not to mention the *Commonwealth Constitution* itself, and are rare in subsequent commentaries on the *Constitution* and High Court of Australia jurisprudence.⁴⁰ It has recently been argued, however, both that the framers of the *Constitution* implicitly held to a ‘constitutive’ conception of popular sovereignty in the *Convention Debates*, and that the *Constitution* itself contains provisions interpretable in terms of constituent power.⁴¹ When these claims are placed alongside High Court jurisprudence on the implied freedom of political communication, which expressly asserts that the *Constitution* derives its authority from popular sovereignty, this motivates a closer investigation of the applicability of constituent power to Australian constitutional circumstances. Could it be that constituent power has been present in Australian constitutionalism all along, but that this was merely obscured by prevailing terminology?

If constituent power is understood as the capacity of a unified extra-constitutional people to determine its constitutional destiny through an act of political will, then there are clear obstacles for its application to Australian

³⁸ See Habermas (n 28); Pettit (n 27).

³⁹ Colón-Ríos (n 10) 334.

⁴⁰ For important exceptions, see nn 50–1 below.

⁴¹ Saunders and Kennedy (n 6) 48–51; Arcioni (n 6) 424.

circumstances. The *Commonwealth Constitution* was established as a federal compact by the plural peoples of the colonies and then legally enacted by the British Imperial Parliament. This British provenance should not be understated. Since the 17th century, the British tradition has downplayed the role of the constituent people in its constitutional arrangements, so that it is arguable it 'now serves no juristic function' because it has been 'entirely absorbed into the doctrine of the absolute authority of the Crown-in-Parliament to speak for the British nation'.⁴² AV Dicey's assertion that the distinction between the power of a constituent assembly and of a legislative assembly belongs to 'the political phraseology of foreign countries' is a well-known expression of this point.⁴³

The transference to Australia of the British commitment to common law constitutionalism is evident in most judicial statements on the source of the authority of the *Constitution* prior to the 1986 Australia Acts. These statements take as their starting point both the status of the *Constitution* as an Act of the British Imperial Parliament and Australia's common law heritage and are perhaps best exemplified by Owen Dixon's critique of the application to Australia of the American doctrine that all legitimate government properly serves as a delegated agent of the people as its principal. In words that evoke the British ambivalence about strong constituent theories of popular sovereignty noted above, Dixon argued in the mid-1930s that

[the *Commonwealth Constitution*] is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretation of our *Constitution* this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we interpret their powers simply as authorities belonging to them by law.⁴⁴

Dixon proceeded to assert that the American doctrine that it is impermissible for the ultimate power of the people to be delegated 'finds no place' in Australia's system,⁴⁵ and insisted elsewhere that the common law is 'the ultimate constitutional foundation' in Australia'.⁴⁶

Even if one accepts the orthodoxy of Dixon's view prior to the Australia Acts, this does not dispense with the applicability of constituent power more generally. In the first instance, the doctrine that Dixon sought to deny with respect to Australian circumstances, is a robust view of popular sovereignty in which the people is understood as the inherent source of constituent authority. Notwithstanding the accuracy of Loughlin's treatment, there is a parallel tradition within British jurisprudence in which 'constituent power' was used 'to refer to the unlimited constitution-making power of Parliament with respect to the colonies, and, in some cases, to the constitution-making power of the colonial legislatures'.⁴⁷ In this respect,

⁴² Loughlin (n 3) 27.

⁴³ AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 37.

⁴⁴ Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 597.

⁴⁵ Ibid.

⁴⁶ Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Legal Addresses* (Lawbook, 1965) 203, 205.

⁴⁷ Colón-Ríos (n 10) 316.

it can be argued that the Westminster Parliament — as an assembly with both constituent and legislative jurisdiction — ‘had a constituent power similar to the one ascribed to the people during the French and American Revolutions’;⁴⁸ that is, one that could not be abdicated. Indeed, in *Attorney-General (NSW) v Trethowan*⁴⁹ and *Clayton v Heffron*,⁵⁰ the High Court suggested that the *Constitution Act 1902* (NSW) was the ultimate source of the New South Wales legislature’s power to enact law and to amend its *Constitution*, while reiterating the requirement for Crown assent.⁵¹

The federal character of the Australian compact is, at least at first glance, another potential obstacle to applying the idea of the constituent power of the people to the *Commonwealth Constitution*. One concern here is that the exercise of constituent power in federations remains under-theorised due to the tendency to privilege the model of unitary states.⁵² This concern would appear, however, to be mitigated if one assumes a wide notion of constituent power. If the *Constitution* is a product of constituent power, then it also a product of plural constituent acts in the colonies, which undermines any straightforwardly robust conception of the people as a unitary pre-constitutional agent. Correspondingly, if constituent power applies to all modern constitutional settlements (on the broadest definition), then federal states like Australia are polities that are constituted through the plural constitutive acts of their constituent polities.⁵³

It remains the case, as discussed above in Part II, that most contemporary advocates of constituent power set out from the assumption of a stronger theory of popular sovereignty grounded in the agency of the people. Given the paucity of explicit references to constituent power in the Australian constitutional tradition, this suggests that the best way to investigate its applicability, or lack thereof, is to consider much more closely that tradition’s approach to the meaning of the doctrine of popular sovereignty. This is particularly the case insofar as it is perhaps unrealistic for the High Court to have raised constituent power as a fundamental public law concept, given the relative stability of Australian political and legal history, which means that there have been limited opportunities to consider the idea. The most fruitful approach is, hence, to examine whether the now orthodox doctrine that ‘constitutional norms, whatever may be their historical origins, are now to be traced

⁴⁸ Ibid 317.

⁴⁹ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 445.

⁵⁰ *Clayton v Heffron* (1960) 105 CLR 214, 245. Interestingly, in *Clayton v Heffron* Menzies J adopted the terminology of constituent power, attributing it to the Legislature of New South Wales: at 272.

⁵¹ Another rare exception to the neglect of constituent power in the Australian tradition is found in William Harrison Moore’s treatise on the *Commonwealth Constitution* written shortly after Federation. Significantly, however, Moore applies the concept to place a limitation on the Australian Parliament, denying that it has ‘the full constituent power,’ not to uphold the agency of the people: William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 130. We are grateful to Benjamin J Saunders for this reference. Relatedly, see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 175; Colón-Ríos (n 10) 318.

⁵² Nicholas Aroney, ‘Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions’ (2017) 17 *Jus Politicum: Revue de Droit Politique* 5, 6–7. See also Aroney (n 2).

⁵³ Aroney (n 52) 7.

to Australian sources',⁵⁴ can be interpreted as at least implicitly supporting a potential commitment to constituent power.

The proposition that popular sovereignty is a normative foundation for the *Commonwealth Constitution* is well-supported textually and historically. From a textual perspective, the main provisions are the Preamble, and ss 7, 24 and 128. The Preamble refers to the agreement of the people of the colonies 'to unite in one indissoluble Federal Commonwealth'. Sections 7 and 24 both refer to the need for representatives to 'be directly chosen by the people': in the former case 'the people' refers to the different peoples of the states who are responsible for electing representatives to the Senate, in the latter case 'the people' denotes the enfranchised citizens responsible for electing members to the House of Representatives. Section 128 stipulates that the *Constitution* may be amended by the decision of a majority of electors in a majority of states and a majority of all electors voting (albeit this process is to be initiated by Parliament). While the federal character of the constitutional compact entails that 'the people' refers variously in the above provisions to: (i) the pre-constitutional colonial peoples; (ii) the peoples of the different states; and (iii) the people as citizens of the Commonwealth, this does not seem an insurmountable obstacle to the claim that the *Constitution* is grounded in popular sovereignty. For, as examples of federal states (including the United States, Germany and India) with a constitutional commitment to popular sovereignty suggest, the coexistence of several 'peoples' within a federal framework that establishes a national people is consistent with the view that political and legal authority is ultimately derived from a popular source.

From a historical perspective, there are sufficient resources to build the case that popular sovereignty has played an important role in Australian constitutionalism since the process leading to Federation. After the breakdown of initial negotiations for a federal compact and the 1891 National Australasian Convention, later efforts towards Federation 'had a more populist cast'.⁵⁵ This was reflected in the establishment of local Federation Leagues and the enactment of legislation in several of the colonies, which provided for direct election of representatives to the Federal Australasian Convention of 1897 and 1898.⁵⁶ Between June 1899 and July 1900, the final draft of the *Commonwealth Constitution* was approved in each colony by a popular vote. If one turns from the process to the recorded views of the framers, discussed more below, then the *Convention Debates* suggest that most of the

⁵⁴ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁵⁵ Saunders (n 4) 11. See also John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (Legal Books, 1976) 148–62; John Andrew La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 199–202; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 172–6.

⁵⁶ The process, it should be noted, was far from uniform. The Western Australian Parliament chose its representatives and Queensland representatives did not attend the 1897–8 Convention: See Saunders (n 4) 11–12.

architects of the *Constitution* were committed to popular self-government through electoral representation.⁵⁷

It may be granted, then, that the Australian constitutional tradition has a longstanding commitment to popular sovereignty of some kind. The more contentious issue is the robustness of this commitment. In their recent historical reassessment of the role of the people in the establishment and maintenance of the *Commonwealth Constitution*, Saunders and Kennedy argue that the Australian constitutional tradition includes both ‘constitutive’ and ‘political’ elements of popular sovereignty. For Saunders and Kennedy, the ‘constitutive’ element refers to the intention of the framers to ‘create a constitutional structure that emanated from the people’.⁵⁸ The ‘political’ element describes the establishment of ‘institutions of government through which the people would rule’.⁵⁹ While Saunders and Kennedy may appear, however, to be offering a defence of the applicability of constituent power to Australian circumstances, this would be a misreading. Indeed, despite some ambiguity, the ‘constitutive’ model of Saunders and Kennedy appears best understood as consistent with a weak model of popular sovereignty tied to representative government.

In the first instance, Saunders and Kennedy distinguish between: (i) a theory of popular sovereignty with a ‘constitutive’ element; and (ii) ‘constituent power’.⁶⁰ Constituent power is defined as the view that there is ‘a unified entity, which by an act of will constitutes the existence of the government’.⁶¹ Saunders and Kennedy rightly suggest that this view is not present in the Australian tradition. The precise role played by the people in the ‘constitutive’ element of popular sovereignty is less clear. According to Saunders and Kennedy, the framers thought that ‘the authority of “the people” lay behind the formation of the *Constitution* as well as the ongoing functioning of the institutions of government’.⁶² This formulation — with its reference to ‘the people’ ‘behind’ the *Constitution* in scare quotes — leaves open whether: (i) an extra-constitutional unified people precedes the establishment of the *Constitution* (consistent with a narrower definition of constituent power); or (ii) the unity of ‘the people’ follows constitutional incorporation. The same equivocation seems present in the claim that the framers made a constitutional structure that ‘emanates’ from the people.

In any case, it is the framers who are centre stage in Saunders and Kennedy’s account of Australia’s process of constitutional formation, not a pre-constitutional people ‘behind’ the *Constitution*. It is the framers who sought to give ‘effect to the people’s wishes’ by establishing a system in which the legislature and the executive

⁵⁷ Saunders and Kennedy (n 6) 51, citing (among other sources) *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1891, 735 (Playford) (‘*Convention Debates (1891)*’); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, 537 (Cockburn); *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, 2198–9 (Wise); William McMillan, *Speech on the Referendum as a Mode of Settling Disputes Between the Two Houses of Parliament* (Angus and Robertson, 1896) 9–10.

⁵⁸ Saunders and Kennedy (n 6) 36.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 50.

⁶¹ *Ibid.* 38–9, citing Loughlin (n 29) 221.

⁶² *Ibid.* 38.

would serve as ‘representatives of the people’.⁶³ It is also the framers who adopted a process that is said to be remarkably democratic ‘for the time’.⁶⁴ Saunders and Kennedy note in this context that the question of the degree to which Federation can truly be described as a ‘popular process’ has been controversial.⁶⁵ They also note the exclusion of most women, ‘workers’ and Indigenous peoples from the federation referendum process.⁶⁶ Quoting Cockburn’s assessment, they nonetheless conclude that the framers believed that ‘[n]ever before has the instrument of government of a nation been so entirely the handiwork of the people themselves’.⁶⁷ One may concede that the power exercised originally by the framers was broadly ‘constitutive’ and that it reflected the wishes of the majority of the people. This is different, however, from the claim that the framers exercised constituent power on behalf of the will of a unified people. What the framers constituted on behalf of the people was, in fact, a federal structure of representative and responsible government. Within this structure, the sovereignty of the people is always exercised by representatives — consistent with weaker models of popular sovereignty — and, hence, legally incorporated within the extant federal constitutional system.

If one concentrates less upon the history of Federation, and considers popular sovereignty in light of subsequent national independence, then the path may still seem open to develop a theory of Australian constituent power grounded in contemporary assumptions. Rather than focus on the background of Federation, and the purported intentions of the framers, such an approach might seek to uncover an implicit constituent power through analysis of references to the people and electoral representation in the text of the *Commonwealth Constitution*, and in the jurisprudence of the High Court of Australia on the popular sovereignty implications of these provisions.

This approach is exemplified by Arcioni’s exploration of the relationship between constituent power and the Australian constitutional people.⁶⁸ According to Arcioni, the text of the *Constitution* implicitly recognises at least two forms of original and ongoing constituent power. In the first instance, Arcioni argues, the

⁶³ Ibid 49.

⁶⁴ Saunders (n 4) 11–12. As Saunders and Kennedy note, ‘[k]ey elements of this process were direct popular election of the delegates by the people of the colonies to the 1897–98 Federal Convention, and submission of the *Constitution* at referendums for the acceptance or rejection of the electors of each colony.’: (n 6) 49. Saunders and Kennedy also refer, citing the *Convention Debates (1891)* (n 57) and the 1897 *Official Report of the National Australasian Convention Debates*, to the emphasis placed by many delegates (an emphasis that it is true to say only increased over time) that the *Constitution* should be ‘accepted’ or endorsed in referendums by the people: (n 6) 49.

⁶⁵ Saunders and Kennedy (n 6) 50, citing Brian De Garis, ‘How Popular Was the Popular Federation Movement?’ (*Papers on Parliament* No 21, Parliament of Australia, 1993) 105; Robert Rudolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 101.

⁶⁶ Saunders and Kennedy (n 6) 50. Levels of voter participation in the federation referendums differed across the colonies within the range of 39.5% to 72.6% of registered electors (which translates to between 7.9% and 36.3% of the total population): Saunders and Kennedy (n 6) 50, citing Glenn Rhodes, *Votes for Australia: How Colonials Voted at the 1899–1900 Federation Referendums* (Centre for Australian Public Sector Management, 2002) 13–14. The nationwide vote for Federation was 2.5:1 in favour: Saunders and Kennedy (n 6) 50. Women from the colonies of South Australia and Western Australia were included in the franchise in 1895 and 1899.

⁶⁷ Saunders and Kennedy (n 6) 51, quoting John A Cockburn, *Australian Federation* (Horace Marshall, 1901) 73.

⁶⁸ Arcioni (n 6) 423.

Preamble ascribes an original constituent power to the people that was exercised through their involvement in the Federation process.⁶⁹ Second, Arcioni identifies an ongoing constituent power in both s 128 and in ss 7 and 24. Section 128, in stipulating the process for constitutional amendment, seems best understood as prescribing the procedure for the exercise of a ‘derived’ or secondary constituent power. Sections 7 and 24 set out the process for the direct election by the people of representatives ‘within’ the governmental framework that is established under the *Constitution*. For Arcioni, these provisions should nonetheless be interpreted as reflecting a tacit understanding of the people as the ultimate source of the power underlying the structure of representative government.⁷⁰

Arcioni also identifies a third form of constituent power by reference to High Court rulings on the franchise in *Roach v Electoral Commissioner*⁷¹ and *Rowe v Electoral Commissioner*.⁷² In these cases (discussed in much greater detail below), the Court assumes responsibility for protecting the integrity of Parliament’s delimitation of the franchise by reference to the system of representative democratic government established under the *Constitution*. The *Constitution*, of course, does not itself stipulate the conditions for citizenship, but leaves this decision to democratically elected parliamentary representatives. On this basis, Arcioni suggests, the Australian people wield ‘a power of collective self-definition’⁷³ because the electorate (as the juridical subset of the people) can decisively influence the breadth of the franchise through their role in electing the representatives who are responsible for determining the criteria for membership of the political community.⁷⁴

Arcioni’s interpretation assumes a broad understanding of constituent power, but is less revisionary than initial impressions suggest. Constituent power is defined as a ‘commitment to popular involvement in the constitution-making process, which leads to “the people” being regarded as a source of authority for the constitution so made’.⁷⁵ There is little suggestion here of constituent power as an ‘irruptive’ political force disrupting the constitutional status quo — let alone of a unitary pre-constitutional will of the people — and in fact the definition traverses the distinction between stronger and weaker theories of popular sovereignty. The phrase ‘popular involvement,’ while not excluding a wide range of activities by the people, evokes in an Australian context (at least subsequent to the original constitutive moment of Federation) the mundane process of electing representatives to Parliament and intermittent participation in referenda. The effect of such a wide definition of constituent power is actually to dilute its more radical connotations. Arcioni’s second and third forms of constituent power, indeed, are ultimately consistent with a weaker view of popular sovereignty, where the people as electorate choose representatives under an established constitutional system.

⁶⁹ Ibid 424.

⁷⁰ Ibid 426.

⁷¹ *Roach v Electoral Commissioner* (2007) 233 CLR 162 (‘*Roach*’).

⁷² *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 39 (‘*Rowe*’).

⁷³ Arcioni (n 6) 422.

⁷⁴ Ibid 424.

⁷⁵ Ibid.

In sum, Saunders and Kennedy, and Arcioni, operate with very broad conceptions of the constitutive or constituent power of the people, which can potentially be read down so that they accord with a weaker understanding of popular sovereignty. Neither account presupposes the idea of a unified pre-constitutional nation or people. Both accounts assume not only that constitution-making will be channelled through an assembly or convention elected by the people, but that ongoing popular participation is mediated by the representative institutions of Parliament. Saunders and Kennedy are also at pains to point out that there is no inconsistency between the framers' commitment to representative and responsible government — whereby the people rule indirectly — and the acceptance of popular sovereignty as the source of constitutional authority.⁷⁶ This undermines the suggestion that the more robust view of popular sovereignty usually associated with constituent power is applicable to Australian circumstances. Arcioni's claim that the Australian constitutional people is represented in an ongoing way by a subset of 'electors' also speaks to the integration of the power of the people within representative government. While consonant with the Australian constitutional tradition, then, these views of popular sovereignty are less robust than is typically found in advocacy of constituent power as a central explanatory concept and would ultimately seem to be reconcilable with a weaker, or even 'normativist,' understanding of the role of the people in Australia's constitutional settlement. In order to elaborate on these points, it is now time to consider more closely High Court of Australia jurisprudence on popular sovereignty in both the implied freedom of political communication and the franchise cases.

IV High Court of Australia Jurisprudence and Constituent Power

A *The High Court and Popular Sovereignty*

The High Court of Australia, in contrast to constitutional courts across jurisdictions as diverse as Germany, Kenya and Latin American nations, has rarely mentioned constituent power. This should not, however, be regarded as dispositive. As discussed above, since the Australia Acts, the High Court has expressly grounded the authority of the *Commonwealth Constitution* in popular or 'political' sovereignty.⁷⁷ If constituent power is applicable in an Australian context, as some recent scholars suggest, then perhaps this is because it can be read as an implication of the Court's treatment of popular sovereignty. The analysis of Part III above hence motivates the thought that the correct question to ask, in relation to High Court jurisprudence, is whether the court's interpretation of the Preamble and ss 7, 24, and 128, tacitly acknowledges the constituent power of the people, or rather reflects a weaker view, which subsumes the authority of the people within elected representative government.

⁷⁶ Saunders and Kennedy (n 6) 51.

⁷⁷ The High Court's shift in terminology from 'popular' to 'political' sovereignty is discussed further in Part IV(B).

The High Court's jurisprudence on popular sovereignty was articulated most extensively in the implied freedom of political communication cases of the early- to mid-1990s. In the words of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*, the Court now insisted that the Australia Acts 'marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people'.⁷⁸ A selective quotation of High Court obiter dicta on popular sovereignty in the early to mid 1990's could indeed support a robust interpretation of the proposition that 'the *Constitution* now enjoys its character as a higher law because of the will and authority of the people'.⁷⁹ In *Nationwide News Pty Ltd v Wills*,⁸⁰ for example, Deane and Toohey JJ asserted that 'the powers of government belong to, and are derived from ... the people'.⁸¹ Four years later, in *McGinty v Western Australia*, McHugh J reiterated that 'the political and legal sovereignty of Australia now resides in the people of Australia'.⁸² These statements unequivocally identify the people as the bearer of ultimate constitutional authority.⁸³ Yet a closer look at the relevant case law also suggests that Dixon's view of constitutional foundations, discussed in Part III, was not completely superseded after the Australia Acts. It is plausible, in fact, that the residual influence of Dixon's once uncontroversial and orthodox view can still be detected in the reluctance of the Court to entertain a stronger theory of popular sovereignty based on a pre-constitutional people.⁸⁴

In this Part, we demonstrate that, scrutinised closely, both the implied freedom of political communication and the franchise cases support a weaker model of popular sovereignty. The doctrine of popular sovereignty developed by the High Court relies principally on ss 7 and 24 of the *Constitution* and, thus, reflects a repeated and overarching commitment to the principle of representative and responsible government, whereby 'the people' is understood in a juridical frame as the elector of representatives. While the incremental shift of the locus of power from

⁷⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 ('ACTV').

⁷⁹ GJ Lindell, 'Why is Australia's *Constitution* Binding? The Reasons in 1900 and Now and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 37. The High Court's statements in the implied freedom cases precipitated extravagant statements of a 'fundamental paradigm shift' and 'glorious revolution': see the citations in George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 1 nn 2–3.

⁸⁰ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*').

⁸¹ *Ibid* 72.

⁸² *McGinty v Western Australia* (1996) 186 CLR 140, 230–7 ('*McGinty*'). For detailed analysis of the implications of McHugh J's reasoning in *McGinty*, see Simon Evans, 'Why is the *Constitution* Binding? Authority, Obligation and the Role of the People' (2004) 25(1) *Adelaide Law Review* 103, 107; George Duke, 'Popular Sovereignty and the Nationhood Power' (2017) 45(3) *Federal Law Review* 415, 422, 426.

⁸³ For similar statements on popular sovereignty, see also *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J) ('*Theophanous*'); *McGinty* (n 82) 201 (Toohey J).

⁸⁴ Even in the earlier implied freedom judgments, it is important to note, there are more hesitant and moderate statements on popular sovereignty. In *Nationwide News*, Deane and Toohey JJ state that the *Constitution* only 'reserves to the people of the Commonwealth the ultimate power of governmental control' through direct election of members of parliament and the referendum processes established in s 128: *Nationwide News* (n 80) 71. In *Theophanous*, Deane J articulated a weaker view of popular sovereignty in his statement that it is the 'maintenance (by acquiescence) of its provisions by the people' that gives the *Constitution* its legitimacy: *Theophanous* (n 83) 171. In *ACTV*, Dawson J is at pains to point out that 'the legal foundation of the *Australian Constitution* is an exercise of sovereign power by the Imperial Parliament': *ACTV* (n 78) 181.

the authorisation of the Imperial Parliament to the Australian people may be regarded as now uncontentious, popular sovereignty has never been understood in a manner which suggests a robust commitment to the agency of an extra-constitutional people.⁸⁵ The High Court's treatment of the principle of popular sovereignty rather tends, on balance, towards a weaker or 'normativist' interpretation of the people's constitutional status and role.

B *The Implied Freedom of Political Communication*

It has been argued that there were two distinct rationales for the implied freedom in High Court of Australia jurisprudence prior to the decisive ruling in *Lange v Australian Broadcasting Corporation*.⁸⁶ On the narrower view, the freedom derives from necessary inferences regarding ss 7, 24 and 128 (and related provisions) of the *Commonwealth Constitution*.⁸⁷ On the broader view, the implied freedom is a product of a 'free standing, extra-constitutional principle of representative democracy' derived from the *Constitution's* liberal democratic pedigree.⁸⁸ Since *Lange*, the narrower view has prevailed.⁸⁹ And the Court's language on the relationship between popular sovereignty and the implied freedom has only become more restrained in subsequent cases (discussed below) such as *McCloy v New South Wales*,⁹⁰ *Unions NSW v New South Wales*⁹¹, *Tajjour v New South Wales*⁹² and *Clubb v Edwards*.⁹³

Even in the earlier 1990s cases, it is difficult to detect any argument that the implied freedom protects communication about political and governmental matters which relies on an extra-constitutional idea of the people as the bearer of popular sovereignty. An instructive example is Mason CJ's statement in *ACTV* that 'the *Constitution* brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people'.⁹⁴ Mason CJ clearly attributed sovereignty to the Australian people. Yet 'on behalf of' is a decisive phrase in this passage, insofar as it entails that the will of the people must always be represented. The people's sovereign authority is here exercised *within* the existing constitutional system of representative democracy, consistent with a weak or moderate view of popular sovereignty.

⁸⁵ We briefly discuss the potential significance of *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*') in Part IIIC.

⁸⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

⁸⁷ See Dan Meagher, 'What is 'Political' Communication? The Rationale of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 445; Carlo Dellora, 'Free Speech Consequentialism: An Australian Account' (2020) 46(2) *Monash University Law Review* 183, 191.

⁸⁸ Meagher (n 87) 445.

⁸⁹ Ibid 445; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

⁹⁰ *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

⁹¹ *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW*').

⁹² *Tajjour v New South Wales* (2014) 254 CLR 508 ('*Tajjour*').

⁹³ *Clubb v Edwards* (2019) 267 CLR 171 ('*Clubb*').

⁹⁴ *ACTV* (n 78) 138.

In any case, even if a more robust interpretation was a possibility in the early 1990's, *Lange* served both to make explicit the narrow scope of the implied freedom, and to preclude a stronger construal of popular sovereignty.⁹⁵ A full bench of the Court stated unequivocally in *Lange* that the scope of the implied freedom is delimited by the requirement in ss 7 and 24 that representatives be 'directly elected' by the people. The implied freedom, that is to say, 'can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the *Constitution* give effect'.⁹⁶ What emerges from *Lange* is the Court's corresponding location of popular sovereignty within the framework of representative and responsible government. In developing this interpretation, the Court draws on both the *Convention Debates* and the text of the *Constitution*. The full bench notes, for example, that following the second 1897 Australasian Convention, the Convention adopted a motion by Edmund Barton resolving that the purpose of the *Constitution* was 'to enlarge the powers of self-government of the people'.⁹⁷ This idea of self-government is understood as mediated by the representative institutions established by the *Constitution*. As Issacs J had stated in 1926, 'the *Constitution* is for the advancement of representative government'.⁹⁸ And, at the time of Federation, 'representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system'.⁹⁹ Here, the people are understood as electors within a constitutional system, and indeed in this formulation, it is the representative legislative chamber (rather than the represented people), that is placed at the true centre of power. The Court does note, to be sure, that for the implied freedom 'to effectively serve the purpose of ss 7 and 24 ... it cannot be confined to the election period'.¹⁰⁰ It immediately refers, however, to the periods between elections set up under the constitutional system, not to an extra-constitutional popular will.¹⁰¹

The full bench in *Lange*, in considering the relevant constitutional provisions regarding the composition and function of Parliament, also suggests that the effect of ss 1, 7, 8, 13, 24 25, 28 and 30 is to 'ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth'.¹⁰² The people are once again here subsumed within a constitutional system of representative government as electors of representatives to Parliament. Importantly, this constitutional system is not simply representative in its design, but also responsible. Sections 6, 49, 62, 64 and 83 of the *Constitution* 'establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government'.¹⁰³ Reference is also made by the full bench to the amendment procedure in s 128, but this reads as something of an afterthought in

⁹⁵ *Lange* (n 86).

⁹⁶ *Ibid* 557.

⁹⁷ *Ibid*, quoting *Official Report of National Australasian Convention Debates*, Adelaide, 1897, 17.

⁹⁸ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178, quoted in *Lange* (n 86) 557.

⁹⁹ *Lange* (n 86) 559.

¹⁰⁰ *Ibid* 561.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* 558.

¹⁰³ *Ibid*.

comparison with ss 7 and 24.¹⁰⁴ The discussion of s 128, while acknowledging the role of electors as the people in constitutional amendment, provides scant resources for a more expansive interpretation of constitutional change tied to the people's ultimate constituent power. The process of constitutional change in s 128 is interpreted in a self-enclosing manner as under the *Constitution*, that is, by reference to the 'procedure for submitting a proposed amendment to the *Constitution* to the informed decision of the people which the *Constitution* prescribes'.¹⁰⁵

The full bench's statements on popular sovereignty in *Lange* are perfectly intelligible in light of its treatment of the implied freedom, which it sought to ground firmly in the 'text and structure of the *Constitution*'.¹⁰⁶ The implied freedom is justified because

the *Constitution* requires 'the people' to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government ...¹⁰⁷

Freedom of communication on matters of government and politics enables the people to exercise a free and informed choice as electors; it is

an indispensable incident of that system of representative government which the *Constitution* creates by directing that members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively.¹⁰⁸

The implied freedom does 'preclude the curtailment of the protected freedom by the exercise of legislative or executive power',¹⁰⁹ but it does not confer personal rights on individuals. In its approach to the implied freedom, the High Court remains close to the British common law heritage, inclusive of parliamentary supremacy, and seeks consistency between the requirements of the common law and the *Constitution*.¹¹⁰ This supports our earlier suggestion that residual elements of Dixon's analysis of constitutional authority have been retained in the Court's treatment of the theme of popular sovereignty. At a minimum, there is no basis, or need, for the Court to appeal to extra-constitutional constituent power to support the operation of the implied freedom.

When one turns to High Court implied freedom jurisprudence after *Lange*, what is most striking is a paucity of references to popular sovereignty. With the partial exception of the plurality judgment in *Chubb*, moreover, the few references that do exist reflect the weaker conception of popular sovereignty as representative government articulated in *Lange*. In our survey of the post-*Lange* implied freedom

¹⁰⁴ Ibid 559.

¹⁰⁵ Ibid 562.

¹⁰⁶ Ibid 567.

¹⁰⁷ Ibid 571.

¹⁰⁸ Ibid 559.

¹⁰⁹ Ibid 560. In this context, the Court cites approvingly Brennan J's statement that 'the implication is negative in nature', insofar as it invalidates laws and creates an immunity from legislative control: *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J).

¹¹⁰ *Lange* (n 86) 566. Hence, it makes little sense in an Australian context to interpret the implied freedom in terms of the United States doctrine of freedom of expression under the First Amendment (*United States Constitution* amend I): see *Lange* (n 86) 563.

jurisprudence, our focus is on those few passages that might be thought to at least imply a more robust interpretation of popular sovereignty.

The plurality in *Unions NSW* referred more directly to the ‘sovereign power’ of the people than other post-*Lange* implied freedom judgments, albeit in the context of a discussion of *ACTV*.¹¹¹ *ACTV*, the plurality noted, established that ‘the concept of representative government in a democracy signifies government by the people through their representatives; in constitutional terms, a sovereign power residing in the people, exercised by the representatives’.¹¹² While this passage clearly attributed sovereignty to the people, it immediately qualified this by reference to its exercise by elected representatives. There is no room here to contemplate the stronger doctrine that the people *themselves* exercise their popular sovereignty through acts of constituent self-determination. As in *Lange*, representative and responsible government remains the terminus of the plurality’s reasoning. This is also true for Keane J’s (at first glance, more expansive) definition of ‘the political sovereignty of the people of the Commonwealth’ in terms of the requirement that they ‘make the political choices necessary for the government of the federation and the alteration of the *Constitution* itself’.¹¹³ With respect to the implied freedom as a constitutionally protected interest, Keane J noted merely the need for the people to make political choices that are in conformity with ss 7, 24 and 128.¹¹⁴ The role of the Court, Keane J’s argument suggested, is primarily to ensure that laws or regulations are ‘compatible with the maintenance of the federation’s system of representative and responsible government’.¹¹⁵

Keane J’s judgment in *Tajjour* could likewise on first impression be taken to express a more robust view of popular sovereignty. Perhaps most suggestive is the statement, made with reference to McHugh J’s judgment in *York v The Queen*,¹¹⁶ that liberty at common law extends beyond negative liberty to a positive ‘liberty to participate in political sovereignty’.¹¹⁷ In isolation, this proposition, with its republican undertones, might serve as a premise in an argument for a more robust interpretation of popular sovereignty as the collective self-determination of citizens. Keane J, however, parsed this positive liberty in terms of participation by citizens in the electoral processes of representative democracy.¹¹⁸ In explicating how ‘sovereign power is exercised within the Commonwealth by its citizens’,¹¹⁹ Keane J hence refers to ‘the people of the Commonwealth as electors’,¹²⁰ rather than a robust pre-constitutional notion of the people. The other judgments in *Tajjour*, in contrast

¹¹¹ *Unions NSW* (n 91) 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹¹² *Ibid.* With respect to the implied freedom, the plurality state that a law will be ‘invalid where it so burdens the freedom that it may be taken to affect the system of government for which the *Constitution* provides and which depends for its existence upon the freedom’: *Unions NSW* (n 91) 548–9 [19]. This statement is intriguing, insofar as it suggests that the system of government is in some sense dependent upon the freedom (potentially raising the significance of the freedom), but even if this construal is correct, it tells us little regarding popular sovereignty.

¹¹³ *Ibid* 571 [104] (Keane J). Cf 578 [135], 580–1 [144]–[146], 582–4 [155]–[159], 586 [166].

¹¹⁴ *Ibid* 572 [112], 573 [115] (Keane J).

¹¹⁵ *Ibid* 583–4 [158] (Keane J).

¹¹⁶ *York v The Queen* (2005) 225 CLR 466, 473.

¹¹⁷ *Tajjour* (n 92) 604 [236] (Keane J). See also at 600 [223].

¹¹⁸ *Ibid* 593 [196]–[197] (Keane J).

¹¹⁹ *Ibid* 601 [225] (Keane J).

¹²⁰ *Ibid.* See also at 601 [226].

even with this relatively moderate construal, almost seem to go out of their way to avoid mentioning popular sovereignty. Gageler J, for example, with reference back to *Lange*, talked of the enlargement of the powers of the self-government of the people, rather than of the sovereignty of the people, and emphasised the connection of the implied freedom to ‘information which might ultimately bear on electoral choice’.¹²¹ The implied freedom was characterised by Hayne J — once again in a manner that echoed the narrower conception of *Lange* — as derived from the *Constitution* itself as ‘an indispensable incident of that system of representative and responsible government which the *Constitution* creates and requires’.¹²²

This relatively conservative approach to popular sovereignty was maintained in *McCloy*. In a perhaps revealing shift of terminology, the High Court referred more often to ‘political’ than to ‘popular’ sovereignty.¹²³ Nettle J defined political sovereignty as ‘the freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes’.¹²⁴ While the reference to ‘political changes’ is a little vague, the statement as a whole once again suggests a weaker notion of popular sovereignty, grounded in an existing constitutional structure of electoral representation, and assuming the subsumption of the people’s authority within democratic procedure. In his closing statements, Nettle J similarly referred to an ‘equality of political power which is at the heart of the Australian constitutional conception of political sovereignty’.¹²⁵ The plurality characterised the equality ‘of opportunity to participate in the exercise of political sovereignty’ as ‘an aspect of the representative democracy guaranteed by our *Constitution*’,¹²⁶ whereas Gordon J simply cited Mason CJ’s identification of government by the people with representative government.¹²⁷

Finally, and despite some innovations in its interpretation of the implied freedom, there is no evidence of any fundamental departure in the High Court’s treatment of popular sovereignty in *Clubb*. Gageler J avoided reference to political sovereignty in his judgment, staying close to the shore by referring to the ‘maintenance of the constitutionally prescribed system of representative and responsible government’.¹²⁸ Likewise, Nettle, Gordon and Edelman JJ grounded the implied freedom firmly in the constitutional requirements of ss 7, 24, 64 and 128 — understood as prescribing representative and responsible government — without

¹²¹ Ibid 577 [141] (Gageler J).

¹²² Ibid 558 [59] (Hayne J). See also at 567 [98].

¹²³ *McCloy* (n 90) 207 [45]. Here the plurality (French CJ, Kiefel, Bell and Keane JJ) follows the language of Keane J in *Unions NSW* (n 91) and *Tajjour* (n 92) and use ‘political’ and ‘popular’ sovereignty interchangeably. If anything, however, the phrase ‘political sovereignty’ seems better aligned with a weaker model of self-government that is tied to an electoral democracy and representative government under a system of constitutional law. The phrase ‘popular sovereignty,’ with its proximity to ‘populism,’ might be thought to imply a more robust interpretation of the role of the people.

¹²⁴ *McCloy* (n 90) 257 [216] (Nettle J).

¹²⁵ Ibid 274 [271] (Nettle J).

¹²⁶ Ibid 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

¹²⁷ Ibid 284 [318] (Gordon J) citing *ACTV* (n 78) 137.

¹²⁸ *Clubb* (n 93) 229 [177] (Gageler J). See also at 239 [207].

direct recourse to popular sovereignty.¹²⁹ In their plurality judgment, Kiefel CJ, Bell and Keane JJ introduced a surprisingly robust notion of human dignity in their treatment of the relationship between the implied freedom and ‘the people of the Commonwealth as the sovereign political authority’.¹³⁰ The conclusion of their Honours’ argument, however, is that

the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom, is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.¹³¹

In making this claim, the plurality cite *Lange*, *Unions NSW* and *McCloy* where the implied freedom is understood to protect ‘the exercise by the people of the Commonwealth of a free and informed choice as electors’.¹³² The purpose of the implied freedom to protect ‘the functioning of the constitutionally prescribed system of representative and responsible government’¹³³ does not motivate a robust popular sovereignty, but rather assumes an identification of active citizenship with the juridical role of an elector.

In closing this analysis of popular sovereignty in the implied freedom cases, it is instructive to note that the obverse of the High Court’s tendency to focus on the role of the people as electors in the implied freedom cases is its understated approach to s 128. Sections 7 and 24 are ubiquitous in explanations of the rationale for the freedom, while s 128 only makes rare appearances.¹³⁴ In one sense, of course, s 128 would potentially allow for a stronger interpretation of popular sovereignty — even to the extent of allowing for a derived form of constituent power — grounded in the pivotal role of the people in major or minor constitutional amendments. This role is qualified, however, by the fact that the s 128 process can only be initiated by Parliament triggering the necessary preconditions for a referendum.¹³⁵ From this perspective, to the extent that s 128 is considered at all by the High Court in discussions of the implied freedom, the role of the people as the political sovereign is again integrated within the existing framework of the *Commonwealth Constitution* and the exercise of popular sovereignty is mediated by the representative institution of parliament. There is little sense in Australia’s constitutional arrangements of an

¹²⁹ Ibid 255–6 [247], 261 [258], 280–1 [307] (Nettle J); 303 [381] (Gordon J); 311 [408], 336–7 [477], 343–4 [495–8] (Edelman J). Gordon J (at 308–9 [401]) emphasises the accountability of those who exercise legislative power to the people.

¹³⁰ Ibid 191 [29] (Kiefel CJ, Bell and Keane JJ).

¹³¹ Ibid 196 [51] (Kiefel CJ, Bell and Keane JJ).

¹³² Ibid 191 [29] (Kiefel CJ, Bell and Keane JJ). See also at 198–9 [60].

¹³³ Ibid 198 [60] (Kiefel CJ, Bell and Keane JJ).

¹³⁴ In *Lange* and *McCloy*, for example, discussion of the significance of s 128 is limited and does not always follow references to ss 7 and 24: see *Lange* (n 86) 559–61; *McCloy* (n 90) 222–3 [101] (Gageler J).

¹³⁵ The high threshold requirements of s 128 — particularly its double-majority condition — have, of course, made successful Australian referenda historically elusive. For discussion, see Dylan Lino, ‘Book Review — *Power People: The History and Future of the Referendum in Australia*’ (2010) 7(21) *Indigenous Law Bulletin* 26.

underlying constituent power of the people that intermittently awakes from its slumber in extraordinary political moments.¹³⁶

High Court jurisprudence on the implied freedom since *Lange*, hence, consistently articulates a weaker conception of popular sovereignty tied to representative government and the role of the people as electors under the framework of the *Constitution*. The conception of popular sovereignty operative in the implied freedom cases neatly exemplifies, in fact, Vinx's weaker formulation in terms of a self-government that is 'immanent in a framework of constitutional rules that makes political leadership elective and gives equal rights of democratic participation to all citizens'.¹³⁷ Only a very creative approach to constitutional interpretation would be able to derive from the implied freedom cases a commitment to a robust popular sovereignty grounded in the constituent power of a unified extra-constitutional people.

C *The Franchise Cases*

The other line of cases in which the High Court has considered the theme of popular sovereignty is *Roach*, *Rowe* and, more recently, *Murphy v Electoral Commissioner*.¹³⁸ These judgments, in which the Court assessed the validity of laws purporting to limit the franchise, undoubtedly raise broader questions of Australia's democratic 'values'.¹³⁹ The judgments have also served, however, as a central foundation for the argument that the concept of constituent power is applicable to Australia's constitutional system.¹⁴⁰ In this section, we argue that while such an identification may be theoretically cogent, it is a non-trivial departure from recent High Court jurisprudence. The Court's treatment of popular sovereignty in the franchise cases is, in fact, for the most part consistent with the weaker representative model of popular sovereignty evident in the implied freedom cases.

Roach opens with Gleeson CJ's reflections on the historical foundations of the *Constitution*. As a member of the 4:2 majority (deciding that a 2006 amendment to s 93(8AA) of the *Commonwealth Electoral Act* 1918 (Cth) was invalid), Gleeson CJ emphasised that the *Constitution*

was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power ... [nor was it] the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure ...

¹³⁶ During the writing of this article, the High Court decided a further implied freedom case: *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490. The judgment does not refer to either political or popular sovereignty.

¹³⁷ Vinx (n 26) 102.

¹³⁸ *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ('*Murphy*').

¹³⁹ See Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143, 163–4. Emerton (at 164) argues that the franchise cases 'provide the best prospect' for the assertion of a clear constitutional value — democratic inclusiveness — in an Australian context.

¹⁴⁰ Arcioni (n 6).

approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty.¹⁴¹

One expression of this admiration, is ‘the extent to which the *Constitution* left it to Parliament to prescribe the form of our system of representative democracy’.¹⁴² It is in this context that one must understand that ‘the words of ss 7 and 24 ... have come to be a constitutional protection of the right to vote’.¹⁴³ For Gleeson CJ, then, and consistent with the prevailing approach in the implied freedom cases, the constitutional protection of the right to vote is embedded in the text of a *Constitution* that ascribes an authoritative role to Parliament. The conclusion that, in this instance, the impugned law was invalid did not rest upon an extra-constitutional notion of the people, but a textually grounded interpretation of representative government.

The plurality judgment of Gummow, Kirby and Crennan JJ in *Roach* ended up in a similar place, despite wide-ranging obiter dicta on the history and comparative breadth of the Australian democratic franchise.¹⁴⁴ The plurality’s finding of invalidity rests on the claim that ‘[v]oting in elections for the Parliament lies at the heart of the system of government for which the *Constitution* provides’¹⁴⁵ (in ss 7 and 24) and that s 93(8AA) was not ‘reasonably appropriate and adapted (or “proportionate”) to the maintenance of representative government’.¹⁴⁶ The two dissenting judgments (Hayne and Heydon JJ) offer even less for a conception of the Australian democratic people outside the constitutional text. Despite the relative orthodoxy of the approach taken by the majority justices, Hayne J in particular insisted that

the *Constitution* does not establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the constitutional text.¹⁴⁷

Taken as a whole, the High Court in *Roach* remained firmly grounded in history and the text in a manner that precludes appeal to an extra-constitutional conception of the democratic people.¹⁴⁸ As with the implied freedom, the Court’s interpretation of the democratic franchise articulated a weaker popular sovereignty tied to representative and responsible government.

¹⁴¹ *Roach* (n 71) 172 [1] (Gleeson CJ).

¹⁴² *Ibid* 173 [4] (Gleeson CJ).

¹⁴³ *Ibid* 174 [7] (Gleeson CJ).

¹⁴⁴ *Ibid* 194 [69] (Gummow, Kirby and Crennan JJ). While noting that ‘the adoption of the constitutional devices of radical democracy ... moved much faster’ in the Australian colonies than they did in the United Kingdom, the plurality also discuss historical limitations on the franchise, before and after Federation, including the disenfranchisement of prisoners: at 194 [69], quoting WG McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 62.

¹⁴⁵ *Roach* (n 71) 198 [81] (Gummow, Kirby and Crennan JJ).

¹⁴⁶ *Ibid* 202 [95] (Gummow, Kirby and Crennan JJ).

¹⁴⁷ *Ibid* 214 [142] (Hayne J).

¹⁴⁸ This is true even if the High Court was exercising a form of judicial ‘leadership’ in these cases by seeking to enforce the constitutional arrangements for which the *Constitution* provides: see Emerton (n 139) 161.

