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# Occasional Address\*

## University of Sydney Law Graduation

Peter Gerangelos†

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In the 1930s, the French Minister for Finance, Pierre-Étienne Flandin, visited England to consult with his counterpart there. Reading *The Times*, to his bemusement, he noticed that the Chancellor of the Exchequer had written to the Editor to say that he had found on his lawn on the previous day a particular type of water-wagtail, that the time was unusually early for that species, and that he was sure he was not mistaken. M. Flandin thought such a letter unimaginable in France, but soon came to appreciate that, in England, there was a prevailing ethos that to be nothing but a politician, or a specialist, and nothing more, renders a person stale, or sour, at least something rather less than a complete human being.

Federigo di Montefeltro, the first Duke of Urbino in the mid-15<sup>th</sup> century, a very great soldier and ruler, thought the same. The portrait of the Duke — either by Pedro Berruguete or Justus van Gent — depicts him in full armour, in all his chivalric glory. His helmet, however, lay at his feet. He is seated in his library, reading from the precious antique manuscripts he assiduously collected. For he was rather more than merely a great general. He was a highly cultivated and intelligent man, who, for pleasure, read the great works of antique literature, regarding the pursuit of the *studia humanitatis* as an attribute of any great man in any profession. The Duke's humanity was his biographer's recurring theme. 'What are the essential attributes to being a good ruler?', he asked the Duke. '*Essere umano*', the Duke replied, 'to be human'; by which we would mean to be humane, to have within you that quality the Greeks referred to as 'to philanthropon' (το φιλανθρωπον); that is, that deep love and reverence for the human person.

These historical anecdotes commend to our graduates the cultivation of the same attitude, not despite, but because of, the rigours and vicissitudes of the professional lives of lawyers and that can have a jading, dehumanising, effect if one is not careful. There is a risk of the loss of that spirit of disinterested enquiry, pursued for its sheer enjoyment, an acquired taste, an essential part of one's humanity: not just for its utility, but which ultimately, inadvertently, has greater utility. When first things are put first, second things will follow; whereas when the contrary applies, both first *and* second things are lost. Is it not the case that the mathematics which have mattered to us more is not that State or industry-sponsored mathematics, such as existed in ancient Egypt for example, but that disinterested, liberal, mathematical

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\* This is an edited version of an address delivered at the University of Sydney Law School Graduation, 7 June 2019, The Great Hall, The University of Sydney, Australia. Footnotes omitted.

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enquiry engaged in by gatherings of friends — Euclid, Pythagoras, and their companions — who were simply fascinated and delighted by numbers? Similarly, such a spirit maintained as the backdrop to one's professional life in the law will reverberate back to enhance one's main occupation.

The Duke of Urbino was not a great ruler because he was a great general, but rather because he was a humane man, who could leave his helmet at his feet while he read Aeschylus and Cicero. No doubt the Duke would have said, along with the poet Milton, that '[a] good book is the precious life-blood of a master spirit, ... treasured up on purpose to a life beyond life.'

It has been asked rhetorically, 'for what do they know of the law who only the laws know?' Serious reflection upon this question commends an attitude of mind that will elevate young lawyers beyond the level of mere technicians, propelling them, one hopes, into the realms of the great jurists: the Demosthenes, the Ciceros, the Lord Mansfields, the Chief Justice Marshalls, the Sir Owen Dixons, the Lord Sumptions. It is not to the point that not all will rise to such eminence, but rather that those adopting this same attitude will become the better lawyers for it, reverberating upon the profession as a whole for the benefit of those it serves.

To illuminate the point, might I invite you to reflect upon a sunbeam in a dark windowless tool shed, issuing through a small crack in the door. By looking *at* that sunbeam, one sees a ray of the sun, with specks of dust gently floating downwards, but little else. One might just admire the sunbeam, the most striking thing in what is otherwise darkness. There may be others who, touched by curiosity, or otherwise inspired by some Muse, will approach the sunbeam and place their eye upon it. Their line of sight will be taken through the crack in the door opening up a vista of green leaves on trees, birds, the blue sky and the sun, from which the ray derives, some 150 million kilometres away: an entirely more exhilarating, and the true, vision. To see that, however, one must stop looking *at* the sunbeam and make the effort to look *through* it.

The specks of dust that float through the sunbeam of prescribed casebooks, of lectures attended, the legal tomes poured over, are the many and varied legal principles that students have striven to master; essential of course for technical proficiency and not the least because as lawyers you will be representing people whose property, liberty and rights — indeed, whose very life — will be at stake. However, the laws cannot be sustained by their own devices, but rather by those lawyers who, looking through the sunbeam, see that they belong to one of the great foundational, liberal and learned professions whose maintenance in its form as a *liberal and learned profession* — and not just another trade or business — is essential for the maintenance of ordered liberty in a democratic society and those civil liberties which enable the enjoyment of the fruits of civilised life, for the cultivation of an ethos in society which, without denying the individual's obligations to civil society, maintains that the law and the State exist not for their own sake, but rather to facilitate human flourishing; that no person — no matter how mean or otherwise disreputable — is ever to be regarded as a means to an end, but an end in themselves, a sacred, inviolable and treasured end, for which the law and the State exist. It is not to be wondered that the French attributed nobility to the legal profession: '*noblesse de robe*' — the nobility of the robe, or the gown — referring

to the gowns being worn here today and in the profession. With true nobility, however, comes obligation: *noblesse oblige*.