Rowe does offer more material for a stronger reading of popular sovereignty. Of particular note are the judgments of French CJ and Crennan J (both in the 4:3 majority in finding multiple provisions of the *Commonwealth Electoral Act* 1918 (Cth) invalid). While both judgments relied on ss 7 and 24 as the ‘constitutional bedrock’ that determines that members of Parliament be directly chosen by the people,¹⁴⁹ they also raised questions of the identity of the Australian people and the foundations of democracy that could support the theoretical development of a more robust interpretation of the meaning of popular sovereignty.¹⁵⁰

French CJ, in discussing the electoral franchise in *Rowe*, stated that

[w]hile ‘common understanding’ of the constitutional concept of ‘the people’ has changed as the franchise has evolved [a law denying] the right to vote to any class of person entitled to be an elector ... denies it to that class of ‘the people’.¹⁵¹

Crucially, French CJ acknowledged that this means that the “‘the people” is not a term the content of which is shaped by laws creating procedures for enrolment and for the conduct of elections’.¹⁵² This is perhaps the closest any High Court justice has come to a concept of the people that could clearly support a theory of constituent power. For it could be taken to suggest that the Australian people exists as a political unity outside of the juridical structure of representative government — as set out in ss 7, 24 and related provisions — established by the *Constitution*. French CJ also referred in this context to the ‘normative framework of a representative democracy based on direct choice by the people’,¹⁵³ which relatedly implied that a normative theory of democracy can legitimately inform judicial interpretation of the textual meaning of the *Constitution*.

Crennan J’s discussion of the history of Australian democracy in *Rowe* also alluded, although to a lesser extent, to normative considerations outside the constitutional text. In discussing franchise breadth debates in the colonies, for example, Crennan J averred that ‘the conception of democracy appealed to during campaigns ... for the right to vote transcended questions of qualifications for the franchise’¹⁵⁴ insofar as it was seen as ‘an active and continuing process in which all legally eligible citizens had an equal share in the political life of the community’.¹⁵⁵ Crennan J also supported her conclusion that the multiple electoral provisions were invalid by linking a standard analysis of ss 7 and 24 with an argument to the effect that changing conceptions of democracy now require a ‘fully inclusive franchise’.¹⁵⁶

While these judicial statements are suggestive, their significance should not be overstated with respect to the High Court’s underlying conception of popular sovereignty. It is noteworthy in this respect that the Court’s subsequent treatment of

¹⁴⁹ *Rowe* (n 72) 12 [1] (French CJ), 107 [327]–[328] (Crennan J), both quoting *Roach* (n 71) 198 [82] (Gummow, Kirby and Crennan JJ).

¹⁵⁰ *Rowe* (n 72) 12 [1] (French CJ), 107 [330] (Crennan J).

¹⁵¹ *Ibid* 20 [25] (French CJ).

¹⁵² *Ibid*.

¹⁵³ *Ibid* 21 [25] (French CJ). Cf *Ruddock v Vadarlis* (2001) 110 FCR 491, 542–3 [191]–[192].

¹⁵⁴ *Ibid* 111 [344] (Crennan J).

¹⁵⁵ *Ibid* 111–12 [344] (Crennan J).

¹⁵⁶ *Ibid* 117 [367] (Crennan J).

peoplehood and democracy in *Murphy* is considerably more circumspect. In their joint judgment, French CJ and Bell J refer quite blandly to the people's role in choosing representatives as an 'aspect of the system of representative government'.¹⁵⁷ Kiefel J acknowledges that '*Roach* and *Rowe* effected something of a turning in the law' regarding the meaning of 'direct and popular choice',¹⁵⁸ but only within the bounds of the Court's interpretation of ss 7 and 24. Gageler J evocatively stated that part of the rationale for the decisions in *Roach* and *Rowe* was to reject the tendency of disenfranchisement that led to the freezing out of 'discrete minority interests'.¹⁵⁹ Yet Gageler J also cited the authority of McHugh J in *Langer v Commonwealth*¹⁶⁰ to the effect that while the content of the term 'the people' has changed over time, the purpose of ss 7 and 24 is ultimately to ensure representative government.¹⁶¹ What is distinctive of a democratic system, Gageler J continued, is that the people to be governed have an opportunity to decide who is to possess the authority to govern them.¹⁶² Keane J, in a statement that could easily recall Hayne J's dissent in *Roach*, asserted that it is impermissible to deduce from 'one's "own prepossessions"'¹⁶³ a (normative) theory of representative democracy and then use this as the benchmark for the validity of parliamentary legislation.¹⁶⁴ It is, Keane J noted, for the Parliament to establish the electoral system and determine the way in which the people will exercise its power to choose representatives under ss 7 and 24.¹⁶⁵ The *Constitution* looks principally to Parliament, as Nettle J also affirmed unambiguously in his judgment, to ensure that the 'sovereign citizenry are able to make a free, informed, peaceful, efficient and prompt choice of their legislators'.¹⁶⁶

What general conclusions should one draw, then, from the High Court's approach to popular sovereignty and the Australian people in the franchise cases? The judgments of French CJ and Crennan J, as acknowledged above, do offer judicial resources for the potential development of a stronger conception of popular sovereignty grounded in an extra-constitutional constituent power of the Australian people. Yet what material there is for such an interpretation is dispersed and ambiguous, reflecting the fact (as Nettle J noted in *Murphy*) that *Rowe* was a highly complex decision, decided by a bare majority of 4:3, with the majority differing in their reasoning.¹⁶⁷ In addition, the Court's approach in *Murphy* suggests, if anything, a step back from such a robust conception of Australian democratic peoplehood. *Rowe*, as Nettle J noted in *Murphy*, cannot be taken as 'authority for the proposition that "chosen by the people" in ss 7 and 24 of the *Constitution* mandates making elections as expressive of the popular choice as practical considerations properly

¹⁵⁷ *Murphy* (n 138) 50 [33] (French CJ and Bell J).

¹⁵⁸ *Ibid* 58 [53] (Kiefel J).

¹⁵⁹ *Ibid* 73 [107] (Gageler J).

¹⁶⁰ *Langer v Commonwealth* (1996) 186 CLR 302 ('*Langer*').

¹⁶¹ *Murphy* (n 138) 69 [89] (Gageler J) citing *Langer* (n 160) 342.

¹⁶² *Murphy* (n 138) 70 [94] (Gageler J), quoting Australia, *Final Report of the Constitutional Commission* (1988).

¹⁶³ *Murphy* (n 138) 86 [177] (Keane J), quoting *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 44.

¹⁶⁴ *Murphy* (n 138) 86 [177] (Keane J), quoting *McGinty* (n 82) 169 (Brennan CJ).

¹⁶⁵ *Murphy* (n 138) 87 [179] (Keane J).

¹⁶⁶ *Ibid* 88 [183] (Keane J).

¹⁶⁷ *Ibid* 102–3 [235] (Nettle J).

permit'.¹⁶⁸ What, in fact, emerges from a holistic analysis of the franchise cases is that the rationale of the Court for its judgments consistently coalesced — as with the implied freedom — around ss 7 and 24. The Court's responsibility to intervene with respect to potentially invalid encroachments on voting rights is viewed as a necessary incident of constitutional provisions (themselves reflective of self-government), not as a form of constitutional guardianship of the will of the extra-constitutional Australian people.¹⁶⁹

On the balance, then, it is difficult to make out the argument that the franchise cases support a stronger conception of popular sovereignty grounded in a unified extra-constitutional people. One of the main reasons for this is, in fact, correctly identified by Arcioni,¹⁷⁰ as part of the argument that the Australian people exercise a form of constituent power by determining criteria for citizenship in their role as electors. The people, within the Australian constitutional tradition, are regarded principally (and certainly since Federation) as electors within the framework of a constitutional structure of representative and responsible government (as set out particularly in ss 7, 24 and 128). It is the Parliament that determines both citizenship criteria and the breadth of the franchise within the Australian constitutional system, albeit as representatives of the people. Even more decisively, this process in no way requires an act of original constituent power either by Parliament or the people as electorate. For the *Constitution* leaves the determination of these questions to the Parliament, as elected by the people, and the properties of a citizen or elector can, in fact, be altered without any change to the fundamental constitutional structure. So far from it being the case that the franchise judgments contain an incipient doctrine of constituent power, they help to explain why the concept has limited applicability to Australia's system of constitutional government.

V Conclusion

The paucity of references to constituent power in the Australian constitutional tradition is not simply a matter of terminological preference. Much depends, it should be recognised, on how constituent power is defined. If constituent power is understood, consistent with the tradition stemming from Sieyès and Schmitt, as the capacity of a unified pre-constitutional people to determine its constitutional destiny, then it does not apply to Australian circumstances. Yet it might seem that the Australian constitutional system of government could accommodate a broader definition of constituent power as simply the power to create or fundamentally amend the material content of a Constitution. The reason this conclusion would still be partially misleading, however, is that it does matter what concepts a constitutional tradition employs to describe its own legal doctrines. Constituent power, despite

¹⁶⁸ Ibid 105 [240] (Nettle J).

¹⁶⁹ With respect to the High Court's treatment of the Australian people, it is true that the judgments of the majority in *Love* (n 85) open up new interpretative possibilities. See, in particular, the statements on Indigenous people as members of the political community and citizenship by Gordon and Edelman JJ: *Love* (n 85) 260–3 [289]–[299] (Gordon J), 288 [394] (Edelman J). The implications of *Love* with respect to popular sovereignty and the Australian people are still rather unclear, however, and outside of the scope of our discussion.

¹⁷⁰ Arcioni (n 6) 441.

attempted domestications, retains strong connotations of a robust theory of popular sovereignty that is alien to both Australian history and the jurisprudence of the High Court of Australia.

From a constitutional perspective, the Australian approach to democratic self-government has consistently suggested a weaker (and sometimes even ‘normativist’ in Loughlin’s sense) conception of popular sovereignty. Such a conception of popular sovereignty must still, of course, acknowledge the historical circumstances of constitution-making which determine a constitutional settlement. Yet there is no room in such a conception for an abiding extra-constitutional unified people that sits outside the structure of representative government and is empowered to exercise its will independently of electoral processes determined by the parameters set in the *Commonwealth Constitution* (or indeed by Parliament on the basis of the *Constitution*).

If one wishes to apply a wider concept of constituent power to the circumstances of Federation, then interesting questions arise as to the relation between the constitutive role of the Imperial Parliament (as the original legal source of the *Constitution*’s authority), and the constitutive role of the peoples of the colonies and states.¹⁷¹ These questions are certainly worthy of further investigation. At a minimum, however, the attribution of an abiding constituent power to the Australian people subsequent to Federation would constitute a major shift for a constitutional tradition that has tended to integrate talk of the people within the structure of representative and responsible government and the election of members of Parliament. Our analysis does not demonstrate the incoherence of granting constituent power a greater role in Australian constitutional jurisprudence, but it does indicate some obstacles to overcome.

¹⁷¹ See Aroney (n 2) 727–58.

Unfair Dismissal in Franchise Networks: A Regulatory Blind Spot?

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Abstract

The unfair dismissal provisions of the *Fair Work Act 2009* (Cth) provide a critical safeguard against arbitrary termination of employment. While the federal unfair dismissal regime has been in place for more than three decades, there has been little consideration of how these protections apply in the context of franchise networks. Franchises defy easy legal classification given that they blur entrenched distinctions between responsibility and control, markets and hierarchies, and small and large business. Our analysis of the case law in this domain reveals that many franchise workers are left without proper protection from unfair dismissal. We argue that these regulatory blind spots cannot be readily justified or sustained. In conclusion, we advance some possible paths to reform, which seek to take a more nuanced approach to the hybrid features of, and unique regulatory challenges presented by, franchise networks.

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I Introduction

The COVID-19 pandemic has revealed how a lack of secure employment can produce perverse outcomes for workers, and lead to dire consequences for the community more generally.¹ To promote job security, it is necessary not just to tighten regulation of casual employment or temporary work arrangements,² but also to ensure that workers are protected from arbitrary termination. The absence of protection from capricious dismissal can compromise the entire safety net of minimum employment standards. Workers may be less willing to enforce their legal entitlements, or seek to improve their working conditions, if they fear that doing so may lead to job loss.³ At their core, statutory provisions that prohibit the unfair dismissal of employees are designed to shore up security of employment. In addition, such laws may also have other important regulatory effects, including playing an educative function and providing an essential check on managerial prerogative.⁴

The scope and application of the federal unfair dismissal regime, which was first introduced in 1994, has evolved over the past three decades. However, an enduring feature of the regime is that it is largely premised on the existence of a binary employment relationship between a single employer and a single employee. This conventional conception of employment does not graft neatly onto work in franchises, which typically involves at least three parties: an employee; the franchisee; and the franchisor. The differential treatment of small and big business — another attribute of the unfair dismissal regime — is difficult to apply to franchises, which are often a ‘combination of both organisational types’.⁵ Indeed, this unique multi-party arrangement raises a host of distinct regulatory challenges about ‘who controls what, why and how’.⁶

In this article, we grapple with some of the most urgent and complex questions concerned with unfair dismissal in franchise networks.⁷ For example, should franchisees be permitted to enjoy the benefit of more generous exemptions

¹ Alex Turner-Cohen, “‘Insecure Work is No Good’: Dan Andrews Blames Casual Jobs for Victoria’s Second Wave”, *News.com.au* (26 July 2020) <<https://www.news.com.au/finance/work/at-work/insecure-work-is-no-good-dan-andrews-blames-casual-jobs-for-victorias-second-wave/news-story/fe58e2da479cac7fb7f7d328a2561fb2>>.

² The recent *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Cth) deals with casual employment. However, there was little in the preceding Bill addressing unfair dismissal or security of employment more generally.

³ Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) 119.

⁴ Joanna Howe, Laurie Berg and Bassina Farbenblum, ‘Unfair Dismissal Law and Temporary Migrant Labour in Australia’ (2018) 46(1) *Federal Law Review* 19, 20.

⁵ Ashlea Kellner, ‘Determinants of Human Resource Management Strategy in a Franchise’ in Tony Dundon and Adrian Wilkinson (eds), *Case Studies in Work, Employment and Human Resource Management* (Edward Elgar, 2020) 32, 37.

⁶ Alan Felstead, *The Corporate Paradox: Power and Control in the Business Franchise* (Routledge, 1993) 2.

⁷ While the regulation of unfair dismissal intersects with other provisions in the *Fair Work Act 2009* (Cth) (‘FW Act’), such as those dealing with unlawful termination, adverse action and bullying, this broader set of provisions go beyond the scope of this article.

and defences in relation to unfair dismissal claims afforded to small business?⁸ In considering whether the termination is ‘harsh, unjust or unreasonable’, should the Fair Work Commission take into account the size of the franchise network and whether the franchisee has access to human resources (‘HR’) support and services via the franchisor? And if the franchisor has effectively made the decision to dismiss the employee, should they be named as party or otherwise held responsible for compensation that is ultimately granted? More generally, we examine the extent to which the current unfair dismissal regime, and the Commission’s application of this statutory scheme, is justified on policy grounds and consistent with other reforms directed at promoting decent work in franchising.⁹

We begin by providing an overview of franchising in Australia, before setting out recent regulatory developments designed to address systemic non-compliance with wage and hour regulation in franchise networks. Next, we outline the background to the federal unfair dismissal regime, its key provisions and the underlying rationale for some of its features, especially its treatment of small business employers. We then consider the way in which the Fair Work Commission has applied these provisions to unfair dismissal applications brought in the franchising context. In Part IV, we analyse some of the novel issues presented by franchise networks and other forms of fissured work arrangements. Our analysis reveals that the current approach of Parliament and the Commission leaves many franchise workers without adequate protection from unfair dismissal. We argue that these deficiencies cannot be easily justified. In conclusion, we advance some possible paths to reform, including: a possible extension of liability to franchisors in certain circumstances; a more considered definition of ‘small business employer’; an expansion of the factors that the Commission considers in determining when a dismissal is unfair; and requiring the Commission to weigh up opportunities for redeployment in the broader franchise network in cases of genuine redundancy.

II Work and Franchising: An Overview of Key Challenges and Developments

A Regulatory Challenges Posed by Franchise Networks

In Australia, it is estimated that the franchise sector has around 1,344 networks, over 98,000 individual franchised outlets and employs more than 598,000 people.¹⁰ Approximately 4% of all small businesses in Australia operate as part of a broader

⁸ A recent review of the Small Business Fair Dismissal Code recommended an expansion of this exemption: Australian Small Business and Family Enterprise Ombudsman (Cth) (‘ASBFE’), *Review of the Small Business Fair Dismissal Code* (August 2019), Annexure A.

⁹ Linda Dickens, ‘Introduction — Making Employment Rights Effective: Issues of Enforcement and Compliance’ in Linda Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart, 2012) 1.

¹⁰ It is extremely difficult to obtain accurate data on the size of the franchise sector in Australia as available data on franchise type and employment status is limited. The data shown here is drawn from the Franchise Council of Australia: *About the FCA* (Web Page, 2022) <<https://www.franchise.org.au/about/>>. See also Lorelle Frazer, Scott Weaven, Anthony Grace and Selva Selvanathan, *Franchising Australia 2016* (Griffith University, 2016); FRANdata Australia, *Report for Australian Franchisee Survey* (2021).

franchise network.¹¹ Franchising may take a variety of different forms and may be delivered through a range of different modes.¹² However, the most well-known is that of ‘business format franchising’ whereby a franchisor who owns the intellectual property rights to an established business concept provides franchisees with a licence to use the franchisor’s concept, brand and know-how for a fee and a share of the profits.¹³ Use of the business format by the franchisee — who is often a first-time business owner¹⁴ — is subject to strict controls and oversight by the franchisor. In particular, the franchisee ordinarily needs to: trade under the franchisor’s brand name; sell only those products that fall within the franchisor’s selected range; and adopt the franchisor’s management and operations systems and methods.¹⁵

Franchising is a prominent form of ‘fissured work’,¹⁶ but it is arguably unique among contracting arrangements in that its economic dynamism means it ‘can function alternatively either like a centralised organisation or as a constellation of independent businesses’.¹⁷ Instead of vertical integration, formal property ownership and direct employment, franchisors have ‘pioneered a new path to bigness’.¹⁸ Rather than owning and operating its business operations directly, franchisors have relied on restrictive contracts to control franchisees to do so.¹⁹ The franchising model essentially provides the franchisor with an opportunity to shed direct employment, minimise management costs, generate upfront capital and reduce the risks associated with liability and business failure. At the same time, franchisors are rapidly able to build a brand by distributing uniform products and services via independent and dispersed franchisee units.²⁰ Collins explains that franchise networks present a paradox given that

no single entity exists through which to consolidate risk, to channel responsibility, and to which every participant owes its loyalty. Nevertheless, this many-headed hydra, this multilateral construction of bilateral contracts, which obliges the parties to co-operate intensively whilst remaining individually responsible for their actions, functions in many respects like a single business association.²¹

¹¹ Frazer et al (n 10) 6.

¹² Department of Jobs and Small Business (Cth), Supplementary Submission 20.2 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (4 May 2018) 2.

¹³ Hugh Collins, ‘Introduction to Networks as Connected Contracts’ in Gunther Teubner, *Networks as Connected Contracts*, tr Michelle Everson, ed Hugh Collins (Bloomsbury, 2011) 1, 9.

¹⁴ Andrew Elmore and Kati L Griffith, ‘Franchisor Power as Employment Control’ (2021) 109(4) *California Law Review* 1317, 1339.

¹⁵ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (Final Report, March 2019) 10 [2.7] (‘Fairness in Franchising Report’).

¹⁶ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

¹⁷ Collins (n 13) 67.

¹⁸ Brian Callaci, ‘Control without Responsibility: The Legal Creation of Franchising, 1960–1980’ (2021) 22(1) *Enterprise and Society* 156, 156.

¹⁹ Ibid.

²⁰ Andrew Elmore, ‘Franchise Regulation for the Fissured Economy’ (2018) 86(4) *George Washington Law Review* 907, 909.

²¹ Collins (n 13) 10–11.

Spencer has described the franchising model as ‘federated’ in that it ‘combines the advantages of small- and large-scale enterprise; it is personal and accessible, while at the same time it achieves important economies of scale and international brand recognition’.²² However, others have pointed to the more sinister effects of the apparent disaggregation of responsibilities in the franchising model. While franchisees are attracted to the idea that they can ‘be their own boss’, in reality, there is little franchisee discretion in how tasks and functions are performed. Instead, ‘[t]he franchisee is working in its own business within parameters mandated by the franchisor’.²³ Franchisors are under no legal obligation to consult franchisees about decisions that may affect the viability and profitability of the franchisee’s business. Moreover, there are very few grounds on which franchisees may challenge the franchisor’s contractual rights to vary the business model, corporate strategy, franchise territory, store layout or the price of key products, even if the exercise of these discretionary powers is to the detriment of the franchisees (either individually or as a collective).²⁴

The franchisor’s overarching control of the franchisee can have important implications for work quality in franchise networks. In particular, Elmore has argued that ‘it is impossible to separate employment practices from other business requirements required of franchisees to operate within the franchisor’s required operational standards’.²⁵ Given this, many measures put in place by franchisors to protect the brand can cause harm to franchise store employees. For example, it is common for franchisors to make recommendations and suggestions in relation to personnel requirements given that franchise store employees represent the brand to the consumer, such as hiring and appearance standards. Franchisors often encourage or impose business tools, such as payroll software, which incorporate relevant pay policies and job functions.²⁶ There is also evidence to suggest that in some sectors that are heavily franchised, such as fast food, staff turnover is high. While some of this employee turnover may be voluntary, it has been argued that ‘a high turnover model invites arbitrary and unfair treatment of workers’,²⁷ which can have a chilling effect on the willingness of existing employees to speak up about poor working conditions.²⁸

²² Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* (Edward Elgar, 2010) 9.

²³ Jenny Buchan, *Franchisees as Consumers: Benchmarks, Perspectives and Consequences* (Springer, 2013) 56.

²⁴ For general discussion of these issues, see *Fairness in Franchising Report* (n 15).

²⁵ Elmore (n 20) 927.

²⁶ Ibid.

²⁷ Center for Popular Democracy, Fast Food Justice, the National Employment Law Project and 32BJ, *Fired on a Whim: The Precarious Existence of NYC Fast-Food Workers* (Research Report, February 2019) 4. Evidence relating to the turnover of franchise workers is more limited in Australia, but see, National Occupational Health and Safety Commission, ‘Occupational Health and Safety Issues for Young Workers in the Fast-Food Industry’ (Research Report, March 2000) 42.

²⁸ Center for Popular Democracy, Fast Food Justice, the National Employment Law Project and 32BJ (n 27) 3–4.

B *Key Provisions of the Fair Work Act 2009 (Cth) relating to Franchise Networks*

The novelty of the franchising model, and the tension between and divergence of franchisor and franchisee interests, have prompted many countries to enact laws directed at the regulation of the franchising relationship.²⁹ While this is also true of Australia, analysis of franchise-specific regulation, such as the *Franchising Code of Conduct*, is beyond the scope of this article as it does not deal directly with the rights and obligations relating to franchise work.³⁰ Instead, we will focus on those provisions of the *Fair Work Act 2009* (Cth) (*'FW Act'*) that are directed at regulating employment within franchise networks.

For the purposes of most provisions of the *FW Act*, there is a general definition of 'franchise' derived from the *Corporations Act 2001* (Cth) (*'Corporations Act'*), which provides that a 'franchise' means:

an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.³¹

Somewhat confusingly, in the *FW Act* there are separate definitions of 'responsible franchisor entity'³² and 'franchisee entity',³³ which do not rely on the general definition of 'franchise', but rather have specific and distinct meanings for the purposes of the extended liability provisions under s 558B of the *FW Act* (which will be discussed further below).

Prior to the enactment of s 558B, the *FW Act* contained only a small number of provisions explicitly dealing with franchises. For example, there are specific provisions relating to franchises in relation to modern enterprise awards³⁴ and multi-employer bargaining.³⁵ In addition, there are other more general provisions — such as the accessory liability provisions set out in s 550 — that have also been used, somewhat sporadically, to tackle some of the work-related problems that arise in franchise networks.³⁶

The challenges associated with curbing systemic 'wage theft' in franchise networks is now relatively well-known following the notorious underpayment case involving 7-Eleven convenience stores. But, as the Migrant Workers' Taskforce noted: '7-Eleven is unlikely to be alone in being associated with significant wage

²⁹ Crawford Spencer (n 22) 1.

³⁰ For a review of recent developments in this space, see: Jenny Buchan and Rob Nicholls, 'The Challenge of Navigating the COVID-19 Pandemic for Australia's Franchise Sector' (2020) 48(2) *Australian Business Law Review* 126.

³¹ *Corporations Act 2001* (Cth) s 9 (definition of 'franchise') (*'Corporations Act'*).

³² *FW Act* (n 7) s 558A(2).

³³ *Ibid* s 558A(1).

³⁴ *Ibid* ss 143A, 168A.

³⁵ *Ibid* s 249(2).

³⁶ See, eg, *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290.

exploitation of its franchisee employers'.³⁷ Persistent concerns from the public, combined with a series of inquiries and investigations, prompted the Coalition Turnbull Government to introduce major law reform in late 2017.³⁸ While the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) was broadly directed at addressing 'deliberate and systematic exploitation of workers',³⁹ there were specific provisions targeting franchise networks. In particular, s 558B(1) of the *FW Act* makes a 'responsible franchisor entity' liable for prescribed contraventions⁴⁰ committed by a 'franchisee entity' in circumstances where they either knew, or should reasonably have been aware of the (actual or likely) contraventions, and could reasonably have taken action to prevent such contraventions from occurring.⁴¹ In addition, s 558B(2) echoes this provision by extending liability to holding companies for prescribed contraventions committed by their subsidiaries. There are at least four critical features of these provisions that are relevant for the purposes of this article.⁴²

First, these extended liability provisions only apply to contraventions of specific civil remedy provisions of the *FW Act* — that is, contraventions of modern awards, enterprise agreements, recordkeeping obligations and sham contracting prohibitions. Significantly, franchisors and parent companies cannot be held liable for contraventions of civil remedy provisions relating to adverse action. Moreover, these secondary liability provisions do not apply in the context of unfair dismissal given that such claims do not hinge on proving a 'contravention' of a civil remedy provision. Confining the extended liability provisions to certain claims, while excluding others, is a matter we will return to in Part V below.

Second, the term 'responsible franchisor entity' has been given an expansive definition. Under s 558A(2)(b) of the *FW Act*, a franchisor will fall within the definition of 'responsible franchisor entity' if the franchisor 'has a significant degree of influence or control over the franchisee entity's affairs'.⁴³ While the term 'affairs' is not expressly defined, the Explanatory Memorandum states that the term is intended to be read broadly.⁴⁴ Rather than being limited to franchisors who have

³⁷ *Migrant Workers' Taskforce* (Cth), *Report of the Migrant Workers' Taskforce* (March 2019) 40.

³⁸ For further discussion, see Tess Hardy, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32(1) *Australian Journal of Labour Law* 62.

³⁹ Explanatory Memorandum, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth), ii ('PVW Explanatory Memorandum'). The Amendment Act introduced a number of provisions that sought to strengthen the enforcement framework under the *FW Act* — for example, by allowing for higher maximum penalties to be imposed for 'serious contraventions' of prescribed workplace laws and shifting the onus of proof to employers where there has been a failure to keep or maintain employment records or issue payslips: *FW Act* (n 7) s 557A.

⁴⁰ *FW Act* (n 7) s 558B(7).

⁴¹ 'PVW Explanatory Memorandum' (n 39) 8 [54].

⁴² For more detailed discussion of these provisions, see Tess Hardy, 'Working for the Brand: The Regulation of Employment in Franchise Systems in Australia' (2020) 48(3) *Australian Business Law Review* 234.

⁴³ *FW Act* (n 7) s 558A(2)(b).

⁴⁴ 'PVW Explanatory Memorandum' (n 39) 6 [39].

control over ‘workplace relations matters’ relating to the franchisee,⁴⁵ it is said to include situations where a franchisor has involvement in the franchisee’s financial, operational and corporate affairs.⁴⁶

Third, the introduction of s 558B was significant because it loosened the knowledge requirement beyond that which applied under the pre-existing provision relating to accessorial liability.⁴⁷ In particular, the Fair Work Ombudsman had encountered difficulties in pursuing third party entities beyond the direct employer because of the need to prove that the person had *actual knowledge* of the essential elements of the contravention.⁴⁸ In comparison, s 558B(1) enables the court to take into account not just actual knowledge (that is, what the franchisor or officer in fact knew), but constructive knowledge (that is, what they ought to have known).

Finally, even if a person who is a responsible franchisor entity is found to have the requisite knowledge of the relevant contraventions committed by the franchisee, they may successfully avoid liability if they can argue that they ‘had taken reasonable steps to *prevent* a contravention by the franchisee entity or subsidiary of the same or similar character’.⁴⁹ In determining whether a person took such ‘reasonable steps’,⁵⁰ the court may have regard to all relevant matters, including:

- (a) the size and resources of the franchise ...;
- (b) the extent to which the person had the ability to influence or control the contravening employer’s conduct ...;
- (c) any action the person took towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the relevant [workplace laws and obligations];
- (d) the person’s arrangements (if any) for assessing the contravening employer’s compliance with the applicable [workplace obligations] ...⁵¹

Important aspects of this defence have been analysed elsewhere.⁵² In the context of this article, it should be noted that, in having regard to the ‘size and resources of the franchise’, it is unclear whether the court should take into account the size and resources of the ‘franchise system’, an individual ‘franchise unit’ or the putative ‘franchisor’.⁵³ While this terminology lacks clarity, it is significant that the

⁴⁵ This was the definition favoured by business groups when the provisions were put before Parliament: see, eg, Franchise Council of Australia, Supplementary Submission 9 to Senate Standing Committee on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (April 2017) 6.

⁴⁶ ‘PVW Explanatory Memorandum’ (n 39) 8 [53]. See also *Fair Work Ombudsman v United Petroleum Pty Ltd* [2020] FCA 590; *85 Degrees Coffee Australia Pty Ltd v Fair Work Inspector Rodwell* (2020) 299 IR 280.

⁴⁷ It should be noted that accessorial liability has never been a feature of the unfair dismissal jurisdiction, a point we will return to below in Part V.

⁴⁸ *Fair Work Ombudsman v Hu* (No 2) (2018) 279 IR 162.

⁴⁹ *FW Act* (n 7) s 558B(3) (emphasis added).

⁵⁰ *Ibid* s 558B(4).

⁵¹ *Ibid* s 558B(4)(a)–(d).

⁵² Hardy (n 38) 79–80.

⁵³ It appears that the Fair Work Ombudsman has assumed that the court will take into account the ‘size and resources of the *franchisor*’ — that is, the larger and more resources the network has, the more it

statute has expressly identified the size and resources of ‘the franchise’ to be of relevance in assessing liability in the context of the *FW Act*.

III The Unfair Dismissal Regime

For most of the 20th century in Australia, there were ‘no laws specifically dealing with unfair dismissal’⁵⁴ and individuals were not able to make unfair dismissal claims. The first federal statutory unfair dismissal regime came into force in 1994 with the passage of the *Industrial Relations Reform Act 1993* (Cth).

Over the 15 years that followed, the scope and scale of the unfair dismissal regime expanded and contracted in response to a series of legislative amendments. Under the conservative Howard Government, for example, the unfair dismissal legislation was significantly wound back. The *Work Choices* amendments,⁵⁵ in particular, introduced wide exemptions for ‘small businesses’, an increased ‘qualifying period’ for those employed by larger businesses and a bar on claims relating to any dismissal made for ‘genuine operational reasons’. In 2009, with the introduction of the *FW Act*, the Rudd/Gillard Government retained the basic framework of the existing regime, but restored the unfair dismissal rights of many employees excluded by the *Work Choices* amendments.⁵⁶

A Overview of the Current Unfair Dismissal Provisions of the Fair Work Act 2009 (Cth)

The unfair dismissal regime is now contained in pt 3-2 of the *FW Act*. It seeks to establish procedures which are ‘quick, flexible and informal’ and to provide remedies where a dismissal is unfair.⁵⁷ The ‘procedures and remedies [established] and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned’.⁵⁸ If an employee is protected from unfair dismissal, and has been dismissed,⁵⁹ they may make an application to the Commission for a remedy within 21 days of the dismissal.⁶⁰ If the relevant employer is not a small business employer (discussed in further detail below), a person is protected from unfair dismissal if, at the time of the dismissal, they have completed a minimum period of employment of six months,⁶¹ and a modern award covers the person or an enterprise bargaining agreement applies to the person’s employment or the sum of the person’s annual

is expected to do’: see Natalie James, ‘Reasonable Steps: The Regulator’s Perspective’ (Speech, Franchise Management Forum, 13 June 2018) 2 (emphasis added).

⁵⁴ Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 7th ed, 2021) 415 [17.11].

⁵⁵ The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amended the *Workplace Relations Act 1996* (Cth).

⁵⁶ On some estimates, the regime under the *FW Act* brought ‘an estimated 100,000 previously exempt businesses, employing between them around 3 million employees, back within the scope of the federal unfair dismissal system’: Andrew Stewart, Anthony Forsyth and Mark Irving, *Creighton and Stewart’s Labour Law* (Federation Press, 6th ed, 2016) 773–4 [23.33].

⁵⁷ *FW Act* (n 7) s 381(1)(b).

⁵⁸ *Ibid* s 381(2).

⁵⁹ *Ibid* ss 385(a), 386.

⁶⁰ *Ibid* s 394(1)–(2).

⁶¹ *Ibid* s 383.

earnings is less than the high income threshold. A person has been 'dismissed' if their employment has been terminated on the employer's initiative or they have been forced to resign because of the employer's conduct (otherwise known as 'constructive dismissal').⁶² This does not include, however, a person who, for example, was employed under a contract of employment for a specified period of time and the employment has been terminated at the end of that period. A person is not unfairly dismissed if the dismissal is a case of genuine redundancy.⁶³ Further, independent contractors are not able to access the unfair dismissal regime in the event that their agreement with the principal contractor is terminated.

Assuming these threshold requirements are satisfied, the task of the Commission in considering an application for a remedy for unfair dismissal is to determine whether the dismissal was unfair within the meaning of the *FW Act*. This requires the Commission to determine whether the dismissal was 'harsh, unjust or unreasonable'.⁶⁴ Importantly, a dismissal may still be considered unfair if it is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust.⁶⁵

The concepts of harshness, injustice or unreasonableness may also overlap.⁶⁶ A termination, for example, may be:

unjust because the employee was not guilty of misconduct on which the employer acted ... unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and ... harsh in its consequences for the personal and economic situation of the employee because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.⁶⁷

In determining whether the dismissal was harsh, unjust or unreasonable, the Commission must take into account a number of matters specifically identified in s 387:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal is related to unsatisfactory performance by the person — whether the person had been warned about that unsatisfactory performance before the dismissal; and

⁶² Ibid s 386(1).

⁶³ Ibid ss 385(d), 389.

⁶⁴ Ibid s 385(b).

⁶⁵ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 465.

⁶⁶ Ibid.

⁶⁷ Ibid.

- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resources management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the [Commission] considers relevant.

If the Commission is satisfied that a protected person has been unfairly dismissed, a remedy may be ordered.⁶⁸ It is explicitly stated in the objects of the unfair dismissal regime that the emphasis is on reinstatement.⁶⁹ An employee may be reinstated by reappointment to the position in which they were employed immediately before their dismissal or by appointment to another position on terms and conditions no less favourable than those they previously enjoyed.⁷⁰ Importantly for present purposes, if the position in which the person was employed no longer exists, but there is an equivalent position with an associated entity of the employer, the relevant reinstatement order may be directed to the associated entity.⁷¹ Compensation may only be ordered if the Commission is satisfied that reinstatement of the person is inappropriate.⁷² While the unfair dismissal regime ostensibly privileges reinstatement over other remedies, in reality reinstatement following an unfair dismissal claim is the 'exception rather than the rule'.⁷³

B *Small Business Fair Dismissal Code*

Important exceptions apply to the unfair dismissal regime where the employer is a 'small business employer', defined as a business that employs fewer than 15 employees at the time of the relevant dismissal. For the purposes of calculating how many employees a small business employs, all full-time and part-time employees are counted, but not casual employees who are not employed on a regular and systematic basis. Employees who work for an 'associated entity' are also counted.⁷⁴ 'Associated entity' has the meaning given to it under s 50AAA of the *Corporations Act*, which provides that one entity (the associate) is the associated entity of another (the principal) if one of a number of circumstances exist, such as where: the principal and associate are related bodies corporate (s 50AAA(2)); if the principal controls the associate (s 50AAA(3)); the associate controls the principal and the operations, resources or affairs of the principal are material to the associate (s 50AAA(4)); or the associate has a qualifying investment in and significant influence over the principal (or vice versa) (s 50AAA(5)–(6)). Given that the legal relationship between franchisors and franchisees is contractual, rather than constitutional, in nature, franchise networks generally fall outside the ordinary definition of a corporate group. With the exception of company-owned units, there

⁶⁸ *FW Act* (n 7) s 390.

⁶⁹ *Ibid* s 381(1)(c).

⁷⁰ *Ibid* s 391(1).

⁷¹ *Ibid* 391(1A). The definition 'associated entity' in the context of *FW Act* pt 3-2 is discussed in further detail below.

⁷² *Ibid* s 390(3)(a).

⁷³ Stewart, Forsyth and Irving (n 56) 796 [23.79].

⁷⁴ *FW Act* (n 7) s 23(3).

is generally no interlinking of ownership between franchisors and franchisees, rather they are constructed as entirely separate legal entities with no common share ownership. Given this, it is not surprising that franchise networks are not generally captured by corporate law concepts directed at ‘associated entities’.

Small business employers are afforded a number of leniencies under the current regime. First, the minimum employment period is one year for small business employers, rather than the standard six months.⁷⁵ Second, for small business employers a dismissal will not be considered unfair unless it was ‘not consistent with the Small Business Fair Dismissal Code’.⁷⁶ Under the *Small Business Fair Dismissal Code*, it is fair for an employer to dismiss an employee without notice or warning (‘summary dismissal’) when the employer ‘believes on reasonable grounds that the employee’s conduct is sufficiently serious to justify immediate dismissal’.⁷⁷ In non-summary dismissals, small business employers must give an employee notice of the reason for which he or she is at risk of being dismissed and the reason must be a ‘valid reason based on the employee’s conduct or capacity to do the job’.⁷⁸ The employee ‘must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement’.⁷⁹ The employee must be given an opportunity to respond to such a warning and a ‘reasonable chance to rectify the problem’.⁸⁰ Employees are permitted to have ‘another person present to assist’ in discussions ‘where dismissal is possible’, but that person must not be ‘a lawyer acting in a professional capacity’.⁸¹ In the event that an employee makes a claim under the unfair dismissal regime, ‘[a] small business employer will be required to provide evidence of compliance with the Code ... including evidence that a warning has been given’.⁸² Small business employers are also encouraged to complete a ‘Small Business Fair Dismissal Code Checklist’ to assist in complying with the Code itself.⁸³ While the Code has been primarily designed to provide guidance to small business owners who ‘do not have the time or expertise to navigate the complexity of the unfair dismissal system’,⁸⁴ the Productivity Commission concluded in its 2015 inquiry that the Code does not provide sufficiently ‘clear and concise advice upon which a small business can rely as a safeguard to a claim’.⁸⁵

More generally, the existence of the Code, and its continuing review and revision, is reflective of Australian industrial relations policy’s ‘unique and perhaps unusual obsession with attempting to exempt unfair dismissal from the activity of [small] businesses’.⁸⁶ Indeed, the ‘vexed’ question of whether unfair dismissal laws

⁷⁵ Ibid s 383(b).

⁷⁶ Ibid s 385(c).

⁷⁷ Small Business Fair Dismissal Code (updated 1 January 2011).

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ ASBFEO (n 8) 3.

⁸⁵ Ibid 8, citing Productivity Commission, *Workplace Relations Framework* (Final Report, December 2015) 600.

⁸⁶ Victoria Lambropoulos, ‘Small Business and Unfair Dismissal: A Review of the Australia Small Business and Family Enterprise Ombudsman’s Proposed Reforms’ (2019) 47(4) *Australian Business Law Review* 318, 319.

should apply to small businesses has been repeatedly raised as an issue for reform over the course of almost three decades.⁸⁷ The issue was first raised by employer groups in the early 1990s and then, between 1997 and 2005, the Howard Government attempted to exempt small businesses from the operation of the unfair dismissal regime on no fewer than 12 occasions,⁸⁸ finally succeeding in passing the *Work Choices* legislation that defined small businesses as those businesses employing 100 employees or fewer. The current provisions under the *FW Act* provide small businesses with a ‘watered-down version of the unfair dismissal regime’,⁸⁹ rather than an exemption per se.

But while the Code is ‘far from being a licence to small employers to dismiss at will’,⁹⁰ it clearly makes ‘some important concessions to small employers’.⁹¹ The ostensible rationale for these concessions is two-fold: first, it is often claimed that unfair dismissal laws create a disincentive for small businesses to hire new staff and that they otherwise reduce productivity. Despite having been repeatedly debunked,⁹² such justifications persist. Second, the differential treatment of small businesses is in recognition of the fact that they have reduced access to expert human resources and/or legal advice. This is important for present purposes and is discussed in further detail below.

IV Unfair Dismissal in Franchise Networks: The Case Law

There is a growing body of unfair dismissal cases that involve, in different ways and to varying extents, franchising arrangements. This section argues that, on close examination, the cases raise a number of key themes or issues, outlined in Part IV(A)–(C) below, that are worthy of further consideration. While this case law analysis provides us with a platform for exploring some of the most pronounced practical and legal issues that appear on the public record, it is important to recognise the inherent limitations of this data. Given that the vast bulk of unfair dismissal claims are resolved via private and confidential settlement, an examination of the case law provides us with bounded insight into broader patterns of behaviour.⁹³ Further, on the face of the decision, it may not be easy to discern whether the applicant was a franchise worker and the respondent a franchisee.⁹⁴ The way in which the cases have been framed and argued before the Commission also constrains deeper analysis of some of the issues at stake, such as the size of the relevant business and the possible tensions and conflicts between the franchisee and the franchisor:

⁸⁷ See generally, Marilyn Pittard, ‘Unfair Dismissal Laws: The Problem of Application to Small Businesses’ (2002) 15(2) *Australian Journal of Labour Law* 154, 154.

⁸⁸ See generally Lambropoulos (n 86) 319–20; Pittard (n 87).

⁸⁹ Lambropoulos (n 86) 320.

⁹⁰ Stewart, Forsyth and Irving (n 56) 793 [23.73].

⁹¹ *Ibid.*

⁹² See, eg, Pittard (n 87) 166–8; and, more recently, Benoit Pierre Freyens and Paul Oslington, ‘A First Look at Incidence and Outcomes of Unfair Dismissal Claims under *Fair Work*, *Work Choices* and the *Workplace Relations Act*’ (2013) 16(2) *Australian Journal of Labour Economics* 295.

⁹³ See Stewart, Forsyth and Irving (n 56) 800 [23.86]; Ashlea Kellner, Paula McDonald and Jennifer Waterhouse, ‘Sacked! An Investigation of Young Workers’ Dismissal’ (2011) 17(2) *Journal of Management & Organization* 226, 229.

⁹⁴ Howe, Berg and Farbenblum (n 4) 26.

all of which are relevant to the question of where responsibility for unfair dismissals should lie.

A *Application of Exemptions for Small Business Employers*

A large number of the available cases consider the application of the *Small Business Fair Dismissal Code* in the franchising context. The case law reveals that franchisees are routinely categorised as small business employers on the basis that only the employees directly engaged by the franchisee employer should be counted for this purpose. There are a number of examples of cases in which employees who are seeking a remedy for unfair dismissal, and who have not served the minimum employment period of 12 months, have sought to argue that the franchisee employer is, in fact, not a small business employer. Such arguments are typically rejected out of hand. In *Tudball v Marvarela Pty Ltd*, for example, the applicant employee, who had been employed for less than 12 months, argued that the franchisee employer, who employed 6–8 people at the relevant time, was not a small business employer because the franchisee and franchisor businesses were ‘associated entities’.⁹⁵ The employee submitted that the employer’s business was ‘a franchise business attached to a franchise group’⁹⁶ that provided ‘a lot more support than a typical small business and pays franchise fees for staff training days etc. Whilst operating individually these guys work as a unit...’.⁹⁷ The respondent franchisee employer submitted, on the other hand, that it ‘maintained control over its management and operations ... [the franchisor] provided branding to the respondent. ... Monthly franchise fees were paid to [the franchisor] and it received a percentage of all sales to the respondent.’⁹⁸ It was submitted by the franchisee employer that s 50AAA of the *Corporations Act*, which, as discussed above in Part III(B), sets out the definition of related entities, could be distinguished from the definition of a franchise under the *Corporations Act* and the fact that the franchisee employer was operating a franchisee unit should not lead to a finding that the franchisee and franchisor were associated entities. The Fair Work Commission accepted this and found that there was no evidence to demonstrate that the franchisee employer and franchisor were associated entities within the meaning of the *Corporations Act*.⁹⁹ It followed that the franchisee employer qualified as a small business employer under the *FW Act* and could rely on the relevant jurisdictional exemption.¹⁰⁰ Other similar examples can be found. It is clear that, typically, franchisees and franchisors will not be considered associated entities in the context of unfair dismissal.¹⁰¹

It is also clear that franchisee businesses under the same franchisor will not generally be considered to function as a single entity or as associated entities. Thus, employees who have worked for more than 12 months, but across multiple

⁹⁵ *Tudball v Marvarela Pty Ltd* [2015] FWC 1620, [8]–[10].

⁹⁶ *Ibid* [9].

⁹⁷ *Ibid*.

⁹⁸ *Ibid* [10].

⁹⁹ *Ibid* [18].

¹⁰⁰ *Ibid* [19].

¹⁰¹ See, eg, *Glick v Domoney Properties Pty Ltd ATF Domoney Investments Unit Trust* [2016] FWC 7649; *Lilwall v The Trustee for Smollen Family Trust* [2019] FWC 4571; *Italia v Viva Life Photography Pty Ltd* [2019] FWC 5710; *Arends v Discount Auto Parts Unit Trust* [2021] FWC 3304.

franchisee businesses within the same franchise network have often been found to fall outside of the regime. The case of *Patel v AAA Tools Pty Ltd*¹⁰² provides a stark example. The applicant employee was employed as a bookkeeper and administrator by AAA Tools Pty Ltd trading as Total Tools Hoppers Crossing ('Total Tools Hoppers Crossing'), which was a franchisee of the nationwide franchise network operating as 'Total Tools'. Some months after starting work with Total Tools Hoppers Crossing, the employee was asked to perform bookkeeping and administrative duties at a separate franchisee business, Mornington Peninsula Tools Pty Ltd trading as Total Tools Mornington ('Total Tools Mornington'). The respondent franchisee owner of Total Tools Hoppers Crossing, Mr Jones, held a beneficial interest in Total Tools Mornington and was a director in both businesses.¹⁰³ Further, in undertaking her work, the employee was subject to direction from Mrs Jones, the wife of the franchisee, in relation to both businesses. In order to determine whether the employee was able to proceed with her unfair dismissal application, the Fair Work Commission needed to determine whether the franchisee employer was a 'small business' (that is, employed less than 15 people): a question that ultimately hinged on the number of people employed by Total Tools Hoppers Crossing and any associated entities.¹⁰⁴ The employee sought to argue that 'the two businesses Total Tools Hoppers Crossing and Total Tools Mornington were associated entities because she performed work for both businesses; because she was subject to direction by Mrs Jones, who had an involvement in both businesses; and because she saw Mr Jones to have involvement in both businesses'.¹⁰⁵

Ultimately, the Commission found that the definition of associated entities under the *Corporations Act* was not satisfied as, among other things, it was not clear that 'one of Total Tools Hoppers Crossing and Total Tools Mornington controls the other, or that the operations, resources or affairs of one is material to the other'.¹⁰⁶ Rather, the relationship between Total Tools Hoppers Crossing, Total Tools Mornington and the franchisee owner (who was a common investor and director of both entities via a family trust) was found to be 'more diffuse'¹⁰⁷ and 'more arm's-length than would be expected'¹⁰⁸ by the *Corporations Act* definition.¹⁰⁹ It was therefore found that Total Tools Hoppers Crossing employed fewer than 15 employees and was a small business employer. This meant that the employee was precluded from proceeding with her unfair dismissal application as she had not served the minimum employment period. Cases such as this raise real questions about whether the concept of 'associated entities' — and the relevant definitions and

¹⁰² *Patel v AAA Tools Pty Ltd* [2016] FWC 6958 ('*Patel v AAA Tools*').

¹⁰³ *Ibid* [25]. In particular, ASIC extracts referred to at [25] showed that

Mr Jones is the Director and Company Secretary of Total Tools Hoppers Crossing Pty Ltd [sic] and that he is the only shareholder of the company. They also show that Mr Jones is a Director of Mornington Peninsula Tools Pty Ltd along with another person, Gerard Kelly, and that two other entities, which Mr Jones describes as trustee companies, are equal shareholders in the company, holding their shareholding beneficially on behalf of the respective directors and their families.

¹⁰⁴ *Ibid* [14].

¹⁰⁵ *Ibid* [24].

¹⁰⁶ *Ibid* [30].

¹⁰⁷ *Ibid* [32].

¹⁰⁸ *Ibid* [31].

¹⁰⁹ *Ibid* [29]–[32].

tests drawn from the *Corporations Act* — need to be reviewed or refined in order to account for the unique features of franchise networks. This is an issue considered in further detail in Part V below.

It is also worth noting that in some cases, the Commission has accepted the franchisee employer's claim to be a small business employer with little or no interrogation.¹¹⁰ For example, in *Cook v Asia Pacific Cleaning Services Pty Ltd*, the Commission found that the managing director of the respondent employer had sought incorrectly to characterise the applicant employee as an independent contractor.¹¹¹ The Commission also found that the managing director was not a witness of truth and rejected, for example, his claim that the relevant employment contract was 'fraudulent'.¹¹² Notwithstanding this, however, the Commission did not scrutinise the employer's claim that it was a small business with 'six franchise operators and no employees',¹¹³ simply stating that '[n]otwithstanding whether these franchise arrangements are properly characterised as such, I have accepted this advice and have concluded that on [the managing director's] advice [the respondent business] was a small business'.¹¹⁴ While the respondent succeeded in being classified as a small business employer, the dismissal in that case was ultimately found to be unfair. Despite finding in favour of the applicant, the Commission's scant consideration of the proper characterisation of the respondent's business and the workers' employment status is concerning. This is especially so in light of cases that suggest that self-employed franchisees may be used to substitute direct employees effectively enabling the putative franchisor/employer to save on labour costs, avoid unfair dismissal laws and reduce responsibility for other employment-related obligations, including superannuation and workers' compensation.¹¹⁵

B *The Role and Influence of the Franchisor*

There are a handful of cases in which the franchisor has played an active role in prompting or even carrying out the dismissal of employees. In some cases, for instance, the franchisor has brought conduct-related issues to the attention of a franchisee with respect to a particular worker and has requested that the worker be excluded from further paid engagements. In *D'Ambrosio v Jakroas Financial Services Pty Ltd*, breaches of client privacy by the applicant worker (who was found to be an independent contractor) were brought to the attention of the franchisee by the franchisor, who requested that the worker be 're-accredited'.¹¹⁶ In *Caine v Audi Enterprises Pty Ltd*,¹¹⁷ the respondent company was a franchisee of a franchised network of couriers and engaged the applicants as drivers. The relevant franchise agreements stipulated that the franchisor must give their approval for an individual to be 'substitute driver' on the basis that the individual has 'met the stringent

¹¹⁰ *Cook v Asia Pacific Cleaning Services Pty Ltd* [2013] FWC 1641 ('Cook'). See also *Chandan v Language Smart Pty Ltd* [2020] FWC 1057.

¹¹¹ *Cook* (n 110) [18]–[28].

¹¹² *Ibid* [13], [17]–[18].

¹¹³ *Ibid* [36].

¹¹⁴ *Ibid*.

¹¹⁵ See, eg, *Sibic v Xmas Pty Ltd* [2011] FWA 5211.

¹¹⁶ *D'Ambrosio v Jakroas Financial Services Pty Ltd* [2017] FWC 1264, [19].

¹¹⁷ *Caine v Audi Enterprises Pty Ltd* [2018] FWC 1097 ('Caine v Audi').

requirements of [the franchisor] including completion of various training and safety courses'.¹¹⁸ The franchisor was also entitled 'in their absolute discretion' to require the franchisee not to use particular drivers.¹¹⁹ The drivers, who were found by the Fair Work Commission to be employees of the franchisee and not independent contractors, were alleged to have stolen deliveries from the depot of the franchisor. After a meeting with representatives of the franchisor, which the franchisee attended but did not participate in, it was agreed that the drivers were to be 'excluded from working with [the franchisor] as [substitute drivers] for [the franchisee]'.¹²⁰ The franchisee did not meet separately with the drivers.

In considering whether there was a valid reason for termination, the Fair Work Commission considered cases occurring in the context of labour hire arrangements where a host employer exercises its contractual right to have the employee removed from the host site.¹²¹ The Commission found that there was a valid reason for the dismissal related to capacity because the franchisor 'had the unfettered right to prohibit the Applicants from working as drivers' and redeployment was not practical in the circumstances.¹²² However, the dismissal was found to be unfair on the basis that the franchisee employer had not explained to the drivers that the franchisor had exercised that right or '[initiated] its own dismissal process',¹²³ and had therefore failed to notify the drivers of the reason for termination and to provide an opportunity to respond. It is worth noting that the franchisor was not a party to the proceedings and was not called to give evidence.

Another case that underlines the interventionist role that franchisors can play with respect to employment supervision and termination is that of *Bridge v Globe Bottleshops Pty Ltd*.¹²⁴ In that case, a customer had made a complaint of sexual harassment to the Cellarbrations 'national office' following a comment made by a franchisee store employee.¹²⁵ Following receipt of this complaint, the State Manager from the Cellarbrations' national office, Mr Quarry, contacted the complainant and then took carriage of the investigation into the allegations.¹²⁶ The sole director of the franchisee was not directly involved in the investigation of the matter. The franchisee director 'did not speak with the complainant himself but relied on the opinion of Mr Quarry who had interviewed the complainant and believed she was being truthful'.¹²⁷ Further, in making a decision to terminate the employee for serious misconduct, the franchisee had relied on 'the Corporate office (Cellarbrations) in regard to disciplinary policies and procedures'¹²⁸ and sought

¹¹⁸ Ibid [9].

¹¹⁹ Ibid.

¹²⁰ Ibid [63].

¹²¹ The Commission noted at [66] that the present case was 'most analogous' to the case of *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 but also considered the cases of *Tasmanian Ports Corporation Pty Ltd v Gee* [2017] FWCFB 1714 and *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925; *Caine v Audi* (n 117) [65]–[66].

¹²² *Caine v Audi* (n 117) [72].

¹²³ Ibid [78].

¹²⁴ *Bridge v Globe Bottleshops Pty Ltd* [2021] FWC 3153 ('*Bridge v Globe Bottleshops*').

¹²⁵ Ibid [22].

¹²⁶ Ibid [44].

¹²⁷ Ibid [34].

¹²⁸ Ibid [14].

guidance from the relevant employer association, Tasmanian Hospitality Association ('THA').

Ultimately, the Fair Work Commission found that while there was a valid reason for the termination of the applicant's employment, the dismissal 'was nothing less than procedurally disastrous'.¹²⁹ The Commission noted that although the franchisee employer 'did not have its own internal human resource management, it relied on both the national office of [Cellarbrations] and the THA for its human resource advice'.¹³⁰ However, in finding for the employee, the Commission ultimately concluded that it was the franchisee employer — Globe Bottleshops — that had 'an obligation to ensure it managed its disciplinary processes in a procedurally fair way and it failed to do so'.¹³¹

There have also been a number of discrete cases that have considered whether, in the context of a genuine redundancy, there is an obligation to redeploy a worker within the franchise network. In particular, in *Romeu v Quest Acquisitions No 2A Trust & Quest*, the applicant employee's position as a Business Development Executive with 'Quest on Chapel', the franchisee employer, was made redundant after a severe decline in occupancy rates as a result of the COVID-19 pandemic and accompanying restrictions imposed by the Victorian Government throughout 2020.¹³² In late August 2020, the 'Quest head office' advised the respondent employer that Quest on Chapel 'could be "de-branded"'.¹³³ This appeared to suggest that the franchise agreement would be terminated. Without the support of the Quest head office, the respondent formed the view that it would be unable to survive as an independent business outside the Quest network.¹³⁴ In September 2020, the respondent attended a meeting with Quest head office where it was decided that Quest on Chapel (along with four other properties) was to close. At this meeting, there were also discussions about redeployment opportunities for staff, including with other franchisees in the Quest network.¹³⁵ Two redeployment opportunities were identified, and offered to the employee, at Quest Ballarat and Quest Wangaratta. But, as the Fair Work Commission pointed out, these hotels were not operated by the franchisee employer, but by 'another franchisee operating under the Quest brand such that it is not an associated entity of the Respondent, so that no right to redeployment in relation to an associated entity arises'.¹³⁶

Such decisions are illustrative of the way in which operational decisions of the franchisor can directly impact upon the franchisee's decision to dismiss one or all of their employees. Furthermore, these cases highlight the fact that franchisors are not accountable for the role they play in such dismissals and expose the limitations of considering 'associated entities' in a formal and narrow sense when it comes to questions of redundancy and redeployment. This is not something that has been explored in any detail in decisions by the Commission. This leads to a third,

¹²⁹ Ibid [64].

¹³⁰ Ibid [73].

¹³¹ Ibid.

¹³² *Romeu v Quest Acquisitions No 2A Trust & Quest* [2021] FWC 272, [14]–[19] ('*Romeu v Quest*').

¹³³ Ibid [16].

¹³⁴ Ibid [16].

¹³⁵ Ibid [19].

¹³⁶ Ibid [63].

related issue that in a large number of cases the existence of a franchise arrangement is apparent, but is not, beyond a passing mention, discussed.¹³⁷ In some of those cases, it is not clear whether the employer is a company-owned unit (which may mean that the franchisor is, in fact, the direct employer) or an independently-owned unit (in which case the franchisee is the employer).

C Access to Human Resources Advice

The cases shed some light on the extent to which access to human resources advice in the franchising context affects the Fair Work Commission's assessment of whether a dismissal was harsh, unjust or unreasonable. The cases reveal that, often, the Commission simply notes the fact that a franchisee has had access to the human resources advice of a franchisor, but does not consider the matter any further. Indeed, in determining whether the dismissal is 'unfair' in the circumstances of a particular case, significant weight has rarely been attached by the Commission to the fact that the franchisee was part of a broader franchise network when considering either:

- (a) 'the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal' (s 387(f)); or
- (b) 'the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal' (s 387(g)).

In some cases, it has been emphasised that the human resources services in franchisors are not services 'dedicated' to the franchisee business. In *Nicholls v The Trustee for MJ Hooper Trust*, for example, the Fair Work Commission said that

[a]s a franchise there is some likelihood that the employer may have had access to the Franchisor's human resource expertise, but this is speculation. It would be reasonable to assume the employer itself has no 'dedicated' human resource expertise within its own immediate business and that this may have impacted on the procedures affecting the dismissal.¹³⁸

While there have been some cases in which the Commission has attached some degree of weight to the franchisee's access to human resources,¹³⁹ for the most part such access is considered to carry little weight, to be neutral or even irrelevant in determining whether the dismissal was harsh, unjust or unreasonable.¹⁴⁰ This tendency in the case law is most relevant in the context of franchisee employers who also qualify as small business employers under the *FW Act*. As discussed above, one

¹³⁷ See, eg, *Cooper v The Trustee for Cleveland 24-7 Unit Trust* [2020] FWC 6715; *Anderson v Spirit WA Pty Ltd* [2020] FWC 4199; *Seitz v Iron Bay Pty Ltd* [2017] FWC 6926; *Costigan v Dobont Pty Ltd* [2014] FWC 3947; *Banda v Mrs Australia Ltd* [2017] FWC 5522; *Evans v Cigarette & Gift Warehouse (Franchising) Pty Ltd* [2015] FWC 2276; *Smith v Cigarette and Gift Warehouse (Franchising) Pty Ltd* [2013] FWC 3300.

¹³⁸ *Nicholls v The Trustee for MJ Hooper Trust* [2016] FWC 6700, [52].

¹³⁹ In *Lavender v Electrociti Pty Ltd*, for example, the Commission found that though the franchisee was 'a small business' it nonetheless had 'access to HR expertise and relied upon that advice, at least to some extent': *Lavender v Electrociti Pty Ltd* [2017] FWC 4221, [86].

¹⁴⁰ See, eg, *McConnell v Terry White Chemists Victoria Point* [2015] FWC 4060; *Candappa v Inedit Holdings Pty Ltd* [2020] FWC 468; *Cooper v Making Dough Pty Ltd* [2016] FWC 6206.

of the key rationales for the differential treatment of small businesses has been to recognise the fact that they have reduced access to expert human resources and/or legal advice. Where this is not the case, and franchises have access to sophisticated and expert human resources advice, the force of the argument for increased leniency for such employers under the unfair dismissal regime is not so easily sustained.

V Analysis

As discussed in Part II(A) above, franchise networks give rise to a series of regulatory conundrums. They do not neatly fit within existing legal categories and defy the entrenched assumptions on which regulatory frameworks, including the unfair dismissal regime, have been founded. In this Part, we draw on the existing scholarship concerned with franchise networks, as well as the preceding case law analysis, to critically examine a number of these core assumptions. We also explore a range of possible reforms to address perceived legal deficiencies, such as expanding the ascription of responsibility beyond the direct employer, redefining ‘small business employer’ in order to reduce jurisdictional hurdles faced by franchise workers and permitting the Fair Work Commission to consider the interlocked nature of the franchising relationship in determining whether the dismissal is unfair.

A *The Legacy of Binary Assumptions and its Legal Implications*

As we alluded to earlier, franchised businesses may look and operate much like a branch of a larger corporation — given that all outlets share the same model, marketing and brand name. However, the franchisee retains a distinct legal persona.¹⁴¹ Moreover, with the exception of company-owned units, it is the franchisee which ordinarily enters into an employment contract with the employee working in the franchise network. As there is no direct contract between the franchisor and the employee, any claim for compensation by an employee lies solely against the franchisee.¹⁴²

In structuring arrangements in this way, the franchisor can obtain the benefit of the work, and the ability to control the worker either directly or via control of the franchisee, but without exposure to the concomitant employment responsibilities.¹⁴³ Collins has previously described this as the ‘capital boundary problem’ — that is, firms may freely circumscribe the limits of their capital boundaries, which also effectively determines the limits of their legal responsibilities.¹⁴⁴ Under most laws, it is difficult, if not impossible, for one capital unit to be held liable for the actions of another. The capital boundary problem is exacerbated in circumstances where work-related responsibilities are ascribed on the basis of: (a) a pre-existing contractual nexus between the employer and the employee; and (b) a unitary

¹⁴¹ Felstead (n 6) 1.

¹⁴² Collins (n 13) 59.

¹⁴³ Pauline Thai, ‘Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia’ (2012) 25(2) *Australian Journal of Labour Law* 152, 157.

¹⁴⁴ Hugh Collins, ‘Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53(6) *Modern Law Review* 731. See also Thai (n 143) 156.

conception of the employer. Both these issues are discernible with respect to the way Australia's federal unfair dismissal regime applies to franchise networks.¹⁴⁵

In particular, with the exception of the provisions relating to 'associated entities', the unfair dismissal provisions of the *FW Act* are generally premised on the pre-existence of a binary relationship between a single employee and a single employer. The provisions also assume that there is a concentration of both ownership and control in one person or entity. Combined, these provisions have led the Fair Work Commission to focus on the action of the 'real' employer (that is, the franchisee), while ignoring the role played by the franchisor.¹⁴⁶

Indeed, while the franchisee may have the ultimate, contractual right to terminate the employment of the employee, the franchisor often retains a level of functional control — by shaping work practices, imposing disciplinary processes and compelling dismissal decisions. Franchisor control is manifest in a number of the cases we examined above. In some instances, such as *Bridge v Globe Bottleshops*, the franchisor may have provided advice to the franchisee on disciplinary procedures.¹⁴⁷ In other matters, the franchisor's intervention or involvement in the dismissal is much more direct. For example, in *Caine v Audi*, the franchisor effectively made the decision to dismiss the drivers and executed the terminations with only tacit involvement of the franchisee.¹⁴⁸ In *Romeu v Quest*, the employee's position was made redundant after the franchisor decided to 'debrand' the franchisee's hotel and terminate the franchise agreement.¹⁴⁹

In many franchise relationships, it is difficult for a franchisee to resist or refuse a direction or command issued by the franchisor.¹⁵⁰ Elmore explains:

Discounting franchisor-required operational policies as evidence of control because the franchisor is not present in the worksite to implement them ignores the franchisee's heavy incentives to implement them because of its dependency on and loyalty to the franchisor. Rejecting evidence of a franchisor's policies that trigger employment law obligations as mere 'recommendations' ignores the franchisee's loyalty to the franchisor that leads the franchisee to adopt recommendations in order to protect the franchisee's survival and future growth within the franchisor's network.¹⁵¹

Notwithstanding the power and control exercised by the franchisor over the franchisee, and the franchisor's influence over working conditions within the franchised unit, in the absence of a bilateral contract between the franchisor and the employee there is no obvious legal avenue to bring unfair dismissal proceedings against the franchisor. Further, it remains difficult, if not impossible, under the current statutory regime to attribute the unfair conduct of the franchisor to the franchisee in the context of an unfair dismissal application. Often, this means that

¹⁴⁵ Thai (n 143) 156.

¹⁴⁶ Ibid 160. See also Paul Davies and Mark Freedland, 'The Complexities of the Employing Enterprise' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006) 273, 287.

¹⁴⁷ *Bridge v Globe Bottleshops* (n 124).

¹⁴⁸ *Caine v Audi* (n 117).

¹⁴⁹ *Romeu v Quest* (n 132).

¹⁵⁰ Elmore (n 20) 936.

¹⁵¹ Ibid 937–8 (citations omitted).

the dismissed employee ‘has no claim against the wrongfulness or unfairness of the dismissal against anyone’,¹⁵² resulting in a ‘no employer black hole’.¹⁵³ In the following sections, we explore a number of possible reforms that seek to ameliorate these problems and bridge this gap.

B *Expanding Liability Ascription*

The complexities and tensions evident in franchise networks suggest that the approach to liability ascription may need to shift in the context of unfair dismissal claims. A range of different models for ascribing liability in fissured workplaces have been explored by scholars in Australia, the United Kingdom and the United States (‘US’), principally in the context of wage and hour claims.¹⁵⁴ In the context of unfair dismissal in Australia, there are at least two options which merit further discussion: (a) introducing a concept of ‘joint employment’; or (b) applying a modified form of statutory secondary liability to unfair dismissal claims. We will address each of these options in turn.

1 *Joint Employment*

As we flagged in Part II, it is difficult to address problems presented by franchise networks under the ordinary principles of the common law. Some have floated the idea of ‘joint employment’ as offering an alternative avenue for addressing these limitations.¹⁵⁵ In essence, the doctrine of joint employment allows courts and agencies to find that if more than one entity exercises the requisite level of control over the performance of work, then all relevant ‘employer’ entities should be held jointly and severally liable for employment-related violations.¹⁵⁶ While the joint employment concept is a longstanding feature of labour legislation in the United States, the complex interplay of federal and state law in the US means that there is no single standard for finding joint employment, and the test to be applied often differs ‘depending on the legal claim, type of employment, and possibly geography’.¹⁵⁷

Notwithstanding the inherent uncertainty and unpredictability associated with the doctrine, joint employment has previously received some tentative judicial

¹⁵² Collins (n 13) 60. See, eg, *Romeu v Quest* (n 132).

¹⁵³ Hugh Collins, ‘A Review of *The Concept of the Employer* by Dr Jeremias Prassl’, University of Oxford, *Labour Law Blog* (Blog Post, 10 November 2015) <<https://blogs.law.ox.ac.uk/content/labour-law-0/blog/2015/11/review-concept-employer-dr-jeremias-prassl>>.

¹⁵⁴ For an overview of some of this literature, see Tess Hardy, ‘Who Should be Held Liable for Workplace Contraventions and On What Basis?’ (2016) 29(1) *Australian Journal of Labour Law* 78; Tess Hardy, ‘Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada, and Australia’ (2018) 40(2) *Comparative Labor Law & Policy Journal* 285 (‘Big Brands, Big Responsibilities?’).

¹⁵⁵ For further discussion of joint employment in the Australian context, see Craig Dowling, ‘The Concept of Joint Employment in Australia and the Need for Statutory Reform’ (LLM Thesis, University of Melbourne, 2008).

¹⁵⁶ Carl H Petkoff, ‘Joint Employment under the *FLSA*: The Fourth Circuit’s Decision to be Different’ (2019) 70(4) *South Carolina Law Review* 1125, 1126.

¹⁵⁷ Jeffrey M Hirsch, ‘Joint Employment in the United States’ (2020) 13(1) *Italian Labour Law e-Journal* 55, 59.

support in the context of unfair dismissal in Australia. Most notably, in *Morgan v Kittochside Nominees Pty Ltd*, a Full Bench of the Fair Work Commission observed, that '[w]ere it necessary to do so, we would incline to the view that no substantial barrier should exist to accepting ... joint employment ... for certain purposes'¹⁵⁸ under the applicable workplace relations legislation. However, later cases, such as *FP Group Pty Ltd v Tooheys Pty Ltd*,¹⁵⁹ cast some doubt on the Tribunal deploying and developing a foreign common law concept such as joint employment.¹⁶⁰ In light of the limitations of the common law in this regard, Thai advanced the idea of introducing a statutory standard for joint employment into the *FW Act* — principally with respect to unfair dismissal claims in labour hire arrangements.¹⁶¹ The statutory model proposed by Thai, which would enable a worker to pursue an unfair dismissal claim against both the labour hire agency and the agency's client as joint employers, comprises two steps.¹⁶² First, in bringing a claim against the agency and the client, the worker would need to show that the client's actions constituted or contributed to the source of unfairness in the dismissal.¹⁶³ In practice, this would mean that 'if the agency unilaterally dismissed the worker from its books without the client's involvement, then the client could not be a joint employer in any ensuing unfair dismissal claim'.¹⁶⁴ Second, Thai suggests that the Fair Work Commission would need to assess 'whether the client is a joint employer' according to the test for functional (as opposed to formal) control set out in leading US cases applicable at that time.¹⁶⁵ That test looked to factors such as whether the client's equipment or premises were used for the worker's work, the degree to which the client supervised the worker's work and whether the worker worked predominantly or exclusively for the client.¹⁶⁶ The Commission would need to weigh such factors in making a conclusion about whether or not a client is a joint employer.

However, since then, some have criticised the joint employment doctrine. For instance, Collins has argued that the joint employment concept 'is unsatisfactory because in effect it tries to invent a business association or firm like a partnership when the business reality is rather a heterarchical network between autonomous businesses'.¹⁶⁷ By focusing on questions of formal or functional control, the joint employment concept may inadvertently reinforce the capital boundary problem and implicitly encourage counterproductive liability avoidance on the part of the franchisor.¹⁶⁸ Further, even where the joint employment standard has been

¹⁵⁸ *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152, 75.

¹⁵⁹ *FP Group Pty Ltd v Tooheys Pty Ltd* (2013) 238 IR 239. See also *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm13.

¹⁶⁰ Stewart, Forsyth and Irving (n 56) 260 [10.30]–[10.31].

¹⁶¹ Thai (n 143).

¹⁶² *Ibid* 173–4.

¹⁶³ *Ibid* 174.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid*. Thai principally draws on the test set out in *Zheng v Liberty Apparel Co Inc*, 355 F 3d 61 (2nd Cir, 2003) ('*Zheng*'). This test has been superseded in some jurisdictions either by later decisions, or by administrative guidance: see Hirsch (n 157) 66–8.

¹⁶⁶ *Zheng* (n 165) 72. See also discussion in Thai (n 143) 162–3.

¹⁶⁷ Collins (n 13) 61.

¹⁶⁸ Collins (n 144) 740. See also Cynthia Estlund, 'Who Mops the Floor at the Fortune 500? Corporate Self-Regulation and the Low Wage Workplace' (2008) 12(3) *Lewis & Clark Law Review* 671, 692; Hardy (n 38).

interpreted broadly, Elmore believes it still fails to account for the structural imbalances that characterise the franchising relationship and shape the working conditions for franchise workers.¹⁶⁹ Rather than simply expand on joint employment, many have pushed for a legal mechanism that better contemplates the economic logic adopted by, and the implicit promises existing between, franchise actors. More specifically, Collins argues that:

What the legal analysis requires is a conceptual scheme that both recognises the fundamental contractual character of the market ordering in the relation between the parties, whilst at the same time adding the dimension of the multilateral associational qualities of the network.¹⁷⁰

2 *Extending Statutory Secondary Liability to Unfair Dismissal Claims*

The extension of the accessory liability provisions of the *FW Act* (contained in s 550) is one possible way in which liability could be ascribed to a third party beyond the direct employer. However, as discussed elsewhere, this provision falls into many of the same traps associated with the joint employment doctrine. In particular, s 550 has a tendency to focus the court's attention on fact-heavy questions of whether the accessory possessed the requisite level of knowledge, rather than whether the third party person was in a position to effectively prevent or deter the wrongdoing.¹⁷¹ Section 558B of the *FW Act* was explicitly drafted to address some of the weaknesses of s 550, and specifically designed to deal with the hybrid features of franchise networks. Extending the application of this existing provision to unfair dismissal applications could have certain advantages, such as promoting a level of consistent treatment across different provisions of the *FW Act*.¹⁷² However, for two primary reasons we argue that this liability mechanism may be inappropriate in the context of unfair dismissal.

First, in determining an unfair dismissal claim, the Fair Work Commission is not exercising judicial power — there is no statutory prohibition on unfair dismissals and an unfair dismissal claim is not contingent on proving the contravention of a civil remedy provision. This sets unfair dismissal apart from many other provisions of the *FW Act*, including those sections dealing with unlawful termination and adverse action. It also underlines the fact that the Commission, as an administrative tribunal, is exercising a function distinct from that of a court under the *FW Act*.¹⁷³ For this reason alone, s 558B sits uncomfortably within the context of the unfair dismissal regime.

Second, from a normative point of view, it seems incongruous that liability for an unfair dismissal claim should be based solely on the franchisor's knowledge of the wrongdoing, or the reasonable steps taken to prevent an unfair dismissal,

¹⁶⁹ Andrew Elmore, 'The Future of Fast Food Governance' (2016–17) 165 *University of Pennsylvania Law Review Online* 73.

¹⁷⁰ Collins (n 13) 61–2.

¹⁷¹ Hardy, 'Big Brands, Big Responsibilities?' (n 154) 319.

¹⁷² Contraventions of pt 3-1 of the *FW Act* ('General Protections'), however, would still sit outside the extended liability regime as it currently stands.

¹⁷³ Stewart, Forsyth and Irving (n 56) 120–1 [5.43]–[5.45].

as this fails to account for the range of ways in which the franchisor may have been involved in the dismissal (as outlined in Part IV above).

One possible — and we argue, preferable — way of navigating these complex questions of responsibility is to provide the Fair Work Commission with a broad power to join a relevant third party (such as a ‘responsible franchisor entity’) to an unfair dismissal proceeding where that third party has ‘constituted or contributed to the source of the unfairness in the dismissal’.¹⁷⁴ The power to join parties beyond the direct employer may be confined to franchise arrangements. Alternatively, it may be conceived and applied more broadly to other types of business networks, such as labour hire arrangements or corporate groups. Of course, in permitting unfair dismissal proceedings to be brought against parties other than the employer, it would be necessary to accord an appropriate level of procedural fairness (for example, by ensuring that the franchisor or third party has an adequate opportunity to respond to the submissions advanced on the part of the applicant and/or the primary respondent). Assuming that a franchisor may be joined to an unfair dismissal proceeding at the initiative of the Fair Work Commission, some new factors could also be added to the list of matters that the Commission must consider in determining whether the termination is harsh, unjust or unreasonable — a possibility that is discussed in further detail below. We argue that this approach could be easily incorporated into the existing unfair dismissal regime and would accord with its broader objectives to balance the needs of business with the needs of employees, adopt procedures that are ‘quick, flexible and informal’¹⁷⁵ and ensure that a ‘fair go all round’¹⁷⁶ is accorded to the relevant parties. Furthermore, we contend that this approach would enable the Commission to simultaneously recognise the ‘market ordering in the relation between the parties’,¹⁷⁷ while also taking into account the multilateral associational qualities of franchising networks.

Determining the appropriate remedial consequences presents a separate challenge where more than one entity is being held responsible for an unfair dismissal claim. In order to enable the ascription of responsibility to franchisors, it would also be necessary to amend the remedial provisions of pt 3-2 of the *FW Act*. For example, reinstatement is still stated to be the primary remedy under the unfair dismissal regime. Arguably, such orders would not be appropriate if the relevant respondent is a franchisor and not the direct employer, although it is possible to contemplate orders of reinstatement applying to other franchisees in the franchise network (for example, following a redundancy). Further, s 392 of the *FW Act*, which deals with compensation, would need to be amended so as to allow orders to be made not just against the person’s employer, but against the responsible franchisor entity. The challenge then becomes how to reasonably apportion liability to pay compensation as between the franchisor and the franchisee. Under the joint employment doctrine, joint and several liability is imposed by default. Such an approach has been criticised as inherently unjust given that it fails to adequately

¹⁷⁴ This picks up on Thai’s model for ascription of liability to some extent: Thai (n 143).

¹⁷⁵ *FW Act* (n 7) s 381(1)(b)(i).

¹⁷⁶ *Ibid* s 381(2).

¹⁷⁷ See above n 170 and accompanying text.

account for relative responsibility or culpability of the respective parties.¹⁷⁸ Another possible way of resolving this unfairness is to afford the Fair Work Commission a high level of remedial discretion, which would permit the tribunal to make different orders for contribution as between the franchisor and the franchisee.¹⁷⁹

It is important to recognise that there is likely to be strong resistance to any approach that extends liability to franchisors. As discussed above, accessory or secondary liability has never been a feature of the unfair dismissal regime, which is infused with binary notions of employment. The broader and more radical concept of joint employment has also been largely dismissed. Enabling the Fair Work Commission to ascribe responsibility to a third party beyond the employer in the context of a dismissal would be a big step. There are legitimate questions about whether extended liability provisions such as those set out in s 558B are appropriate or justified with respect to individual, as opposed to systemic, problems. Outside of mass redundancies, unfair dismissal applications are generally concerned with the performance or conduct issues of a specific employee, and the management and response to those issues by a specific employer. Some may argue that the franchisor is more removed from the direct issues at stake and should therefore be insulated from the relevant legal consequences. Another question arises in relation to whether there is a need for deterrence in the context of unfair dismissal as there is in cases of underpayment or sham contracting (which are the concern of s 558B). The State — via the Office of the Fair Work Ombudsman — also has an active interest in curbing non-compliance with prescribed provisions, such as contraventions of a modern award and adverse action, but has no mandate to intervene in disputes about the fairness of any given dismissal. Is there a need for deterrence in the context of unfair dismissal claims? If so, then liability questions are more pronounced. If not, then ascribing liability to the franchisor is potentially more of a stretch. Nonetheless, in light of the inequities identified in the cases discussed above in Part IV, we believe that there remains a robust case for extending liability for unfair dismissal claims to franchisors in certain circumstances.

C *Justifications for the Small Business Exemptions and Privileges*

As noted above in Part III, it has been commonly assumed by policymakers and the judiciary that larger firms are better equipped to comply with the law given that they have more resources at their disposal and more ready access to expert advice. Conversely, smaller firms are frequently viewed as being less sophisticated and less capable of keeping on top of the relevant regulatory requirements.¹⁸⁰ These assumptions have led to divergent legal requirements being imposed on large and small firms under the *FW Act*. Small businesses are afforded more leniency when it comes to jurisdictional objections and defending their decision to dismiss.

¹⁷⁸ Charles Wynn-Evans, 'A Solution to Fissuring? Revisiting the Concept of the Joint Employer' (2021) 50(1) *Industrial Law Journal* 70.

¹⁷⁹ Thai (n 143) 175.

¹⁸⁰ For a general discussion of these assumptions, see Paul Edwards, 'Employment Rights in Small Firms' in Linda Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart, 2012) 139.

The distinct legal treatment of businesses of different sizes has been an enduring and contested feature of the unfair dismissal laws since their inception.¹⁸¹ In its recent review of the *Small Business Fair Dismissal Code*, the Australian Small Business and Family Enterprise Ombudsman ('ASBFEO') observed that '[t]he unfair dismissal jurisdiction within Australia's workplace relations system is commonly identified as a regulatory "pain point" for small businesses'.¹⁸² While it has been common for business groups to focus on the negative effects of unfair dismissal on small business survival and job creation, far less emphasis has been placed on the way in which expanding the small business exemption could further erode fundamental rights of certain groups of employees and exacerbate the discriminatory application of unfair dismissal laws to certain groups of workers.¹⁸³ Indeed, one of the reasons for ensuring that 'associated entities' of the employer are captured when determining the size of the business is to guard against a corporate group restructuring their business in order to avoid the operation of the laws by 'dividing its workforce between a series of small employing entities'.¹⁸⁴

In the US, franchisees were historically excluded from the definition of 'small business'. This was because the vertical controls that defined franchising relationships meant that the franchisees were seen as being an integral part of franchisor organisations and not independent businesses at all. As a result, franchisees were rendered ineligible for financial assistance directed towards small businesses. However, through successful lobbying in the 1960s, franchisors were able to argue that franchisor control should be disregarded when considering the franchisee's independence. Rather, franchisors successfully contended that the regulatory framework should focus on whether 'the franchisee had the "right to profit" from effort and bore the "risk of loss or failure"'.¹⁸⁵ In changing the rules around small business, the franchise lobby groups were able to open up 'an important new source of financing to franchisors that remains important to this day'.¹⁸⁶ For our purposes, this example underlines the fact that the classification of franchisees as a small business (or not) has been contested for over 50 years and remains central to many practical and legal questions.

Indeed, our review of unfair dismissal applications in the franchising context revealed that a large number of claims fell down on the basis that the franchisee was not an 'associated entity' of another franchisee unit or the franchisor. This has often meant that applications could not proceed on jurisdictional grounds. The case of *Patel v AAA Tools*,¹⁸⁷ referred to above in Part IV(A), illustrates this problem. Whether or not the employer was part of a broader corporate group has also arisen in the context of redundancy. While the Fair Work Commission has often considered whether there were any redeployment opportunities in 'associated

¹⁸¹ Pittard (n 87) 154 (citing Marilyn J Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7(2) *Australian Journal of Labour Law* 170).

¹⁸² ASBFEO (n 8) 5.

¹⁸³ Pittard (n 87) 168. See also Craig Dowling and John Howe, 'Fried Chicken, Unfair Dismissal and Job Creation: One of These Things is Not Like the Other' (2002) 15(2) *Australian Journal of Labour Law* 170; *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78.

¹⁸⁴ Stewart, Forsyth and Irving (n 56) 775 [23.36].

¹⁸⁵ Callaci (n 18) 171.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Patel v AAA Tools* (n 102).

entities', as well as the employer's business, redeployment opportunities in the broader franchise network were not essential to satisfy the relevant requirements following a redundancy.¹⁸⁸ In this section, we challenge some of the assumptions that underpin the exemptions and privileges afforded to small businesses in the context of franchise networks. In particular, we propose that the definition of 'small business' should be narrowed in order to reduce some of the jurisdictional obstacles faced by franchise workers seeking to bring an unfair dismissal claim. We also argue for a revision of the relevant factors to be considered by the Commission in determining whether a dismissal is unfair. Finally, we contend that the meaning of 'genuine redundancy' should take into account redeployment opportunities in the franchise network.

Redefining 'Small Business'

In its review of the *Small Business Fair Dismissal Code*, the ASBFEO acknowledged that 'there is no universal measure of what constitutes a small business and definitions vary between policy contexts'.¹⁸⁹ Accordingly, one of the recommendations made by the ASBFEO was to '[c]learly explain the meaning of "small business employer" in the Code so an employer can identify whether they are able to apply it'.¹⁹⁰ However, the ASBFEO did not expand on this recommendation or explicitly identify business models, such as franchising, which may fall within this legal grey zone.

Borrowing the definition of 'associated entities' from the *Corporations Act* may have presented a simple way of dealing with corporate groups when the unfair dismissal regime was first introduced in 1993. However, it is doubtful whether it remains appropriate today. The 'associated entities' provision has the effect of capturing corporate groups and ensuring that they cannot evade the unfair dismissal law through clever or creative restructuring. However, as the case law makes clear, the 'associated entities' provision does not easily graft onto franchise networks where the employer is legally independent, but economically reliant, on the franchisor.

In our view, the definition of 'small business employer' is excessively tied to traditional conceptions of the unitary employer and is too narrow in its conception of business networks. In failing to keep pace with contemporary work arrangements, the definition has the effect of permitting franchisees and franchisors to exploit the capital boundary and minimise legal liability for arbitrary or capricious dismissals. It also treats small businesses in franchise networks differently from small businesses in corporate groups. In our view, this inconsistent treatment is difficult to justify on an instrumental or normative basis. To tackle these issues, we recommend that the definition of 'small business employer' in s 23 of the *FW Act* be amended.¹⁹¹

¹⁸⁸ See, eg, *Romeu v Quest* (n 132).

¹⁸⁹ ASBFEO (n 8) 5.

¹⁹⁰ *Ibid* 9.

¹⁹¹ Amending the general definition of 'small business employer' would also affect the operation of a number of other provisions of the *FW Act* (n 7) outside the unfair dismissal regime, such as s 66AA (small business employers have no obligation to offer casual conversion) and s 121(1)(b) (small business employers are excluded from obligation to pay redundancy pay under s 119). Alternatively, a new definition of 'small business employer' could be introduced into Part 3-2 alone.

In particular, we suggest that for the purpose of calculating the number of employees employed by an employer at a particular time, all franchisee units within a particular franchise network, as well as the franchisor, are taken to be one enterprise. In our view, this would better reflect the ‘federated’ nature of franchise networks,¹⁹² remove the inconsistency related to the ‘associated entities’ provision in the context of unfair dismissals and reinforce other provisions in the *FW Act* that apply to franchise networks (including those concerned with multi-employer bargaining and extended liability for certain civil remedy contraventions).

D Other Recommendations for Reform

1 *Revising Relevant Factors to be Considered by the Fair Work Commission*

A more modest change to the unfair dismissal regime may be to amend those factors that the Fair Work Commission considers when assessing whether the dismissal is harsh, unjust or unreasonable. This amendment could complement the introduction of a new statutory power enabling the Commission to join a third party to unfair dismissal proceedings. Alternatively, an expanded list of factors under s 387 could be implemented as a standalone reform.

For example, in assessing the ‘size of the employer’s enterprise’ under s 387(f) or the degree to which the enterprise has access to ‘dedicated [HR] management specialists or expertise’ under s 387(g), ‘enterprise’ could be defined broadly to encompass franchise networks. Accordingly, in assessing whether procedural fairness has been afforded to the applicant, the Commission would be permitted to take into account the size and resources of the franchisor, and the HR support and assistance provided by the franchisor to the franchisee. This statutory shift may also mean that the Commission has a greater opportunity to critically examine the relationship between the franchisor and the franchisee. So, for example, the Commission could look at whether the franchisee is a company-owned or independently-owned unit.¹⁹³ More broadly, this legislative amendment might mean that, rather than focus exclusively on the actions and decisions of the direct employer, the capacity of the franchisee and the control exercised by the franchisor may be considered relevant in determining not just whether the decision to dismiss was unfair, but ultimately where responsibility for the dismissal should rest. However, if there is no accompanying recourse against the responsible franchisor entity, this amendment would need to be carefully constructed and applied in order to avoid creating an ‘employer black hole’ where a franchisee is able to argue that the unfairness of a dismissal was caused by a franchisor who cannot, in turn, be held accountable.

¹⁹² See above n 22 and accompanying text.

¹⁹³ Maryse J Brand and Evelien PM Croonen, ‘Franchised and Small, the Most Beautiful of All; HRM and Performance in Plural Systems’ (2010) 48(4) *Journal of Small Business Management* 605, 607.

2 *Reviewing the Definition of 'Genuine Redundancy'*

If the person was dismissed on the basis that their position has been made redundant, then the Fair Work Commission is currently required to consider whether it was a case of 'genuine redundancy' or not. In particular, s 389(2) of the *FW Act* states that the dismissal would not be classified as a 'genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within: (a) the employer's enterprise; or (b) the enterprise of an associated entity of the employer.' As noted above in Part IV(B), applicant franchise employees have previously attempted to argue that the franchisee employer should have explored all redeployment opportunities within the broader franchise network before proceeding to terminate the person's employment on the grounds of redundancy. In the case of *Romeu v Quest*, the Commission gave short shrift to this argument finding that independent franchisees were not 'associated entities' and the employee could not challenge the redundancy on the grounds that it was not genuine.¹⁹⁴ In our view, the circumstances of this case, and the conclusion that was ultimately drawn, suggests that the definition of 'genuine redundancy' should be reviewed to ensure consistent treatment between corporate groups and franchise networks. For example, it might be possible to redefine 'the employer's enterprise' to include all units within a relevant franchise network. Alternatively, a new sub-section could be added to s 389(2) to deal explicitly with the need to assess redeployment opportunities within the wider franchise network.

VI Conclusion

Franchise networks represent a unique form of economic coordination between multiple parties that are bound by a collection of bilateral contracts. They also have the effect of blurring long-held distinctions between responsibility and control, markets and hierarchies and small and large business. While franchise relationships share many similar features to business associations there is a 'darker side' to franchise networks.¹⁹⁵ As Collins has argued, 'these novel forms of business organisation achieve part of their advantage over other mechanisms of economic co-ordination by externalising and evading the risks of their activities'.¹⁹⁶

We have sought to explore this problem in the context of the federal unfair dismissal regime under the *FW Act*. The regime has been described as 'a foundational aspect of statutory labour law in Australia and ... a safeguard against other forms of exploitation'.¹⁹⁷ Given its importance, it is critical that we understand the way in which the regime regulates, and responds to, a range of different work arrangements and organisational forms. While unfair dismissal in the context of labour hire arrangements has received scholarly attention,¹⁹⁸ the regulation of

¹⁹⁴ *Romeu v Quest* (n 132) [62]–[67].

¹⁹⁵ Collins (n 13) 71.

¹⁹⁶ Ibid 71.