Looking through the sunbeam, what else might one see? Permit me to share some of the things I saw and recorded in a notebook of quotations kept when I was a law student here, recently discovered gathering cobwebs in the attic, some of which have already been relied on above. Taken down at a time when I was approximately your age, these may be helpful and may also assist my demurrer to any charge of didacticism.

To reflect the point just made, here is the first quotation from the Professor of Medieval and Renaissance Literature at the University of Cambridge in the 1950s, perhaps a throwaway line, but the general point is important:

The State exists simply to promote and to protect the ordinary happiness of human beings in this life. A husband and wife chatting over a fire, a couple of friends having a game of darts in a pub, a man reading a book in his own room or digging in his garden — that is what the State is there for. And unless they are helping to increase and prolong and protect such moments all the laws, parliaments, armies, courts, police, economics etc. are simply a waste of time.

The second relates to the famous criminal barrister Sir Richard Muir concerning the fundamental attribute of all the truly great lawyers: attention to detail, for striving for perfection in small things. ‘He was always polishing and rounding off and revising his cases, and even if a case should be postponed or adjourned over the weekend, the same process would continue. He always wanted to go a little better.’ This brings to mind the story of arguably the most outstanding cellist of the 20<sup>th</sup> century, Pablo Casals. At the age of 93, he continued to practice the cello for three hours a day! When asked why he did so, he replied, ‘I am beginning to notice some improvement.’ Remember, the universe is not just infinite in its vastness. It is also infinite in its smallness.

The third quote comes from William Pitt — that great Prime Minister described by the historian as ‘not just clever, but pure’ — in his speech in the House of Commons in 1763 reflecting upon the rule of law and its solicitous care for the most vulnerable:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!

Who can forget Lord Mansfield’s judgment in the *Somerset Case* in 1772, (1772) 98 ER 499, not only one of the greatest adornments to the common law, but also the harbinger of the abolition of slavery by the great generation that followed?:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, ... It is so odious, that nothing can be suffered to support it ... Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England ...

Its modern analogue is Lord Atkin's famous dissent in *Liversidge v Anderson* [1942] AC 206 at 244, delivered in 1941 during the British Commonwealth's darkest hour in the Second World War:

In [England], amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive ...

In constitutional law lectures, the admonition may have been heard: 'Smell out the Caesars as well as the taxes.' It reflects the calling of every lawyer to be fiercely independent, no matter the personal cost: not only independent of peer group pressure, 'group think', of the untested assertions of any particular 'tribe' to which we may belong, ideology, but also independent of powerful and wealthy interest. We must *see* what others do not, or will not, or cannot, see, calling out an overreaching government seeking to deal with a crisis by imposing disproportionate limits on civil liberties, seeing through the spin of large commercial entities ever seeking to advance their own interests at the expense of the individual citizen and the democratic polity, to expose those who 'know the price of everything and the value of nothing'. The motto of the New South Wales Bar Association encapsulates this rather well: 'Servants of all, yet of none.' This is at the core of our profession, its most enduring service to the commonwealth.

Some of our graduates may entertain doubts about being lawyers, even now. This is not uncommon, especially if one prefers more liberal, less arid, forms of intellectual engagement. Some quotations referred to Sir Owen Dixon, arguably our greatest Chief Justice and the greatest lawyer of the 20<sup>th</sup> century in the common law world. Originally, he aspired to be a classicist, having read classics for his first degree. Difficult family circumstances, however, required him to pursue a more certain career path. Classics' loss was the law's gain; although he never ceased to read Homer and Aeschylus for pleasure — in the original. Being exposed to such high literary art no doubt had something to do with the quality of his judgments. He would have been exposed, for example, to that great dilemma dramatised in Sophocles' *Antigone*, with extraordinary prescience, which confronted the then newly nascent democracy and still confronts democratic societies today: obedience to the State — in this case of a tyrant King who prohibited a proper burial to Antigone's dead brother on the pain of death — or obedience to the higher law of family obligation and religious observance that required Antigone to retrieve her brother's body in order to bury it with all proper ceremony? The tragedy flows of course from Antigone's disobedience to the State decree. Dixon would also have been aware that the very first line of the *Iliad* is an appeal to the Muse to inspire a poem to celebrate a protest against an unjust royal decree. The DNA of any liberal, democratic polity is manifest in the very first lines of our great literature; and happy is that polity whose lawyers and judges are only too familiar with it.

Sir Owen Dixon also set us an example of wide erudition beyond the law; and one often finds a great correlation between the degree of general erudition and that of excellence as a lawyer. One need only peer a little deeper into the lives of the great lawyers and jurists, including academic lawyers, to see this borne out. I name

only one from many: Lord Sumption, one of Britain's leading silks and recently retired from the United Kingdom's Supreme Court Bench, has written a five-volume historical work, *The Hundred Years War*, which some have compared to Gibbon's *Decline and Fall*. Closer to home, and in my own field, I found this extraordinary erudition amongst those constitutional lawyers who have contributed so much to constitutional law scholarship, indeed to the Commonwealth more generally, and with whom I had more than a passing acquaintance: the late Professors Leslie Zines and George Winterton. Their example is commended.

This tension between duty and personal preference, the hard life of the law — and it can be very hard — and the gentler life of private pursuits away from the vicissitudes of public life and human conflict, has been a perennial dilemma of thoughtful people throughout the centuries. This quote comes from late Graeco-Roman antiquity:

In view of the darkness attending the life of human society, will our wise man take his seat on the judge's bench, or will he not have the heart to do it? Obviously he will sit; for the claims of human society constrain him and draw him to his duty, and it is unthinkable that he should not do it.

Actually, it is especially those who have these doubts, who do not actually crave high judicial office, who are not concerned with the gaudy (and very fleeting) baubles of worldly fame, who simply aspire to doing the best job they can for any person they have the privilege to represent, that are not only best suited to such positions, but are actually the ones chosen — heaven help them. The principle of *nolo episcopari* (literally, 'I do not wish to be an overseer', or 'bishop') ought always to be kept in mind. Moreover, it is not just the 'high flyers' who contribute to the legal profession. 'They also serve who only stand and wait' appears in the notebook from the High Court's decision in *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 (per Dixon J), itself a line from Milton's famous poem reflecting on his (Milton's) impending total blindness.

Another quote comes from Sir Ninian Stephen's book on Dixon. Without in any way discounting the achievements of our prize winners, this one is for those students for whom I have the utmost admiration: the ones not necessarily in the top academic echelon or as gifted, or on *Sydney Law Review*, not necessarily the ones who received that coveted graduate job in the large commercial firms, or as associates of our judges; but rather the ones who, despite all this, doing what they could generally to contribute, lending a helping hand to fellow students, going about their study conscientiously, quietly, sincerely striving to learn and to think like lawyers, taking in the ethos and ethics of the law, barely scoring much above a Credit, always attempting their hand at mooting although never quite making it beyond the quarter-finals; but never complaining, or giving up, or succumbing to envy, who kept picking themselves up, dusting themselves off, and returning once more to the fray; and especially the ones who had to endure very difficult personal vicissitudes on top of everything else.

There are such students; and it is their names that are the easiest to remember over the years. For such students will have learnt through hard experience the fundamental secret to success in legal practice: quiet perseverance, pursuing learning for its own sake and not for the glory of prizes and recognition, collegiality, learning

to overcome disappointment and discouragement, knowing that achieving one's personal best is good enough, that serving the true ideals of the profession provides ultimate success and fulfilment in one's career and personal life — not necessarily being appointed partner, Senior Counsel, Professor of Law, or to the High Court. Strangely enough — although it is not so strange — it is those people who often end up being the most successful as lawyers and as human beings. Here is the quote:

It was in practice at the Bar rather than his studies at the University that [Dixon's] great intellect became clearly manifest. ... his results did nothing to mark him as destined for the immense stature which he attained both at the Bar and on the Bench.

To the virtuous and dutiful student, permit me to say: do not let the naysaying, or any general, petty nastiness — I regret to say — of others you may come across, undermine your confidence. Turn it into a stepping stone for the long ascent. For as Marlowe wrote, 'virtue is the fount whence honour springs'. From my experience over many years, *in the long run*, nice guys finish *first*.

Today is a day of happiness and celebration and, on behalf of my colleagues, I extend to you my very sincerest and profound congratulations and best wishes for your future careers. To your parents, family, friends and supporters, I offer the same good wishes, acknowledging with the greatest respect the considerable sacrifices that have been made, often unnoticed and unrewarded. To them too, a quote is offered: 'By loving them for more than their abilities, we show our children that they are much more than the sum of their accomplishments.' May you all drink long and fulsomely from this cup of achievement, relief and joy.

Finally, to our new graduates, permit me to send you off with one final quote you may be all too familiar with, with all good will and sincerity: 'Good morning to you all ...'.



# *The Inherent Jurisdiction of Courts and the Fair Trial*

Rebecca Ananian-Welsh\*

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## *Abstract*

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

## **I Introduction**

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

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

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

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

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

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

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

## II Inherent Jurisdiction

Writing in 1997, Dockray observed that:

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

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

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

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

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

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

## A *Inherent Jurisdiction and Inherent Powers*

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

<sup>4</sup> Dockray (n 2) 120.

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

<sup>6</sup> *Keramanakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268, 280 [36] (French CJ) ('*Keramanakis*').

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

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

<sup>9</sup> *Ibid* 222.

court of law’;<sup>10</sup> that is, it refers to ‘the power which a court has simply because it is a court of a particular description’.<sup>11</sup>

In his seminal article concerning the inherent jurisdiction, Master I H Jacob provided an evocative description of the concept. Accepting the ‘metaphysical’<sup>12</sup> quality of the inherent jurisdiction, Jacob described it as:

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

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

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

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

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<sup>10</sup> Master I H Jacob, ‘The Inherent Jurisdiction of the Court’ (1970) 23(1) *Current Legal Problems* 23, 27.

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

<sup>12</sup> Jacob (n 10) 27.