¹⁹⁷ Howe, Berg and Farbenblum (n 4) 38.

¹⁹⁸ See, eg, Thai (n 143).

arbitrary or capricious termination in franchise networks has flown under the regulatory radar.¹⁹⁹

The body of case law dealing with applications for unfair dismissal in the context of franchising arrangements reveals a number of issues. In particular, it shows that important features of franchise networks often go unexamined in the Fair Work Commission's assessment of jurisdictional issues or its determination of whether the dismissal is unfair, resulting in many applicants who are employees in franchise networks being unable to access a remedy. For example, the interpretation of 'associated entities' as excluding franchisee–franchisor relationships or franchisee–franchisee relationships expands the scope of jurisdictional exemptions intended for small businesses and intensifies the barriers faced by applicants. In addition, adhering to the capital boundaries imposed by franchise networks implicitly benefits franchisors who remain immune from legal responsibility even where it is the franchisor which has been primarily responsible for key decisions relating to the dismissal — either by terminating the franchise agreement, restructuring the network or compelling the franchisee to suspend, stand down or dismiss workers within their units. At the same time, assumptions about employer business size mean that many franchisee respondents are able to defend a lack of procedural fairness based on the absence of in-house HR resources and capacity. These issues suggest that there is a level of deficiency and incoherency in both the coverage and content of the unfair dismissal regime as it applies to franchise arrangements.²⁰⁰

This, in turn, raises important instrumental and normative questions about how the law should respond to franchise networks that simultaneously defy easy juridical classification²⁰¹ and 'exhibit traits of organised irresponsibility' in the context of unfair dismissal.²⁰² We have suggested several options for reform. First, we argue for the introduction of a new liability mechanism in the unfair dismissal regime, which would have the effect of allowing the Fair Work Commission to take into account the role and influence exercised by the franchisor in the context of disciplinary procedures and dismissal decisions. Second, in order to achieve a 'fair and balanced approach that takes into account business size',²⁰³ we advance the idea that 'small business employer' should be redefined to account for the broader franchise network. Third, we contend that the capacity and resources available to the direct employer via the broader franchise network needs to be taken into account in assessing whether the relevant dismissal is harsh, unjust or unreasonable. Finally, we argue that, in cases involving redundancy, the Commission should be required to take into account whether, and to what extent, redeployment opportunities in the franchise network have been explored. In combination, these reforms would dispense with the simplistic distinction between small and large businesses and enable a more nuanced approach tailored to franchise arrangements.

¹⁹⁹ Buchan (n 23) 55.

²⁰⁰ Howe, Berg and Farbenblum (n 4).

²⁰¹ Gunther Teubner, 'Beyond Contract and Organization? The External Liability of Franchising Systems in German Law' in Christian Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Nomos, 1991) 105, 116.

²⁰² Collins (n 13) 73.

²⁰³ ASBFEO (n 8) 6.

Ultimately, we suggest that careful reconsideration of the unfair dismissal regime is required not just in relation to franchises, but a range of other types of business networks, including labour hire arrangements. In our view, maintaining the status quo, and adhering to misplaced assumptions regarding the nature of employment relationships and business size in the contemporary labour market, may have the effect of eroding fair dismissal procedures for all workers and jeopardising the promotion of decent work in Australia.²⁰⁴

²⁰⁴ Dowling and Howe (n 183) 7.

A Conceptual Framework: What the Forgotten History of Victorian Torrens Legislation Tells Us about Priority Disputes involving Paramount Interests

Lisa Spagnolo*

Abstract

The history of the *Transfer of Land Act 1958* (Vic) can tell us much about exceptions to indefeasibility known as ‘paramount interests’. Current case law suggests these interests do not enjoy automatic priority in Victoria. Instead, once a paramount interest is established, the registered interest is effectively stripped of indefeasibility and a priority dispute ensues, with the outcome determined under general law priority rules. In this article I analyse Victorian legislative history to argue paramount interests were legislatively intended to enjoy ipso facto priority over registered interests. I develop a historically based conceptual policy framework to support future purposive interpretations of the Victorian paramount interest provision (s 42(2) of the Act). My insights demonstrate how the paramount interest exception was intended to operate in Victoria, how competing legislative aims were balanced within it, as well as the way in which it interacts with other exceptions to elucidate how priority operates for exceptions to indefeasibility more broadly. Moreover, I outline the vulnerability of other jurisdictions to case law outcomes similar to that which has arisen in Victoria. A deeper understanding of the Victorian legislative history can help prevent a similar folly in those jurisdictions.

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I Introduction

The term ‘paramount interests’ describes specified unregistered interests in Torrens land protected by legislative provisions. My central argument in this article is that such interests should enjoy automatic priority over registered interests. The reader may wonder why the need to make such an argument. After all, isn’t an exception to indefeasibility just that? The answer lies in what some might describe as a Victorian peculiarity.

The *Transfer of Land Act 1958* (Vic) (‘*TLA 1958*’) s 42(2) protects numerous paramount interests; indeed, often more generously than other Australian jurisdictions.¹ Until 2010, paramount interests were presumed to enjoy automatic priority over registered interests. *Perpetual Trustee Co Ltd v Smith*² turned this presumption on its head. Relying on two earlier High Court of Australia decisions, the Full Federal Court of Australia interpreted s 42(2)(e) and held that it did not give tenants in possession automatic priority. Instead, it held that a two-step test applied: first, the registered interest-holder was effectively stripped of indefeasibility vis-à-vis the paramount interest; and second, that priority should then be determined in accordance with general law priority rules (‘the *Perpetual* principle’).

Perpetual departs from how similar provisions are understood in other Australian jurisdictions. While it only discusses tenants in possession, it sets a dangerous precedent which could be extended to other paramount interests. Additionally, although it concerns Victorian legislation, legislation in other jurisdictions could be susceptible to similar reasoning.

In this article, I review the *Perpetual* principle through the lens of Victorian legislative history to demonstrate how the *Perpetual* principle is contrary to a purposive interpretation that seeks to give effect to legislative intent. Whether s 42(2) of the *TLA 1958* requires a ‘one-step’ or ‘two-step’ approach is a question of legislative interpretation. A purposive approach that takes legislative history into account is preferable,³ especially where there is uncertainty. A purposive approach was not taken in *Perpetual*, nor was legislative history considered beyond one passing mention in High Court cases upon which *Perpetual* relied.

The importance of this is clear. The *Perpetual* principle leads to uncertainty about priority and reverses outcomes for many paramount interest holders who otherwise benefit from the protection that s 42(2) was previously understood to provide with disastrous effect for those interest-holders. For example, the priority enjoyed by an easement holder against a newly registered purchaser of land must now be doubted. Under the previously understood one-step priority rule for paramount interests, easements were automatically protected by s 42(2)(d) of the *TLA 1958*. However, the *Perpetual* principle requires the easement holder to also establish priority under general law rules. Although the registered owner is treated as notionally ‘unregistered’ for this purpose, the outcome turns on the general law

¹ *Transfer of Land Act 1958* (Vic) s 42(2) (‘*TLA 1958*’).

² *Perpetual Trustee Co Ltd v Smith* (2010) 186 FCR 566 (‘*Perpetual*’).

³ *Interpretation of Legislation Act 1984* (Vic) s 35.

merits test.⁴ This rewinds Victoria's Torrens system back in time to archaic and convoluted general law priority rules; the very rules it sought to overcome with innovations such as abolition of the notice doctrine.⁵

Although largely ignored outside Victoria, the *Perpetual* principle in fact deserves more careful examination in jurisdictions similarly prone to such an approach. The Victorian situation is not as unique as some might argue. A deeper understanding of why the approach is of concern and how it arose in Victoria could prevent the same issue arising in other jurisdictions.

Moreover, the historical analysis below highlights the legislative rationale for priority rules between registered interests and unregistered paramount interests; and to some degree, between registered and unregistered interests more broadly. On this basis, I develop a more cohesive conceptual framework as a means to help resolve more complex priority issues and to reconcile treatment of paramount interests with other exceptions to indefeasibility.

After briefly examining the *Perpetual* principle's origins (Part II), I examine Victorian legislative history to establish legislative intent concerning paramount interest priority (Part III). I then analyse historical policy reasoning behind selection and design of interests within the provision to highlight justifications relied upon by drafters in balancing competing interests (Part IV). I thereby derive a conceptual framework to guide purposive interpretation of the provision, against which the *Perpetual* principle is compared (Part V). In Part V, I also give brief consideration to which other jurisdictions are vulnerable to similar interpretive folly, before concluding (Part VI).

II How the *Perpetual* Principle Arose

The following is a brief overview as to how the *Perpetual* principle arose. A more thorough analysis appears elsewhere for those wishing to delve more deeply into the case law.⁶

A *Perpetual Trustee Co Ltd v Smith*

In 2010, the Full Federal Court of Australia in *Perpetual* determined that tenancies in possession did not enjoy automatic priority pursuant to the *TLA 1958* s 42(2)(e). In so holding, the decision contrasted with the widely held view across Australia that paramount interests had automatic priority over registered interests.

Explored further in another article that I co-authored with Sharon Rodrick,⁷ the case arose as a class action concerning reverse mortgage arrangements that

⁴ Or arguably 'bona fide purchaser without notice' priority rule, depending on characterisation of interests. See further Lisa Spagnolo and Sharon Rodrick, 'The Perpetual Trustee Co Ltd v Smith Priority Paradox: Just How Paramount Are Paramount Interests?' (2022) 45(2) *University of New South Wales (UNSW) Law Journal* 839.

⁵ *TLA 1958* (n 1) s 43.

⁶ Spagnolo and Rodrick (n 4) 842–53.

⁷ For details, see *ibid* 842–3.

permitted retirees to remain within their homes for life. This led to a priority dispute between the registered mortgagee and retiree tenants in possession. At trial, Middleton J had held, in accordance with conventional wisdom, that s 42(2)(e) provided the retirees with automatic priority over the registered mortgages.⁸

On appeal, the Full Federal Court majority also awarded the retiree tenants priority.⁹ However, all three judges disagreed with Middleton J and instead held the effect of s 42(2)(e) was merely to strip registered proprietors of indefeasibility for purposes of the priority dispute; thereafter, priority was to be determined by general law rules.¹⁰ The importance of this reasoning is that it effectively converted a one-step priority test into a two-step priority test. Establishing an interest as tenant in possession only satisfied the initial step. Beyond that, under the *Perpetual* principle, tenants in possession must also establish priority under general law rules.

The two-step test in *Perpetual* did not arise in a vacuum. The Full Federal Court relied on two High Court of Australia decisions that also concerned the Victorian provision: *Burke v Dawes* and *Barba v Gas & Fuel Corporation of Victoria*.¹¹ However, reliance upon them as support for the principle that general law priority rules determine priority for paramount interests was controversial. Upon closer analysis, these cases were actually decided on other grounds.¹²

B *Burke v Dawes*

Burke arose from a Will that devised a life interest to the registered owner's housekeeper (Cummins), who was permitted to continue living on the land by the executor. The executor became registered proprietor and granted a registered mortgage. Cummins claimed priority over the registered mortgagees as tenant in possession pursuant to the predecessor to *TLA 1958* s 42(2), the *Transfer of Land Act 1928* (Vic) s 72 ('*TLA 1928*').¹³

Latham CJ held that s 72 afforded the tenant in possession automatic priority.¹⁴ By contrast, Evatt J concluded s 72 merely deprived the registered proprietor of indefeasibility and general law priority rules determined priority.¹⁵ Both were dissentients in the result. In Evatt J's judgment we find the genesis of the *Perpetual* principle. But how did this view ultimately prevail?

The problem lies with the inaccurate headnote, which states that all judges other than Latham CJ adopted Evatt J's interpretation of s 72. Yet, as explained elsewhere,¹⁶ for the majority of Starke, Dixon and McTiernan JJ, the case turned on

⁸ *Haslam v Money for Living (Aust) Pty Ltd* (2008) 172 FCR 301, 330 [83].

⁹ *Perpetual* (n 2) 587–8 [74] (Moore and Stone JJ).

¹⁰ Moore and Stone JJ 585–7 [66]–[74] applied the general law merits test, while Dowsett J applied a separate notice test: at 594–6 [108]–[110].

¹¹ *Perpetual* (n 2) 583 [57], 584 [62], 585 [65], relying on *Burke v Dawes* (1938) 59 CLR 1 ('*Burke*'); *Barba v Gas & Fuel Corporation of Victoria* (1976) 136 CLR 120 ('*Barba*').

¹² See further Spagnolo and Rodrick (n 4) 846–50.

¹³ *Transfer of Land Act 1928* (Vic) s 72 ('*TLA 1928*').

¹⁴ *Burke* (n 11) 8.

¹⁵ *Ibid* 25. On the context of Evatt J's reasoning, see Spagnolo and Rodrick (n 4) 849.

¹⁶ *Ibid* 848–9 nn 46–52.

the executor's powers. The devised life estate had never been transferred, thus Cummins was a mere tenant at will,¹⁷ a tenuous interest subject to the executor's power to administer the estate and mortgage the land. At no stage did any majority judge endorse the two-step effect of s 72 espoused by Evatt J, nor did they apply general law priority rules. Indeed, McTiernan J, clarified that s 72 only protected 'such interest as [Cummins] had as a tenant in possession'.¹⁸ Likewise Dixon J (with whom McTiernan J agreed) ultimately determined the matter on the basis that Cummins' possession was still subject to the executor's power to mortgage.¹⁹

There is little in *Burke* to support the *Perpetual* principle. The majority ratio decidendi determined the tenancy was subject to the executor's powers, and the provision's protection could only ever be as good as the tenancy's scope.²⁰ In other words, *the scope of the tenancy interest itself* was qualified by a 'carve-out' upon its creation. Properly understood, all judgments (except for Evatt J) in *Burke* were consistent with Latham CJ's view of conferral of automatic priority under the equivalent of *TLA 1958* s 42(2). The latter was the sole judgment to hint at legislative background.²¹

Interestingly, the supposed expression of the *Perpetual* principle in *Burke* went unrecognised by drafters of subsequent legislative amendments, as we shall see below in Part III.

C *Barba v Gas & Fuel Corporation of Victoria*

The respondent in *Barba* ('Gas & Fuel') had obtained an option for an easement over land later sold under a terms contract to the Barbas, who went into possession as tenants at will. Gas & Fuel eventually exercised the option and registered the easement, but the Barbas still refused Gas & Fuel entry and claimed priority due to *TLA 1958* s 42(2)(e).

In the High Court, Gibbs J (Stephen and Jacobs JJ agreeing) held s 42(2)(e) stripped the registered easement of indefeasibility, following what his Honour perceived to be the principle in *Burke*. Gibbs J referred to *Burke* as standing for the proposition that s 42(2)(e) 'does not give to a tenant in possession any greater protection than he would have had if the land were under the general law'.²² In support, his Honour cited two passages from *Burke*:²³ Dixon J's *hypothetical* analysis of what would have happened had it not been Torrens land,²⁴ despite Dixon J's ratio decidendi that turns upon the scope of the protected tenancy interest;

¹⁷ *Burke* (n 11) 28 (McTiernan J).

¹⁸ Ibid 28. Dixon J considered what the result would be if the *TLA 1928* did not apply (general law), but only as a hypothetical exercise: Spagnolo and Rodrick (n 4) 848 n 49.

¹⁹ *Burke* (n 11) 21–2 (Dixon J, McTiernan J agreeing at 27).

²⁰ Ibid 12 (Stärke J), 19–22 (Dixon J), 27–8 (McTiernan J).

²¹ 'The section has always been construed as providing that certain rights and interests, even though not mentioned on the certificate of title as encumbrances, are rights and interests to which the title of any registered proprietor is subject.': ibid 9 (Latham CJ).

²² *Barba* (n 11) 140–1, later echoed in *Perpetual* (n 2) 584 [63]. Compare the discussion below in Part III(C)(3).

²³ *Barba* (n 11) 141 (Gibbs J).

²⁴ *Burke* (n 11) 18. See also n 18.

and a reference within the judgment of Starke J in which Starke J explains the tenant's interest is subject to the executor's powers,²⁵ merely reiterating McTiernan J's point that the provision cannot shield a tenant from interests to which their tenancy is subject.²⁶ Contrary to Gibbs J's assertion,²⁷ his Honour's express approval of Evatt J's two-step reasoning was not consistent with the *Burke* majority.²⁸

However, despite this endorsement, *Barba*'s ratio decidendi resembled that in *Burke*. It too turned on a finding that the scope of the tenancy interest was limited by a carve-out favouring the easement via a special condition in the sales contract.²⁹ It was for this reason that s 42(2) of the *TLA 1958* could not shield the *Barbas* from the easement. Thus, reference in *Barba* to Evatt J's two-step approach and general law priority rules can be viewed as obiter dictum.³⁰

D *How the Perpetual Principle Led the Law Astray*

The High Court cases referred to in *Perpetual* that purportedly support two-step priority fall short of doing so. The Court in *Perpetual* simply fell into the same trap as Gibbs J in *Barba*: the mistaken perception that in *Burke* all judges except Latham CJ had endorsed Evatt J's view.³¹ As discussed earlier, the dissenting Evatt J was alone in relying upon the two-step approach and general law priority rules; and subsequent endorsement of Evatt J's reasoning in *Barba* is obiter dictum. The ratio decidendi of both decisions actually supports the proposition that s 42(2)(e) of the *TLA 1958* only protects tenancy interests to the extent of their scope.

Each individual judgment in *Burke* and *Barba* relied upon general law, but only to determine whether facts revealed property interests that attracted legislative protection and to identify limitations to the scope of those interests. With the sole exception of Evatt J, no other judgment relied upon general law priority rules. Indeed, none of the majority judgments truly engaged with priority rules at all because their ultimate ratio decidendi of limitations in scope precluded any true conflict between purportedly competing interests.

An automatic priority interpretation of s 42(2)(e) could never permit the tenancy to prevail over an interest benefitting from an embedded condition or carve-out qualifying the tenancy. The provision can protect 'only such interest as [the tenant] had'.³² *Burke* and *Barba* are arguably consistent with such a one-step interpretation.

²⁵ *Burke* (n 11) 13.

²⁶ *Ibid* 28.

²⁷ *Barba* (n 11) 141 (Gibbs J stating that Evatt J's 'views on this point were not in my opinion different from those accepted by the majority').

²⁸ *Ibid* 141 (Gibbs J), 142–3 (Stephen and Jacobs JJ each agreeing with reasoning of Gibbs J).

²⁹ *Ibid* 142.

³⁰ See also Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 4th ed, 2019) 508 [27.205].

³¹ *Perpetual* (n 2) 583 [60].

³² *Burke* (n 11) 28 (McTiernan J).

Yet *Perpetual* nonetheless resorted to general law priority rules without a solid basis for that leap. Interestingly, the same outcomes flow from automatic priority in all three cases. The *Perpetual* retirees' leases were unqualified, so they would have obtained automatic priority; the scope of tenancies in *Burke* and *Barba* were qualified, so automatic priority could not protect the tenants.

Regrettably, none of the judgments in *Burke*, *Barba* or *Perpetual* refer to Victorian legislative history (except Latham CJ's brief allusion) to consider which approach would best give effect to legislative intent. Perhaps the elusive threads of history were not presented in argument. Yet a purposive interpretation could have prevented the unfortunate return to general law priority rules the Torrens system sought to avoid.

As discussed in Part III below, drafters were aware possession was generally considered good notice in a general law priority dispute.³³ This was arguably why tenancies in possession were included as paramount interests.³⁴ However, it does not follow that the legislature intended general law rules to govern their priority. In Part III, I argue that, had legislative history been considered and a purposive interpretation been adopted, Victorian law would not have strayed into the uncertainty of the two-step test.

III History of the Victorian Paramount Interest Provision

Commencing as a hotly contested private member's bill,³⁵ the *Real Property Act 1862* (Vic) ('*RPA 1862* (Vic)') was introduced by Mr Service, a non-lawyer whose opponents taunted that he could perhaps try to walk the Bill through Parliament 'on the back of a donkey'.³⁶ The contemporaneous parliamentary debates indicate a vague understanding at best.³⁷ Between 1862 and 1958 many amendments were made. Historical materials surrounding those amendments reveal far more about legislative intent. One might presume this would confirm the *Perpetual* principle given deferred indefeasibility held sway until 1967. However, such presumption can be rebutted by historical evidence. On balance, this demonstrates automatic priority was intended.

In this section I highlight the legislative intent behind s 42(2) of the *TLA 1958* regarding priority for tenancies in possession and other paramount interests. I draw inferences from textual and structural reforms (Part III(A)), contrast debates on paramount interests with parallel debates on other priority disputes and exceptions (Part III(B)), and examine descriptions by drafters and contemporaneous commentators (Part III(C)).

³³ See below discussion at nn 95, 153.

³⁴ Ibid.

³⁵ Real Property Bill 1862 (Vic) first introduced in 1861.

³⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 11 March 1862, 762 (Mr Aspinall).

³⁷ Loose remarks by lay politicians when Torrens was still novel should be disregarded, eg, comments that, despite including the completely new concept of indefeasibility, s 39 was 'the same as the existing law': Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 742 (Mr Service).

A *Do Structural Reforms Contraindicate Automatic Priority?*

The Victorian paramount interest provision has significantly changed structure over time. Do these changes suggest paramount interests were not intended to automatically prevail over registered interests?

1 *1862–1954: Single Combined Clause*

The contents of the *TLA 1958* s 42(1) ('indefeasibility') and s 42(2) (paramount interest exceptions) were originally located within a single combined clause:³⁸ the *RPA 1862* (Vic) s 39.³⁹ The Victorian combined clause, which persisted until 1954,⁴⁰ conferred indefeasibility and provided exceptions for fraud, registered encumbrances, claims under prior certificates of title, boundary misdescriptions and easements (the sole paramount interest in the original clause). Exceptions were later added,⁴¹ modified⁴² and subtracted.⁴³

The original single clause appears to accord equal importance or status to all exceptions. Each was expressed as an 'exception' to indefeasibility. Were differential priority approaches intended one might anticipate signalling language to that effect. Yet none appears. Early cases recognised automatic priority for prior certificate holders.⁴⁴ The natural conclusion is that the same priority was intended for easements (later considered a paramount interest).

³⁸ A structure retained elsewhere: *Real Property Act 1900* (NSW) s 42(1) ('*RPA 1900* (NSW)'); *Real Property Act 1866* (SA) s 69 ('*RPA 1866* (SA)').

³⁹ *Real Property Act 1862* (Vic) s 39 ('*RPA 1862* (Vic)').

Notwithstanding the existence in any person of any estate or interest whether derived by grant from the Crown or otherwise which but for this Act might be held to be paramount or to have priority the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall except in case of fraud hold the same subject to such encumbrances liens estates or interests as may be notified on the folium of the register book constituted by the grant or certificate of title of such land but absolutely free from all other encumbrances liens estates or interests whatsoever except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act and except as regards the omission or misdescription of any right of way or other easement created in or existing upon any land and except so far as regards any portion of land that may by wrong description of parcels or boundaries be included in the grant certificate of title lease or other instrument evidencing the title of such registered proprietor not being a purchaser or mortgagee thereof for value or deriving from or through a purchaser or mortgagee thereof for value.

⁴⁰ *RPA 1862* (Vic) (n 39) s 39; *Transfer of Land Statute 1866* (Vic) s 49 ('*TLA 1866*'); *Transfer of Land Act 1890* (Vic) s 74 ('*TLA 1890*'); *Transfer of Land Act 1915* (Vic) s 72 ('*TLA 1915*'). Contra *Transfer of Land Act 1954* (Vic) ss 42(1)–(2) ('*TLA 1954*'); *TLA 1958* (n 1) ss 42(1)–(2).

⁴¹ See, eg, 1866 additions: reservations, Crown grant conditions and powers, unpaid rates, statutory licences, adverse possession, tenants in possession; 1915 addition: public rights of way.

⁴² Description changes: reservations to Crown grants (1954); adverse possession (1954); easements (1866, 1890, 1954); unpaid rates and taxes (1915, 1928, 1954, 1958, 2013, 2017, 2020); and tenants in possession (1954).

⁴³ Statutory leases and licences were removed in 1954.

⁴⁴ *Stevens v Williams* (1886) 12 VLR 152, 158; *Alma Consols Gold Mining Co v Alma Extended Co* (1874) 4 AJR 190. See also discussion in H Dallas Wiseman, *The Law relating to the Transfer of Land* (Law Book Co, 2nd ed, 1931) 99.

2 1866: 'Proviso' and 'Notwithstanding' By-Line

By 1866, the exceptions list had grown. An amendment reorganised some exceptions (those later known as paramount interests) within a 'proviso', while others continued as express 'exceptions'. Lacking punctuation per the drafting style of the time, *Transfer of Land Statute 1866* (Vic) ('*TLA 1866*') s 49 stated:

Notwithstanding the existence in any other person of any estate or interest whether derived by grant from Her Majesty or otherwise which but for this Act might be held to be paramount or to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the folium of the register book constituted by the grant or certificate of title but absolutely free from all other encumbrances whatsoever except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the grant or certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser **Provided always** that the land which shall be included in any certificate of title registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof and to any rights subsisting under adverse possession of such land and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land and to any unpaid rates and to any license granted by the Board of Land and Works under the '*Mining Statute 1865*' and also where possession is not adverse to the interest of any tenant of the land notwithstanding the same may not be specially notified as encumbrances on such certificate or instrument.⁴⁵

Separation behind a proviso could hint at an intention to treat paramount interests differently. It certainly caused Victoria to depart from other jurisdictions that continued to style them as 'exceptions'. Collection under the proviso perhaps led to their renaming as 'paramount interests'. However, nothing in the contemporaneous legislative history reveals any intention to alter their status. They remained within the same clause as fraud, notified encumbrances and boundary misdescriptions, which retained the designation of exceptions.⁴⁶ As if to counter misconceived perceptions of a new lower status for paramount interests vis-a-vis other exceptions, a further line was added to s 49, immediately following the paramount interests list: 'notwithstanding the same may not be specially notified as encumbrances on such certificate or instrument'.

The 'notwithstanding' sentence arguably seeks to preserve their status as exceptions equivalent to recorded encumbrances.⁴⁷ Despite sweeping removal of obsolete wording (particularly in 1954),⁴⁸ this reassuring sentence remains today in

⁴⁵ *TLA 1866* (n 40) (emphasis added).

⁴⁶ *TLA 1958* (n 1) s 42(1).

⁴⁷ By 'equivalent to recorded encumbrances' it is not suggested their priority operates per *TLA 1958* (n 1) s 34, but rather pursuant to Torrens provisions rather than priority rules outside the Torrens system.

⁴⁸ See consolidations of 1890 (s 74), 1915 (s 72), 1928 (s 72), and 1958 (s 42(2)).

TLA 1958 s 42(2): ‘notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register’.

Questions remain. Why the proviso? Why were some exceptions relegated to the proviso list and others not? No explanations are offered in contemporaneous legislative history, but a plausible inference is that the proviso was a welcome marker in the increasingly indecipherable clause; a drafting device to break the monotony of numerous exceptions. The 1862 combined clause in s 39 was brief, containing fraud, recorded encumbrances, prior certificate, boundary misdescription and easements. By 1866, the combined clause in s 49 had expanded to include Crown grant reservations, adverse possession, unpaid rates, statutory licences and tenants in possession. It had become an unruly textual monolith; a single sentence with no punctuation, indentations or sub-clauses. The proviso remained until 1954.

3 *1954: The Big Split*

In 1954, a dramatic structural change occurred when the combined clause was split into two subsections. Section 42(1) retained indefeasibility, exceptions for fraud, registered encumbrances, boundary misdescriptions, and prior certificates, whereas proviso exceptions were shifted into s 42(2), where they remain today.

But does this signify that subsection (2) interests were thereafter intended to bear a different character to those in subsection (1)? The legislative history indicates a definitive ‘no’. The clear reason for the split was purely to improve the flow of the Act. Even after the 1866 proviso and small concessions to punctuation in intervening consolidations,⁴⁹ the *TLA 1928* s 72 was still hard to swallow:

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from His Majesty or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such encumbrances as are notified on the folium of the register book constituted by the grant or certificate of title; but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the grant certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser: **Provided always** that the land which is included in any certificate of title or registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof, and to any rights subsisting under any adverse possession of such land, and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land, and to any unpaid rates or other moneys which without reference to registration under this Act are by or under the express provisions of an Act of Parliament declared to be a charge upon land in favour of any responsible Minister or any Government department or officer or any public corporate body and to any

⁴⁹ Minor punctuations inserted by 1890 and 1915 consolidations remained in the *TLA 1928* (n 13) consolidation.

leases licences or other authorities granted by the Governor in Council or any responsible Minister or any Government department or officer or any public corporate body and in respect of which no provision for registration is made and also where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same respectively are not be specially notified as encumbrances on such certificate or instrument.⁵⁰

The entire *TLA 1928* was riddled with archaic clauses badly in need of a more digestible format. A major goal of the Transfer of Land Bill 1949 ('1949 Bill') was 'simplification and clarification of the Act'.⁵¹ The Bill's draftsman, Mr Wiseman, explained that s 72 was 'most confused', thus he had 'split' it into two separate paragraphs and paragraphed the proviso.⁵² The 1949 Bill cl 104 was more organised, but rather inelegant.⁵³ Importantly, Wiseman had explicitly dispelled any suggestion the new structure signalled a change to the provision's effect, which had 'not been altered'.⁵⁴

The Transfer of Land Bill 1954 ('1954 Bill') replaced the 1949 Bill,⁵⁵ completely overhauling the Act's entire structure and format. In seizing opportunity for significant restructure, the Assistant Parliamentary Draftsman, Mr Garran, explained that the 1954 Bill was designed to 'bring some sort of order' to the Act's 'haphazard' arrangement and to remove numerous obsolete clauses.⁵⁶ It more clearly transformed the combined clause into the now familiar bifurcated format,⁵⁷ enacted as *Transfer of Land Act 1954* (Vic) ('*TLA 1954*') s 42:

⁵⁰ *TLA 1928* (n 13) (emphasis added; citations omitted).

⁵¹ Explanatory Paper, Transfer of Land Bill 1949 (Vic) 1 [4] ('1949 Explanatory Paper').

⁵² Statute Law Revision Committee, Parliament of Victoria, *Progress Report on the Transfer of Land Bill* (20 September 1949) 18 (Mr Wiseman) ('1949 SLRC Report').

⁵³ Transfer of Land Bill 1949 (Vic) ('1949 Bill') cl 104:

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from His Majesty or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such encumbrances as are notified on the folium of the register book constituted by the grant or certificate of title; but absolutely free from all other encumbrances whatsoever, except—

- (a) The estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except;
- (b) As regards any portion of land that by wrong description of parcels or boundaries is included in the grant certificate of title or instrument evidencing the title of such proprietor [sic] not being a purchaser for valuable consideration or deriving from or through such a purchaser.

Provided always that the land which is included in any certificate of title or registered instrument shall be deemed to be subject to—

- (a) the reservations exceptions conditions and powers (if any) contained in the grant thereof; and
- (b) any rights subsisting under any adverse possession of such land; and
- (c) any public rights of way; and
- (d) any easements acquired by enjoyment or user; and
- (e) any unpaid rates and taxes;

notwithstanding the same respectively are not specially notified as encumbrances on such certificate or instrument.

⁵⁴ *1949 SLRC Report* (n 52) 18 (Mr Wiseman).

⁵⁵ Transfer of Land Bill 1954 (Vic) ('1954 Bill').

⁵⁶ Statute Law Revision Committee, *Report on the Proposals contained in the Transfer of Land Bill 1954* (25 November 1954) 9 (Mr Garran) ('1954 SLRC Report').

⁵⁷ *1954 Bill* (n 55) cl 42 was identical to the *TLA 1954* (n 40) s 42 except subsection (d): see below n 58.

- (1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are notified on the Crown grant or certificate of title but absolutely free from all other encumbrances whatsoever, except—
 - (a) the estate or interest of a proprietor claiming the same land under a prior registered Crown grant or certificate of title;
 - (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the grant certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
- (2) Notwithstanding anything in the foregoing the land which is included in any Crown grant certificate of title or registered instrument shall be subject to—
 - (a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;
 - (b) any rights subsisting under any adverse possession of the land;
 - (c) any public right of way;
 - (d) any easements howsoever acquired subsisting over or upon or affecting the land;⁵⁸
 - (e) the interest (but excluding any option to purchase) of a tenant in possession of the land;
 - (f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-five of the *Local Government Act 1946* section ninety-three of the *Sewerage Districts Act 1928* section three hundred and thirty-four of the *Water Act 1928* or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the *Government Gazette*—

notwithstanding the same respectively are not specially notified as encumbrances on such grant certificate or instrument.⁵⁹

This essentially remains in the consolidated *TLA 1958*.⁶⁰ Historical records suggest all structural reforms to the provision were mere drafting improvements. In particular, the 1954 split was part of major structural reform to modernise the Act, rather than to denote any change in character for paramount interests that might suggest a two-step priority approach.

⁵⁸ Final wording of s 42(2)(d) indicated inclusion of implied easements: *1954 SLRC Report* (n 56) 54 (Appendix A). See further below n 217.

⁵⁹ *TLA 1954* (n 40) s 42.

⁶⁰ *TLA 1958* (n 1) s 42 is almost identical to the *TLA 1954* (n 40) s 42: see above n 59. Although irrelevant for present purposes, amendments since 1954 have made minor changes, eg, *Transfer of Land (Computer Register) Act 1989* (Vic) and updated legislative provisions referenced within them, with the current version now referencing 'section 121 of the *Local Government Act 2020*, section 158 of the *Water Act 1989*': *TLA 1958* (n 1) s 42(2)(d).

B *Do Debates on Other Priority Disputes Reveal Legislative Intent for Paramount Interests?*

Major reforms of 1954 arose from a five-year period of debate within the Statute Law Revision Committee. Paramount interest reforms were not the only proposals debated. The 1949 Bill proposed reform to priority between competing unregistered interests. Ultimately rejected,⁶¹ had it succeeded, unregistered equitable interests would have enjoyed priority *inter se* in accordance with dates upon which they were caveated.⁶² The radical proposal was designed to improve transparency by ensuring unregistered interests appeared on register and to deal with manifest concern over court cases applying general law priority rules in disputes between competing equitable interests which the 1949 Explanatory Paper described as unsatisfactory and causing uncertainty.⁶³

Although the 1949 Bill failed, discussions around it are revealing. What is important for present purposes is the stark difference between parallel discussions within the Committee that drafted the *TLA 1954*. The difference reveals how drafters perceived priority between registered interests and paramount interests. It is abundantly clear the Committee, which included many lawyers, understood priority disputes between two unregistered interests in Torrens land were determined by general law priority rules.⁶⁴ Indeed, dissatisfaction with this was a catalyst for the 1949 Bill, which would have displaced general law priority rules for those disputes.⁶⁵

Paradoxically, the Committee completely failed to consider the impact of general law priority rules at any point in its lengthy discussions on paramount interests concerning what became s 42(2) *TLA 1958*.⁶⁶ Yet it completely overhauled the paramount interest provision and the question of how it should be reshaped took up much space in its 10 reports. Had the Committee understood that general law priority rules determined priority for paramount interests *vis-à-vis* registered interests, this omission would seem odd. However, if the Committee intended paramount interests automatically to prevail, the omission makes perfect sense.

⁶¹ Statute Law Revision Committee, Parliament of Victoria, *Report on the Proposals contained in the Transfer of Land Bill 1953* (4 December 1953) 6 [8] adopting Ruoff's view it would enable 'the fast and the smart ... to beat the slow and simple', 16–19, 30 (Mr Fox, Law Institute of Victoria) ('1953 SLRC Report'); Theodore BF Ruoff, 'An Englishman Looks at the Torrens System: Part 2 — Simplicity and the Curtain Principle' (1952) 26(3) *Australian Law Journal* 162, 165 ('An Englishman Looks at the Torrens System: Part 2'); Statute Law Revision Committee, Parliament of Victoria, *Final Report on the Transfer of Land Bill 1949* (17 July 1951) 31 (Mr Jessup, Registrar-General South Australia) ('1951 SLRC Report'); Statute Law Revision Committee, Parliament of Victoria, *Supplementary Report on the Transfer of Land Bill 1949* (19 August 1952) ('1951–52 SLRC Supplementary Report') 13 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England).

⁶² 1949 Bill (n 53) cls 224 and 240, echoed in Law Reform Commission of Victoria, *Priorities* (Report No 22, April 1989) 12. See Mary-Anne Hughson, Marcia Neave, and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21(2) *Melbourne University Law Review* 460, 488.

⁶³ 1949 Explanatory Paper (n 51) 2 [6] (referring to *Lapin v Abigail* (1930) 44 CLR 166).

⁶⁴ *Ibid* 2 [6]; 1951 SLRC Report (n 61) 31 (Mr Jessup, Registrar-General South Australia), 75 (Mr Fraser), 78 (Mr Rylah); 1951–52 SLRC Supplementary Report (n 61) 13 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England); 1954 SLRC Report (n 56) 40 (Mr Adam).

⁶⁵ 1949 Bill (n 53) cl 240; 1953 SLRC Report (n 61) 15–19; 1949 Explanatory Paper (n 51) 3–4 [6]–[7].

⁶⁶ Discussed below in Part IV.

It seems unfathomable that the Committee spent years debating replacement of general law priority rules for disputes between unregistered interests, without any time at all being devoted to why it was nonetheless appropriate to retain those same rules for paramount interests if that was indeed its legislative intent, especially when it focused most attention upon the latter. Even when debating the radical caveat priority proposal for unregistered interests, it was asserted that, by contrast, because they were already ‘protected by the Act’ paramount interest holders need not caveat nor register.⁶⁷ Likewise, the 1949 Bill had omitted tenancies and implied easements from the provision, but the Committee recommended their reinstatement because they ‘should not have to protect their rights by caveat’.⁶⁸ This suggests paramount interest holders had nothing to gain by caveating. Surely if general law rules had been intended to determine priority for paramount interests, while not strictly necessary, caveats would nevertheless help establish notice under those priority rules, especially for non-possessory interests. However, a five-year Committee led by lawyers overlooked this point.

The overall impression is that the 1949–54 drafters assumed paramount interests simply bound the registered proprietor automatically without recourse to general law priority rules.⁶⁹ This explains why the Committee did not stop once to consider how general law priority rules would impact upon the protection it was so carefully crafting for paramount interests, despite the perception that general law priority rules posed a problem of such significance that it warranted a draft Bill to redesign priority between unregistered interests.

Conspicuous absence of reference to general law priority rules during debates reshaping the paramount interests provision stand in complete contrast with debates on general law priority rules in disputes between unregistered interests. This supports the conclusion that the legislative intent of the Committee was that paramount interests automatically prevailed over registered interests and should continue to do so. Moreover, while the Committee referred to cases between unregistered interests, in debates on paramount interests *Burke* was never mentioned, despite being decided 11 years prior. This suggests that the case was not viewed as contrary to the Committee’s understanding of automatic priority.

C *Do Descriptions Indicate an Intention General Law Priority Rules Apply?*

1 *Words Describing How Paramount Interests Relate to Registered Interests*

Language describing the relationship between registered interests and paramount interests can provide clues about legislative intent concerning priority. Legislative history consistently confirms the general view registered proprietors took ‘subject

⁶⁷ 1949 SLRC Report (n 52) 6–8 (Mr Wiseman), 13 (Mr Wiseman), 19 (Mr Wiseman); 1953 SLRC Report (n 61) 4 [5] (Committee), 28 (Mr Fox, Law Institute of Victoria), 12–14.

⁶⁸ 1953 SLRC Report (n 61) 14 (Mr Rylah, Chairman).

⁶⁹ See above n 47 for clarification on ‘equivalent’.

to 'paramount interests'.⁷⁰ Occasionally drafters were more ambiguous: registered title was '*not paramount* to ... outstanding rates and taxes';⁷¹ or paramount interests 'can get priority' over registered interests.⁷² Stronger expressions were more common; paramount interests deserved to be 'preserved'⁷³ or 'protected' from indefeasibility.⁷⁴

Vivid descriptions by influential Committee advisors clearly considered paramount interests enjoyed one-step automatic priority. Describing the combined clause as containing '*overriding*' interests, 1949 Bill draftsman Wiseman summarised paramount interests as 'interests ... *overriding the legal title* given by the certificate of title'⁷⁵ and explained all interests in the combined clause '*prevail over the legal estate*'.⁷⁶ 1954 Bill draftsman Garran described paramount interests as 'binding'.⁷⁷

Wiseman's 1931 text clearly favours automatic priority.⁷⁸ Commenting on *Tuckett v Brice*, which held that registered title '*cannot prevail* against easements existing though not expressed upon it',⁷⁹ Wiseman summarised the *only* relevant question: '[d]oes the easement exist?'⁸⁰ If so, it prevailed.⁸¹

Common expressions 'subject to' and 'protection' likely denoted automatic paramountcy since they were also employed to describe priority for fraud, boundary misdescription and prior certificates.⁸² Remaining doubt is diminished by the descriptions 'overriding', 'binding' and 'prevailing'.

2 Indications of Equivalent Status to Other Exceptions

Another reason for absence of discussion about effects of general law priority rules on the efficacy of the paramount interest provision was that the Committee

⁷⁰ Victoria, *Parliamentary Debates*, Legislative Council, 12 October 1904, 2183 (JM Davies), 2184 (Sir Henry Cuthbert); Victoria, *Parliamentary Debates*, Legislative Assembly, 7 September 1916, 1273 (Mr Lawson, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2620–1; 1949 *SLRC Report* (n 52) 19 (Mr Fraser, Chairman).

⁷¹ 1953 *SLRC Report* (n 61) 32 (Mr Rylah, Chairman) (emphasis added). See also at 24.

⁷² 1951 *SLRC Report* (n 61) 7 [18] (Committee).

⁷³ *Transfer of Land Statute Amending Act 1887* (Vic) s 13; 1949 Explanatory Paper (n 51) 3 [6], 18.

⁷⁴ 1949 Explanatory Paper (n 51) 18–19; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1954, 625, 629 (Mr Merrifield, Minister of Public Works) ('1954 Second Reading Speech'); 1949 *SLRC Report* (n 52) 17–18 (Mr Wiseman), 20–21 (Mr Wiseman); 1951 *SLRC Report* (n 61) 7 [18] (Committee), 79 (Mr Voumard, Chief Justice's Committee on Law Reform); 1953 *SLRC Report* (n 61) 13–14 (Mr Rylah, Chairman; Mr Wiseman).

⁷⁵ 1953 *SLRC Report* (n 61) 15 (Mr Wiseman) (emphasis added). See also 39 (Appendix A); 1951–52 *SLRC Supplementary Report* (n 61) 12 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England); Theodore BF Ruoff, 'An Englishman Looks at the Torrens System: Part 1 — The Mirror Principle' (1952) 26(2) *Australian Law Journal* 118, 118–19 ('An Englishman Looks at the Torrens System: Part 1').

⁷⁶ 1953 *SLRC Report* (n 61) 13 (Mr Wiseman) (emphasis added).

⁷⁷ 1954 *SLRC Report* (n 56) 17 (Mr Garran).

⁷⁸ Wiseman (n 44) 99.

⁷⁹ *Tuckett v Brice* (1917) VLR 36, 60 (emphasis added).

⁸⁰ Wiseman (n 44), 111. See also *James v Stevenson* [1893] AC 162, 169.

⁸¹ Wiseman (n 44), 111 (on *TLA* 1928 (n 13) s 72).

⁸² 1953 *SLRC Report* (n 61) 13 (Mr Wiseman).

considered paramount interests had a status equivalent to recorded encumbrances or interests affected by fraud. The Committee therefore presumed that paramount interests prevailed by virtue of the Act, rather than at the whim of priority rules external to it.⁸³

As early as 1916, Parliament clearly references their status as of equivalent importance to registered encumbrances: ‘in addition to the encumbrances which appear on the face or the back of the certificate of title, there are other encumbrances which are not specified, but are made encumbrances by section 72’.⁸⁴ This view of early legislators was echoed by Latham CJ’s 1938 dissent in *Burke*.⁸⁵ It was also itself an echo of the 1867 lament by notable early Victorian Torrens commentator Thomas à Beckett⁸⁶ that protection for tenants was ‘almost equivalent to registration’.⁸⁷

The 1949 Explanatory Paper made no distinctions between registered encumbrances, paramount interests or other exceptions. It simply listed all the interests protected by cl 104,⁸⁸ without hint of difference between operation of priority. In detailed explanations of the 1949 and 1954 Bills, neither parliamentary draftsman indicated a two-step priority approach applied to some, but not all, exceptions to indefeasibility.⁸⁹ Instead, Garran indicated registered interests were paramount except for other registered interests, fraud or interests in cl 42(2).⁹⁰ The 1954 Second Reading Speech echoed his words: ‘the estate of the registered proprietor is paramount except in the case of fraud or as against registered interests, or as against unregistered leases or easements or interests, referred to in [s 42(2)]’.⁹¹ Discussing unpaid rates, the Committee Chair elaborated they ‘would have a priority’ over the registered estate in the same way as interests revealed by title search.⁹²

The inescapable inference is that priority for paramount interests was intended to work in the same manner as for other exceptions: automatically. Explicit in the 1862 structure, this was intended to continue after 1954.

⁸³ See also Part III(A)(2) and n 47 for clarification on ‘equivalent’ in this context.

⁸⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2621 (Mr Blackburn).

⁸⁵ *Burke* (n 11) 9.

⁸⁶ Thomas à Beckett was a law reporter, barrister, lecturer and judge.

⁸⁷ Thomas à Beckett, *Introduction and Notes to the Transfer of Land Statute of Victoria* (1867, Baillière) 70.

⁸⁸ 1949 Explanatory Paper (n 51) 18 lists interests protected by combined cl 104:

1. Encumbrances notified in the register book.
2. Estate of a proprietor claiming the same land under a prior grant or certificate of title.
3. Any portion of the land included by wrong description in the grant or certificate of a proprietor not being a purchaser for value or one claiming through him.
4. The reservations, exceptions, conditions and powers (if any) contained in the Crown grant.
5. Rights under adverse possession.
6. Public rights of way.
7. Easements acquired by enjoyment or user.
8. Unpaid rates.
9. Unpaid taxes ...

⁸⁹ 1953 *SLRC Report* (n 61) 13 (Mr Wiseman). See also n 90.

⁹⁰ 1954 *SLRC Report* (n 56) 15 (Mr Garran).

⁹¹ 1954 Second Reading Speech (n 74) 628.

⁹² 1954 *SLRC Report* (n 56) 14 (Mr Rylah, Chairman).

3 Other References to General Law Priority Rules

Other historical remarks on general or common law principles in disputes between registered and paramount interests relate to establishing the existence and scope of proprietary interests rather than priority.

In his 1867 text,⁹³ *à Beckett* asserted notice of tenants in possession affected purchasers ‘*in the same way as under the general law*’.⁹⁴ However, he was comparing Torrens outcomes with those under (recently superseded but familiar) general law by way of explanation, rather than suggesting old priority rules had a continuing role. Similarly, Mr Fox in 1953 explained tenants in possession were paramount interests because of the old rule that ‘the fact [of] possession ... is sufficient notice to all the world’.⁹⁵ Far from advocating application of general law priority rules, this explained why tenants were protected within the provision; the same rationale had informed older priority rules.

The Committee heard evidence that disputes between parties with competing equities had long been fought out in the courts,⁹⁶ and members remarked upon their reluctance to ‘disturb the law of equity’.⁹⁷ However, these remarks do not pertain to disputes between paramount vis-à-vis registered interests. The discussion involved 1949 Bill cls 104 and 240; the latter being the radical proposal for priority between unregistered interests. It is undoubtedly cl 240 to which these members referred; the Committee contemporaneously mentioned *Abigail v Lapin*⁹⁸ and unregistered purchasers.⁹⁹ Finally, Ruoff’s 1952 remark that Torrens did not rank non-registered interests,¹⁰⁰ also concerned priority between unregistered interests in cl 240.¹⁰¹

Nothing in the legislative history indicates any intention for general law principles to determine priority between registered and paramount interests. Instead, it strongly suggests *Perpetual* contradicts the legislatively intended one-step approach to priority. However, history can do more than just indicate *how* priority was intended to operate; it can also suggest *why* this was so, further informing a purposive interpretation of s 42(2) of the *TLA 1958*.

IV Policy behind Design of the Paramount Provision

Why did Parliament select the paramount interests listed in s 42(2) of the *TLA 1958*? The following analysis focuses on individual paramount interests to reveal the careful legislative balancing exercise that determined the extent to which priority

⁹³ *à Beckett* (n 87) 18.

⁹⁴ *Ibid* 70 (emphasis added).

⁹⁵ 1953 *SLRC Report* (n 61) 30 (Mr Fox). See also 1949 *SLRC Report* (n 52) 19 (Mr Wiseman); 1953 *SLRC Report* (n 61) 13–14 (Mr Wiseman; Mr Byrnes); Wiseman (n 44) 102, 108, 111.

⁹⁶ 1951 *SLRC Report* (n 61) 78 (Mr Fraser). See also at 31 (Mr Jessup, Registrar-General South Australia).

⁹⁷ *Ibid* 78 (Mr Rylah).

⁹⁸ *Abigail v Lapin* (1934) 51 CLR 58.

⁹⁹ 1951 *SLRC Report* (n 61) 75–8.

¹⁰⁰ 1951–52 *SLRC Supplementary Report* (n 61) 13 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England).

¹⁰¹ *Ibid*; Ruoff, ‘An Englishman Looks at the Torrens System: Part 2’ (n 61) 165.

was appropriate for various rights protected by s 42(2). From policy considerations inherent within that balance we can derive a conceptual framework to guide purposive interpretation of the provision.

Two fundamental characteristics justified inclusion as paramount interests: their nature as vulnerable private interests or public interests (Part IV(A)). Moreover, historical material demonstrates that the drafters finely balanced priority choices through twin justifications of discoverability and practicability (Part IV(B)).

A Selection of Interests to be Protected

All paramount interests are either particularly vulnerable private interests or public interests.

1 Particularly Vulnerable Private Interests

The Victorian provision includes private interests vulnerable to elimination by new registrations were it not for the exception: adverse possession,¹⁰² implied or prescriptive easements;¹⁰³ and tenancies in possession.¹⁰⁴ Most are vulnerable because they cannot be registered.

Easements were recognised as paramount interests in 1862.¹⁰⁵ Adverse possession followed in 1866.¹⁰⁶ Inchoate titles of adverse possessors or long users would remain vulnerable until elapse of requisite periods,¹⁰⁷ when registration becomes possible.¹⁰⁸ Until then, without s 42(2)(b) and (d) they would be defeated by new registration. Convincing arguments for abolition aside,¹⁰⁹ while they continue to be recognised,¹¹⁰ they are impossible to register in immature form.

¹⁰² *TLA 1958* (n 1) s 42(2)(b).

¹⁰³ *Ibid* s 42(2)(d). See also broad coverage of easements: *Land Titles Act 1980* (Tas) s 40(3)(e) ('*TLA 1980* (Tas)'); *Transfer of Land Act 1893* (WA) s 68(1A) ('*TLA 1893* (WA)'). In other jurisdictions, protection is narrower: providing exception for 'omitted' easements: *Land Title Act 2000* (NT) s 189(1)(c) ('*TLA 2000* (NT)'); *RPA 1900* (NSW) (n 38) s 42(2)(a1); *RPA 1866* (SA) (n 38) s 69(d). See also *Land Titles Act 1925* (ACT) s 58(1)(b) ('*TLA 1925* (ACT)'). Queensland only protects prior easements, previously recorded easements, or those omitted or misdescribed by registrar error: *Land Title Act 1994* (Qld) ss 185(1)(c), (3) ('*TLA 1994* (Qld)'). Narrowing meaning of 'omitted' easements: *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149. Prescriptive easements are not protected or recognised in all jurisdictions: below n 110.

¹⁰⁴ *TLA 1958* (n 1) s 42(2)(e).

¹⁰⁵ *RPA 1862* (Vic) (n 39) s 39.

¹⁰⁶ *TLA 1866* (n 40) s 49.

¹⁰⁷ In Victoria, 15 years (adverse possession) and 20 years (prescriptive easement): *Limitation of Actions Act 1958* (Vic) s 8; *Nelson v Hughes* [1947] VLR 227; *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415 ('*Sunshine Retail*'); *Laming v Jennings* [2018] VSCA 335, [179]–[198] ('*Laming*').

¹⁰⁸ *TLA 1958* (n 1) ss 60–2, 72(2).

¹⁰⁹ Brendan Edgeworth, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15(1) *Australian Property Law Journal* 1, 23; Victorian Law Reform Commission, *Easements and Covenants: Final Report* (Report No 22, December 2010) 54–5 [4.85]–[4.88].

¹¹⁰ In Western Australia ('WA') and Victoria, prescriptive easements are protected: above n 107; *Maio v City of Stirling* (No 2) [2016] WASCA 45, [72]–[78]; *Maddi Developments Pty Ltd v Perpetual Trustees WA Ltd* [2019] WASC 253, [16]–[20]. Contra in New South Wales ('NSW'): *Williams v State Transit Authority NSW* (2004) 60 NSWLR 286, 297, 299–302. See also Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) [11.16];

Tenancies in possession are susceptible to defeat by registration and were protected from 1866.¹¹¹ Victorian leases of less than three years cannot be registered.¹¹² Section 42(2)(e) is uniquely generous in protecting registrable leases and leases of any duration.¹¹³ The 1949 Bill proposed to remove protection, effectively forcing tenants to caveat or register to protect their interests but was quickly abandoned due to their vulnerability. Weekly tenancies were common in Melbourne,¹¹⁴ and the Committee felt it unfair to expect such short-term tenants to caveat.¹¹⁵ The 1954 Bill therefore reinstated protection.

2 Public Interests

Remaining paramount interests are of a public nature. *TLA 1958* s 42(2) protects governmental interests in reservations in Crown grants;¹¹⁶ public infrastructure in public rights of way;¹¹⁷ and rights to unpaid rates and taxes.¹¹⁸ Arguably existence of inconsistent legislation could sufficiently protect such interests. Indeed, besides Victoria, express protection for such rights is conferred only in Western Australia ('WA'), the Australian Capital Territory ('ACT') and Tasmania.¹¹⁹ Other jurisdictions rely upon inconsistent legislation.¹²⁰ However, two reasons explain why express protection might have been warranted.

The first is abundance of caution. Legislation imposing a charge can override indefeasibility conferred by s 42(1), but the paramount interest removes any doubt. Second, not all unpaid rates and taxes are protected by statutory charge. Parliament

Peter Butt, *Land Law* (Lawbook, 4th ed, 2001) [2071]. See similar conclusion in NT: Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31(1) *Melbourne University Law Review* 3, 24, 26, 28. Abolishing prescriptive easements unless created before 1975: *Property Law Act 1974* (Qld) s 198A. Doctrine of lost modern grant replaced with legislative statutory easements process: *LTA 1980* (Tas) (n 103) ss 138I–L. Doctrine not applicable in South Australia ('SA'): *Yip v Frolich* (2004) 89 SASR 467, 486 [89].

¹¹¹ *TLA 1866* (n 40) s 49.

¹¹² *TLA 1958* (n 1) s 66(1).

¹¹³ In Victoria, tenancies of any length are protected: *ibid* s 42(2)(e); *Swan v Uecker* (2016) 50 VR 74 (Airbnb). Protection is more confined elsewhere, with maximum lease terms of 1 year (SA), 3 years (NSW, Qld, Tas, ACT and NT) and 5 years (WA): *RPA 1866* (SA) (n 38) s 69(h); *RPA 1900* (NSW) (n 38) s 42(1)(d); *LTA 1994* (Qld) (n 103) ss 185(1)(b), (2); *LTA 1980* (Tas) (n 103) s 40(3)(d)(ii); *LTA 1925* (ACT) (n 103) s 58(1)(d); *LTA 2000* (NT) (n 103) s 189(2)(b); *TLA 1893* (WA) (n 103) s 68(1A). Only prior leases are protected in SA, WA, the Australian Capital Territory ('ACT') and NSW. In NSW, the registered proprietor must have taken with notice of the lease. Possession is required in Victoria, WA, NT, and SA (Chambers (n 30) 508 [27.205]), but NSW also protects tenants 'entitled to immediate possession': *RPA 1900* (NSW) (n 38) s 42(1)(d). Not requiring possession: *LTA 1994* (Qld) (n 103) ss 185(1)(b), (2); *LTA 1925* (ACT) (n 103) s 58(1)(d). Note limited protection for equitable leaseholders: *LTA 1980* (Tas) (n 103) s 40(3)(d).

¹¹⁴ *1953 SLRC Report* (n 61) 14 (Mr Byrnes); *1949 SLRC Report* (n 52) 19 (Mr Wiseman, Mr Schilling).

¹¹⁵ See Part IV(B)(1) (b) and Part IV(B)(2)(c). Considered tenants for the purposes of s 42(2)(e) and therefore protected by it, buyers in possession comprised half of 1953 house sales: *1953 SLRC Report* (n 61) 29 (Mr Fox). See also Spagnolo and Rodrick (n 4) 843.

¹¹⁶ *TLA 1958* (n 1) s 42(2)(a).

¹¹⁷ *Ibid* s 42(2)(c).

¹¹⁸ *Ibid* s 42(2)(f).

¹¹⁹ *TLA 1893* (WA) (n 103) s 68(1A); *LTA 1925* (ACT) (n 103) ss 58(1)(f), (2); *LTA 1980* (Tas) (n 103) ss 40(3)(c), (g).

¹²⁰ *Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd* [2019] QSC 265, [112]–[126]; *City of Canada Bay Council v F&D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424, 447–8, [84]–[88].

and the Committee recognised relevant Acts required passage of a specified overdue period before charges arose.¹²¹ The *Local Government Act 1989* (Vic) s 181(1)(a) creates a charge only after amounts are three years overdue. Those overdue by a lesser period remain vulnerable and are mere choses in action.¹²² The Committee recognised that these could not be protected by caveats.¹²³ Such rights cannot be registered, or even stand in a priority dispute. Statutory licences occupy a similar position and were protected from 1866 until 1954.¹²⁴

The Committee assiduously protected the public purse.¹²⁵ Inclusion of reservations in Crown grants and public rights of way is unusual, although not uniquely Victorian.¹²⁶

B *Balancing Priority between Registered and Paramount Interests*

Having identified grounds for selection, this section explores the extent to which paramount interests were considered worthy of priority; the policy behind balances struck by drafters.

In Victoria, tenancies and easements are generously protected; yet protection for rates and taxes is restricted. This distinction reveals much about policy rationale. Historical records show a balancing process was undertaken to define the degree to which priority was appropriate. That drafters were at pains to precisely balance competing registered and paramount interests belies any intent for a two-step priority system. Were that so, the Committee's five years would have been for naught since balances struck would be undone by general law priority rules.

The following analysis reveals that policy choices for priority between registered and paramount interests rested on the concept that it was fair to expect purchasers (registered proprietors) to make reasonable inquiries. Protection was justifiable where competing paramount interests were easily discoverable, and where it was practicable to expect purchasers to undertake investigations to reveal paramount interests, and/or impracticable for paramount interest holders to register or caveat. Thus protection, and its limits, turned on twin justifications of discoverability and practicability.

1 *Discoverability*

Most paramount interests are easily discoverable. That they were 'expected' or 'obvious' is repeated throughout the historical discourse. This supports the proposition that automatic priority was legislatively intended, because generic

¹²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 September 1915, 2507 (Mr Snowball); 1949 Explanatory Paper (n 51) 18; 1949 *SLRC Report* (n 52) 31–2; 1953 *SLRC Report* (n 61) 24 (Mr Fagan, Municipal Association of Victoria), 33–4 (Mr Rylah, Chairman; Messrs Brennan and Banks, Melbourne Metropolitan Board of Works), 39–43 (Appendix A).

¹²² 1953 *SLRC Report* (n 61) 34–5 (Mr Banks, Melbourne Metropolitan Board of Works; Mr McArthur).

¹²³ 1949 Explanatory Paper (n 51) 19; 1949 *SLRC Report* (n 52) 32 (Mr Fraser).

¹²⁴ *TLA 1866* (n 40) s 49 protected mining licences, *TLA 1928* (n 13) s 72 other statutory licences/leases, but these were omitted from the *TLA 1954* (n 40) s 42(2).

¹²⁵ Although private rights were more vulnerable: 1953 *SLRC Report* (n 61) 14 (Mr Wiseman).

¹²⁶ See above n 119.

discoverability can justify deemed (one-step) priority as opposed to a two-step approach reliant upon factual notice.

Ease of discoverability often led drafters to conclude it was fair to expect purchasers to discover the interest because the burden upon them was not too onerous when weighed against vulnerability of competing interests. Discoverability's importance in justifying priority is evident from historical records. The radical 1949 Bill sought to make unregistered interests discoverable by title search,¹²⁷ but never proposed paramount interests should be abolished, or registered or caveated to obtain priority (except tenancies).¹²⁸ They were considered so 'readily ascertainable' that their special protection remained untouched, although this meant not all unregistered interests could be revealed by title search.¹²⁹

Architects of the 1949 and 1954 Bills explained this special treatment through the rationale of discoverability. Wiseman stated that '[t]he characteristic of all those [paramount interest] provisions is that the rights referred to are capable of fairly easy discovery'¹³⁰ and they overrode registered title because they were 'fairly easy to discover'.¹³¹ Garran reasoned that paramount interests were discoverable by search of statutory authority registers or 'fairly obvious' from 'looking at the land itself'.¹³² The 1954 Second Reading Speech described them as 'ascertainable' from statutory authority registers or 'inspection of the land'.¹³³

Careful design of various paramount interests illustrates legislative preoccupation with discoverability as justification for legislatively deemed priority, perhaps most clearly with rates and taxes.

(a) *Unpaid Rates and Taxes*

Reforms to Victorian protection for unpaid rates and taxes clearly demonstrate drafters' concerns that, to gain priority, paramount interests must be easily discoverable. What began as blanket protection for 'any unpaid rates' in 1866¹³⁴ was lengthened in 1915.¹³⁵ The 1949 Bill proposed a return to the earlier, open-ended wording, adding only 'taxes'. The Committee rejected this. To ensure that protected rights were 'discoverable',¹³⁶ it preferred a more precise balance between protected government interests and burdens on purchasers. A laborious five-year enquiry scrutinised the extent to which amounts owed to statutory bodies were ascertainable and therefore deserving of protection.

¹²⁷ 1949 Explanatory Paper (n 51) 2 [6].

¹²⁸ Ibid 3 [6].

¹²⁹ Ibid 18.

¹³⁰ 1953 *SLRC Report* (n 61) 13 (Mr Wiseman).

¹³¹ Ibid 15 (Mr Wiseman). See also Ruoff, 'An Englishman Looks at the Torrens System: Part 1' (n 75) 119.

¹³² 1954 *SLRC Report* (n 56) 15 (Mr Garran).

¹³³ 1954 Second Reading Speech (n 74) 628.

¹³⁴ *TLA 1866* (n 40) s 49.

¹³⁵ *TLA 1915* (n 40) s 72, wording retained in consolidation: *TLA 1928* (n 13) s 72.

¹³⁶ 1949 Bill (n 53) cl 104(e).

Taxes were uncontroversial. They were ‘so well known’¹³⁷ and easily discoverable that purchasers were expected to investigate them.¹³⁸ Moreover, taxes were certified to purchasers pursuant to legislation.¹³⁹ Outstanding rates were harder to discover,¹⁴⁰ but the Committee still considered that purchasers should make enquiries of statutory authorities and noted standard practice was to seek information from municipal councils.¹⁴¹

Yet the Committee did not stop there in drawing the line. It investigated exactly which amounts each statutory authority was legislatively required to disclose to prospective purchasers in binding certificates. It expressed concern over gaps in disclosure requirements and alarm that the *Local Government Act 1946* (Vic) s 385¹⁴² did not require inclusion of road construction, paving or other incidentals in binding municipal certificates. Likewise, certificates issued under the *Sewerage Districts Act 1928* (Vic) were not binding.¹⁴³ It noted that blanket protection had enabled recovery from a purchaser of charges omitted from a binding municipal certificate.¹⁴⁴

The Committee reshaped the balance in two ways. First, protection of unpaid rates was reduced to incentivise accurate disclosure by curtailing priority to amounts discoverable by purchasers from certificates issued pursuant to specified statutes, eliminating priority for omitted amounts.¹⁴⁵ Previously blanket protection was limited in s 42(2)(f) in the *TLA 1954*:

any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-five of the *Local Government Act 1946* section ninety-three of the *Sewerage Districts Act 1928* section three hundred and thirty-four of the *Water Act 1928* ...

Second, the Committee addressed carelessness in disclosure,¹⁴⁶ by recommending reforms to other statutes to precisely align the newly curtailed protection with binding disclosure responsibilities.¹⁴⁷

The legislature intentionally reshaped protection according to discoverability via binding certificates.¹⁴⁸ It aimed to tilt the balance of priorities to reduce

¹³⁷ 1951 *SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia).

¹³⁸ 1951 *SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia), 30 (Mr Fraser), 32 (Mr Rylah); 1949 *SLRC Report* (n 52) 18 (Mr Wiseman). See also Ruoff, ‘An Englishman Looks at the Torrens System: Part 1’ (n 75) 120.

¹³⁹ 1953 *SLRC Report* (n 61) 5 [7(d)] (Committee), referring to *Land Tax Act 1928* (Vic) s 96.

¹⁴⁰ 1949 *SLRC Report* (n 52) 32 (Mr Wiseman); 1954 *SLRC Report* (n 56) 15 (Mr Randles).

¹⁴¹ 1949 *SLRC Report* (n 52) 31 (Mr Wiseman); 1951 *SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia).

¹⁴² 1949 *SLRC Report* (n 52) 31 (Mr Wiseman).

¹⁴³ 1953 *SLRC Report* (n 61) 6 [7(d)] (Committee).

¹⁴⁴ Ibid 24–5 (Mr Rylah, Chairman; Mr Randles; Messrs Rigby and Fagan, Municipal Association of Victoria) discussing *Shire of Braybrook v Robinson* [1920] VLR 552.

¹⁴⁵ 1953 *SLRC Report* (n 61) 24–5 (Messrs Rigby and Fagan, Municipal Association of Victoria).

¹⁴⁶ Ibid 25 (Mr Rigby, Municipal Association of Victoria).

¹⁴⁷ Ibid 6 [7(d)] (Committee), 35 (Mr McArthur).

¹⁴⁸ 1954 Second Reading Speech (n 74) 628; 1953 *SLRC Report* (n 61) 6 [7(d)] (Committee); 1954 *SLRC Report* (n 56) 53 [4] (Appendix A).

government protection,¹⁴⁹ and ‘make it as easy as possible’ for purchasers to ascertain information.¹⁵⁰ Amounts not readily discoverable were no longer protected. This uniquely Victorian formulation¹⁵¹ essentially remains in *TLA 1958*.¹⁵² Notably, preoccupation to precisely align protection with discoverability clearly demonstrates drafters believed it was *they* who were legislatively deeming where priority lay. Discoverability was key to that balance.

(b) *Tenants in Possession and Adverse Possession*

Treatment of adverse possession and tenancies in possession was consistent with rates and taxes; only discoverable interests deserved priority. The Committee recognised that possession (by tenants or adverse possessors) had been considered good notice at general law.¹⁵³ From its inclusion in 1866,¹⁵⁴ Victorian protection for adverse possession was never seriously challenged,¹⁵⁵ perhaps because adverse possession must be overt, thus discoverable.¹⁵⁶

The 1949 Bill proposed removal of protection for tenancies in possession (and statutory licences).¹⁵⁷ Ironically, it was argued that tenants failed the justificatory principle of discoverability because it was ‘very difficult to discover’¹⁵⁸ the identity of tenants, whether they were in possession, and the nature of their rights.¹⁵⁹ The proposal was rejected,¹⁶⁰ and protection for tenants retained in the *TLA 1954*.¹⁶¹ Notably, in reaching this position, the Committee ignored general law priority rules. Instead, it balanced ease of discovery by purchasers against the burdens on tenants of alternative protective measures.¹⁶² Due to their vulnerability, it was considered unfair to expect weekly tenants to caveat.¹⁶³ Given ease of land inspection by purchasers, the Committee concluded that tenants should enjoy priority.¹⁶⁴

¹⁴⁹ 1953 *SLRC Report* (n 61) 24 (Mr Rigby, Municipal Association of Victoria).

¹⁵⁰ Ibid 27 (Mr Fagan, Municipal Association of Victoria).

¹⁵¹ Compare *LTA 1980* (Tas) (n 103) s 40(3)(g) (‘any money charged on land under any Act’).

¹⁵² *TLA 1958* (n 1) s 42(2)(f).

¹⁵³ On tenants in possession, see above n 95. Concerning adverse possession: 1949 *SLRC Report* (n 52) 19 (Mr Wiseman).

¹⁵⁴ *TLA 1866* (n 40) s 49.

¹⁵⁵ Strong objections were raised to reforms permitting registration of title acquired by adverse possession.

¹⁵⁶ However, more difficult to discover is partial adverse possession, which might require precise measurement.

¹⁵⁷ 1949 Bill (n 53) cl 104. Statutory licences were removed: above n 124.

¹⁵⁸ 1949 Explanatory Paper (n 51) 19.

¹⁵⁹ 1949 *SLRC Report* (n 52) 19 (Mr Schilling), 20 (Mr Wiseman), 31 (Mr Wiseman).

¹⁶⁰ 1951 *SLRC Report* (n 61) 7 [18] (Committee), 78 (Mr Voumard); 1953 *SLRC Report* (n 61) 4 [5].

¹⁶¹ *TLA 1954* (n 40). See also *TLA 1958* (n 1) s 42(2)(e). Options to purchase were excluded to overcome *McMahon v Swan* [1924] VLR 397; 1954 *SLRC Report* (n 56) 16 (Mr Garran); 1954 Second Reading Speech (n 74) 629.

¹⁶² See Part IV(B)(2)(c).

¹⁶³ 1951 *SLRC Report* (n 61) 78 (Mr Rylah), 79 (Mr Voumard). See also 1949 *SLRC Report* (n 52) 20 (Mr Wiseman) detailing Law Institute of Victoria objections to removing protection for small tenancies.

¹⁶⁴ 1954 Second Reading Speech (n 74) 629.

Victoria limits protection to tenants 'in possession', a feature also of West Australian, South Australian and Northern Territory ('NT') legislation.¹⁶⁵ This is perhaps influenced by the policy of discoverability. Leases not yet in possession are less easily ascertainable. The exception to tenancy protection further illustrates the delicacy of the balance struck and its rationale. Tenants did not gain priority against registered mortgagees unless their lease pre-dated the mortgage,¹⁶⁶ or the mortgagee's prior written consent was obtained.¹⁶⁷ This remains true today.¹⁶⁸ The exception makes sense given the policy basis for priority of discoverability and the counterbalanced weight of burdens on registered interest-holders. Most registered proprietors are expected to take reasonable steps to discover and prevent paramount interests from arising, but it is less fair to expect this of registered mortgagees that lack possessory rights until default.

(c) *Reservations in Crown Grants*

In Victoria, reservations within Crown grants are paramount interests.¹⁶⁹ These are ascertainable, although costly chain-of-title searches to discover them reinstates a problem that Torrens was designed to eliminate. Drafters lamented undermining this key Torrens aim,¹⁷⁰ but tolerated this nod to *nemo dat non quod habet* since the Crown could compulsorily acquire land in any event.¹⁷¹ Nonetheless, discomfort over difficulty of discovery lingered. Crown reservations were not always noted on title,¹⁷² and the prevalence of 'special railway conditions' caused great consternation.¹⁷³ Multiple attempts to tackle this proved fruitless. A warning clause within standard contractual terms was proposed, but abandoned after legislators realised the warning itself would preclude purchasers from refusing settlement after discovering a reservation.¹⁷⁴ Likewise, an attempt to insert standard warning on certificates of title failed,¹⁷⁵ for comically unrelated reasons.¹⁷⁶

¹⁶⁵ See above n 113.

¹⁶⁶ *Perpetual* (n 2); *Balanced Securities Ltd v Bianco* (2010) 27 VR 599 ('*Bianco*'). See *TLA 1928* (n 13) s 72; *TLA 1915* (n 40) s 72; *TLA 1890* (n 40) s 74; *TLA 1866* (n 40) s 49. See Wiseman (n 44) 108.

¹⁶⁷ Prior mortgagees not bound by registered leases without written consent: *RPA 1862* (Vic) (n 39) s 46; *TLA 1866* (n 40) s 75; *TLA 1890* (n 40) s 99; *TLA 1915* (n 40) s 131; *TLA 1928* (n 13) s 131; *TLA 1954* (n 40) s 66(2); *TLA 1958* (n 1) s 66(2). Purchasers from mortgagee under power of sale not bound by subsequent lease without written consent of the mortgagee: *TLA 1890* (n 40) s 118; *TLA 1915* (n 40) s 150; *TLA 1928* (n 13) s 150; *TLA 1954* (n 40) s 77(4); *TLA 1958* (n 1) s 74(4). See also *1949 SLRC Report* (n 52) 17; *1954 SLRC Report* (n 56) 20 (Mr Garran); *Bianco* (n 166).

¹⁶⁸ *TLA 1958* (n 1) s 66(2) and relevant words in s 77(4) removed by *Transfer of Land Amendment Act 2014* (Vic) ss 11, 15(a). See now *TLA 1958* (n 1) s 87C.

¹⁶⁹ *TLA 1958* (n 1) s 42(2)(a): 'reservations exceptions conditions and powers' in Crown grants.

¹⁷⁰ *1949 SLRC Report* (n 52) 21 (Messrs Reid, Wiseman, Schilling and McDonald); *1951 SLRC Report* (n 61) 45–56, especially 46 (Mr Reid; Mr Knight, Secretary to the Law Department; Mr Oldham, Chairman).

¹⁷¹ Wiseman (n 44) 101; *Chirnside v Registrar of Titles* (1921) VLR 406, 411; à Beckett (n 87) 18.

¹⁷² *1951 SLRC Report* (n 61) 31 (Mr Reid).

¹⁷³ *Ibid* 45 (Mr Reid).

¹⁷⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 1914, 1484–5 (Mr Blackburn, Mr Snowball, on Schedule, Table A contract of sale).

¹⁷⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 7 September 1916, 1273 (Mr Lawson, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2620 (Mr Bailey).

¹⁷⁶ The *Transfer of Land Bill 1916* also dispensed with requirements that title certificates be produced on parchment. The two Houses disagreed on the warning, but parchment became so scarce that the

(d) *Easements and Public Rights of Way*

Normally, public rights of way are easily detected.¹⁷⁷ Unregistered easements less so. Victoria protects implied and prescriptive easements.¹⁷⁸ Inspection may not reveal rights to cross another's land,¹⁷⁹ yet only 'reasonable opportunity' to become aware is required.¹⁸⁰ Fiery legislative debates arose about the unfairness of prescriptive easements and adverse possession, but both interests were thought sufficiently discoverable to remain protected.¹⁸¹

2 *Practicability*

Alongside discoverability, historical records reveal that priority in Victoria was also guided by a second justificatory principle: practicability.

(a) *Non-Proprietary Rights*

Non-proprietary paramount interests were vulnerable to indefeasibility: unpaid rates not yet secured by a charge,¹⁸² and (previously protected) mining licences.¹⁸³ In Victoria, non-proprietary rights cannot be caveated nor registered,¹⁸⁴ making it impracticable to protect them by other means. Drafters supported their protection to avoid detriment to the public purse.¹⁸⁵ Such rights must logically enjoy automatic priority. It would make no sense to include non-proprietary interests were this not so, since they would have no standing in a priority dispute against the registered interest, even one stripped of indefeasibility.¹⁸⁶ Two-step priority would render any legislatively intended protection worthless.

(b) *Lack of Writing*

The protection of vulnerable interests was often motivated by the impracticability of registration due to absence of evidence in writing.¹⁸⁷ Immature prescriptive easements cannot be registered in Victoria.¹⁸⁸ À Beckett explained their inclusion as

Legislative Assembly relented, reluctantly discarding the warning: Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2620 (Mr Bailey).

¹⁷⁷ But see *Calabro v Bayside City Council* [1999] 3 VR 688, [3], [18]. The Calabros registered title to a narrow strip of land. The land had never been named as a street. Nonetheless the court ultimately held it was a public road.

¹⁷⁸ See above nn 58, 107.

¹⁷⁹ See, eg, *Sunshine Retail* (n 107) [82]–[86].

¹⁸⁰ Ibid [126].

¹⁸¹ See above n 155.

¹⁸² *Local Government Act 1989* (Vic) s 181(1)(a).

¹⁸³ See above n 124.

¹⁸⁴ *TLA 1958* (n 1) s 89.

¹⁸⁵ *1951–52 SLRC Supplementary Report* (n 61) 12 (Mr Rylah). While not held in the public interest, statutory licences were a source of government revenue.

¹⁸⁶ *Spagnolo and Rodrick* (n 4) 869.

¹⁸⁷ The same is true for exceptions such as fraud: Ruoff, 'An Englishman Looks at the Torrens System: Part 1' (n 75) 119.

¹⁸⁸ See *Sunshine Retail* (n 107) [8] arguing, although unsuccessfully, that upon court declaration recognising acquisition they would obtain the right to register their prescriptive easement under *TLA 1958* (n 1) s 72(2).

‘obvious’ because they were ‘evidenced by no writing’ and ‘incapable of registration’.¹⁸⁹ Inchoate adverse possessory rights lacked writing, thus it was considered impractical to require their registration.¹⁹⁰ Lack of writing also influenced protection of tenancies, since leases under three years cannot be registered in Victoria.¹⁹¹ Originally, statute of frauds legislation required written evidence only for leases of three years or more.¹⁹² The impracticability of registration for short-term oral leases thus further justified their protection.¹⁹³ Caveats were a potential solution for interests not evidenced in writing, but were counterproductive for inchoate adverse possession or immature prescriptive easements, as the caveat itself might stir owners into action.

(c) *Relative Practicability: Burden of Alternative Protection*

Another historical concern was the balance of inconvenience; burdens of inquiries expected of purchasers were weighed against burdens of alternative protective steps open to paramount interest holders. The abandoned 1949 proposal to remove their protection would have forced tenants to register or caveat.¹⁹⁴ This was thought unfairly onerous upon tenants due to the impracticality of a lack of written evidence in many cases, and the frequency of caveats for short-term tenants.¹⁹⁵ The 1954 Second Reading Speech recognised that to expect weekly tenancies or those leasing flats or rooms to caveat was impractical,¹⁹⁶ given the cost and effort relative to the modest value of short-term leasehold interests. By comparison, purchasers stood to protect interests of relatively larger value, by means of modest burdens of inspection.

Rates and taxes created a burden upon purchasers to enquire of multiple statutory authorities,¹⁹⁷ but this was appropriate given existing standard practice, such that ‘[n]o particular difficulty’ was created by the requirement.¹⁹⁸ Drafters balanced this against the alternative burden; the recurring nature of rates and taxes would make it ‘unreasonable to require a caveat to be lodged’ by statutory authorities to guard the public purse were protection removed.¹⁹⁹ Thus, relative practicability justified retention of protection.

(d) *Clutter*

Another justification was avoidance of clutter on the Register.²⁰⁰ For those interests whose details tended to fluctuate, continued protection was justified simply because

¹⁸⁹ à Beckett (n 87) 46.

¹⁹⁰ Contra, encumbrances ‘created by any deed or writing’ were registrable: *Transfer of Land Statute Act 1885* (Vic) s 41.

¹⁹¹ *TLA 1958* (n 1) s 66(1).

¹⁹² à Beckett (n 87) 83.

¹⁹³ *TLA 1958* (n 1) s 42(2)(c).

¹⁹⁴ *1951 SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia).

¹⁹⁵ 1954 Second Reading Speech (n 74) 629.

¹⁹⁶ *Ibid.*

¹⁹⁷ *1953 SLRC Report* (n 61) 42–3 (Appendix C); *1954 SLRC Report* (n 56) 15 (Mr Garran).

¹⁹⁸ *1949 SLRC Report* (n 52) 31 (Mr Wiseman).

¹⁹⁹ 1949 Explanatory Paper (n 51) 18.

²⁰⁰ Prompting reconsideration of entire 1949 Bill due to the ‘evil’ of clutter: Ruoff, ‘An Englishman Looks at the Torrens System: Part 1’ (n 75) 118; *1951 SLRC Report* (n 61) 32 (Mr Rylah); *1953*

it was ‘impracticable to keep a record’ of them on title.²⁰¹ The impracticability of clutter on the Register was another reason proposed removal of protection for tenants failed; it was ‘absolutely impracticable that all tenancies, down to weekly tenancies, should go on [title]’ as registered leases or caveats.²⁰² Likewise, it was ‘undesirable to clutter up the Register’ with fluctuating rates and taxes by requiring their registration,²⁰³ rather than continued protection as a paramount interest.

(e) *Titles Office Workload*

The removal of some paramount interests threatened ‘unreasonable amount[s] of additional work’ for the Titles Office.²⁰⁴ The removal of unpaid rates and taxes protection would have increased registrations or caveats.²⁰⁵ Fears of worsening Titles Office workloads was further reason for rejection of the radical 1949 proposal to award priority in order of caveat between unregistered interests.²⁰⁶

Today, this seems a strange reason for shaping law reform. What has long been forgotten is that by 1949, the Victorian Titles Office was in a chaotic state of utter disorganisation — significant enough to prompt its complete structural overhaul. There were long delays before registration of lodged dealings.²⁰⁷ In 1951, the Committee remarked on ‘deplorable inefficiency’²⁰⁸ within the Titles Office, such that certificates of title often could not be found and title searches were ineffective to disclose interests because ‘months, and even years, elapse before many dealings lodged for registration are completed’.²⁰⁹ Matters were so bad that it was feared the benefits of the Torrens system had been completely undermined.²¹⁰ After investigating causes of the delays,²¹¹ the Committee deferred substantive law reform from 1949 until 1954 to allow for organisational overhaul.²¹² By then, average registration time had reduced from five months to three weeks,²¹³ but any reforms with potential to increase Titles Office workloads were, understandably, deemed utterly impracticable.

SLRC Report (n 61) 19 (Mr Taylor, Registrar of Titles), 39 (Appendix A: Comments by Mr HD Wiseman on Articles by Mr TBF Ruoff in the *Australian Law Journal*).

²⁰¹ *1953 SLRC Report* (n 61) 15 (Mr Wiseman).

²⁰² *1951 SLRC Report* (n 61) 76 (Mr Rylah).

²⁰³ *1953 SLRC Report* (n 61) 5 [7(d)] (Committee).

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.* But see Part IV(B)(2)(a).

²⁰⁶ See 1949 Bill (n 53) cl 240; *1953 SLRC Report* (n 61) 19 (Mr Taylor, Registrar of Titles).

²⁰⁷ *1951 SLRC Report* (n 61) 38 (Mr Rogers, Law Institute of Victoria, citing *Law Institute Journal* articles), 78 (Mr Voumard).

²⁰⁸ *Ibid* 4 [5] (Committee). See also *ibid* 15–16 (Appendix: Report by Mr Jessup, Registrar-General of South Australia).

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ The main causes were the overlapping responsibilities of Registrar and Commissioner of Titles, and unwarranted Titles Office inquiries into potential competing equitable claims and stamp duties: *ibid* 4 [8], 5 [12], 15 (Appendix), 36 (Mr Rylah), 36 (Mr Fox), 42 (Mr Knight, Secretary to the Law Department); *1951–52 SLRC Supplementary Report* (n 61) 3 [3] (Committee). Mr Knight described the Commissioner as ‘brood[ing] over the Department like a clucky hen’ during questioning about reasons for 24,000 dealings for which registration was being delayed: *ibid* 24 (Mr Knight).

²¹² *1951 SLRC Report* (n 61) 5 [12]–[13] (Committee), 7 [18] (Committee), 79 (Mr Voumard), 82 (Mr Rylah); *1951–52 SLRC Supplementary Report* (n 61) 3 [4] (Committee).

²¹³ 1954 Second Reading Speech (n 74) 630.

V A Conceptual Framework for Victorian Paramount Interests and Its Implications

The above discussion identified the historical rationale behind the protection of paramount interests. Drafters consistently considered policy justifications to carefully balance competing interests, including non-proprietary rights, which underscores the inference that Parliament intended all paramount interests to enjoy automatic priority.

Interests identified as worthy of protection were either vulnerable private interests or public interests. Additionally, two principles justifying priority were discerned from historical records: discoverability and practicability. The legislative endeavour sought to determine which party could most efficiently and fairly bear the costs involved, and granted priority accordingly. This demonstrates a legislative search for the ‘least-cost avoider’ as the apex of an appropriate balance for priority.²¹⁴

Discoverability helped weigh two potential burdens: burdens upon purchasers to investigate; and an alternative burden borne by putative paramount interest holders if protection were withdrawn. The latter were sometimes well-placed to bear that burden efficiently and fairly: such as well-resourced municipal councils could accurately disclose rates; for others, the burdens were too onerous or impracticable: such as requiring weekly tenants caveat every week. Where costs were borne by the particularly vulnerable, or by the public purse, fairness was of heightened importance, especially if discoverability was high, or practicability for putative paramount interest holders low. Balancing these factors gave drafters answers as to who deserved priority.

This represents a conceptual framework of policy justifications that can aid purposive interpretations in future.

A *Implications of Conceptual Framework for Perpetual Principle and Application to other Paramount Interests*

Drafters painstakingly arrived at carefully balanced allocations of relative costs and fairness between competing interests without once alluding to general law priority rules that, if applicable, would often completely reverse the legislatively desired balance. The only plausible conclusion is that the legislature intended paramount interests to enjoy absolute priority over registered interests. If Victorian drafters intended legislatively to deem automatic priority for all paramount interests according to the conceptual framework of policy justifications above, it follows that the *Perpetual* principle runs counter to a purposive interpretation of the *TLA 1958* s 42(2)(e) and is incorrect. Likewise, on a purposive interpretive approach, the *Perpetual* principle should not be extended by analogy to other paramount interests in s 42(2).

²¹⁴ The party with lower costs of avoiding harm is the ‘least-cost avoider’, to which assignment of liability is more efficient: Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).

The better approach would be for interpretation of the entire provision to align with legislative purpose. The construction of all s 42(2) paramount interests as automatically paramount in a manner consistent with the conceptual framework would restore internal coherence within the provision, and resolve the illogical differentiation between sub-s 42(2)(e) and the remainder of s 42(2).

Return to a one-step priority rule would also realign Victoria with all other Australian jurisdictions. Nonetheless, it is worth briefly contemplating whether legislation in other jurisdictions is similarly prone to a *Perpetual*-style misstep (Part V(D)).

B *Using the Conceptual Framework to Guide Purposive Interpretation*

The conceptual framework can guide interpretation. The need for this approach was mentioned in *Laming v Jennings*,²¹⁵ which queried whether s 42(2)(d) only protected long user periods accumulated after registration, or whether it extended to periods accumulated before a new registration so that long user periods subsisted and survived registration. The conceptual framework supports the latter, given that the policy rationale of protecting ‘discoverable’ interests vulnerable to elimination via registration was the policy for continued protection of prescriptive easements.²¹⁶ The final wording was intended only to clearly indicate re-inclusion of implied easements following the failed 1949 attempt to exclude them.²¹⁷ Contrary to conjecture in *Laming*,²¹⁸ the wording was not intended to impose temporal limitations on the protection of prescriptive easements.

C *Implications for Other Exceptions to Indefeasibility*

In the above discussion, I have assumed ‘automatic’ priority operates within other exceptions, and argued that the legislature intended the same approach for paramount interests. Elsewhere, Rodrick and I carefully compare treatment of priority under other exceptions and conclude that a one-step approach applies to them.²¹⁹

However, doubts might be raised in relation to some instances of fraud: where priority has seemingly been determined in reliance on general law rules, despite application of the fraud exception. If so, it could not be said that the fraud exception always attracts one-step priority. False attestation or ‘fraud on the registrar’

²¹⁵ *Laming* (n 107) [194].

²¹⁶ Parts IV(A)(1), IV(B)(1)(d).

²¹⁷ *TLA 1928* (n 13) s 72 words ‘easements acquired by enjoyment or user or subsisting over or upon or affecting such land’ had encompassed both implied and prescriptive easements. The 1949 Bill proposed ‘easements acquired by enjoyment or user’ to limit protection to prescriptive easements alone: 1949 Explanatory Paper (n 51) 18; *1951 SLRC Report* (n 61) 6 [17] (Committee). After the 1949 Bill was abandoned, re-inclusion of implied easements was indicated by the proposed wording ‘howsoever acquired’: *1951 SLRC Report* (n 61) 79–80 (Mr Voumard). The final wording ‘any easements howsoever acquired subsisting over or upon or affecting the land’ was intended to make this re-inclusion clearer: *1954 SLRC Report* (n 56) 54 (Appendix A).

²¹⁸ *Laming* (n 107) [194].

²¹⁹ Spagnolo and Rodrick (n 4) 857–60.

situations are cases in point. In *Hickey v Powershift Tractors Pty Ltd*, the fraud exception applied due to the mortgagee's false attestation, but as Mrs Hickey had wanted the loan and had received the advance, the equitable mortgage was upheld and the mortgagee awarded possession.²²⁰ Similarly, in *Bank of South Australia v Ferguson*, a case involving falsified internal bank documentation, Mr Ferguson had wanted the loan and received the monies.²²¹ Although fraud was not made out, the High Court speculated that, if it had been, relief would have been conditional upon *restitutio in integrum* of loan monies.²²²

The question to be resolved is whether these cases buck the one-step approach. On closer inspection, they do not. In both, fraud was not the only exception in play. The equitable mortgages also enlivened the in personam exception, although not expressly mentioned. While each exception would attract the one-step approach in isolation, where multiple exceptions are invoked, one may 'trump' the other to produce a different outcome than might otherwise result.²²³ Notably, general law priority rules remain irrelevant.

D *Implications for Other Jurisdictions: Does the Perpetual Principle Pose a Risk?*

It is easy to discount *Perpetual* as an anomaly sparked by peculiarly Victorian legislation. The Victorian provision is comparatively broad (covering matters omitted in many jurisdictions)²²⁴ and generous (scope of protection for tenants in

²²⁰ *Hickey v Powershift Tractors Pty Ltd* (1999) NSW ConvR ¶55-889, 56,942.

²²¹ *Bank of South Australia v Ferguson* (1998) 192 CLR 248.

²²² *Ibid* 259.

²²³ Spagnolo and Rodrick (n 4) 857 n 94.