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

<sup>14</sup> Dockray (n 2) 121.

<sup>15</sup> Keith Mason, ‘The Inherent Jurisdiction of the Court’ (1983) 57(8) *Australian Law Journal* 449, 449.

<sup>16</sup> Jacob (n 10) 23.

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

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

<sup>19</sup> Mason (n 15) 449.

*patriae* jurisdiction ‘to take care of those who are not able to take care of themselves’ (principally persons of unsound mind and children).<sup>20</sup>

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

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

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

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

<sup>21</sup> Mason (n 15) 447–9.

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

<sup>23</sup> Joseph (n 8) 225–32.

<sup>24</sup> *Ibid* 225.

<sup>25</sup> *Ibid* 232.

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

jurisdiction) make it a ‘problematic’ comparator to New Zealand and, indeed, to most other common law jurisdictions in this field.<sup>27</sup>

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

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

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

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

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

## **B     *The Implied Powers of Courts of Statute***

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

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

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

<sup>29</sup> *Keramanakis* (n 6) 280 [36] (French CJ), quoted in *Pompano* (n 8) 60 [40] (French CJ).

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

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

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

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

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

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

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

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<sup>32</sup> Lacey (n 7) 67–70.

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

<sup>34</sup> *Ibid* 241 [27] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

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

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

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

<sup>38</sup> *BUSB* (n 35) 176 [28] (Spigelman CJ).

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

<sup>40</sup> *BUSB* (n 35) 175 [27].

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

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

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

to be “subjected to the touchstone of reasonableness”<sup>44</sup>. ‘Necessity’ will also adapt its meaning in light of what is needed for the proper administration of justice. As Spigelman CJ observed in *BUSB*:

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

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

### III The Fair Trial

#### A Principles

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

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

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

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<sup>44</sup> Ibid.

<sup>45</sup> *BUSB* (n 35) 176 [33]–[34] (citations omitted).

<sup>46</sup> Dockray (n 2) 121.

<sup>47</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’). See also *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, UN Doc A/810 (10 December 1948) art 10; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended, art 6 (‘European Convention on Human Rights’).

<sup>48</sup> US Constitution amends V, XIV.

<sup>49</sup> *Human Rights Act 1998* (UK) s 1(1).

<sup>50</sup> *Canada Act 1982* (UK) c 11, sch B pt I (‘Canadian Charter of Rights and Freedoms’).

<sup>51</sup> *Bill of Rights Act 1990* (NZ) s 27(1).

<sup>52</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1) (‘Victorian Charter’).

<sup>53</sup> *Human Rights Act 2004* (ACT) s 21(1) (‘ACT HRA’).

<sup>54</sup> *Human Rights Act 2019* (Qld) ss 31–3 (‘Qld HRA’).



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

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

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

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

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

<sup>56</sup> *Australian Constitution* s 80; *ibid* 356.

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

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

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

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

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

<sup>62</sup> *Ibid*.

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

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

<sup>65</sup> *Dietrich* (n 64) 364 (Gaudron J); Spigelman (n 1) 43.

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

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

## B *Protections*

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

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

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

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

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<sup>67</sup> Mason (n 15) 449.

<sup>68</sup> Spigelman (n 1) 31.

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

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

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

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

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

<sup>71</sup> See, eg, *ibid*.

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

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

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

<sup>75</sup> *Leghaei* (n 74) [83].

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

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

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

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

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

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

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

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

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

<sup>82</sup> *Evidence Act 1995* (Cth) s 135.

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

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

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

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

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

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

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

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

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

<sup>89</sup> Lacey (n 7) 59.

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

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

<sup>92</sup> (2010) 239 CLR 531.

<sup>93</sup> Beck (n 90) 303–8.

## IV Two Case Studies

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

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

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

### A Secret Evidence

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

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

<sup>95</sup> *Jago* (n 64).

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

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

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

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

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

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

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

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

<sup>100</sup> Mason (n 15) 452.

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

<sup>102</sup> (n 8).

<sup>103</sup> (2007) 179 A Crim R 470.

<sup>104</sup> [2007] VSC 141 (‘*Benbrika (No 1)*’).

<sup>105</sup> (n 8).

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

<sup>107</sup> *Ibid.*

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

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

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

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

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

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

<sup>108</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 3.

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

<sup>110</sup> *Pompano* (n 8) 46 [1] (French CJ).

<sup>111</sup> *Ibid*.

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

<sup>113</sup> *Ibid* 102 [167] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>114</sup> *Ibid* 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

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



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

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

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

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

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<sup>116</sup> *Pompano* (n 8) 115 [212] (Gageler J).

<sup>117</sup> *Ibid* 115 [212]. See also 105 [178] (Gageler J).

<sup>118</sup> *Ibid* 59–64 [38]–[49] (French CJ).

<sup>119</sup> See, eg, *ibid* 61–2 [43]–[44], 75 [76], 79–80 [88]–[89] (French CJ).

<sup>120</sup> *Ibid* 63 [46] (French CJ).

<sup>121</sup> *Ibid* 61 [42] (French CJ).

<sup>122</sup> *Ibid* 63 [46] (French CJ).

<sup>123</sup> *R v Lodhi* (2006) 65 NSWLR 573.

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

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

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

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

<sup>125</sup> Ananian-Welsh and Williams (n 99) 380.

<sup>126</sup> *NSI Act* s 8.

<sup>127</sup> *Ibid* s 31(7)(a).

<sup>128</sup> *Ibid* s 31(7)(b).

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

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

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

in a criminal trial’ or, specifically, the court’s task of ensuring ‘that the accused is not dealt with unfairly.’<sup>132</sup>

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

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

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

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

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

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

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

<sup>136</sup> *Ibid* 484–5 [41], [45] (Spigelman CJ).

<sup>137</sup> *Ibid* 484 [42]–[44] (Spigelman CJ).

<sup>138</sup> *Ibid* 488 [68]–[69] (Spigelman CJ).

<sup>139</sup> *Benbrika (No 1)* (n 104).

<sup>140</sup> Nicola McGarrrity, ‘“Testing” Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia’ (2010) 34(2) *Criminal Law Journal* 92, 108.

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

<sup>142</sup> *Benbrika (No 1)* (n 104) [19] (Bongiorno J).

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

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

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

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

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid [4].

<sup>145</sup> Ibid. See [19] for the redacted text of these orders, which extend to 45 paragraphs covering information storage, access, confidentiality, copying, transportation, declassification, destruction and more.

<sup>146</sup> Ibid [14].

<sup>147</sup> Ibid [16].

<sup>148</sup> Ibid [15]–[16].

<sup>149</sup> Ibid [7].

<sup>150</sup> Ibid. See also [15], in which his Honour emphasises the importance of a fair trial.

## B *Prison Conditions*

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

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

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

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<sup>151</sup> (2008) 18 VR 410 ('*Benbrika (No 20)*').

<sup>152</sup> *Ibid* 418 [31].

<sup>153</sup> *R v Benbrika (Ruling No 12)* [2007] VSC 524, 532–3 [17]–[19] (Bongiorno J) ('*Benbrika (No 12)*').

<sup>154</sup> *Ibid*.

<sup>155</sup> *Ibid* [33].

<sup>156</sup> Matthew Groves, 'Editorial: Prison Conditions and the Right to a Fair Trial' (2008) 32 *Criminal Law Journal* 133, 133.

<sup>157</sup> *Benbrika (No 20)* (n 151) 419 [34].

<sup>158</sup> *Ibid* 419 [35].

<sup>159</sup> *Ibid* 422 [54], quoting the evidence of Dr Amanda Silcock, occupational physician.

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

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

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

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

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

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<sup>160</sup> *Benbrika (No 12)* (n 153).

<sup>161</sup> *Ibid* [7].

<sup>162</sup> *Ibid* [28]–[29].

<sup>163</sup> *Ibid* [28].

<sup>164</sup> *Ibid* [29].

<sup>165</sup> *Ibid* [28].

<sup>166</sup> *Benbrika (No 20)* (n 151) 427 [85].

<sup>167</sup> *Ibid* 428 [88].

<sup>168</sup> *Ibid* 415 [16], citing *Victorian Charter* (n 52) s 49(2).

<sup>169</sup> *Benbrika (No 20)* (n 151) 416 [17]–[19]. Justice Bongiorno observed that the mere fact that the accused had been in custody for two years or more was 'of itself unsatisfactory' (at 417 [26]) and sounded a general warning that the notice provisions of the *Victorian Charter* might be 'used to delay

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

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

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

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

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

<sup>170</sup> Ibid 424–6 [71]–[86].

<sup>171</sup> Ibid 425 [75].

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

<sup>173</sup> *Benbrika (No 20)* (n 151) 428 [91].

<sup>174</sup> Ibid 429 [93].

<sup>175</sup> Ibid 430–1 [100].

<sup>176</sup> Groves (n 156) 134.

<sup>177</sup> (2008) 184 A Crim R 161 ('*Rich (No 2)*').

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

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

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

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

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

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

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

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

<sup>180</sup> Ibid 181 [92].

<sup>181</sup> Ibid 172 [48].

<sup>182</sup> (2018) 98 NSWLR 113 ('*Liristis*').

<sup>183</sup> [2018] NSWSC 1060.

<sup>184</sup> *Liristis* (n 182) 122 [37] (Basten JA).

<sup>185</sup> Ibid 121–2 [35]–[36] (Beazley P).



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

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

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

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

## V Assessing the Inherent Jurisdiction as a Fair Trial Protection

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

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<sup>186</sup> Ibid.

<sup>187</sup> *Castles v Secretary of the Department of Justice (Vic)* (2010) 28 VR 141 (*‘Castles’*).

<sup>188</sup> Ibid 176 [145].

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

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

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

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

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<sup>189</sup> de Jersey (n 22) 326.

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

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

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

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

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

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

<sup>192</sup> *Dietrich* (n 64) 364 (Gaudron J); Spigelman (n 1) 43.

<sup>193</sup> Groves (n 156).

<sup>194</sup> *Ibid* 138.

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

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

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

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

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

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

<sup>196</sup> Williams and Hume (n 55) 325.

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

<sup>198</sup> Jacob (n 10) 23.

<sup>199</sup> Groves (n 156) 138.