²²⁴ The scope of protection for interests of a similar nature to those listed in the Victorian paramount interest provision varies significantly: *TLA 1958* (n 1) s 42(2) (Crown reservations; adverse possession; public rights of way; easements; tenants in possession; unpaid rates and taxes); *RPA 1900* (NSW) (n 38) s 42(1) (easements, tenancies, profits à prendre); *LTa 1994* (Qld) (n 103) s 185(1) (leases, easements, adverse possession, specified statutory access rights such as geothermal tenure); *LTa 2000* (NT) (n 103) s 189(1) (leases, easements); *RPA 1866* (SA) (n 38) s 69 (easements, adverse possession, leases); *LTa 1980* (Tas) (n 103) s 40(3) (Crown reservation, water body rights, public right of way, tenants in possession, easements, statutory charge, adverse possession, compulsory acquisition); *TLA 1893* (WA) (n 103) s 68(1A) (Crown reservation, adverse possession, public rights of way, easements, unpaid rates, statutory mining leases/licences, tenants in possession); *LTa 1925* (ACT) (n 103) s 58(1) (easements, leases, Territory granted licences, unpaid duties, rates and taxes), s 58(2) (reservations in Crown grants). Note the abolition of adverse possession claims in ACT and Northern Territory ('NT'): *LTa 1925* (ACT) (n 103) s 69; *LTa 2000* (NT) (n 103) s 198. Adverse possession is recognised in SA in very limited situations: see Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th ed, 2020) 184–5 [3.400]. In NSW (except old titles converted to Torrens), no exception exists for inchoate adverse possession due to s 45C, although an adverse possessor who has entirely accrued the requisite possession in the period following registration of the fee simple that the adverse possessor seeks to extinguish can register pursuant to *Real Property Act 1900* (NSW) s 45D. Queensland's protection of adverse possession is restricted to matured adverse possessory rights entitled to registration: *LTa 1994* (Qld) (n 103) s 185(1)(d). By contrast, Victoria, WA and Tasmania preserve both inchoate and matured adverse possessory rights against new registered proprietors: *LTa 1980* (Tas) (n 103) s 40(3)(h); *TLA 1958* (n 1) s 42(2)(b); *TLA 1893* (WA) (n 103) s 68(1A).

possession and easements).²²⁵ So far, no *Perpetual*-style cases have arisen in other jurisdictions, but that does not guarantee their legislation is not prone to similar interpretive folly. After all, before 2010, Victorian tenants were widely thought to enjoy automatic priority.

Some legislative wording clearly militates against this possibility. South Australian legislation expressly deems automatic priority for leases of up to one year, since leaseholder's interests 'prevail' over registered interests.²²⁶ By contrast, New South Wales ('NSW'), WA, the ACT and (other than leases) SA merely list paramount interests as 'exceptions' to indefeasibility,²²⁷ or state registered interests are 'subject to' paramount interests.²²⁸ It will be recalled the Victorian s 42(2) also states land is 'subject to' paramount interests. Consequently, none of these jurisdictions are immune.²²⁹

Wording of Queensland and NT legislation actually specifies that, vis-à-vis paramount interests, registered proprietors 'do not enjoy the benefit' of sections conferring indefeasibility.²³⁰ Likewise, Tasmanian registered proprietors are expressly 'not indefeasible' vis-à-vis listed interests.²³¹ Such wording appears consistent with the *Perpetual* principle that registered title is stripped of indefeasibility by the exception, leaving a justificatory lacuna for priority. Arguably, this indicates Queensland, the NT and Tasmania could be *Perpetual* prone. Yet their legislative structures suggests that a two-step test that resorts to general law priority rules does not necessarily follow.²³² Tasmanian legislation includes fraud in the same subsection listing paramount interests against which registered title is 'not indefeasible'.²³³ As interests affected by fraud undoubtedly attract automatic priority,²³⁴ the words 'not indefeasible' cannot preclude automatic priority for paramount interests. A similar conclusion arises from the Queensland and NT structure, since the subsection listing paramount interest exceptions also restates the in personam exception.²³⁵ Thus, the risk created by more prone legislative wording in these jurisdictions is mitigated slightly by contextual indications which hint that expressions that registered proprietors 'do not enjoy the benefit' of indefeasibility do not necessarily denote two-step priority.

The argument against NSW, SA or ACT being *Perpetual*-prone is stronger. A structural divide exists between NSW, the ACT and SA on the one hand, and WA

²²⁵ Most Australian jurisdictions more narrowly define protected easements and leases: above nn 103, 110 (easements), 113 (tenancies). Conversely, Victoria omits some interests that other jurisdictions protect, eg, mining, geothermal and water rights (Queensland, ACT, WA): above n 224.

²²⁶ *RPA 1866* (SA) (n 38) s 69(h): 'the title of the tenant under such lease... shall prevail' (emphasis added).

²²⁷ Using 'except': *RPA 1900* (NSW) (n 38) s 42(1); *LTA 1925* (ACT) (n 103) s 58(1).

²²⁸ Using 'subject to': *TLA 1958* (Vic) (n 1) s 42(2); *RPA 1866* (SA) (n 38) s 69; *TLA 1893* (WA) (n 103) s 68(1A); *LTA 1925* (ACT) (n 103) s 58(2).

²²⁹ Except for South Australia, but only in regard to leases of up to one year.

²³⁰ *LTA 1994* (Qld) (n 103) s 185(1); *LTA 2000* (NT) (n 103) s 189(1).

²³¹ *LTA 1980* (Tas) (n 103) s 40(3).

²³² Conceivably, identical priority might not have been intended for all subsections, but one would anticipate legislative indication were this so.

²³³ *LTA 1980* (Tas) (n 103) s 40(3).

²³⁴ 'Automatic' priority for the fraud exception is further discussed above in Part V(C).

²³⁵ See, eg, *Tara Shire Council v Garner* [2003] 1 Qd R 556, 564 [23], 585 [90].

and Victoria on the other. As discussed earlier in Part III(A)(3), the Victorian 1954 ‘big split’ shifted exceptions that undoubtedly attract automatic priority (fraud, boundary misdescription and prior certificates) into a different subsection, leaving paramount interests in splendid isolation from their historic neighbours. Western Australian legislation follows a similar split structure to that of Victoria.²³⁶ However, fraud appears within the same subsection as paramount interests in NSW and the ACT,²³⁷ and in the same (undivided) section in SA.²³⁸ Likewise, these jurisdictions retain paramount interests bundled together with exceptions for boundary misdescription and prior certificates.²³⁹ Thus, the structure in these three jurisdictions better preserves the historic connection between these exceptions, providing some protection against a *Perpetual*-style interpretation. While Part III demonstrated it was not intended to signal a two-step priority test, regrettably the Victorian split may have inadvertently contributed to the chain of unfortunate events culminating in the *Perpetual* principle. The same split therefore renders WA particularly vulnerable.

VI Conclusion

Victorian Torrens legislative history provides solid grounds for concluding that paramount interests were intended to enjoy automatic priority over registered interests without resort to general law priority rules. Drafters believed they had deemed when paramount interests were to prevail over registered interests. Rules outside the Torrens system were not intended to play a role in their priority. Instead, the legislative intent was that priority was automatically deemed by s 42(2), and this was justified by balancing interconnected rationales that pinpointed which paramount interests should be protected (vulnerable private interests or public interests), and to what extent (discoverability and practicability).²⁴⁰ It is contended that this conceptual framework was utilised to identify ‘least cost avoiders’, and a fair and appropriate division of burdens between competing interests in a way that can still guide interpretation of the provision today.

It follows that *Perpetual* was incorrect. It ignored historical records that would have revealed the two-step priority approach was not intended by the legislature. A purposive approach would have avoided reintroduction of general law

²³⁶ *TLA 1893* (WA) (n 103) s 68(1) (fraud, registered encumbrances, prior certificate, misdescribed boundaries), s 68(1A) (grant reservations, adverse possession, public rights of way, easements, tenants in possession, unpaid rates, statutory mining leases or licences).

²³⁷ *RPA 1900* (NSW) (n 38) s 42(1) (fraud, prior certificate, easement, profit à prendre, boundary misdescription, and tenancies); *LTA 1925* (ACT) (n 103) s 58(1) (fraud, prior certificate, easements, boundary misdescription, leases, Territory grants (lease/licence), unpaid duties, rates and taxes).

²³⁸ *RPA 1866* (SA) (n 38) s 69 (fraud, forgery/disability, boundary misdescription, easements, prior certificate, adverse possession, leases, and mortgagee’s verification failure). But see, regarding adverse possession, n 224.

²³⁹ See above nn 237–8, although grant reservations are separate in s 58(2) *LTA 1925* (ACT) (n 103) (see n 224).

²⁴⁰ See also Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 3rd ed, 2013) 567 [33.205]–[33.210] (concluding that adverse possession and tenants in possession ‘readily discoverable’ thus justified, but less discoverable easements possibly justified because dominant tenement costs of removal outweigh servient tenement maintenance costs). This is consistent with a least cost avoider approach.

rules in priority disputes involving tenants in possession. Unless otherwise indicated, solutions external to the Torrens system should be avoided lest the ‘simplicity of the Torrens System [...] be destroyed by the importation ... of the esoterics ... of the general law’.²⁴¹

Unfortunately, absence of reference to legislative history is not unique to *Perpetual*. Apart from the passing allusion by Latham CJ, legislative history was not drawn upon in *Burke* and *Barba*. In this article, I also contended that the rationes decidendi of those High Court of Australia decisions do not support the *Perpetual* principle in any event.

The Victorian situation stands as a salient tale of woe, and reminder that historical analysis can underpin a purposive interpretation to avoid such interpretive mishaps. Examination of historical intent can even guide a more cohesive and coherent interpretation that aligns with related legislative provisions, and provide a better understanding of how provisions operate in tandem. It is to be hoped that historical perspectives will not be overlooked in future decisions on paramount interests.

²⁴¹ Ruoff, ‘An Englishman Looks at the Torrens System: Part 2’ (n 61) 165.

Case Note

Palmer v Western Australia: A Critique of the High Court of Australia's Approach to Constitutional Review of Executive Exercises of Power

Tom Manousaridis*

Abstract

In *Palmer v Western Australia*, the High Court of Australia dismissed a challenge to Western Australia's border closure, which was implemented to prevent the spread of the COVID-19 virus. Mr Palmer challenged the *Quarantine (Closing the Border) Directions* (WA), which were authorised by the *Emergency Management Act 2005* (WA), on the basis that they infringed freedom of intercourse between the states guaranteed by s 92 of the *Australian Constitution*. The High Court dealt with several constitutionally significant issues, but an aspect of the decision that has received less attention is the Court's further endorsement and application of the approach to constitutional review of executive exercises of power taken in *Wotton v Queensland*, which only allows constitutional analysis to be directed at the impugned legislation, not the exercise of executive power under that legislation. This case note suggests that this approach has several shortcomings, and the approach will be difficult to apply in practice. As such, the High Court may wish to reconsider this approach to constitutional review of executive exercises of power.

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I Introduction

To prevent the COVID-19 virus from infecting Western Australians, the State Emergency Coordinator issued the *Quarantine (Closing the Border) Directions* (WA) ('Directions') on 5 April 2020,¹ which closed the Western Australian border to all persons unless they were an exempt traveller under the Directions. While this was seen as a drastic response at the time, border closures and internal travel restrictions have become ubiquitous in Australia during the COVID-19 pandemic. Eventually, the Directions were challenged in the High Court in *Palmer v Western Australia*² on the basis that the Directions infringed s 92 of the *Australian Constitution* ('*Constitution*') by restricting freedom of intercourse between the states. *Palmer* is a significant decision for several reasons,³ including its unification of the test to determine an infringement of both the trade and commerce and intercourse 'limbs' of s 92⁴ and its discussion of structured proportionality analysis.⁵ However, a development that has not received as much attention is the High Court's decision to assess the constitutionality of the *Emergency Management Act 2005* (WA) ('*EM Act*') rather than the exercise of executive power under the *EM Act*; namely, the Directions. This is despite Mr Palmer directing the constitutional challenge at the Directions. Directing constitutional analysis at the impugned legislation, rather than the exercise of executive power, was an application of the approach taken by the majority of the High Court of Australia in *Wotton v Queensland*.⁶ However, the *Wotton* approach can be problematic and its further application by the High Court raises several issues for future challenges to the constitutionality of executive exercises of power. It is this aspect of *Palmer* that I will explore in this case note. Part II provides a brief explanation of the background and findings of the case. Part III provides a detailed overview of the *Wotton* approach and how the High Court applied it in *Palmer*. Part IV outlines both the strengths and weaknesses of the *Wotton* approach. Part V argues that the deficiencies in the *Wotton* approach have not been remedied after *Palmer*, and that courts determining future challenges to the constitutionality of executive exercises of power will struggle with applying the *Wotton* approach as further developed in *Palmer*.

¹ Commissioner of Police and State Emergency Coordinator, *Quarantine (Closing the Border) Directions* (WA) (5 April 2020) ('Directions').

² *Palmer v Western Australia* (2021) 388 ALR 180 ('*Palmer*').

³ Also published in this issue of the *Sydney Law Review* is Anuki Suraweera's case note, which explores the unification of s 92 and the High Court's discussion of structured proportionality analysis in greater depth.

⁴ See David J Townsend, 'Constitutional Algebra: *Palmer v Western Australia* Reunites the Broken Parts of s 92' (2021) 76 *Law Society Journal* 84.

⁵ Amanda Stoker and Jye Beardow, "'Mr McGowan, Tear Down This Wall!': Section 92 after *Palmer v Western Australia*' (Speech, Samuel Griffith Society, 2021 Online Speaker Series) 10.

⁶ *Wotton v Queensland* (2012) 246 CLR 1 ('*Wotton*').

II The Case

A Background

COVID-19 is a novel respiratory virus with the potential to cause severe health problems. It was officially detected in Australia for the first time on 25 January 2020⁷ and was declared a pandemic by the World Health Organization on 11 March 2020.⁸ To prevent the spread of COVID-19, several Australian states and territories prevented persons living or residing in other states or territories from entering their jurisdictions.⁹ Western Australia was one of these states. Using powers conferred by s 67 of the *EM Act*, the Western Australian Government prohibited entry into Western Australia by issuing the Directions, which came into effect on 5 April 2020.¹⁰ The Directions had the effect of closing ‘the border of Western Australia to all persons from any place unless they were the subject of exemption under the Directions’.¹¹

B Relevant Legislative Provisions

The relevant provisions of the *EM Act* for the purposes of this case note are ss 56 and 67. Section 56(1) of the *EM Act* permits the Minister for Emergency Services (‘the Minister’) to ‘declare that a state of emergency exists in the whole or in any area or areas of the State’. Section 56(2) outlines the conditions that the Minister must fulfil in order to make a state of emergency declaration, which include considering the advice of the State Emergency Coordinator¹² and being satisfied ‘that extraordinary measures are required to prevent or minimise ... loss of life, prejudice to the safety, or harm to the health, of persons or animals’.¹³ A state of emergency initially lasts for three days,¹⁴ but can be extended for up to 14 days and is then renewable.¹⁵

Once a state of emergency is declared under s 56, s 67 of the *EM Act* outlines the powers that can be exercised relating to movement for the purposes of emergency management:

67. Powers concerning movement and evacuation

For the purpose of emergency management during an emergency situation or state of emergency, a hazard management officer or authorised officer may do all or any of the following —

⁷ Department of Health (Cth), ‘First Confirmed Case of Novel Coronavirus in Australia’ (Media Release, 25 January 2020).

⁸ *Palmer* (n 2) 183 [1] (Kiefel CJ and Keane J).

⁹ See Rebecca Storen and Nikki Corrigan, ‘COVID-19: A Chronology of State and Territory Government Announcements (up until 30 June 2020)’ (Research Paper Series 2020–21, Parliamentary Library (Cth), 22 October 2020) 6. The specifics of these orders have varied slightly throughout Australia over the course of the pandemic, and some jurisdictions made exceptions for their residents to return.

¹⁰ Directions (n 1) [3].

¹¹ *Palmer* (n 2) 184 [7] (Kiefel CJ and Keane J).

¹² *Emergency Management Act 2005* (WA) s 56(2)(a) (‘*EM Act*’).

¹³ *Ibid* s 56(2)(c)(i).

¹⁴ *Ibid* s 57.

¹⁵ *Ibid* s 58.

- (a) direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area;
- (b) direct the evacuation and removal of persons or animals from the emergency area or any part of the emergency area;
- (c) close any road, access route or area of water in or leading to the emergency area;
- (d) direct that any road, access route or area of water in or leading to the emergency area be closed.

An ‘emergency area’ can include the entirety of Western Australia.¹⁶ ‘Emergency management’ is defined in s 3 of the *EM Act*:

emergency management means the management of the adverse effects of an emergency including —

- (a) prevention — the mitigation or prevention of the probability of the occurrence of, and the potential adverse effects of, an emergency; and
- (b) preparedness — preparation for response to an emergency; and
- (c) response — the combating of the effects of an emergency, provision of emergency assistance for casualties, reduction of further damage, and help to speed recovery; and
- (d) recovery — the support of emergency affected communities in the reconstruction and restoration of physical infrastructure, the environment and community, psychosocial and economic wellbeing[.]

C The Challenge and Findings

In May 2020, Mr Palmer, former Member of Parliament and current chairman of the United Australia Party, was denied an exemption under the Directions to travel to Western Australia.¹⁷ As a result, he challenged the Directions in the High Court.

The substantive question to be determined by the High Court was whether the Directions and/or the *EM Act* were ‘invalid (in whole or in part, and if in part, to what extent) because they contravene s 92 of the *Constitution*’.¹⁸ While the plaintiffs challenged the validity of the Directions and the *EM Act* on s 92 grounds, they also submitted that the High Court should assess the constitutionality of the Directions rather than the *EM Act*. Victoria, intervening, submitted that the question reserved ‘can be answered by focusing on the legislative scheme ... rather than any particular exercise of statutory power’.¹⁹

The High Court unanimously held that ss 56 and 67 of the *EM Act* ‘in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the

¹⁶ Ibid s 3 (definition of ‘emergency area’).

¹⁷ Henry Cooney and Harry Sanderson, ‘Border Closures and s 92: Clive Palmer’s Quest to Enter WA’, *Australian Public Law (AUSPUBLAW)* (Blog Post, 4 August 2020) <<https://auspublaw.org/2020/08/border-closures-and-s-92-clive-palmers-quest-to-enter-wa/>>.

¹⁸ Clive Frederick Palmer, ‘Plaintiffs’ Submissions’, Submission in *Palmer v Western Australia*, Case No B26/2020, 22 September 2020, 2 [2].

¹⁹ Attorney-General (Vic), ‘Submissions of the Attorney-General for the State of Victoria (Intervening)’, Submission in *Palmer v Western Australia*, Case No B26/2020, 19 October 2020, 5 [10].

Constitution in each of its limbs'.²⁰ Each Justice also held that constitutional analysis could only be directed at the *EM Act* as opposed to the Directions, given the exercise of the power conferred by the *EM Act* 'does not raise a constitutional question'.²¹ Provided that the *EM Act* itself does not infringe the *Constitution*, the Directions could only be invalidated on statutory grounds in an administrative challenge (that is, if the Directions went beyond their statutorily defined jurisdiction) and the issue of whether they comply with the *Constitution* would not arise. This finding was based on the application of the majority approach in *Wotton*.

III The *Wotton* Approach and its Application in *Palmer*

In accepting that constitutional review can only be directed at enabling legislation and not the executive exercise of power, *Palmer* adopted and further entrenched the *Wotton* approach to constitutional review.²² An application of the *Wotton* approach results in exercises of executive power only being challenged on administrative grounds of review, provided that the authorising legislation is not invalid on its face and does not need to be read down to comply with the *Constitution*. Before evaluating the *Wotton* approach and its development in *Palmer*, it is necessary to understand what the *Wotton* approach is and how exactly it was applied in *Palmer*.

A Overview of *Wotton*

The High Court of Australia has, on several occasions, considered how it should assess the constitutionality of executive exercises of power and its approach has evolved.²³ For instance, prior to *Wotton* the High Court was reticent to leave exercises of power solely to administrative review applications due to, inter alia, underdeveloped grounds of review.²⁴ However, this and other concerns have dissipated, paving the way for the High Court to adopt the approach undertaken in *Wotton*.

Mr Wotton was convicted of an offence under the *Criminal Code Act 1899* (Qld) in relation to riots on Palm Island in November 2004.²⁵ Mr Wotton challenged provisions that permitted a parole board to impose bail conditions that allegedly impugned the implied freedom of political communication.

In considering Mr Wotton's challenge, the majority made observations regarding how discretionary executive decisions made under an authorising statutory provision are kept within their constitutional limits. The majority in *Wotton* applied Brennan J's judgment in *Miller v TCN Channel Nine Pty Ltd*,²⁶ and concluded that 'the discretionary powers must be exercised in accordance with any applicable law,

²⁰ *Palmer* (n 2) 255 [293].

²¹ *Ibid* 256 [293].

²² David Hume, '*Palmer v Western Australia* (2021) 95 ALJR 229; [2021] HCA 5: Trade, Commerce and Intercourse Shall be Absolutely Free (Except When It Need Not)', *Australian Public Law (AUSPUBLAW)* (Blog Post, 23 June 2021) <<https://auspublaw.org/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5/>>.

²³ James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324, 327 ('Constitutional Limitations and Statutory Discretions').

²⁴ *Ibid*.

²⁵ *Wotton* (n 6) 8 [4] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁶ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 ('*Miller*').

including the *Constitution* itself.²⁷ Brennan J in *Miller* held that while a statutory discretion must be wide in its application out of necessity, ‘it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account’.²⁸

In adopting Brennan J’s approach, the majority in *Wotton* held that ‘the conferral by statute of a power or discretion upon [an administrative body] will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act ultra vires’.²⁹ That is to say, given the legislation conferring executive decision-making power is itself limited by the *Constitution*, the exercise of executive power cannot go beyond the limits imposed by the *Constitution*. The Commonwealth’s submissions in *Wotton* adopted this approach. The High Court accepted these submissions and summarised them as follows:

The Commonwealth submitted that: (i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case ... does not raise a constitutional question, as distinct from a question of the exercise of statutory power. ...

The Commonwealth further, and correctly, developed these points by emphasising ... that if the power or discretion be susceptible of exercise in accordance with the constitutional restriction upon legislative power, then the legislation conferring that power or discretion is effective in those terms. No question arises of severance or reading down of the legislation.³⁰

This summary constitutes the *Wotton* approach to constitutional review.

Stellios has noted that propositions (i)–(iv) in the Commonwealth’s submissions ‘identify judicial review in the classic binary way’ by separating constitutional review (undertaken at the level of the enabling statute) from judicial review (undertaken at the level of the exercise of power).³¹ He explores this binary by placing legislative provisions that confer executive decision-making power into four categories. In the first three categories, it is clear at what stage constitutional and judicial reviews take place:

1. If the statutory discretion fails to comply with the constitutional limitation, then it is invalid on its face.
2. If the statutory discretion is completely within the bounds of the constitutional limitation, the statutory discretion is entirely valid in all circumstances (provided it is within jurisdiction).

²⁷ *Wotton* (n 6) 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁸ *Miller* (n 26) 613 (Brennan J).

²⁹ *Wotton* (n 6) 14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

³⁰ *Ibid* 14 [22]–[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

³¹ Stellios, ‘Constitutional Limitations and Statutory Discretions’ (n 23) 334.

3. If the statutory discretion is calibrated in its terms to the constitutional limitation, constitutional review takes ‘an abbreviated form’ and administrative review ensures that the exercise of power was made within limits.³²

The fourth category is what Stellios calls the difficult category:

4. Legislation falls within the difficult category when it cannot be determined that, in all its possible operations, it will comply with the *Constitution*.³³ This may occur when legislation is cast in broad terms and has no mechanism to limit its applicability.

For legislation that falls within the difficult category, it may be appropriate to direct constitutional review at the exercise of executive power, rather than the impugned legislation, creating an exception to the general approach taken in *Wotton*.

B *The Application of Wotton in Palmer*

Each Justice in *Palmer* applied the *Wotton* approach, and instead of assessing the constitutionality of the Directions, their Honours assessed whether the impugned provisions of the *EM Act* infringed the *Constitution*.

Kiefel CJ and Keane J expressly adopted Victoria’s intervening submission, which urged applying the *Wotton* approach.³⁴ Their Honours held that ‘the question of compliance with the constitutional limitation is answered by the construction of the statute. This is consistent with an understanding that constitutionally guaranteed freedoms operate as limits on legislative and executive power.’³⁵ Their Honours also acknowledged the existence of the exception to the *Wotton* approach by noting that ‘[i]n some cases difficult questions may arise because the power or discretion given by the statute is broad and general.’³⁶ However, their Honours did not hold that the *EM Act*’s provisions fell into the difficult category, as the prohibition on entry into Western Australia ‘is largely controlled by the EM Act itself and is proportionate to its purposes’.³⁷

Gageler J also held that constitutional analysis must be directed at the legislation and clearly distinguished between the ‘statutory question’ and the ‘constitutional question’.³⁸ Like Kiefel CJ and Keane J, Gageler J noted the existence of the difficult category and held that in such cases the constitutional and statutory questions

can converge ... in respect of executive action undertaken in the exercise of a discretionary power conferred by a statutory provision that is so broadly expressed as to require it to be read down as a matter of statutory construction to permit only those exercises of discretion that are within constitutional limits.³⁹

³² Ibid 335.

³³ Ibid 337.

³⁴ *Palmer* (n 2) 196 [63], [65].

³⁵ Ibid 196 [65] (Kiefel CJ and Keane J).

³⁶ Ibid 197 [68] (Kiefel CJ and Keane J).

³⁷ Ibid.

³⁸ Ibid 208 [119].

³⁹ Ibid 209 [122] (Gageler J).

This convergence can occur when there is not ‘a ready answer’⁴⁰ as to whether a statutory discretion that could impose a burden on constitutional freedoms was justified ‘across the range of potential outcomes of the exercise of that discretion’.⁴¹ When a convergence occurs, the Court may assess whether the exercise of power infringes the *Constitution* by asking the hypothetical: ‘If the subordinate legislation in issue had been enacted as legislation, would that legislation have been compliant with the constitutional guarantee in issue?’.⁴² However, like Kiefel CJ and Keane J, Gageler J did not think that the *EM Act* fell into this category. Asking this hypothetical question with the Directions would fail ‘to acknowledge the constitutional significance of critical constraints built into the scheme of the Act which sustained the Directions’.⁴³

Edelman J also adopted the *Wotton* approach and identified two premises underlying the application of the approach. First, ‘questions of constitutional validity should be determined at the level of an empowering statute’⁴⁴ and leave the validity of an exercise of power ‘to be resolved by reference to whether the valid statute empowers that action’.⁴⁵ Second, the answer to the question before the High Court did not determine the validity of the impugned provisions of the *EM Act* ‘in all of their applications’.⁴⁶ Despite the slightly different approach, his Honour held that the constitutional analysis must be undertaken at the level of the enabling statutory provisions and, in this case, they did not infringe s 92.

Gordon J adopted the *Wotton* approach without qualification.⁴⁷

Following *Palmer*, it appears that there is little room for constitutional analysis to be directed at an exercise of executive power like the Directions. Such an approach suffers from several practical and theoretical shortcomings, and it is unclear how it would be applied in practice.

IV Analysing the *Wotton* Approach

A *Strengths*

The main strength of the *Wotton* approach, at least in the eyes of the executive branch of government, is that it limits the ways in which executive actions can be challenged.⁴⁸ In a constitutional challenge against an executive exercise of power, the constitutional analysis is limited to the impugned legislation (except when legislation falls within the difficult category), with the challenge to the exercise of executive power being limited to administrative grounds of review. Such a result means that the executive can act without the threat of a constitutional challenge

⁴⁰ Ibid 209 [123] (Gageler J).

⁴¹ Ibid.

⁴² Ibid 209 [124] (Gageler J).

⁴³ Ibid 210 [126] (Gageler J).

⁴⁴ Ibid 234 [224] (Edelman J).

⁴⁵ Ibid.

⁴⁶ Ibid 235 [226] (Edelman J).

⁴⁷ Ibid 229 [201] (Gordon J).

⁴⁸ See Hume (n 22).

looming over each exercise of executive power made under an enabling piece of legislation.

In this regard, the *Wotton* approach is a practical one. Courts do not want to unnecessarily burden the executive in a way that prevents them from dealing with urgent crises. The judicial acknowledgment of ‘problems of society’⁴⁹ has led to an acceptance of the need to ‘confer, and to uphold the validity of, administrative powers which involve constitutional interpretation, constitutional fact findings and the making of decisions whose validity depends on a constitutional purpose’.⁵⁰

B Weaknesses

The *Wotton* approach has been criticised for not adequately reflecting the principle that the *Constitution* limits both legislative and executive power. Prior to *Palmer*, the High Court in *Comcare v Banerji* considered the question of where constitutional review should be directed.⁵¹ *Comcare* involved a challenge to the termination of an Australian Public Service (‘APS’) employee who allegedly infringed the APS Code of Conduct due to social media posts, and a subsequent Administrative Appeals Tribunal decision that the termination was unlawful as it burdened the implied freedom of political communication.⁵² It was ultimately held by the High Court that the termination of the employee was not unlawful. However, the Australian Human Rights Commission (‘AHRC’) as amicus curiae submitted that constitutional analysis should be directed at individual exercises of executive power.⁵³ Given the implied freedom ‘acts as a limit on both legislative *and* executive power’,⁵⁴ the constitutional limitation ‘operates *directly* on the exercise’⁵⁵ of executive power and therefore ‘a constitutional challenge to the exercise of a statutory discretion may be resolved at *either* the statutory level or at the level of the individual exercise’⁵⁶ (although this argument was ignored by the plurality and rejected by Gageler J).⁵⁷ Gageler J in *Palmer* also acknowledged that s 92, like the implied freedom of political communication, operates as a limitation on both Commonwealth and state/territory legislative and executive power.⁵⁸ Given the *Wotton* approach directs constitutional analysis at impugned legislation and not executive power (except in narrow circumstances), the approach does not fully give effect to the principle that constitutional provisions limit both executive and legislative power.

It is also unclear how the *Wotton* approach will apply to legislation that falls within the difficult category. In such cases, courts will interpret the legislation in such a way that the statutory conferral of jurisdiction is ‘read ... to only authorise

⁴⁹ James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015) 333.

⁵⁰ *Ibid.*

⁵¹ *Comcare v Banerji* (2019) 267 CLR 373 (‘*Comcare*’).

⁵² *Ibid* 388–9 [1] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁵³ Australian Human Rights Commission (‘AHRC’), ‘Submissions of the Australian Human Rights Commission Seeking Leave to Appear as Amicus Curiae’, Submission in *Comcare v Banerji*, Case No C12/2018, 12 December 2018, 3–4 [9]–[10] (‘AHRC *Comcare* Submissions’).

⁵⁴ Kieran Pender, ‘*Comcare v Banerji*: Public Servants and Political Communication’ (2019) 41(1) *Sydney Law Review* 131, 141 (emphasis in original).

⁵⁵ *Ibid* (emphasis in original).

⁵⁶ *Ibid* (emphasis in original).

⁵⁷ *Comcare* (n 51) 408 [51] (Gageler J).

⁵⁸ *Palmer* (n 2) 208 [117].

decisions that would comply with the constitutional limitation'.⁵⁹ The AHRC in its *Comcare* amicus curiae submissions criticised this approach as it involved reading the statutory text as if 'it contained the words "unless the particular exercise of discretion would be contrary to the implied freedom"', which may be contrary to its ordinary meaning.⁶⁰ This method of interpretation risks legislation being construed in a way that distorts its ordinary and intended meaning to prioritise its validity. The AHRC argued that if legislation is interpreted in this way, legislation 'is less accessible to the public, Parliament is less accountable to the electorate ... [and a] toll is exacted on the rule of law when the meaning of a law departs markedly from its ordinary meaning'.⁶¹

Finally, there is a concern that 'administrative law has simply not developed a framework with which to undertake' the task of reviewing the constitutionality of an impugned exercise of executive power.⁶² While there have been 'attempts to incorporate constitutional limitations into existing administrative grounds of review', there has not been universal acceptance of this approach by the courts.⁶³ Furthermore, while a decision-maker who acts contrary to a constitutional freedom 'has committed a jurisdictional error, this acknowledgment hardly advances the search for an appropriate framework to assess the decision-maker's compliance with the freedom'.⁶⁴

V Lingering Theoretical and Practical Difficulties from *Palmer*

Palmer's application of *Wotton* has highlighted further difficulties with the High Court's approach to constitutional review of executive exercises of power.

A The Difficult Category: A Lingering Uncertainty

Each Justice in *Palmer* recognised that when a court is faced with a constitutional challenge that involves legislation falling within the difficult category, (namely legislation that is so wide in its operation that it is not clear whether it will, in all circumstances, be in accordance with the *Constitution*), the strict application of the *Wotton* approach may become impractical. In these difficult cases, it may be appropriate to direct constitutional analysis at the executive action itself. However, because the *EM Act* did not fall within the difficult category, the Justices in *Palmer* did not provide any detailed guidance as to when and how the exception is applicable, leaving this challenge to lower courts.

This challenge was faced shortly after *Palmer* by the Supreme Court of Victoria in *Cotterill v Romanes*.⁶⁵ The challenge in *Cotterill* was directed at a Victorian exercise of executive power that restricted movement to prevent the spread

⁵⁹ Stellios, 'Constitutional Limitations and Statutory Discretions' (n 23) 338.

⁶⁰ AHRC *Comcare* Submissions (n 53) 13 [47].

⁶¹ *Ibid* 12 [45] (citations omitted).

⁶² Kieran Pender, "'Silent Members of Society'? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 344.

⁶³ *Ibid* 345.

⁶⁴ *Ibid*.

⁶⁵ *Cotterill v Romanes* (2021) 360 FLR 341 ('*Cotterill*').

of COVID-19. Ms Cotterill challenged a fine she received for allegedly breaching the *Stay at Home Directions (Restricted Areas) (No 14)* (Vic) ('*Victorian Directions*') issued under the *Public Health and Wellbeing Act 2008* (Vic) ('*PHW Act*') during Victoria's second outbreak of the COVID-19 virus in 2020. Ms Cotterill challenged the constitutional validity of the *Victorian Directions* rather than the *PHW Act*, arguing that they burdened the implied freedom of political communication.⁶⁶ Ms Cotterill submitted that the difficult category exception applied because the *PHW Act* was cast too broadly, meaning the constitutional analysis should be directed at the *Victorian Directions*, rather than the *PHW Act*. This was rejected by Niall JA applying *Palmer*.⁶⁷ Given the similarity between the impugned statutory provisions in *Cotterill* and *Palmer*, his Honour was able to reason by analogy to conclude that the *PHW Act* was not so wide as to apply the exception. His Honour concluded that the *PHW Act*'s 'criteria, the context in which the power arises, and the manner of its exercise is tightly prescribed' like the *EM Act*'s powers are, meaning that the exception did not apply.⁶⁸

While Niall JA was able to rely on the similarity between the Victorian and Western Australian acts to reach his conclusion, not all public health legislation across the country is similar to either the *EM Act* or the *PHW Act*. Take, for example, New South Wales' *Public Health Act 2010* (NSW) ('*Public Health Act*'). Section 7 of the *Public Health Act* gives the Minister for Health a wide range of powers to respond to a risk to public health. If the Minister for Health considers, on reasonable grounds, that there is or is likely to be a risk to public health,⁶⁹ he or she 'may take such action' and 'give such directions' that the Minister considers necessary to deal with the risk and its possible consequences.⁷⁰ This provision was used to impose restrictions along the New South Wales border and 'lock down' metropolitan areas during the COVID-19 Delta variant outbreak in Sydney in 2021. Unlike the *EM Act* or the *PHW Act*, s 7 of the *Public Health Act* is a broad and general power. Given the findings in *Cotterill* were based, in part, on the fact that the impugned provision of the *PHW Act* was 'not broad or general in the sense described by Kiefel CJ and Keane J in *Palmer*',⁷¹ it is unclear how courts would approach a challenge to an order made under a broader provision such as s 7 of the *Public Health Act*, which would likely fall within the difficult category.

B *The High Court's Own Difficulty in Applying the Approach*

In *Palmer*, despite each Justice holding that they were only considering the constitutional validity of the *EM Act* rather than the Directions, some of the Justices appear to have considered the effect of the Directions (that is, the impact that the Directions would have on the health of Western Australians) in their assessment of the constitutionality of the *EM Act*. This goes beyond the provisions of the *EM Act* and instead involves the consideration of an exercise of power under the *EM Act*.

⁶⁶ Ibid 245–6 [10] (Niall JA).

⁶⁷ Ibid 383 [205] (Niall JA).

⁶⁸ Ibid 383–4 [207] (Niall JA).

⁶⁹ *Public Health Act 2010* (NSW) s 7(1) ('*Public Health Act*').

⁷⁰ Ibid s 7(2).

⁷¹ *Cotterill* (n 65) 383 [207].

This was most obvious in Kiefel CJ and Keane J's joint judgment⁷² when their Honours stated that s 67 of the *EM Act* is valid in part because there is 'little room for debate about effective alternatives' to the border closure imposed by the Directions.⁷³ The consideration of the exercise of power in determining the constitutional validity of legislative provisions indicates that while the strict distinction between statutory analysis and constitutional analysis is theoretically possible, in practice it is difficult to keep the two kinds of analysis separate.

Beyond demonstrating the practical difficulties in applying the *Palmer* approach, the joint judgment highlights how directing structured proportionality analysis solely at the legislation would result in an analysis that fails to consider the factual circumstances in which a challenge arises. If a court applies the approach taken in *Palmer* strictly, it cannot consider the actual application of the impugned legislation through the exercise of executive power when it undertakes structured proportionality analysis. Such a result would divorce constitutional analysis from the facts that exist when the challenge is made. To remedy such a result, structured proportionality analysis would have to consider, in some way, the factual circumstances by focusing on the exercise of executive power through instruments such as the Directions. This difficulty is most evident when hypothetical constitutional challenges to exercises of executive power are considered.

C *Hypothetical Challenges: Difficulties in Applying the Approach in Practice*

The *Wotton* approach can also lead to an outcome where an executive exercise of power can be found to comply with the *Constitution*, given the *Wotton* approach only permits constitutional analysis to be directed at the impugned statute. But if that same executive exercise of power were enacted as legislation, it would infringe the *Constitution*. To demonstrate these strange outcomes, it is best to use a hypothetical challenge to the Directions and the *EM Act* in different factual circumstances.

Consider a scenario in which some states and territories have very low or zero COVID-19 transmission, or a scenario in which there is community transmission of COVID-19, but there is a high national COVID-19 vaccination rate. In either scenario, the danger posed to Western Australians by COVID-19 is significantly reduced. Presume that an individual who is either from a state or territory with low to zero COVID-19 transmission, or is fully vaccinated against COVID-19, attempts to enter Western Australia, is denied entry due to the Directions and challenges the Directions on the basis that they infringe s 92 of the *Constitution*. This challenge takes place shortly after judgment in *Palmer* is delivered.

In the hypothetical challenges, the court must first consider whether the Directions are ultra vires the *EM Act*. For an authorised officer to exercise restrictions on movement pursuant to s 67, the Minister must validly declare a state of emergency. If the Minister has considered the advice of the State Emergency Coordinator⁷⁴ and he or she is satisfied that extraordinary measures are required to

⁷² See *Palmer* (n 2) 198–9 [76]–[81].

⁷³ *Ibid* 199 [80].

⁷⁴ *EM Act* (n 12) s 56(2)(a).

prevent or minimise loss of life or harm to the health of people,⁷⁵ they may be satisfied that an emergency is imminent,⁷⁶ enabling the Minister to validly declare a state of emergency. This is so because, despite there being little to no COVID-19 in some states or territories, there is a real risk that it could enter Western Australia undetected.

With a state of emergency validly declared, the Minister may restrict movement within the State⁷⁷ by exercising powers granted in s 67 of the *EM Act*. The movement restriction powers may only be used for the purpose of emergency management,⁷⁸ which includes the ‘mitigation or prevention of the probability of the occurrence of, and the potential adverse effects of, an emergency’.⁷⁹ It is arguable that the Directions, which prohibit entry into Western Australia, are for the purpose of emergency management in the sense that the border closure mitigates the possibility of COVID-19 entering Western Australia even from states and territories with low levels of COVID-19, as a case could be detected in these jurisdictions at any time. Therefore, the Directions are not ultra vires. It is at this point that the hypothetical constitutional challenge to the Directions would end, given the court cannot direct constitutional analysis at the executive exercise of power. The High Court in *Palmer* also ruled that there is no need to read down the impugned provisions of the *EM Act* to ensure it does not infringe s 92 of the *Constitution*. As such, it is unlikely that in these hypothetical challenges a court would make a different ruling in relation to reading down the *EM Act*. Therefore, the challenge would fail.

But what if the Directions had been enacted as legislation? Let us refer to this hypothetical statute as the ‘Directions Act’. If the Directions Act were challenged in these hypothetical scenarios, applying proportionality analysis (as the majority did in *Palmer*) it is likely that the Directions Act would be disproportionate to the burden on s 92 of the *Constitution*. The Directions Act is not reasonably necessary, as there are other obvious means of achieving the purpose⁸⁰ of preventing infection of Western Australians with COVID-19 that impose a lesser burden on s 92, namely restricting access to people coming from states and territories with high cases of COVID-19. Applying the *Wotton* approach, therefore, may result in a strange scenario where an executive exercise of power does not infringe the *Constitution*, but that same executive exercise of power could be found to infringe the *Constitution* if it were enacted as legislation.

D A Different Outcome? Directing Constitutional Analysis at the Directions

Still considering the hypothetical challenges to the *EM Act* and Directions above, if the court in these challenges were able to direct constitutional analysis at the Directions themselves, the results would likely be different. In the challenge where

⁷⁵ Ibid s 56(2)(c)(i).

⁷⁶ Ibid s 56(2)(b).

⁷⁷ Ibid s 67(a).

⁷⁸ Ibid s 67.

⁷⁹ Ibid s 3 (definition of ‘emergency management’).

⁸⁰ *Palmer* (n 2) 249 [271] (Edelman J).

a plaintiff is coming from a State that has had no recent cases of community transmission, the court, in applying structured proportionality analysis directly to the Directions, would likely find that the Directions were no longer necessary. An obvious and compelling alternative to the blanket border closure that is reasonably practicable would be to institute border closures based on state-specific risk assessment. This would allow free entry to persons coming from states with no recent cases of community transmission.

In the challenge where there is high vaccination coverage but still cases of community transmission, the Directions would likely be inadequate in their balance. Given vaccines are not completely effective at preventing transmission of COVID-19, there is no alternative to the Directions that would prevent COVID-19 transmission within Western Australia. However, given vaccination has changed the nature of the illness, a total border closure to prevent transmission of the disease would no longer be an adequate response for an illness that is not as deadly or as likely to cause severe illness.

By directing constitutional analysis at the Directions themselves, the court can apply structured proportionality analysis in such a way that takes account of the changing circumstances of the pandemic. On one view, such an approach would strengthen one of Australia's 'relatively few constitutional freedoms'⁸¹ by permitting 'the type of fact-sensitive analysis that may be required to reach invalidity'.⁸² It would also avoid the absurd result outlined above where executive actions — that would otherwise be invalid if they were legislation — survive constitutional challenges.

VI Conclusion

At the time of writing, it appears as if state and territory border closures are becoming a thing of the past. However, state and territory governments still have the ability to impose restrictions on interstate travel via executive decisions. If such restrictions are reintroduced, someone, or indeed some government, may seek to challenge those measures. It is important, therefore, for the High Court to ensure that a logical approach to challenge the constitutional validity of executive exercises of power exists. This case note has argued that such an approach is not yet settled. *Palmer* has further entrenched the *Wotton* approach to assessing the constitutionality of executive exercises of power. The decision, however, did not take the opportunity presented in *Palmer* to remedy the shortcomings of the *Wotton* approach. Given the High Court's strong endorsement of the *Wotton* approach, *Palmer* appears to be the Court's final answer to the issue 'of ensuring that an administrator will keep within the law'⁸³ when it comes to ensuring the constitutionality of executive decisions. However, it is likely that courts will face difficulty in applying the approach and more likely still the approach will result in strange outcomes, such as finding an executive exercise of power to be constitutionally valid when, if it were enacted as an Act, it would be invalid. For constitutional analysis to be meaningful, courts should be able to consider facts specific to the exercise of power, which can only

⁸¹ Stoker and Beardow (n 5) 10.

⁸² Ibid.

⁸³ Stellios, *Zines's The High Court and the Constitution* (n 49) 188.

occur if the analysis is directed toward the exercise of power, rather than the legislation. If, as this case note argues, lower courts are unable to easily apply the approach or its application leads to undesirable outcomes, the High Court should consider altering the *Wotton* approach in future challenges to exercises of executive power to ensure it is a workable approach that allows for a consideration of circumstances as they exist at the time of the challenge.