<sup>200</sup> *Ibid*; *Jago* (n 64) 57 (Deane J).

<sup>201</sup> de Jersey (n 22) 326; Mason (n 15) 459.

<sup>202</sup> *Connelly v DPP* (1964) AC 1254, 1347 (Lord Devlin).

<sup>203</sup> Mason (n 15) 449.

<sup>204</sup> *Ibid*.

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

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

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

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

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

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

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

<sup>207</sup> Appleby (n 87) 93–4; Meyerson (n 206).

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

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

<sup>210</sup> Meyerson (n 206).

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

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

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

## VI Conclusion

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

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

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<sup>211</sup> *Jago* (n 64) 57 (Deane J).

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

<sup>213</sup> Groves (n 156) 138; Debeljak (n 195) 1339–51.

<sup>214</sup> Appleby (n 87) 91.

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

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

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

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

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<sup>215</sup> *Batistatos* (n 3) 295 [122].





# Reconciling Equitable Claims with Torrens Title

Rohan Havelock\*

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## Abstract

Under the Torrens system of land registration, the act of registration confers what is commonly regarded as immediate ‘indefeasibility’ of title, meaning the relevant estate or interest is held free from unregistered estates or interests. Nevertheless, the courts have always permitted so-called ‘in personam claims’ against registered proprietors based on legal or equitable obligations, and which may result in the title being defeated. Although it has been more than 130 years since the first Torrens statute was enacted, the relationship between the statutory protection and equitable claims arising out of receipt of property by third parties remains an uneasy one. This has been an enduring source of uncertainty for those using or administering the Torrens system. This article argues in favour of a more systematic approach to delineation of the legitimate scope of ‘receipt-based’ equitable claims. The key question is whether the claim involves the assertion of an interest or estate incompatible with the protection conferred by the wording of the Torrens statutes.

## I Introduction

Under the Torrens system of land registration, the act of registration confers what is commonly regarded as immediate ‘indefeasibility’ of title to the relevant estate or interest. Although the language of the various statutes is not uniform,<sup>1</sup> this generally means that the estate or interest in land is held free from all other estates or interests whatsoever. Nevertheless, it has been maintained ever since the establishment of the Torrens system that the registered proprietor is still exposed to so-called ‘in personam claims’ arising from certain legal or equitable obligations.<sup>2</sup> Such claims

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<sup>1</sup> See *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42(1); *Land Title Act 2000* (NT) ss 188–9; *Land Title Act 1994* (Qld) ss 184–5; *Real Property Act 1886* (SA) ss 69–70; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) s 68. In New Zealand, the *Land Transfer Act 2017* (NZ) s 51(1) provides that on registration of a person as the owner of an estate or interest in land, ‘the person obtains a title to the estate or interest that cannot be set aside’.

<sup>2</sup> See *Barry v Heider* (1914) 19 CLR 197, 208 (Griffiths CJ), 213 (Isaacs J); *Great West Permanent Loan Co v Friesen* [1925] AC 208 (Privy Council); *Frazer v Walker* [1967] 1 AC 569, 585 (Privy Council); *Breskvar v Wall* (1971) 126 CLR 376, 384–5 (‘*Breskvar v Wall*’); *Oh Hiam v Tham Kong* (1980) 2 BPR 9451, 9454 (Privy Council) (‘*Oh Hiam*’); *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 653; *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433, 484–5 [155]–[156] (Supreme Court of New Zealand) (‘*Regal Castings*’).

may ultimately result in the title of the registered proprietor being divested. Perhaps the most controversial category of claims is those arising out of receipt by third parties of property subject to trust or fiduciary obligations.

The Torrens system was first established in South Australia over 130 years ago,<sup>3</sup> and it is therefore surprising that the identification of in personam claims has recently been described as ‘judicial work in progress’.<sup>4</sup> This question has also divided academics, with what may be described as ‘wide,’<sup>5</sup> ‘narrow’<sup>6</sup> and ‘middle ground’<sup>7</sup> views emerging. There are several possible reasons for this state of affairs. The immediate reason is that most of the relevant statutes do not define the relationship such claims have with their regimes, let alone specify which claims and remedies are available.<sup>8</sup> Those statutes that expressly exempt in personam claims from their central ‘indefeasibility’ provision do so either in general terms<sup>9</sup> or by singling out certain rights,<sup>10</sup> and are silent as to available remedies.

Second, this area of law has been blighted by the longstanding use of confusing terminology. The description of title as ‘indefeasible’ is a misnomer, for the act of registration affords protection only against unregistered estates or interests, and is subject to a host of exceptions and limitations.<sup>11</sup> Further, the phrase ‘in personam claims’ is itself vague and ambiguous,<sup>12</sup> and misleading in that it implies that such claims are invariably equitable, or that they do not, or cannot, have proprietary consequences.

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<sup>3</sup> *Real Property Act 1858* (SA); now the *Real Property Act 1886* (SA).

<sup>4</sup> William Gummow, ‘The In Personam Exception to Torrens Indefeasibility’ (2017) 91 ALJ 549, 560. See also *Story v Advance Bank of Australia Ltd* (1993) 31 NSWLR 722, 739 (Court of Appeal) (‘*Story*’).