Case Note

Palmer v Western Australia: Pandemic Border Closures and Section 92 of the Australian Constitution

Anuki Suraweera*

Abstract

In *Palmer v Western Australia*, the High Court of Australia found unanimously that the Western Australian Government's pandemic border restrictions were not invalid under s 92 of the *Australian Constitution*. The bench delivered its decision in four judgments, expressing significant disagreement regarding structured proportionality testing's applicability to s 92 and its place in Australian constitutional law broadly. This case note examines the hardening of differences between proponents and critics of structured proportionality and suggests that structured proportionality is not the appropriate analytical tool for assessing invalidity claims under s 92. It also explores two other notable, and unanimous, findings of the High Court: the reunification of 'trade, commerce and intercourse' in s 92 as a composite expression subject to the same test used to invalidate statutes, and the affirmation of the Court's earlier decision in *Wotton v Queensland* that the constitutional question is determined at the level of the statute, rather than the ministerial exercise of power under the statute.

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ORCID iD:  <https://orcid.org/0000-0002-6767-3790>. I am very grateful to Professor Chester Brown for his invaluable feedback in preparing this case note.
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I Introduction

In *Palmer v Western Australia*,¹ the High Court of Australia held that Western Australian border restrictions imposed in response to the COVID-19 pandemic were within power and not invalid for contravening s 92 of the *Australian Constitution*. In four separate judgments, the bench of five justices unanimously rejected the challenge brought by Mr Palmer and the mining company he owns and controls, Mineralogy Pty Ltd, against both the authorising Act and Directions made under the Act. *Palmer* departs significantly from the High Court's previous jurisprudence, including the landmark decision on s 92, *Cole v Whitfield*,² in three respects. First, by a narrow majority, the Court adopted 'structured proportionality' as the appropriate analytical tool for determining contraventions of s 92 in place of the 'reasonable necessity' test. Second, the Court departed from the bifurcated approach to 'trade and commerce' and 'intercourse' in *Cole*, finding instead that both limbs only invalidate statutes that impose 'discriminatory' burdens on s 92 freedoms. Third, the Court followed and further developed its approach in *Wotton v Queensland*³ by holding that the constitutional question arises at the level of the statute's terms, rather than the decision taken under the statute.⁴

In Part II of this case note I introduce the border restrictions that were subject to challenge and outline the High Court's reasoning. I then explore each of the key findings of *Palmer*, beginning with the Court's findings regarding 'structured proportionality' in Part III, before turning to the reunification of the two limbs of s 92 in Part IV and considering the Court's application of the principle in *Wotton* in Part V. I conclude that the Court's findings in *Palmer* represent a significant development in Australian constitutional law and in an area of jurisprudence that has been relatively subdued since *Cole*,⁵ with the four diverging judgments leaving room for future clarification.

II Background

A The Border Restrictions and the Challenge

The challenge in *Palmer* was made against the *Emergency Management Act 2005* (WA) ('*EM Act*') and border restrictions imposed under the *EM Act*.⁶ The first plaintiff, Mr Palmer, is a Queensland resident and Chairman and Managing Director

¹ *Palmer v Western Australia* (2021) 388 ALR 180 ('*Palmer*').

² *Cole v Whitfield* (1988) 165 CLR 360 ('*Cole*').

³ *Wotton v Queensland* (2012) 246 CLR 1 ('*Wotton*').

⁴ Also published in this issue of the *Sydney Law Review* is Tom Manousaridis's case note, which gives fuller attention to the High Court's findings regarding *Wotton*.

⁵ Peter Gerangelos, Nicholas Aroney, Sarah Murray, Patrick Emerton, and Adrienne Stone, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thomson Reuters, 4th ed, 2017) 653–7 [8.10]–[8.30]; Stephen Gageler, 'The Section 92 Revolution' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 24, 24–33; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 131–44 ('*Proportionality in Australian Constitutional Law*'); Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 314–35.

⁶ *Emergency Management Act 2005* (WA) ('*EM Act*'); *Palmer* (n 1) 183 [1].

of the second plaintiff, Mineralogy Pty Ltd, a mining company with operations in Western Australia. In response to Mr Palmer being refused entry into Western Australia on 22 May 2020, the plaintiffs submitted that the *EM Act* and the *Quarantine (Closing the Border) Directions* (WA) ('the Directions') made under the Act contravened s 92 of the *Australian Constitution* by burdening the freedom of trade, commerce and intercourse between States.

The *EM Act* provided a statutory framework for emergency management, including a host of emergency powers exercisable by authorised members of the executive. Section 56 of the *EM Act* empowered the Western Australian Minister for Emergency Services to declare a state of emergency if they were satisfied that an emergency had occurred and that extraordinary measures were required to minimise loss of life, prejudice to safety or harm to health of the Western Australian population. When a declaration was in force, s 67 of the *EM Act* empowered a hazard management officer or authorised officer to make directions regarding the movement of persons within or in proximity to the designated emergency area. On 15 March 2020, the Minister for Emergency Services declared a state of emergency with respect to the COVID-19 pandemic.⁷ On 5 April 2020, the Commissioner of Police, empowered under the *EM Act* as State Emergency Coordinator, issued the Directions pursuant to s 67 of the *EM Act*.⁸ The Directions included community isolation measures which closed the border of Western Australia to all but certain 'exempt travellers', including those with the written approval of the State Emergency Coordinator.⁹ The Directions applied for a finite duration and required regular renewal by the Commissioner of Police,¹⁰ and the *EM Act* also confined the scope of the discretion by imposing preconditions before the Minister's powers were enlivened.¹¹

Mr Palmer's application to enter Western Australia as an 'exempt traveller' was refused.¹² The plaintiffs brought proceedings against Western Australia seeking a declaration that the authorising Act (the *EM Act*) and the Directions were invalid on the basis that they contravened s 92 of the *Australian Constitution*.¹³ They argued that the Directions imposed a burden on the freedom of intercourse between States by prohibiting the cross-border movement of persons or, alternatively, that the freedom of trade and commerce was contravened by the imposition of a discriminatory burden with protectionist effect.¹⁴ The defendants, the State of Western Australia and the Commissioner of Police for Western Australia, argued the *EM Act* and the Directions had the legitimate, non-protectionist purpose of protecting residents of Western Australia from the dangers of COVID-19

⁷ *Palmer* (n 1) 183 [1].

⁸ *Ibid.*

⁹ *Quarantine (Closing the Border) Directions* (WA) [27]; *ibid* 184 [7]; David Tomkins, 'The Constitutional Challenge to End the COVID Border Closures', *Law Society Journal Online* (Blog Post, 1 October 2020) <<https://lsj.com.au/articles/the-constitutional-challenge-to-end-the-covid-border-closures/>>.

¹⁰ *EM Act* (n 6) ss 10, 51–2.

¹¹ *Ibid* s 56(2).

¹² *Palmer* (n 1) 185 [10].

¹³ *Ibid* 185 [12].

¹⁴ *Ibid* 185 [13]; Michelle Sharpe, 'Case Notes: The Latest from the High Court' (2021) (77) *Law Society of NSW Journal* 88, 88.

transmission.¹⁵ The parties could not arrive at agreed facts, requiring the High Court to remit the issues to the Federal Court.¹⁶ On remittal, Rangiah J found that the facts pleaded by the defendants had been established.¹⁷ His Honour concluded that the uncertainties of COVID-19 merited a precautionary approach to decision-making.¹⁸ After hearing the submissions of the parties and interveners, the High Court delivered judgment on 24 February 2021, holding in favour of the defendants that the *EM Act* was valid. The Court swiftly rejected the plaintiffs' allegation that the Directions imposed a burden on the freedom of trade and commerce that was discriminatory in a protectionist sense,¹⁹ and instead the four judgments focused primarily on the freedom of intercourse as it applied to the provisions of the *EM Act*.

B The High Court's Decision

The High Court held that while the Directions did impose a burden on trade, commerce and intercourse, the *EM Act* was constitutionally valid. Sections 56 and 67 of the *EM Act* did not discriminate against interstate trade, commerce and intercourse on their terms, but did impede interstate intercourse in their application.²⁰ The burden imposed by the *EM Act* was reasonably necessary in the context of the 'extraordinary' emergency circumstances resulting from the COVID-19 pandemic.²¹ This conclusion relied strongly on the findings of fact made by Rangiah J in the Federal Court. Particular reliance was placed on the 'precautionary principle',²² a public health management concept introduced by two expert witnesses and accepted by Rangiah J.²³ The health consequences of a COVID-19 outbreak in Western Australia were found to be potentially catastrophic.²⁴ That the High Court found in favour of the defendants is therefore unsurprising, given past jurisprudence that has consistently regarded threats to public health as justifying some restriction of the freedom of intercourse.²⁵ Those decisions indicate that s 92 does not preclude States from controlling their borders in circumstances of necessity. In coming to this conclusion, the Court rejected the plaintiffs' submissions that the *EM Act* was analogous to the legislation invalidated in *Gratwick v Johnson*,²⁶ and that restrictions

¹⁵ Western Australia and Christopher John Dawson, 'Defendants' Submissions', Submission in *Palmer v Western Australia*, Case No B26/2020, 12 October 2020, 16–17 [54]–[57]; *Palmer* (n 1) 185 [14]; Sharpe (n 14) 88.

¹⁶ *Palmer* (n 1) 185 [15].

¹⁷ *Palmer v Western Australia* (No 4) [2020] FCA 1221 ('*Palmer* (No 4)').

¹⁸ *Palmer* (n 1) 187 [23] (Kiefel CJ and Keane J), quoting *ibid* [366] (Rangiah J).

¹⁹ *Palmer* (n 1) 199 [82] (Kiefel CJ and Keane J).

²⁰ *Ibid* 197–8 [72] (Kiefel CJ and Keane J).

²¹ *Ibid* 197 [68]–[69] (Kiefel CJ and Keane J), 222 [178] (Gordon J).

²² *Ibid* 199 [79] (Kiefel CJ and Keane J); *Palmer* (No 4) (n 17) [73] (Rangiah J).

²³ *Palmer* (n 1) 199 [79] (Kiefel CJ and Keane J).

²⁴ *Ibid* 187 [21] (Kiefel CJ and Keane J).

²⁵ *Ex parte Nelson* (No 1) (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ); *James v Cowan* (1932) 47 CLR 386, 396; *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 584 (Barwick CJ), 600 (Gibbs J), 607 (Mason J); *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 641; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) ('*Castlemaine Tooheys*'); *Nationwide News v Wills* (1992) 177 CLR 1, 58 (Brennan J) ('*Nationwide News*'); *Tasmania v Victoria* (1935) 52 CLR 157, 168–9 (Gavan Duffy CJ, Evatt and McTiernan JJ); *R v Smithers*; *Ex parte Benson* (1912) 16 CLR 99, 110 (Barton J).

²⁶ *Gratwick v Johnson* (1945) 70 CLR 1.

on the State border ‘could not be justified on any terms’.²⁷ The Court followed its decision in *Cole* by declining to return to the ‘criterion of operation’ doctrine,²⁸ whereby laws directed to an essential attribute of interstate trade, commerce or intercourse are invalid.²⁹

III Structured Proportionality in Australian Constitutional Law

The first noteworthy aspect of *Palmer* is that, despite unanimously determining the *EM Act* to be valid, the High Court was divided on the appropriate test for determining validity under s 92 of the *Australian Constitution*. Kiefel CJ, Keane and Edelman JJ departed from the Court’s earlier approach to s 92 of ‘reasonable necessity’ by adopting structured proportionality as the appropriate test. Structured proportionality is an analytical tool of German origin, now experiencing global popularity in constitutional law.³⁰ Since its introduction into Australian law in the context of the implied freedom of political communication (‘the implied freedom’), judges and commentators have expressed significant doubts regarding whether it is appropriate to import it into the Australian context³¹ and have posited alternatives that they consider more appropriate.³² It has been described as an ‘exotic jurisprudential pest destructive of the delicate ecology of Australian public law’³³ and has weathered nearly a decade of criticism in implied freedom jurisprudence.³⁴ Nonetheless, structured proportionality has been adopted in several instances by other common law jurisdictions,³⁵ where it has demonstrated sufficient flexibility to justify its importation into Australian law. I suggest however, that the High Court in *Palmer* has inappropriately extended the application of this imported principle by applying it in relation to s 92, where it provides less value as an analytical tool than in an implied freedom context.

²⁷ Clive Frederick Palmer, ‘Plaintiffs’ Submissions’, Submission in *Palmer v Western Australia*, Case No B26/2020, 22 September 2020, 7 [11].

²⁸ *Cole* (n 2) 400–3.

²⁹ *Palmer* (n 1) 188 [28], 198 [74]–[75] (Kiefel CJ and Keane JJ); 214–5 [147]–[149] (Gageler J).

³⁰ Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47(1) *Columbia Journal of Transnational Law* 72, 73; *R v Oakes* [1986] 1 SCR 103; *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700 (‘*Bank Mellat*’); *R v Hansen* [2007] 3 NZLR 1.

³¹ Murray Wesson, ‘The Reception of Structured Proportionality in Australian Constitutional Law’ (2021) 49(3) *Federal Law Review* 352; Evelyn Douek, ‘All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia’ (2019) 47(4) *Federal Law Review* 551; Adrienne Stone, ‘Proportionality and Its Alternatives’ (2020) 48(1) *Federal Law Review* 123; Amelia Simpson, ‘Grounding the High Court’s Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone’ (2005) 33(3) *Federal Law Review* 445.

³² Rosalind Dixon, ‘Calibrated Proportionality’ (2020) 48(1) *Federal Law Review* 92; Anne Carter, ‘Bridging the Divide? Proportionality and Calibrated Scrutiny’ (2020) 48(2) *Federal Law Review* 282.

³³ *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 52 [37] (French CJ and Bell J) (‘*Murphy*’).

³⁴ *McCloy v New South Wales* (2015) 257 CLR 178, 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ) (‘*McCloy*’); *Clubb v Edwards* (2019) 267 CLR 171, 208–9 [96]–[102] (Kiefel CJ, Bell and Keane JJ), 266–9 [270]–[275] (Nettle J), 341–5 [491]–[501] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 402–5 [38]–[42] (Kiefel CJ, Bell, Keane and Nettle JJ), 455–8 [202]–[206] (Edelman J) (‘*Comcare v Banerji*’).

³⁵ *R v Oakes* (n 30); *Bank Mellat* (n 30); *R v Hansen* (n 30); Chordia, *Proportionality in Australian Constitutional Law* (n 5) 23–7; Carlos Bernal, ‘The Migration of Proportionality to Australia’ (2020) 48(2) *Federal Law Review* 288, 289.

A History

Structured proportionality testing was originally developed by the German Federal Constitutional Court in a context of constitutional rights and freedoms.³⁶ In *McCloy v New South Wales*,³⁷ the High Court of Australia adopted a three-stage process of structured proportionality analysis in relation to the implied freedom that asks whether the impugned law is ‘suitable’, ‘necessary’ and ‘adequate in its balance’.³⁸ A law is suitable if it possesses a ‘rational connection’ to its purported legitimate purpose;³⁹ necessary if there is no reasonably practicable ‘obvious and compelling alternative’ with a less restrictive impact on the freedom;⁴⁰ and adequate in its balance if the law’s legitimate purpose is adequate to support the extent of the burden on the constitutional freedom.⁴¹ Structured proportionality was adopted for its perceived advantages in encouraging a culture of justification, producing predictable outcomes and improving dialogue between the legislature and judiciary compared to the ‘reasonably appropriate and adapted’ formulation applied in respect of the implied freedom in *Lange v Australian Broadcasting Corporation*.⁴²

B Divisions in Palmer

Palmer is the first instance of structured proportionality being applied to s 92 of the *Australian Constitution*. Applying the three stages of structured proportionality analysis from *McCloy*, the plurality held that the *EM Act* did not impose a discriminatory burden on the freedom of intercourse. First, the purpose of the *EM Act* was to protect the health of residents of Western Australia and the Act was suitable for achieving the purpose of preventing infected persons from entering the community.⁴³ Second, there were no effective alternatives to a general restriction on entry into Western Australia, accepting Rangiah J’s endorsement of a precautionary approach to COVID-19.⁴⁴ Finally, balancing the burden on the freedom against the *EM Act*’s legitimate purpose, the plurality held that the importance of protection of public health justified the severity of the restrictions.⁴⁵

Gageler and Gordon JJ formed the minority, maintaining in separate judgments that reasonable necessity remains the correct approach for determining invalidity.⁴⁶ Under this approach, an Act or provision would be deemed invalid if it imposed a differential burden on s 92 freedoms that was not reasonably necessary to

³⁶ Chordia, *Proportionality in Australian Constitutional Law* (n 5) 29–62.

³⁷ *McCloy* (n 34).

³⁸ Ibid 217 [79] (French CJ, Kiefel, Bell and Keane JJ); Anne Carter, ‘Moving Beyond the Common Law Objection to Structured Proportionality’ (2021) 49(1) *Federal Law Review* 73, 74.

³⁹ *Palmer* (n 1) 249 [269] (Edelman J).

⁴⁰ Ibid 248 [265] (Edelman J).

⁴¹ Ibid.

⁴² *McCloy* (n 34) 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘*Lange*’); Chordia, *Proportionality in Australian Constitutional Law* (n 5) 163–5.

⁴³ *Palmer* (n 1) 198 [74], 199 [77] (Kiefel CJ and Keane J).

⁴⁴ Ibid 199 [79]–[80] (Kiefel CJ and Keane J).

⁴⁵ Ibid 199 [81] (Kiefel CJ and Keane J).

⁴⁶ Ibid 202 [94]–[97] (Gageler J); 226 [192]–[193] (Gordon J).

achieve its legitimate purpose.⁴⁷ Their Honours held that imposing a differential burden on interstate intercourse was justified in response to an epidemic emergency and, being justified, the burden imposed was neither discriminatory nor protectionist.⁴⁸ Both noted that discretionary powers under the *EM Act* were tightly constrained, and could only be exercised reasonably for the sole purpose of managing an emergency in specific circumstances.⁴⁹ Despite reaching the same conclusion as the majority, both Gageler and Gordon JJ were critical of structured proportionality's application to s 92 and in the Australian constitutional context more broadly.

C *Structured Proportionality in Australian Constitutional Law?*

Structured proportionality is typically challenged due to its origins in a legal jurisdiction dissimilar to the Australian context. Gageler J is particularly critical of the tool as one 'forged in a different institutional setting within a different intellectual tradition and social and political milieu where it has been deployed for different purposes'⁵⁰. This criticism is not merely semantic. There are evident inconsistencies in integrating a tool so dependent on value-laden judgments and judicial discretion into the more textualist and legalist Australian constitutional context.⁵¹

The principal difficulty with structured proportionality is that it overtly requires the Court to make value judgments. The first two stages of the test are not particularly novel, however the third 'balancing' or 'strict proportionality' stage poses the greatest challenge for Australian courts. The first stage, 'suitability', closely resembles compatibility testing under the 'reasonable necessity' test. The second stage, 'necessity', is often applied as 'reasonable necessity' in practice,⁵² including in *Palmer*, where the question considered was whether there existed an 'obvious and compelling alternative',⁵³ rather than whether the law was the single least restrictive means of achieving the desired outcome. Therefore, the most meaningful distinction between the two tests is that structured proportionality's third stage allows the Court to invalidate a law by assessing the relative benefit of the

⁴⁷ *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Betfair (No 2)*').

⁴⁸ *Palmer* (n 1) 218–9 [166] (Gageler J), 231 [210] (Gordon J).

⁴⁹ *Ibid* 218–9 [165]–[166] (Gageler J), 230–1 [208] (Gordon J).

⁵⁰ *Ibid* 214 [144] (Gageler J).

⁵¹ Aroney et al (n 5) 365; Wesson (n 31) 365–7; Douek (n 31) 555; Stone (n 31) 134 citing Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 153–4; James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 638–50 ('*Zines's the High Court and the Constitution*'); Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 575–6 [14.60]; Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the *Australian Constitution*' (2016) 14(1) *International Journal of Constitutional Law* 60, 63.

⁵² Wojciech Sadurski, 'Reasonableness and Value Pluralism in Law and Politics' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer, 2009) 129, 133–4; *McCloy* (n 34) 217 [81]–[82] (French CJ, Kiefel, Bell and Keane JJ).

⁵³ *Palmer* (n 1) 248 [265] (Edelman J).

competing interests or values.⁵⁴ The Court must balance the benefits of the legislation against the costs of infringing the constitutional right or freedom to determine which ‘value’ ought to be prioritised.⁵⁵ The analysis of competing values is extrinsic to the text of the *Australian Constitution* and is highly fact-specific. Consistent with the Australian judiciary’s reluctance to take a values-driven approach to resolving constitutional questions,⁵⁶ judges have expressed resistance to proportionality for embroiling the judiciary in value judgments and policy decisions.⁵⁷ It certainly requires greater scrutiny of legislative burdens,⁵⁸ and risks encouraging judicial intrusion into a legislative role without possessing the requisite democratic legitimacy.⁵⁹ It must be accepted, however, that the High Court has adopted a particularly cautious approach when applying the balancing stage of structured proportionality in implied freedom cases.⁶⁰ Each stage may be applied at higher or lower levels of intensity, reflecting the necessary degree of judicial restraint.⁶¹ This more restrained approach to evaluating legislative policymaking may well have the effect of tempering concern regarding structured proportionality.⁶² Edelman J’s judgment in *Palmer* reflects this caution, arguing that the use of the balancing stage to invalidate legislation must be exceptional, otherwise the effect may be such that Parliament can never legislate to achieve that legitimate purpose.⁶³

An additional criticism of structured proportionality is that it imposes excessively restrictive and rigid stages of reasoning in every case. Gageler J’s view is that ‘[s]tructured proportionality exhaustively defines, and in so doing confines, each of those standardised inquiries.’⁶⁴ His Honour’s concern is that irrelevant factors will receive ‘unwarranted analytical prominence’, whereas factors relevant to the inquiry but beyond the scope of structured proportionality will be neglected.⁶⁵ Both Gordon and Gageler JJ argue that to treat the existence of alternative means as conclusive would be too rigid and prescriptive.⁶⁶ An example is given of a complex legislative scheme, where it is difficult if not impossible to assess the

⁵⁴ Aharon Barak, ‘Proportionality (2)’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738, 744–6.

⁵⁵ Stone Sweet and Mathews (n 30) 75–6.

⁵⁶ Wesson (n 31) 365–7; Douek (n 31) 555.

⁵⁷ *Leask v Commonwealth* (1996) 187 CLR 579, 601 (Dawson J), 616 (Toohey J).

⁵⁸ Stone (n 31) 129.

⁵⁹ Bernhard Schlink, ‘Proportionality (1)’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 718, 733–6.

⁶⁰ *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 510 [85] (Kiefel CJ, Keane and Gleeson JJ), 536 [201]–[202] (Edelman J) (*LibertyWorks*).

⁶¹ Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21(1) *Melbourne University Law Review* 1, 54 (‘Constitutional Guarantees’); *McCloy* (n 34) 216 [77] (French CJ, Kiefel, Bell and Keane JJ); Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) 111.

⁶² Gabrielle Appleby and Anne Carter, ‘Parliaments, Proportionality and Facts’ (2021) 43(3) *Sydney Law Review* 259.

⁶³ *Palmer* (n 1) 248 [267] (Edelman J).

⁶⁴ *Ibid* 214 [143] (Gageler J).

⁶⁵ *Ibid* 214 [146] (Gageler J).

⁶⁶ *Ibid* 228 [198] (Gordon J); 214 [144]–[146] (Gageler J). See also *Murphy* (n 33) 123 [299] (Gordon J); *Brown v Tasmania* (2017) 261 CLR 328, 477 [476] (Gordon J); *McCloy* (n 34) 234 [140] (Gageler J).

appropriateness of alternatives.⁶⁷ However, this is not a particularly persuasive justification for rejecting structured proportionality, especially when accounting for the benefits to judicial legitimacy of a clearly articulated and justified reasoning process.⁶⁸ Proponents of structured proportionality have argued that value judgments are inevitable, but that structured proportionality exposes a court's reasoning rather than obscuring the underlying decision-making process.⁶⁹ Judges must consider each element in turn, rather than intuiting or flexibly applying them at their discretion. Edelman J contends in *Palmer* that the language of 'appropriate and adapted' leaves 'a vast area for the exercise of discretion and subjective preference'.⁷⁰ The requirement for judges to methodically justify their conclusions may improve judicial legitimacy and produce greater consistency of outcomes when applied in an appropriate context.⁷¹ On the whole, the High Court has demonstrated that structured proportionality testing can be effectively tailored to Australian constitutional law in relation to the implied freedom, and resistance to the test is more muted in that context.⁷²

D Structured Proportionality in the Context of Section 92

Further issues arise in relation to the tool's application to s 92 of the *Australian Constitution*, justifying the view that structured proportionality is not an appropriate analytical tool for s 92 freedoms. In particular, s 92 is incompatible with the balancing stage of structured proportionality. Chordia, cited for her commentary on proportionality in Australian law in three judgments in *Palmer*,⁷³ contends that the application of structured proportionality requires the existence of a balancing inquiry. This occurs where:

- (1) there are two conflicting sets of rights or interests in consideration;
- (2) each of which operates on the same normative plane;
- (3) neither of which is absolute; and
- (4) at least one of which cannot be defined in the abstract.⁷⁴

Applying this framework illuminates the difficulty in adopting structured proportionality in relation to s 92. With respect to the third requirement in Chordia's analysis, s 92 is an absolute constitutional prohibition, which militates against the need for a balancing stage.

In *Palmer*, Kiefel CJ and Keane J attempted to frame structured proportionality as an extension of existing authority on s 92, ostensibly drawing on the analysis of Stephen and Mason JJ in *Uebergang v Australian Wheat Board*⁷⁵ and

⁶⁷ *Palmer* (n 1) 228 [198] (Gordon J).

⁶⁸ Sadurski (n 52) 139; Kirk, 'Constitutional Guarantees' (n 61) 13–20.

⁶⁹ *Palmer* (n 1) 194 [55] (Kiefel CJ and Keane J).

⁷⁰ *Ibid* 247 [263] (Edelman J).

⁷¹ *McCloy* (n 34) 216 [76] (French CJ, Kiefel, Bell and Keane JJ).

⁷² See *LibertyWorks* (n 60) 517 [119] (Gageler J).

⁷³ *Palmer* (n 1) 194 [54], 195 [58] (Kiefel CJ and Keane J); 227 [197], 229 [199] (Gordon J); 247 [264] (Edelman J).

⁷⁴ Chordia, *Proportionality in Australian Constitutional Law* (n 5) 150–1.

⁷⁵ *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 304–6 ('*Uebergang*').

the majority in *Castlemaine Tooheys Ltd v South Australia*.⁷⁶ Their Honours argued that strict proportionality reasoning ‘simply explicates the tests for justification’,⁷⁷ rather than deviating from *Cole* and discarding ‘reasonable necessity’. This is consistent with Kirk’s view that structured proportionality reasoning is implicit in s 92 jurisprudence since *Uebergang*, prior even to *Cole* being decided.⁷⁸ However, Chordia states in response that though there appears to be a superficial alignment between ‘reasonable necessity’ and the balancing stage of proportionality testing, they have two different purposes. The prohibition against a ‘discriminatory burden’ determines absolutely the limits of legislative power, even though balancing is relevant in determining whether a specific restriction is protectionist.⁷⁹ Discussion of ‘balancing’ in the context of reasonable necessity is ultimately a deferential test, applied to detect a disguised improper purpose rather than to balance competing legislative interests and constitutional rights.⁸⁰ Where the means exceed the ends in reasonable necessity analysis, it becomes possible to ‘smoke out’ a hidden protectionist purpose.⁸¹ On this analysis, ‘reasonable necessity’ is directed at the question of characterising a discriminatory burden as ‘protectionist’, rather than applied to determine whether a law is justified by balancing constitutional values or interests.⁸² Structured proportionality is not suited to replace the test of reasonable necessity, and its application in *Palmer* does not demonstrate a natural progression in s 92 jurisprudence.

Unlike the implied freedom, which is tied to the maintenance of a system of representative and responsible government and is not an absolute right,⁸³ s 92 as an absolute prohibition cannot be upheld to varying degrees on a case-by-case basis, rendering it incompatible with the third factor in Chordia’s framework. It is therefore difficult to envision a scenario in which a law would be invalidated at the balancing stage of the test. In *Palmer*, Kiefel CJ and Keane J minimised the impact of the third stage by emphasising that it will only invalidate a law ‘in absolutely exceptional cases’,⁸⁴ where the ‘legitimate, but trivial, purpose [is outweighed by the] high constitutional purpose’ of s 92.⁸⁵ This description is likely correct, but for the reason that structured proportionality’s balancing analysis is not suitable for s 92.

A further complication is that the High Court has held that s 92 functions as an express limitation on legislative and executive power,⁸⁶ rather than an

⁷⁶ *Castlemaine Tooheys* (n 25) 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

⁷⁷ *Palmer* (n 1) 195 [58] (Kiefel CJ and Keane J).

⁷⁸ Kirk, ‘Constitutional Guarantees’ (n 61) 13–15.

⁷⁹ Shipra Chordia, ‘Border Closures, COVID-19 and s 92 of the Constitution — What Role for Proportionality (if any)?’, *Australian Public Law (AUSPUBLAW)* (Blog Post, 1 October 2020) <<https://auspublaw.org/2020/06/border-closures-covid-19-and-s-92-of-the-constitution/>>.

⁸⁰ Chordia, *Proportionality in Australian Constitutional Law* (n 5) 148–9.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Lange* (n 42) 561–2; Chordia, *Proportionality in Australian Constitutional Law* (n 5) 170–1; Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25(2) *Melbourne University Law Review* 374.

⁸⁴ *Palmer* (n 1) 248 [265] (Kiefel CJ and Keane J).

⁸⁵ *Ibid.*

⁸⁶ *Cole* (n 2) 394; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150 (Brennan J) (*ACTV*); *Betfair (No 2)* (n 47) 258–9 [14] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

empowering provision or one that confers a personal right.⁸⁷ This is an unusual context in which to apply structured proportionality, which is more apposite to the balancing of personal rights than the weighing of constitutional limitations against legislated-for benefits. Even the tool's application to the implied freedom had attracted criticism for this reason.⁸⁸ In the context of the implied freedom, Gageler J has described structured proportionality as requiring the judiciary to enhance political outcomes to 'achieve some notion of Pareto-optimality',⁸⁹ which is particularly problematic in relation to s 92 freedoms that cannot be optimised in this manner as the prohibition against discrimination is absolute.⁹⁰ Gageler J's comment alludes to the criticism made of structured proportionality that it requires the weighing of incommensurable and intangible values, in effect comparing proverbial apples and oranges.⁹¹

Scepticism regarding the appropriateness of structured proportionality remains strong both in relation to s 92 and Australian constitutional law more broadly.⁹² As highlighted by Gageler J, the 'march' of structured proportionality in Australian law has been stymied in the past, in relation to assessing the compatibility of electoral procedures with the system of representative government.⁹³ A more practical question is whether the introduction of structured proportionality will make a profound difference to the outcome of s 92 cases. Though the bench in *Palmer* was highly divided in their approach, it arrived at the same outcome unanimously. This has been a hallmark of several Australian cases applying structured proportionality.⁹⁴ Stone contends that the adoption of structured proportionality will simply make the Court's implicit reasoning explicit, rather than dramatically altering legal outcomes.⁹⁵ Regardless, structured proportionality may make a real difference in borderline cases, where a law could be invalidated at the balancing stage. The ongoing debate regarding structured proportionality requires further development before this methodological question can be resolved, and the future of structured proportionality in relation to s 92 more clearly defined.

IV The Unification of Section 92

A second significant finding in *Palmer* is the High Court's reinterpretation of s 92 of the *Australian Constitution* as a composite expression, with both the 'trade and commerce' and 'intercourse' limbs of the section invalidating legislation that imposes a 'discriminatory' burden on the freedoms.⁹⁶ In *Cole*, the Court had

⁸⁷ *Palmer* (n 1) 198 [73] (Kiefel CJ and Keane J), 204–5 [105] (Gageler J), 222 [180] (Gordon J), 240 [241] (Edelman J).

⁸⁸ Douek (n 31); Stone (n 31).

⁸⁹ *Murphy* (n 33) 74 [110].

⁹⁰ *Ibid* 73–4 [109]–[110].

⁹¹ Chordia, *Proportionality in Australian Constitutional Law* (n 5) 57–62.

⁹² Carter (n 38) 76 citing *Leask v Commonwealth* (n 57) 600–1 (Dawson J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 [17] (Gleeson CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 172–3 [431]–[433] (Heydon J).

⁹³ *Murphy* (n 33); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333.

⁹⁴ Stone (n 31) 147.

⁹⁵ *Ibid*.

⁹⁶ *Palmer* (n 1) 207 [114] (Gageler J), 223–4 [184] (Gordon J), 240 [241] (Edelman J).

bifurcated the freedoms as being ‘quite distinct’⁹⁷ to resolve decades of contention by adopting a free trade interpretation for the trade and commerce limb alone.⁹⁸ The intercourse limb was regarded as having a wider operation and as being a personal right.⁹⁹ The broader scope afforded to the second limb included application to general laws that did not impose, in law or in fact, a discriminatory burden on interstate intercourse.¹⁰⁰ Discrimination relevantly arises in ‘the unequal treatment of equals, and, conversely, in the equal treatment of unequals’.¹⁰¹ The reason for the distinction between the two limbs was not fully explained or justified in *Cole*, and lacks a basis in the text or drafting of the *Australian Constitution*.¹⁰²

Cole was followed by a lack of clarity regarding the precise nature and scope of the freedom of intercourse. The freedom was not limited solely to invalidating statutes imposing discriminatory burdens,¹⁰³ nor did it impose a prohibition against all restrictions on intercourse across state borders.¹⁰⁴ Neither did the High Court resolve in subsequent cases the question of how to address statutory burdens on intercourse that also burden the freedom of trade and commerce, and which test to apply.¹⁰⁵ The relationship between the two limbs of s 92 remained unclear.¹⁰⁶ *Palmer* resolves this uncertainty by departing from the position in *Cole* and limiting the scope of the freedom of intercourse in line with the freedom of trade and commerce.¹⁰⁷ The freedom of intercourse provides absolute freedom only from ‘discriminatory’ burdens on intercourse between States.¹⁰⁸ The Court held unanimously that the bifurcation of s 92 has no textual or literalist basis, and that the two provisions should be given the same scope. The drafters’ intention to create a composite expression was identified in *Palmer* as militating against separate operation of the two limbs of s 92.¹⁰⁹

The reunification of the two limbs of s 92 was adopted unanimously and is likely to be uncontroversial, having improved the coherence of the Court’s approach to s 92 freedoms. Stellios is one of several critics of the Court’s earlier, bifurcated approach, remarking that ‘all, or nearly all, acts of trade and commerce are also

⁹⁷ *Cole* (n 2) 388.

⁹⁸ *Palmer* (n 1) 191–2 [44]–[45] (Kiefel CJ and Keane J), 223 [182] (Gordon J), 241–2 [246] (Edelman J); Jeremy Kirk, ‘Section 92 in its Second Century’ in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 253, 256; Aroney et al (n 5) 335–8.

⁹⁹ Stellios, *Zines’s the High Court and the Constitution* (n 51) 191; *Cole* (n 2) 393.

¹⁰⁰ Kirk, ‘Section 92 in its Second Century’ (n 98) 269–75.

¹⁰¹ *Castlemaine Tooheys* (n 25) 480 (Gaudron and McHugh JJ).

¹⁰² *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 456–7 [401] (Hayne J) (‘*APLA*’).

¹⁰³ *Nationwide News* (n 25) 55–6 (Brennan J); *ACTV* (n 86) 192, 194 (Dawson J).

¹⁰⁴ *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307 (Mason CJ), 333 (Brennan J), 346–7 (Deane J), 366 (Dawson J), 384 (Toohey J), 392 (Gaudron J), 395 (McHugh J) (‘*Cunliffe*’).

¹⁰⁵ *Palmer* (n 1) 200 [86] (Gageler J); *Cunliffe* (n 104); *ACTV* (n 86); *Nationwide News* (n 25); *APLA* (n 102); *AMS v AIF* (1999) 199 CLR 160.

¹⁰⁶ William Gummow, ‘Unity’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 405, 411.

¹⁰⁷ *Palmer* (n 1) 187–8 [27] (Kiefel CJ and Keane J); Kirk, ‘Section 92 in its Second Century’ (n 98) 279.

¹⁰⁸ *Palmer* (n 1) 207 [114] (Gageler J), 223–4 [184] (Gordon J), 240 [241] (Edelman J).

¹⁰⁹ *Ibid* 191–2 [44]–[45] (Kiefel CJ and Keane J); 241–2 [246] (Edelman J).

intercourse'.¹¹⁰ Despite this, the High Court in *Cole* had rejected the individual-rights approach in relation to the freedom of trade and commerce, while preserving it for the freedom of intercourse.¹¹¹ The consequence was that a lower threshold for contravening the intercourse limb risked that limb subsuming the trade and commerce limb and reasserting an individual-rights approach to interstate intercourse that occurs in the course of trade and commerce.¹¹² The application of 'discriminatory burden' as the touchstone for determining a breach of either limb of the section resolves this inconsistency and prevents one limb of s 92 operating with greater scope and effect than the other. The High Court in *Palmer* was also in agreement that the right to freedom of intercourse is not a personal right.¹¹³ Gageler J highlighted the greater coherency achieved by unifying the two limbs, with the test for both now requiring identifying unequal treatment when comparing interstate activity against intrastate activity, justification for the differential treatment, and applying the same measure of justification for differential treatment.¹¹⁴

This approach is also consistent with the overarching purpose of s 92, to ensure that Australia remains an integrated free trade area and national polity without the Commonwealth or States imposing barriers to freedom of movement or trade.¹¹⁵ Edelman J was in agreement with the remainder of the bench, but also indicated that discrimination between interstate and intrastate trade and commerce need not necessarily be 'protectionist'¹¹⁶ in order to contravene s 92.¹¹⁷ His Honour argued that it is more appropriate to apply the same requirements for legislation governing intercourse and trade and commerce by removing the requirement of protectionism, given that interstate trade and commerce will almost always involve intercourse.¹¹⁸ This approach relies on economic analyses that indicate free trade is not defined merely by the absence of protectionism.¹¹⁹ There is also a body of academic writing that supports this proposition, including extra-curial writings of Kiefel CJ.¹²⁰

¹¹⁰ Stellios, *Zines's the High Court and the Constitution* (n 51) 194; Kirk, 'Section 92 in its Second Century' (n 98) 275–81; *Nationwide News* (n 25) 54–5, 59 (Brennan J).

¹¹¹ Kirk, 'Section 92 in its Second Century' (n 98) 277; *Befair (No 2)* (n 47) 266–8 [42]–[50] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹¹² *Palmer* (n 1) 192 [48] (Kiefel CJ and Keane J), 207–8 [115] (Gageler J), 225 [187] (Gordon J); Kirk, 'Section 92 in its Second Century' (n 98) 270; Aroney et al (n 5) 338.

¹¹³ *Palmer* (n 1) 191–2 [42]–[45] (Kiefel CJ and Keane J), 204–5 [105] (Gageler J), 222 [180] (Gordon J), 240 [241] (Edelman J).

¹¹⁴ *Ibid* 202–3 [98]–[99].

¹¹⁵ David J Townsend, 'Constitutional Algebra: *Palmer v Western Australia* Reunites the Broken Parts of s 92' (2021) 76 *Law Society of NSW Journal* 84, 85; *Palmer* (n 1) 223 [182]–[183] (Gordon J), 241–3 [246]–[249] (Edelman J).

¹¹⁶ *Palmer* (n 1) 232 [214].

¹¹⁷ *Ibid* 232 [216].

¹¹⁸ *Ibid* 243–4 [252]–[253] (Edelman J).

¹¹⁹ *Ibid* 243 [251] (Edelman J); *Befair (No 2)* (n 47) 293 [127] (Kiefel J); Kirk, 'Section 92 in its Second Century' (n 98) 253.

¹²⁰ See Susan Kiefel, 'Section 92: Markets, Protectionism and Proportionality — Australian and European Perspectives' (2010) 36(2) *Monash University Law Review* 1 ('Section 92'); Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85 ('Proportionality'); Gonzalo Villalta Puig, 'Intercolonial Free Trade: The Drafting History of Section 92 of the *Australian Constitution*' (2011) 30(2) *University of Tasmania Law Review* 1; Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Lawbook, 2008); Christopher Staker, 'Section 92 of the *Constitution* and the European Court of Justice' (1990) 19(3–4) *Federal Law Review* 322; Stellios, *Zines's the High Court and the*

It remains to be seen whether Edelman J's approach of dispensing with the requirement for protectionist discrimination is adopted in future cases. By unanimously giving 'trade and commerce' and 'intercourse' the same scope of operation, the High Court has made a sensible departure from the incoherence of the prior position in *Cole*.¹²¹ The intercourse limb of s 92 has historically provoked less debate than the trade and commerce limb, and with the Court in *Palmer* further narrowing its application to discriminatory burdens, it is likely to remain relatively uncontroversial.

V Validity and *Wotton v Queensland*

The third issue addressed by the High Court in *Palmer* concerned the measures in relation to which the question of validity should be determined. On this issue, the bench was united in accepting the submissions made by the Attorney-General for Victoria, and ultimately adopted by the defendants, that validity should be determined at the level of the Act rather than the Directions.¹²² Following its decision in *Wotton*, the High Court in *Palmer* unanimously held that it is the terms of the statute that raise a constitutional question, though the exercise of statutory power may be subject to administrative review.¹²³ The *Wotton* principle provides that where the statutory discretion conferred under the authorising Act is susceptible to being exercised in accordance with the relevant constitutional limitations, the Act will be valid in respect of that limitation. This approach was first proposed by Brennan J in *Miller v TCN Channel Nine Pty Ltd*.¹²⁴ His Honour stated, in dissent, that where a broad discretion can only be lawfully exercised within certain limits, the conferral of the discretion is construed as being subject to those limits.¹²⁵ This principle was then adopted by the plurality in *Wotton*¹²⁶ before its application in implied freedom cases,¹²⁷ and now unanimously in *Palmer*.

In *Wotton*, a challenge was made to conditions attached to a parole order, however the question of constitutional validity was determined by reference to the

Constitution (n 51) ch 8. Cf Kirk, 'Section 92 in its Second Century' (n 98) 253, 269; Naomi Oreb, 'Betting across Borders — *Betfair Pty Limited v Western Australia*' (2009) 31(4) *Sydney Law Review* 607, 612–4; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

¹²¹ Kirk, 'Section 92 in its Second Century' (n 98) 277–81; Stellios, *Zines's the High Court and the Constitution* (n 51) 194.

¹²² *Palmer* (n 1) 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [201]–[202] (Gordon J), 234–5 [225] (Edelman J); Attorney-General (Vic), 'Submissions of the Attorney-General for the State of Victoria (Intervening)', Submission in *Palmer v Western Australia*, Case No B26/2020, 19 October 2020, 17–20 [47]–[53]; Transcript of Proceedings, *Palmer v Western Australia* [2020] HCATrans 178, 3675–3730 (JA Thomson SC); Transcript of Proceedings, *Palmer v Western Australia* [2020] HCATrans 179, 3915–4025 (JA Thomson SC).

¹²³ *Palmer* (n 1) 196 [65] (Kiefel CJ and Keane J), quoting *Wotton* (n 3) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Palmer* (n 1) 208 [119], 210 [127] (Gageler J), 229 [201] (Gordon J), 234–5 [224]–[226] (Edelman J).

¹²⁴ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J) ('*Miller*') quoting *Inglis v Moore* [No 2] (1979) 46 FLR 470, 476 (Brennan and St John JJ).

¹²⁵ *Miller* (n 124) 614 (Brennan J).

¹²⁶ *Wotton* (n 3) 14 [22]–[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹²⁷ *Comcare v Banerji* (n 34); *Wainohu v New South Wales* (2011) 243 CLR 181; *Gaynor v Chief of the Defence Force* (No 3) (2015) 237 FCR 188 ('*Gaynor* (No 3)'); Kieran Pender, "'Silent Members of Society'": Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 336–7 ('Silent Members of Society').

authorising statute, rather than the conditions themselves. The *Wotton* principle therefore distinguishes between the constitutional question of statutory validity, and the administrative law question of whether the executive action is authorised.¹²⁸ The principle was further developed in *Attorney-General (SA) v Corporation of the City of Adelaide*, where the joint judgment contended that *Wotton* only presupposed the validity of a statutory discretionary power where its scope for exercise is confined to constitutional limitations.¹²⁹ The exercise of the discretion in *Wotton*, for example, was calibrated to a standard of reasonable necessity, unlike the by-law in *City of Adelaide*. However, the High Court in *Palmer* determined that the *Wotton* principle applies even in instances where the discretionary power is not qualified in its own terms.¹³⁰ In *Palmer*, the Court identified several limitations on power that appropriately constrained the discretionary power in question. Section 56 of the *EM Act* required that the Minister satisfy several requirements before making a declaration, including: considering the advice of the State Emergency Coordinator; being satisfied that an emergency ‘has occurred, is occurring or is imminent’; and being satisfied that extraordinary measures are required to prevent or minimise loss of life, harm to health or damage to or destruction of property or the environment.¹³¹ A declaration was only effective for three days, and required periodic extension for no more than 14 days at a time.¹³² Section 67 then empowered an ‘authorised officer’ to direct or prohibit the movement of persons within, into, out of or around the vicinity of the emergency area, for the purpose of emergency management. The Court’s orders noted that no issue was raised as to whether the Directions were authorised by the statutory provisions, and therefore no constitutional question was raised.¹³³

The *Wotton* principle, in effect, implies a legislative intention that a statutory discretion is to be constrained by constitutional limitations.¹³⁴ A challenge to an exercise of power under the statute ‘does not raise a constitutional question, as distinct from a question of the exercise of statutory power’.¹³⁵ Exercises of discretion may, instead, be subject to administrative challenge, and can be held invalid without affecting the validity of the authorising Act. This finding is likely to impede attempts by litigators to overturn administrative regimes by challenging their statutory basis, instead limiting applicants to overturning a single instance of executive action. The inability to strike down a statute by reference to the nature or effect of the executive action is particularly favourable to a finding of statutory validity where a statute is drafted in broad terms, and capable of general application.¹³⁶ In *Palmer*, Gageler J

¹²⁸ *Palmer* (n 1) 208 [119] (Gageler J).