<sup>5</sup> See Lyria Bennett Moses and Brendan Edgeworth, ‘Taking it Personally: Ebb and Flow in the Torrens System’s In Personam Exception to Indefeasibility’ (2013) 35(1) *Sydney Law Review* 107; Matthew Harding, ‘*Barnes v Addy* Claims and the Indefeasibility of Torrens Title’ (2007) 31(2) *Melbourne University Law Review* 343; Lynden Griggs, ‘The Tectonic Plate of Equity — Establishing a Fault Line in Our Torrens Landscape’ (2003) 10(1) *Australian Property Law Journal* 78; Barry C Crown, ‘Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*’ [2002] *Singapore Journal of Legal Studies* 409.

<sup>6</sup> 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, 490; Kelvin FK Low, ‘The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities’ (2009) 33(1) *Melbourne University Law Review* 205.

<sup>7</sup> See Tang Hang Wu, ‘Beyond the Torrens Mirror: a Framework of the In Personam Exception to Indefeasibility’ (2008) 32(2) *Melbourne University Law Review* 672.

<sup>8</sup> This omission left the early courts guessing as to how the statutes should be interpreted, leading to inconsistency in decisions: see Les A McCrimmon, ‘Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title’ (1994) 20(2) *Monash University Law Review* 300, 301.

<sup>9</sup> See *Land Title Act 1994* (Qld) s 185(1)(a); *Land Title Act 2000* (NT) s 189(1)(a). Both refer to ‘an equity arising from the act of the registered proprietor’. In New Zealand, *Land Transfer Act 2017* (NZ) s 51(5) states that ‘[n]othing in this section affects the in personam jurisdiction of the court.’

<sup>10</sup> See *Real Property Act 1886* (SA) ss 71(d)–(e), preserving the rights of a person with whom a registered proprietor has made a contract for the sale of land, and the rights of a beneficiary where the registered proprietor is a trustee.

<sup>11</sup> For a summary of these, see Peter Butt, *Land Law* (Lawbook, 6<sup>th</sup> ed, 2010) 796–831; LexisNexis, *Hinde, McMorland & Sim Land Law in New Zealand* (online at 25 November 2019) [9.015]–[9.077].

<sup>12</sup> As others have observed, the term ‘personal’ has at least four distinct meanings: see Moses and Edgeworth (n 5) 115–16.

This article argues that a systematic yet nuanced approach to the scope of equitable ‘receipt-based’ claims is necessary.<sup>13</sup> It will be argued that the key question is whether the nature of the claim is compatible with the protection which the statutes confer on registered title.<sup>14</sup> Based on the common wording of representative statutes, this turns on whether the claim involves asserting an ‘estate’ or ‘interest’ adverse to that protection.

## II ‘Indefeasibility’

Before questions of compatibility can be addressed, it is necessary briefly to outline the precise nature and extent of the protection that Torrens title provides to the registered proprietor. As one commentator has aptly observed, the ‘in personam exception’ is poorly understood because the concept of ‘indefeasibility’ itself is poorly understood.<sup>15</sup>

### A Meaning and Effect

The nature of Torrens title can only be properly understood by reference to the system that Sir Robert Torrens is credited as reforming:<sup>16</sup> a system of conveyancing by deeds.<sup>17</sup> Title was created or transferred by the execution and delivery of a valid deed of conveyance, not by the registration of the deed.<sup>18</sup> Registration of instruments was advisable, but was not compulsory. Importantly, registration did not confer security of title against all interests, or cure defects in instruments.

Sir Robert Torrens was convinced that the defects of the current systems all had a common source: ‘The dependent nature of titles.’<sup>19</sup> First, the system depended upon the execution and preservation of original valid instruments creating the

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<sup>13</sup> Some attempts at categorisation have been made. See, eg, Bryan distinguishing between classes of: (1) legal or equitable interests created by the registered proprietor with the intention that they should be enforceable against the registered title; and (2) equitable interests imposed by court order in response to conduct on the part of the registered proprietor (which he labels ‘unconscientious denial of title’ cases): Michael Bryan, ‘Recipient Liability under the Torrens System: Some Category Errors’ in Charles Rickett and Ross Grantham (eds) *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, 2008) 339, 356–7. See also Hughson, Neave and O’Connor (n 6) 492–3.

<sup>14</sup> This protection will be referred to throughout using the neutral description, ‘the statutory protection’. But see Douglas J Whalan, *The Torrens System in Australia* (Lawbook, 1982) 297, preferring ‘state-guaranteed title’.

<sup>15</sup> Low (n 6) 233.

<sup>16</sup> There is some controversy as to whom the authorship of the Torrens system should be attributed: see P Moerlin Fox, ‘The Story behind the Torrens System’ (1950) 23(9) *Australian Law Journal* 489; Douglas Pike, ‘Introduction of the Real Property Act in South Australia’ (1961) 1(2) *Adelaide Law Review* 169; Horst K Lücke, ‘Ulrich Hübbe and the Torrens System’ (2009) 30(2) *Adelaide Law Review* 213.

<sup>17</sup> See generally Whalan (n 14) ch 2; RTJ Stein and MA Stone, *Torrens Title* (Butterworths, 1991) 4–10.