¹²⁹ *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 87–8 [214]–[216] (Crennan and Kiefel JJ) (*‘City of Adelaide’*); Pender, ‘Silent Members of Society?’ (n 127) 327, 344. *City of Adelaide* (n 129) 88 [216] (Crennan and Kiefel JJ).

¹³⁰ *Palmer* (n 1) 183 [2]; *EM Act* (n 6) s 58(4).

¹³¹ *EM Act* (n 6) ss 57(b), 58(4).

¹³² *Palmer* (n 1) 256.

¹³³ James Stellios, ‘*Marbury v Madison*: Constitutional Limitations and Statutory Discretions’ (2016) 42(3) *Australian Bar Review* 324, 344–6 (*‘Marbury v Madison’*); Kieran Pender, ‘*Comcare v Banerji*: Public Servants and Political Communication’ (2019) 41(1) *Sydney Law Review* 131, 142 (*‘Public Servants’*).

¹³⁴ *Wotton* (n 3) 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Gaynor (No 3)* (n 127) 240 [211] (Buchanan J).

¹³⁵ *Wotton* (n 3) 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

acknowledged that the statutory question and constitutional question can converge where a provision 'is so broadly expressed as to require it to be read down as a matter of statutory construction to permit only those exercises of discretion that are within constitutional limits'.¹³⁷ This process of construction is assisted by the principle that statutory powers can be read as subject to constitutional limitations such as the implied freedom and s 92.¹³⁸ Kiefel CJ and Keane J jointly identified the development of administrative law in the period since the decision in *Wotton* as overcoming a prior barrier to adoption of this approach.¹³⁹ Presumably, a greater range of grounds of review and greater availability of remedies for administrative error have led the High Court to view administrative review as a suitable mechanism for reviewing executive action.¹⁴⁰

The *Wotton* principle represents an important evolution in the High Court's approach to challenges to statutes based on constitutional limitations. Under the *Australian Constitution*, freedoms are not held individually, but rather function as limitations on legislative power.¹⁴¹ Allowing applicants to contest the validity of legislation on a case-by-case basis would amount to enforcing s 92 freedoms as individual rights.¹⁴² The Court's affirmation of *Wotton* in *Palmer* ensures that statutes are not invalidated based on isolated executive decisions that breach the relevant constitutional limitation. Nevertheless, plaintiffs may avail themselves of administrative review remedies where executive action is undertaken pursuant to a valid statutory grant of authority, but nevertheless contravenes s 92. Exceeding the statutory grant of power will constitute an ultra vires act by the decision-maker.¹⁴³ This approach in *Palmer* also provides a unanimous rejection of Gageler J's alternative approach in *Tajjour v New South Wales*,¹⁴⁴ which proposed a more limited analysis of statutory validity than *Wotton*, based on the burden at hand rather than assessing the validity of the statute in all contexts.¹⁴⁵ The High Court in *Palmer* did not, however, address the unresolved questions of how constitutional limitations are to be integrated with administrative grounds of review, and what framework or test is to be used when determining whether the executive action is ultra vires for non-compliance with constitutional limitations.¹⁴⁶ The effect of the approach in *Wotton* is that contraventions of constitutional freedoms will be assessed in relation to the statute, and executive action is limited to review of whether it is authorised by

¹³⁷ *Palmer* (n 1) 209 [122] (Gageler J).

¹³⁸ David Hume, 'Palmer v Western Australia (2021) 95 ALJR 229; [2021] HCA 5: Trade, Commerce and Intercourse Shall Be Absolutely Free (Except When It Need Not)', *Australian Public Law (AUSPUBLAW)* (Blog Post, 1 October 2020). <<https://auspublaw.org/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5/>>.

¹³⁹ *Palmer* (n 1) 197 [67] (Kiefel CJ and Keane J).

¹⁴⁰ *Ibid*; Stellios, 'Marbury v Madison' (n 134) 327–8.

¹⁴¹ Hume (n 138); Pender, 'Public Servants' (n 134) 140; Susan Kiefel, 'Standards of Review in Constitutional Review of Legislation' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 488, 489; McCloy (n 34) 202–3 [30] (French CJ, Kiefel, Bell and Keane JJ).

¹⁴² Warwick Ambrose, 'Wotton v Queensland (2012) 285 ALR 1' (2012) 33(1) *Adelaide Law Review* 281, 283.

¹⁴³ *Wotton* (n 3) 13–14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ); Pender, 'Silent Members of Society?' (n 127) 339, 344.

¹⁴⁴ *Tajjour v New South Wales* (2014) 254 CLR 508.

¹⁴⁵ Pender, 'Silent Members of Society?' (n 127) 346.

¹⁴⁶ *Ibid* 345.

the valid statute, rather than whether it is independently consistent with the constitutional freedom.

However, there remains a degree of nuance in the High Court's application of the *Wotton* principle in *Palmer*. The *Wotton* principle requires an assessment of whether statutory provisions infringe upon a constitutional freedom 'across the range of their potential operations'.¹⁴⁷ Edelman J argued, in obiter dicta, that the Court should rarely adjudicate upon the validity of every application of the relevant statutory provision, particularly in the present case, which concerned 'open-textured' provisions that could be applied across a wide range of circumstances.¹⁴⁸ His Honour rejected the notion of a court speculating upon whether the provisions are valid even in hypothetical scenarios by giving a conclusive statement of validity. His Honour instead confined the implications of the Court's orders to ss 56 and 67 of the *EM Act* in their limited application to an emergency constituted by a hazard in the nature of a plague or epidemic.¹⁴⁹ Edelman J's analysis drew a distinction between assessing the validity of the legislation by reference to its application, and assessing the validity of the application itself.¹⁵⁰ This approach is measured and responsive to the shortcomings of a more general approach to invalidity.¹⁵¹ Assessing the law's general application, rather than addressing a specific burdening of the constitutional freedom, would be overly favourable to a finding of validity. Equally, this approach does not require the Court to invalidate a statute because a single option within the range of possible executive actions contravenes a constitutional limitation of power. Regardless, this hypothetical scenario is unlikely to eventuate. In such a case, the Court would likely prefer to find the impermissible exercise of discretion to be in contravention of the statute itself, to ensure that the statute only gives effect to executive action within constitutional limits.¹⁵² Edelman J's proposed approach allows for greater responsiveness to the specific provisions in each case and would be an appropriate revision to the High Court's application of the *Wotton* principle.

VI Conclusion

Palmer is a significant addition to the High Court's jurisprudence on s 92, providing an important modification to the approach to s 92 of the *Australian Constitution* established by consensus in *Cole*. Of the Court's findings in *Palmer*, the adoption of structured proportionality by a bare majority is the most precarious and open to future challenges.¹⁵³ Kiefel CJ remains a strong proponent of this analytical approach, both in her judicial role and extra-judicial work.¹⁵⁴ Edelman J is a

¹⁴⁷ *Comcare v Banerji* (n 34) 408 [50] (Gageler J). See also 404–5 [42], 405–6 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 423–5 [100]–[106] (Gageler J), 439–40 [156]–[161] (Gordon J).

¹⁴⁸ *Palmer* (n 1) 235–6 [227]–[228] (Edelman J).

¹⁴⁹ *Ibid* 252–3 [282] (Edelman J).

¹⁵⁰ *Ibid* 237 [231] (Edelman J).

¹⁵¹ Pender, 'Silent Members of Society?' (n 127) 347.

¹⁵² *Wotton* (n 3) 9–10 [10], 13–14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ), quoting and citing *Miller* (n 124) 613–14 (Brennan J); *Comcare v Banerji* (n 34) 459 [210]–[211] (Edelman J).

¹⁵³ Anthony Gray, 'COVID-19, Border Restrictions and Section 92 of the *Australian Constitution*' in Augusto Zimmermann and Joshua Forrester (eds), *Fundamental Rights in the Age of COVID-19* (Connor Court Publishing, 2020) 99.

¹⁵⁴ Kiefel, 'Section 92' (n 120); Kiefel, 'Proportionality' (n 120).

relatively new convert to structured proportionality, but a firm advocate for its application in *Palmer*.¹⁵⁵ However, with Keane J and Kiefel CJ approaching retirement, the longevity of structured proportionality may well require the support of Steward and Gleeson JJ. Following *LibertyWorks Inc v Commonwealth*, it appears that both are accepting of structured proportionality in the context of the implied freedom.¹⁵⁶ Nevertheless, for the reasons explored above, structured proportionality is less well-suited to s 92 than it is to the implied freedom, as s 92 applies as an absolute limitation on laws imposing a discriminatory burden on trade, commerce and intercourse. I suggest that the Court's adoption of structured proportionality analysis in the context of s 92 should be revisited in future litigation.

The High Court's reintegration of s 92 as a composite expression and affirmation of the *Wotton* principle are unlikely to ignite significant controversy, having been adopted unanimously. The former has narrowed the application of the intercourse limb of s 92 by requiring burdens to be discriminatory to invalidate statute, and the latter has limited access to judicial review in favour of administrative review of whether executive actions are authorised by statute. For s 92 claims in particular, opportunities to challenge border closures are dwindling as COVID-19 becomes endemic and States embrace the national reopening of borders. The Court's acceptance of stringent border controls in *Palmer* bodes poorly for litigious opponents of closed borders, indicating that there will be no dramatic resurgence in litigation for what was once the most controversial provision in the *Australian Constitution*.

¹⁵⁵ *Palmer* (n 1) 246–51 [261]–[276] (Edelman J).

¹⁵⁶ *LibertyWorks* (n 60) 503–10 [44]–[85] (Kiefel CJ, Keane and Gleeson JJ), 545 [247] (Steward J).

Review Essay

Entering the “Grey Zone” of Sports Jurisprudence

The Jurisprudence of Sport: Sports and Games as Legal Systems by Mitchell N Berman and Richard D Friedman (2021) West Academic Publishing, 601 pp, ISBN 9781684678907

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Abstract

This review essay explores, in five parts, the burgeoning study of sports jurisprudence, where scholars analyse sports and games as legal systems. First, sports jurisprudence is introduced via a seemingly bizarre conclusion to a 2022 United States National Football League playoff game. Second, this review essay probes the so-called ‘grey zone’ in sports that lies at the intersection of fair strategic tactics and unfair competition manipulation. Third, using Mitchell Berman and Richard Friedman’s new book, *The Jurisprudence of Sport: Sports and Games as Legal Systems*, it delves into a host of thought-provoking ‘grey zone’ quandaries in sports, all of which speak to a broader narrative about governance and the design of legal systems. Fourth, this review essay explains how a United States Supreme Court decision serves as a useful case study for the lessons derived from the book and associated academic articles. Finally, it concludes with some brief takeaways about how principles of jurisprudence can shape the ‘grey zone’ in sports.

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We should never let a football game be determined from a coin — like, I think that's the most craziest rule in sports. You can fight your entire fight the whole game and then the game comes down to a 50-50 chance of a coin toss? Like, this ain't Vegas. We're not at the casino table.¹

I Introduction

On 23 January 2022, United States National Football League ('NFL') fans got a lesson in sports jurisprudence. After multiple lead changes during the final minutes of a playoff game between the Kansas City Chiefs and the Buffalo Bills, the score was tied at the end of regulation time. In overtime, NFL rules dictated that a coin flip would determine which team started the overtime period with possession of the ball. NFL overtime rules also stated that if the team possessing the ball first in overtime scores a touchdown, such team will be declared the winner. The Kansas City Chiefs won the coin toss, took possession of the ball, and promptly scored a touchdown to seal the victory, with the Buffalo Bills never having had the opportunity to touch the ball in overtime. A prominent journalist described the ending this way:

It was the worst possible ending to the best NFL playoff game ever. ... When the Kansas City Chiefs won the coin flip, the game was effectively over. ... Look, there is no great way to break ties in sports. Whether it's a shootout, penalty kicks or sudden death, someone is always going to feel short-changed in the some way. ... [W]hen so much is at stake, something that has absolutely no relation to athletic ability or physical skills should not determine, or even influence, the winner. ... Rather than allowing its biggest games to be determined by its best players, the NFL is leaving it up to the whims of a small piece of metal. ... All that mattered was what side was up when a coin landed on the ground. Which really is as dumb as it sounds.²

Dilemmas like different mechanisms to resolve ties in sports are among the dozens of thought-provoking issues analysed in a fascinating new book written by Mitchell N Berman and Richard D Friedman entitled *The Jurisprudence of Sport: Sports and Games as Legal Systems*.³ Berman and Friedman expertly position sports as a near-ideal laboratory to test general principles of jurisprudence and persuasively make the case that sport governance is a de facto legal system worthy of scholarly inquiry. Berman and Friedman's book also overlaps with a host of recent academic articles on the subject and dovetails nicely with a prominent United States ('US') Supreme Court ruling that delved into the essence of sports under the legal microscope.

¹ Adam Teicher and Alaina Getzenberg, 'Twenty-five Points in 2 minutes? Inside the Kansas City Chiefs' Thrilling Victory over the Buffalo Bills' *ESPN* (online, 24 January 2022) quoting Buffalo Bills player Dion Dawkins <https://www.espn.com/nfl/story/_/id/33138797/twenty-five-points-2-minutes-kansas-city-chiefs-thrilling-victory-buffalo-bills>.

² Nancy Armour, 'Opinion: Chiefs-Bills Masterpiece Decided on a Coin Flip Shows NFL's Overtime Rule is Awful and Must Be Fixed', *USA Today* (online, 24 January 2022) <<https://www.usatoday.com/story/sports/columnist/nancy-armour/2022/01/24/nfl-overtime-rule-ruined-bills-chiefs-must-fix/6637396001/?gnt-cfr=1>>.

³ Mitchell N Berman and Richard D Friedman, *The Jurisprudence of Sport: Sports and Games as Legal Systems* (West Academic Publishing, 1ST ed, 2021) ('*The Jurisprudence of Sport*').

This review essay probes some of the sports jurisprudence issues at the forefront of contemporary discourse. Part II unpacks the ‘grey zone’ of sports jurisprudence, with a focus on a handful of influential academic articles that have tackled controversial topics similarly addressed by Berman and Friedman. Part III, with a singular focus on Berman and Friedman’s book, highlights how treating sports and games as a topic worthy of scholarly inquiry can yield useful insights on governance. In Part IV, this review essay takes a deep-dive into *PGA Tour v Martin*,⁴ a US Supreme Court ruling from 2001 that serves as an on-point case study of how sports jurisprudence manifests itself in a real-life dispute with practical implications. Part V offers two takeaways.

II Entering the Scholarly ‘Grey Zone’

A trilogy of academic papers nudge readers into the ‘grey zone’ of sports jurisprudence. At the outset, King has explored gamesmanship in criminal procedure and found that there are ‘fruitful analogies in the world of sport’.⁵ The analogy is most clearly seen when ‘the strategic and aggressive invocation of minor rules to confuse or disadvantage one’s opponent’ alters outcomes of sport events (or criminal trials).⁶ King flags one-sided examples in sports where a team or individual may lose on purpose at the early stage of a competition to increase the chances of winning overall later. Berman and Friedman focus here too, asking in Chapter 15 of *The Jurisprudence of Sport* ‘whether in a given setting a competitor should decline to maximize her chance of winning by taking full advantage of the situation’.⁷

King also pinpoints the two-sided cases where ‘it will be in the interests of both teams to lose a match in the preliminary round, leading to some bizarre match behavior’,⁸ such as the 2012 Olympic women’s badminton doubles where a farce ensued when both teams were simultaneously trying to lose.⁹ King notes that purposeful losing is ‘a form of gamesmanship easily addressed by changes to the governing rules’.¹⁰ Indeed, having preliminary rounds structured as round robins, instead of double-elimination knockout draws, only serves to incentivise gamesmanship and strategies to lose.¹¹

Next, Goh tackled the challenge of regulating — or not — ‘performing enhancing strategies’ that are unrelated to doping.¹² The author cites two high-profile examples: hi-tech polyurethane swimsuits such as the LZR Racer and fibre-plated running shoes like Nike’s Vaporfly.¹³ Both products were used to smash world

⁴ *PGA Tour Inc v Martin*, 532 US 661, (2001) (*‘PGA Tour v Martin’*).

⁵ John D King ‘Gamesmanship and Criminal Process’ (2021) 58(1) *American Criminal Law Review* 47, 48.

⁶ *Ibid* 60.

⁷ Berman and Friedman (n 3) 513.

⁸ King (n 5) 63.

⁹ *Ibid* 63–4.

¹⁰ *Ibid* 65.

¹¹ For an alternate approach, see Julien Guyon, “‘Choose Your Opponent’: A New Knockout Design Hybrid Tournaments’ (2022) 8(1) *Journal of Sports Analytics* 9.

¹² Chui Ling Goh ‘The Challenge of Regulating Doping and Non-Doping “Performance-Enhancing Strategies” in Elite Sports’ (2021) 21(1–2) *The International Sports Law Journal* 47.

¹³ *Ibid* 52.

records in swimming and distance running, respectively. Goh cites the patchwork of regulatory efforts to date and recommends the establishment of a global sports integrity body to ‘begin the process of harmonising the respective regulatory frameworks’ when dealing with non-doping matters, rejecting calls for a hands-off approach advocated by others.¹⁴ Similarly, Berman and Friedman analyse performance enhancement via technological change in Chapter 8 of their book, asking readers whether infrared clothing and carbon-fibre pole vault poles should be regulated too.¹⁵

Finally, Van Der Hoeven and four co-authors use match-fixing in road cycling as a case study to decipher the difference — or ‘grey zone’ — between tactics and manipulation.¹⁶ Van Der Hoeven and colleagues explain that road cycling ‘has several peculiarities that complicate the system in which cyclists have to perform ... road cycling is an individual sport that requires teamwork [and] which requires both competition and cooperation between competitors’.¹⁷ Using semi-structured interviews, the authors asked 15 research participants (road cyclists) how match-fixing is institutionalised, rationalised, and socialised in road cycling.¹⁸ The researchers found cooperation with competitors to be pervasive, with cyclists adopting strategies to rationalise and normalise such behaviour.¹⁹ Van Der Hoeven and colleagues recommended instituting a whistleblower program and revised competition formats.²⁰ They also left readers with an existential question at the core of sports jurisprudence: ‘After all, if everyone agrees to fixing, is it still fixing?’²¹ Such a question was probed by Berman and Friedman too, with the authors having readers consider the infamous 1982 World Cup soccer match between West Germany and Austria.²²

III The Gamewright’s Crystal Ball

A perusal of *The Jurisprudence of Sport*’s table of contents reveals the authors to be soothsayers. The topics that Berman and Friedman explore in the book represent inclusive coverage of the most vexing issues under the umbrella of sports jurisprudence. They accomplish this by setting the strongest of foundations, positing that ‘[s]ports play a significant and enduring role in human life’.²³ Berman and Friedman explain:

Sports are not only rewarding to play and diverting to watch. They do more than contribute massively to national and world economies. They are also

¹⁴ Ibid 59.

¹⁵ Berman and Friedman (n 3) 284–5.

¹⁶ Stef Van Der Hoeven, Bram Constandt, Cleo Schyvinck, Wim Lagae and Annick Willem, ‘The Grey Zone between Tactics and Manipulation: The Normalization of Match-Fixing in Road Cycling’ (2022) *International Review for the Sociology of Sport* (advance).

¹⁷ Ibid 2 (citations omitted).

¹⁸ Ibid 8–9.

¹⁹ Ibid 16.

²⁰ Ibid.

²¹ Ibid.

²² Berman and Friedman (n 3) 517.

²³ Ibid 11.

worthy of serious and sustained intellectual attention. They are fit subjects of study.²⁴

...

This book concerns sports *as* law — not ‘sports law’. Its subject is *not* how ordinary legal systems of a state interact with formal institutionalized sporting systems ... but rather the sets of rules and standards that these superficially disparate types of systems, and less formal ones as well, establish to create and shape the competitions they oversee.²⁵

...

It explores both differences among these systems and ways in which they are alike and can illuminate each other. It is about the surprising and valuable lessons we might learn about sports by thinking hard about law — and about the lessons we can learn about law by investigating sports. And because law and sports are just two of the myriad of complex rule-based systems designed to structure, facilitate, empower, regulate, deter, incentivize, and punish human behavior of varied sorts, attention to sports and law together might even teach us something interesting about human life and institutions more generally.²⁶

Berman and Friedman’s persuasive foundation for studying sports jurisprudence is centred around the gamewright, ‘any entity or person who designs a game or sport or oversees its formal rules’.²⁷ The gamewright is charged with a multitude of tasks, including creating the competitive structure, adjudicating the contest via officials and umpires, and allocating awards. Three issues arising from such tasks evidence the breadth of Berman and Friedman’s book.

A first gamewright issue is ties, tiebreakers, and draws. Like sports, the law has taken an interest in tiebreakers too: ‘As the US Supreme Court has observed, when decision is measured by multiple factors or considerations, “any one factor will act as a tiebreaker when the other factors are closely balanced”’.²⁸ Berman and Friedman pose several questions on this topic: When should ties be recognised?²⁹ When should ties remain unbroken?³⁰ How should ties be broken?³¹

The latter question is the most timely, as NFL fans learned early in 2022. Gamewrights have a multitude of options to resolve ties. Continuing play after regulation is the most common method, with preset overtime periods where the team in the lead upon the expiration of time wins or ‘sudden death’ tiebreakers where the first team to score in overtime is declared the winner. The NFL opted for neither, however: ‘Starting with the 2011 playoffs, the NFL introduced a hybrid model

²⁴ Ibid.

²⁵ Ibid (emphasis in original).

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid, quoting *Metropolitan Life Insurance Company v Glenn*, 554 US 105, 117 (2008). See also, Adam M Samaha, ‘On Law’s Tiebreakers’ (2010) 77(4) *University of Chicago Law Review* 1661.

²⁹ Berman and Friedman (n 3) 138.

³⁰ Ibid 144.

³¹ Ibid 147.

between true and equalized sudden death',³² where an initial touchdown worth six points would end the game (true sudden death), but an initial field goal worth three points would result in the game continuing (equalised sudden death).

Berman and Friedman offer several novel tiebreaker ideas in other sports. In tennis, where each of the four Grand Slam tournaments had different tiebreak rules for the third set (women's singles) or fifth set (men's singles) in 2021, the authors suggest that gamewrights could 'count total points in the set if the score in games reaches, say, 6-6. This approach would presumably eliminate marathon matches. It would also incentivise players to compete hard on every point, no matter what the score in the particular game.'³³ To avoid soccer shootouts, Berman and Friedman opine that the size of the goal could be increased progressively during overtime or players could be removed from the field every ten minutes if the game remained tied.³⁴

A second gamewright issue is the use of technology-assisted instant replay to correct in-game officiating errors, which has become pervasive in sports, although the expansion has been bumpy due to 'many difficult and interesting questions of system design'.³⁵ Berman and Friedman explain instant replay's rationale:

for interrelated reasons of truth and justice we want to get things right; and given current technology that permits high-definition videography from multiple angles, many or most sports can improve accuracy by using instant replay to review at least some on-field calls in close to real time.³⁶

Enter laches, the equitable principle in law that undue delay can result in the termination of a lawsuit or appeal. The same principle applies in sports: undue delay in implementing replay review of officiating calls (or non-calls) can be fatal. Tennis players and NFL coaches, for example, must challenge perceived errors promptly or risk being saddled with an error. The latency issue, according to Berman and Friedman, mandates that 'gamewrights should resist any rule changes that introduce greater delay to the conduct of competition'.³⁷ They cite the 8,500 words in the Major League Baseball rulebook devoted to instant replay as evidence of the 'startlingly complex' issues presented when trying to decide what calls are reviewable and what standards of review attach.³⁸

In legal jurisprudence, standards such as 'beyond a reasonable doubt' and 'preponderance of the evidence' are prevalent in common law countries. In sports, the review standards run the gamut. Before 2016, the NFL required 'indisputable visual evidence' for reversal.³⁹ Since 2016, the standard shifted to a 'clear and obvious visual evidence' guideline.⁴⁰ Major League Baseball has a 'clear and convincing evidence' standard for appeals, while the National Basketball

³² Ibid 148.

³³ Ibid 152.

³⁴ Ibid 154.

³⁵ Ibid 428. For more details, see Mitchell N Berman, 'Replay' (2011) 99(6) *California Law Review* 1683.

³⁶ Berman and Friedman (n 3) 428.

³⁷ Ibid 428 ('The challenge for any gamewright designing a system of review is to balance these interests.').

³⁸ Ibid.

³⁹ Ibid 438.

⁴⁰ Ibid.

Association only permits call reversals if there is ‘clear and conclusive visual evidence’.⁴¹

Regarding a third gamewright task, Berman and Friedman tackle the ‘grey zone’ that is at the convergence of intentional rule-breaking and loopholing, a concept defined by them as ‘cheating within the rules’.⁴² Berman and Friedman persuasively frame the issue as a complicated one: ‘It is routine in many sports for a competitor to intentionally break a rule based on the instrumental calculation that the competitive benefit thereby secured exceeds the competitive cost of the expected sanction.’⁴³ While there are intentional fouls across almost all sports, some are overt and some are covert. *The Jurisprudence of Sport* expertly distinguishes between the two and provides mind-bending examples for readers to consider. One of the most jarring involved golfer Phil Mickelson’s calculated decision to intentionally strike a moving ball and take a two-shot penalty. Two scandals involving the NFL’s New England Patriots team — Spygate and Deflategate — are also compared and contrasted in-depth. Likewise, baseball sign-stealing, spitballs, and corked bats receive treatment. Berman and Friedman conclude the sub-section with a jurisprudential riddle: ‘If cheating is a form of proscribed advantage-seeking behavior, must a cheater be trying to gain an advantage over another competitor? Is it possible to cheat at solitaire?’⁴⁴

Loopholing, a close cousin of intentional rule-breaking for a competitive advantage, is put under Berman and Friedman’s analytical lens too. A noted criminal law professor described loopholes as ‘spaces that actors reveal through new behaviors that render law underinclusive in ways lawmakers did not foresee and may have been unable to foresee’.⁴⁵ Such parameters for law generally are applicable to sports too. In 2013, tennis player Victoria Azarenka was accused of ‘cheating within the rules’ following a lengthy, but permissible, medical timeout that involved no apparent medical treatment at all.⁴⁶ Two decades after so-called ‘spaghetti strings’ were banned by tennis governing bodies, a new form of polyester strings burst onto the professional tennis scene, with Andre Agassi lauding the strings’ merits and Pete Sampras describing the strings as ‘cheatalon’.⁴⁷ Berman and Friedman also introduce a teaser of sorts about loopholing and doping, with an easy-to-anticipate situation where certain athletes could create specifically-tailored synthetic drugs that technically escape the narrow confines of anti-doping codes.

These three gamewright-specific issues, along with a multitude of others explored by Berman and Friedman, all converge in a golf-related US Supreme Court

⁴¹ Ibid.

⁴² Ibid 479.

⁴³ Ibid 466–7.

⁴⁴ Ibid 478.

⁴⁵ Samuel W Buell, ‘Good Faith and Law Evasion’ (2011) 58(3) *UCLA Law Review* 611, 616 n 14 (emphasis omitted).

⁴⁶ Berman and Friedman (n 3) 479.

⁴⁷ Ryan Rodenberg, ‘Conspiracy String Theory: How New Technology Killed American Men’s Tennis’, *Vice* (online, 27 May 2015) <<https://www.vice.com/en/article/qkqyvd/conspiracy-string-theory-how-new-technology-killed-american-mens-tennis>>

case — reproduced and discussed at length in Chapter 2 of *The Jurisprudence of Sport* — that addresses ‘the essence of the game’.⁴⁸

IV The United States Supreme Court Enters the Sports Jurisprudence Fray

When the US Supreme Court exercised its jurisdiction to hear the *PGA Tour v Martin* case, it is unlikely that any of the nine justices tasked with deciding the case would have predicted that it would result in a discussion of sports jurisprudence. The lawsuit started when professional golfer Casey Martin sued the PGA Tour for the right to ride in a cart while competing, even though tour rules mandated that players walk the course.⁴⁹ One of the questions the US Supreme Court had to decide was ‘whether a disabled contestant may be denied the use of a golf cart because it would “fundamentally alter the nature” of the tournaments ... to allow him to ride when all other contestants must walk’.⁵⁰ Berman and Friedman devote Chapter 2 almost entirely to this courtroom dispute, explaining that the case illustrates the ‘fundamental questions concerning the nature of a sport and the functions of the rules that constitute it’.⁵¹

Martin won the case by a 7:2 vote count. The seven-justice majority looked to history in justifying its ruling:

As an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking — using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible. That essential aspect of the game is still reflected in the very first [version] of the Rules of Golf ...⁵²

The US Supreme Court rejected the PGA Tour’s contention that its ‘walking rule’ was an essential rule of competition and any waiver thereof would fundamentally alter the nature of golf tournaments.⁵³ Instead, the US Supreme Court concluded that the walking rule was ‘at best peripheral’ to professional golf.⁵⁴ As such, accepting the PGA Tour’s arguments that its rules ‘are sacrosanct and cannot be modified under any circumstances’ would amount to an effective exemption from the law’s reasonable modification requirement, one that does not have any exemption for elite-level athletics.⁵⁵

Two members of the US Supreme Court dissented from this view and questioned broadly why the legal system was interjecting itself into sports rule-making and enforcement. Justice Antonin Scalia penned the minority dissent and

⁴⁸ *PGA Tour v Martin* (n 4) 683.

⁴⁹ Martin sued under a law known as the *Americans with Disabilities Act of 1990*: *ibid* 664.

⁵⁰ *Ibid* 665.

⁵¹ Berman and Friedman (n 3) 23.

⁵² *Ibid* 683–4.

⁵³ *Ibid* 689.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

queried — with what appeared to be a heavy dose of sarcasm — the proper role of legal systems overseeing sports:

Nowhere is it writ that PGA Tour golf must be classic ‘essential’ golf. Why cannot the PGA Tour, if it wishes, promote a new game, with distinctive rules ... [T]he rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone — not even the Supreme Court of the United States — can pronounce one or another of them to be ‘nonessential’ if the rulemaker (here the PGA Tour) deems it to be essential.⁵⁶

...

I am sure that the Framers of the [US] Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a ‘fundamental’ aspect of golf.⁵⁷

...

Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration — these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.⁵⁸

In this way, two-ninths of the US Supreme Court seemingly questioned whether to enter the ‘grey zone’ at all. Berman and Friedman would almost certainly dissent from this minority position.

V Conclusion

Over the course of 600-plus pages, Berman and Friedman have penned the seminal treatise at the intersection of jurisprudence and sports. The book is as thought-provoking as it is comprehensive. Any professor using the book as part of a PhD-level seminar would almost certainly need two full semesters to cover the expansive content included in Berman and Friedman’s work. Indeed, the ‘grey zone’ in sports is vast.

This expansiveness speaks to the utility of treating sports and games as legal systems. The overlap between sports and the law is easy to isolate, and sometimes evidences itself in revealing — and funny — ways, especially vis-à-vis this review essay’s opening quote. As Berman and Friedman observed: ‘The NFL, for example,

⁵⁶ Ibid 699–700.

⁵⁷ Ibid 700 (emphasis in original).

⁵⁸ Ibid 703–4.

recognizes twelve (!) tiebreakers to determine a division champion when two or more teams tie for division lead based just on won-loss-tie record ... The final tiebreak is a coin toss ... Coin tosses are used outside of sports too. Occasionally, they have even been used to break tied elections.’⁵⁹

The humorous aspects aside, the sports jurisprudence–legal jurisprudence coverage does lend itself to two key takeaways about ‘grey zones’ in the former. First, the jurisprudence of sport is real. Legal principles play a profound role in sports. And the study of sports as a *de facto* legal system can shed insight on law positively and normatively, a conclusion aptly demonstrated by Berman and Friedman’s opus and others’ academic articles covering the same ground. Second, as highlighted by the point–counterpoint in the *PGA Tour v Martin* case, it is plausibly debatable — but not realistically avoidable — for sports and legal systems to be completely detached from each other. The more relevant debate would be centred on the *extent* of overlap between the two in a sports jurisprudence Venn diagram that can be less opaquely grey moving forward.

⁵⁹ Berman and Friedman (n 3) 150.

Book Review

A Free and Regulated Press: Defending Coercive Independent Press Regulation by Paul Wragg
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The boldness of Professor Paul Wragg's contribution to the scholarship on press freedom and its limits is apparent from the very title of his book: *A Free and Regulated Press: Defending Coercive Independent Press Regulation*.¹ Any defence of coercive press regulation will be bold — and perhaps much more than bold — in the eyes of the press itself: that is to state the obvious. What is of greater concern for defenders of the principle of freedom of expression, and its subsidiary, press freedom, is the boldness of Wragg's project in comparison with the strength of the classical-liberal normative consensus: that the press should be insulated from coercion or control as to how and what it publishes, and that this insulation is integral to a liberal-democratic order.

Accepting this as the philosophical status quo, the questions, then, are: how Wragg envisages coercive regulation of the press to be independent; how targeting regulatory efforts on the press in particular can nevertheless leave us with a free press; and exactly which activities of the press would be controlled — and how — under a new regulatory scheme.

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¹ Paul Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, 2020).

What essentially matters here is how a thesis defending coercive press regulation interacts with the principles of press freedom and freedom of expression, the extent to which such regulation interferes with these principles, and whether any such interference ought to be tolerated in a liberal democracy.

In this book, Wragg offers a serious and rigorous answer to all of these questions. Though the mere prospect of coercive press regulation in a liberal democracy may cause discomfort for those who accept a classical-liberal, or negative-liberty, conception of freedom of expression and press freedom, Wragg's contribution certainly cannot be ignored, and nor should it be dismissed. This is because it offers a novel, critical, and comprehensive reassessment of the normative underpinnings of press freedom, and the established theoretical claims justifying the insulation of the press from all forms of regulation targeted at the press *per se*.

Aptly, the book begins with a much needed disambiguation of liberalism and libertarianism. It then examines the rationale for press freedom, providing a welcome analysis of the historical, unified and straightforward vision of press freedom.² There is also discussion of a more complex, internally diverse normative quantity that we continue to label 'press freedom', including the distinct aims of plurality, impartiality, and the need to maintain the rule of law over press activities.³ What follows is a construction of press freedom in terms of its moral duties and expectations, its responsibilities and accountability, emphasising the relevance of ethics, power and misuse of power by the press.⁴

Wragg then explains what he means by coercive regulation, and exactly what it is targeted at: primarily, accuracy of subject-matter published, and the conduct of the press in its operations.⁵ The final part of the book sets out how regulation should be implemented in order to address the concerns raised and in a way that is consistent with the analysis of and theoretical justification for press freedom developed earlier.⁶ This is a valuable work of scholarship for its breadth and detail, its intellectual heft and integrity, and its coherent and persuasive reconstruction of what it means for the press to be free.

The book's critical analysis of the conventional understanding of press freedom itself, and its justification for normatively prioritising press duties over its liberties and immunities, ends with the simple question: "why not?"⁷ It is a fair question with which to end this significant contribution to the literature on press freedom and press regulation. Having answered the question "why 'yes' to coercive regulation?" in the book itself, Wragg appropriately leaves readers — scholars, jurists, and policymakers — with the responsibility to reconsider the status quo position of near-absolute immunity from direct regulation. And, however strong our allegiance might be to the classical, simplified vision of the press in a liberal democracy, it is crucial that we continuously examine and re-examine our understanding of the position, and privilege, of the press in a liberal society. Despite

² Ibid ch 1.

³ Ibid ch 2.

⁴ Ibid part 2 (chs 3–5).

⁵ Ibid part 3 (chs 6–8).

⁶ Ibid part 4 (chs 9–10).

⁷ Ibid 291.

the boldness of the book's title, the nuance, detail and coherence with which Wragg's thesis is furthered assuages concerns that what is being promoted here is a wholesale, substantive censorship apparatus for the press. Vitrally, Wragg draws a clear line between accountability for wrongdoing in how the press conducts itself and accountability for publishing sensationalist, politicised, ideological or unenlightened material: only the former is in issue here.

Above all, and as Wragg persuasively contends, there is a distinction between press freedom and press wrongdoing, so that the former does not subsume the latter, immunising the press from committing wrongs that interfere unjustifiably with individuals' lives. Indeed, the press — including individual journalists, press corporations and publishers — have always been subject to laws (whether civil or criminal liability) that apply generally and equally across all actors within a particular jurisdiction, including the torts of defamation and malicious falsehood, liability for privacy interferences, and laws prohibiting harassment, hacking and fraud. In addition to this straightforward rule-of-law aspect of how the press is treated in a liberal society (that it is subject to the ordinary laws of the land, unless specially exempted, as with some data privacy protection regulation), liberal democracies have also acknowledged the importance of (extra-legal) codes of ethics for the press, which commonly encompass standards of good conduct and accuracy.

As is clear from Wragg's book, such basic standards are intimately connected with the moral duties imposed upon the press in a free society, and the virtues associated with a free press in a liberal democracy. Without such standards, the press would not be able to claim the virtue that justifies its freedom and immunities in a liberal democracy. If it recklessly publishes inaccurate stories, if it intimidates, harasses and coerces individuals, how can it possibly be relied upon to educate, enlighten, facilitate democratic participation, and credibly hold the powerful (including those wielding public power) to account?

The problem identified by Wragg is that the harm occasioned by press breaches of the laws that bind it, and contraventions of clear, basic media ethics, has passed a threshold that requires us to consider whether direct, coercive regulation becomes normatively irresistible. Is it sufficient to rely on the general bindingness of ordinary laws, enforced *ex post facto*, and on the presence of self-policed ethical codes, to ensure that the press, whose power and privilege can well be justified by virtue of its instrumentality to the liberal democratic order, does not commit serious wrongs against individuals?

It is clear that Wragg's defence of coercive press regulation rests upon a consequentialist justification for such interference, specifically, the harm principle: such regulation is justified by the need to prevent serious harms to individuals. What is significant is that Wragg does not reconstruct press freedom into a weak principle that can be set aside whenever any form of harm is alleged to have flowed from press behaviour and publications. It is a particular type of harm to individuals that Wragg recognises as warranting our consideration of coercive regulation, and *that* harm involves stripping individuals of the autonomy to which they are entitled in equal measure in a liberal democracy. There is an inconsistency between a liberal democracy privileging the press for its liberty- and democracy-promoting value to society and the individuals in it, and the same liberal democracy permitting the press

through its misbehaviour to destroy individuals' basic autonomy, and liberty, in how they live their lives. Wragg is not concerned with any purported harms in one-sided, sensationalist, ideological media commentary; he is, rightly, concerned only with egregious interferences that have the potential to ruin individuals' and families' lives.

It has been a decade since the publication of the Leveson Report, which documented the extent of the wrongdoing by elements of the British press, including a contemptuous disregard for ordinary laws prohibiting hacking, harassment and interference with privacy; abuse of power; flagrant flouting of basic media ethics; and a profound effect on the individuals and families victimised by such wrongdoing.⁸ Such press misbehaviour not only results in harms well documented in the Leveson Report, but also entails a degree of wrongfulness, which can hardly be said to be defensible even under a strong, absolutist principle of freedom of expression.⁹

Such press wrongdoing does not, as Wragg argues, sit comfortably with the virtues associated with a free press, and with the moral duties borne by the press in a liberal democracy: ensuring that the public can be informed, educated and enlightened; facilitating democratic participation; and facilitating, through transparency and criticism, the accountability of the exercise of public (and private) power. And so, asks Wragg, how can we possibly defend a near-absolute freedom from regulatory attention for an institution that is at once expected to do good and been proven to have done bad?

It is not so much a 'riddle' that the press is obliged to do certain things, and simultaneously not obliged to do these things,¹⁰ but, rather, that the press is obliged to discharge certain (moral) duties, and not to commit certain (legal or ethical) wrongs, but its immunity from regulation has seen the press commit egregious wrongs and act inconsistently with its moral responsibilities. The real riddle is whether coercive regulation, purporting to be consistent with the virtue-based duties borne by the press, necessarily violates the very same principles and virtues that give rise to the duties and privileges of the press in the first place. Is coercive regulation of the press simply impermissible, whatever the purposes and limitations? Wragg says 'no', and, what is more, the values underpinning a liberal democracy, understood in the way he has reassessed them in his book, *demand* that the press be coercively regulated to protect against press wrongdoing.

It is crucial to emphasise that Wragg's thesis is not a paternalistic one: he unambiguously rejects the justificatory basis for press regulation that sees readers as victims of a press that has fallen short of the virtues and duties imposed upon it. The harm that justifies the type of intervention Wragg advocates, and the (re)vision of press freedom that he furthers in this book, is not associated with how the material the press publishes is received by its readership, eliminating any sense of autonomy and responsibility of readers. As Wragg rightly puts it, '[t]he collective good cannot

⁸ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012) ('Leveson Report').

⁹ Indeed, a recent major philosophical defence of the absolute principle of freedom of expression does not include such wrongdoing within the protective ambit of that freedom: Matthew H Kramer, *Freedom of Expression as Self-Restraint* (Oxford University Press, 2021).

¹⁰ Wragg (n 1) 287.

be pursued at the expense of individual autonomy. This is the immutable, irreducible minima of the open society and the secret to the good life ... all we can do is manage harm when it arises.¹¹ Instead, the harm necessitating intervention, in Wragg's view, is the harm suffered by those individuals who are impermissibly commodified by the press in producing its reportage or commentary. This reoriented view of press freedom means that the protection of the press from coercive regulation must stop at the point at which the press causes serious harm to individuals through its wrongful behaviour and operations, and not through how readers might receive or react to reportage and publications.

This point is important, precisely because it allays any instinctual concerns that the press's freedom will be interfered with for its substantive publications, which may or may not carry or reflect a particular political or ideological stance. Those classical liberals who take issue with coercive press regulation for the risks it poses to empower the State to control or punish those elements of the press that publish disagreeable material will take comfort in Wragg's clear allegiance to individual autonomy and responsibility. It bears setting out how he clarifies his position:

The reader that believes what she reads must be taken to have made a *choice* to believe. Consequently, her conclusions about the information she receives is itself a manifestation of her autonomy. She has chosen to read the information. She has chosen to suspend her critical judgment and accept that information, which may be because it accords with her own worldview. Or she has conducted her own independent research, but poorly so as not to discover the truth. Yet, in any event, these decisions, as defective as they may be, are her own responsibility. This is true even of the reader who we suspect has not reached her decision *rationally*, which is to say that she has preferred feelings, emotions, and beliefs over reason, scepticism, and analysis. It is true of the reader who chooses sensationalism over the dispassionate. In this way, we should see that the idea of the reader — or larger society — here as victim is simply unvarnished paternalism.¹²

Coercive regulation of the press, then, is targeted at preventing the types of harms to individuals which are, more or less, *already* prohibited in law or codified in ethical standards, including unreasonable and unjustified interference with privacy, harassment, phone-hacking, having a reckless disregard to accuracy, and mistreating the individuals who are the subject of, or are involved in, the particular story reported or commented on.

Insofar as press freedom has been (mis)understood as plenary immunity from accountability for serious wrongdoing, Wragg has in this book sought to dislocate the tectonic plates on top of which such a vision of press freedom has comfortably rested. He has proposed that '[m]eaningful press regulatory reform is *not* an attack on press freedom. It is an attack on press malfeasance.'¹³ Whether or not Wragg succeeds in convincing every reader that he is right about the nature of press freedom and the need for coercive regulation as the solution to the problem highlighted, *A Free and Regulated Press* will undoubtedly have a major influence on scholarship

¹¹ Ibid 291.

¹² Ibid 290–1 (emphasis original).

¹³ Ibid 291 (emphasis original).

(and perhaps even policy) on the rationale for and boundaries of press freedom. At the very least, it raises the bar that needs to be met by those who seek to defend the classical normative conception of press freedom and the justifications for its protection from any form of regulation whatsoever.



CORRIGENDA

Date issued: 17 June 2022

Change to: Volume 38 Number 1 March 2016 issue since the original version was published, due to discontinuation of legal proceedings.

Article: Andreas Schloenhardt and Colin Craig, 'Prosecutions of People Smugglers in Australia 2011–14' (2016) 38(1) Sydney Law Review 49.

Pages 70–1: Paragraph starting at the end of page 70 and ending at the start of page 71 (including associated footnotes 125–7) deleted as the legal proceedings referred to therein were discontinued.

Date issued: 15 July 2022

Change to: Volume 44 Number 1 March 2022 issue since the original version was published, due to a typographical error misattributing the relevant judicial officer.

Before the High Court column: Elisa Arcioni and Kirsty Gover, 'Aboriginal Identity and Status under the *Australian Constitution: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*' (2022) 44(1) Sydney Law Review 137.

Pages 139, 145–6: 'Derrington J' should read 'SC Derrington J'.