<sup>18</sup> See *Perpetual Executors and Trustees Association of Australia Ltd v Hosken* (1912) 14 CLR 286, 289 (Griffith CJ): ‘The substance of the scheme of the *Transfer of Land Act* was to substitute conveyance by registration for conveyance by deed.’

<sup>19</sup> Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer General Printing Office, 1859) 8.

interest.<sup>20</sup> If the instrument was invalid for any reason, no transfer was effected. A purchaser therefore depended on his or her solicitor to investigate the validity of the chain title, which had to be repeated afresh on every dealing, with associated expense, delay and inconvenience.<sup>21</sup> Second, pre-existing legal and equitable interests might affect the estate and give rise to possible claims against the purchaser. Competing interests in the same parcel of land were resolved by the rules of priority.<sup>22</sup> In the case of a competition between a prior equitable interest and a subsequent legal interest, notice of the prior interest was fatal to the latter, and would prevent the purchaser from acquiring free of the prior interest, even if there was registration.

Against the background of a series of reform attempts in England,<sup>23</sup> Sir Robert Torrens sought to eradicate these problems in South Australia by nothing short of replacement of the existing system.<sup>24</sup> Security and simplicity to dealings in land was primarily achieved by making the title created by registration *independent* of any non-registered estates or interests. The change necessarily removed the need for retrospective investigation of the chain of title.<sup>25</sup>

## B 'Indefeasibility' – A Misnomer

The terms 'indefeasible' or 'indefeasibility' are in common parlance in land law and practice, despite the fact they are not featured in all the relevant statutes, or defined where they are featured.<sup>26</sup> In reality, a 'mosaic of sections'<sup>27</sup> in the statutes — relating to paramountcy, ejectment, notice and protection of purchasers — defines the meaning and extent of so-called 'indefeasibility'.

Even as a 'convenient description'<sup>28</sup> of the effect of registration, the term 'indefeasible' is a patent misnomer.<sup>29</sup> Most obviously, the title is instantly defeated

<sup>20</sup> With the complications that: (1) some transactions did not operate by conveyance, such as succession by will, powers of attorney, and special/general appointments; and (2) the register did not include interests which arose without a document, such as mortgages by deposit, leases by parol, and liens. See Stein and Stone (n 17) 4–5.

<sup>21</sup> *Gibbs v Messer* [1891] AC 248, 254 (Lord Watson). See also *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 WLR 1529, 1533 (Privy Council); Stein and Stone (n 17) 6–8.

<sup>22</sup> See Butt (n 11) [19-4]–[19-86].

<sup>23</sup> Stein and Stone (n 17) 10–16.

<sup>24</sup> The law of real property 'could not be patched or mended: the very foundation was rotten, therefore the entire fabric must be razed to the ground and a new super-structure substituted': Torrens' printed speeches, cited in Stanley Robinson, *Transfer of Land in Victoria* (Law Book, 1979) 2.

<sup>25</sup> For other advantages, see Whalan (n 14) 14–17.

<sup>26</sup> See *Real Property Act 1886* (SA) s 69, referring to the title of every registered proprietor as 'absolute and indefeasible', and also *Real Property (Registration of Titles) Act 1945* (SA) s 15; *Land Title Act 2000* (NT) (heading to pt 9, div 2, sub-div 2 is 'Indefeasibility'); *Land Title Act 1994* (Qld) (heading to pt 9, div 2, sub-div B is 'Indefeasibility'); *Land Titles Act 1980* (Tas) s 40(2), providing that the title of a registered proprietor of land is 'indefeasible'. Torrens did use the terms in his speeches and writings: see those referenced in Robinson (n 24) 4–5.

<sup>27</sup> Whalan (n 14) 293.

<sup>28</sup> *Frazer v Walker* (n 2) 580 (Lord Wilberforce).

<sup>29</sup> See Whalan (n 14) 296–7; GW Hinde, 'Indefeasibility of Title' in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, 1971) 36; *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705, 712 ('Davies').

by a successive title conferred by registration.<sup>30</sup> The title is also encumbered by any interests recorded on the register at the time of registration. Further, the title is subject to numerous exceptions and limitations both within and outside the statutes.<sup>31</sup>

Importantly, Torrens title does not confer *immunity* from legal or equitable liability that the registered proprietor has incurred to others (usually by his or her own acts), and that may result in a remedy which divests title.<sup>32</sup> Such liability exists in parallel with the statutory protection,<sup>33</sup> although it can be incompatible with it, as will be discussed shortly.

## C Statutory Wording

With three exceptions, the introductory words of the central paramountcy sections are materially identical in each Australian legal jurisdiction.<sup>34</sup> The principle they have in common is that the registered proprietor shall, except in the case of fraud, hold the relevant estate or interest subject to prior registered interests, but absolutely free from all other encumbrances, estates, or interests whatsoever. This protection concerns the *status* of title: the title is paramount (in the sense of prevailing) over all unregistered estates or interests.<sup>35</sup>

The exceptions to this common wording are found in the statutes of:

- Victoria,<sup>36</sup> referring only to ‘all other encumbrances’ — defined as ‘any estate interest mortgage charge right claim or demand which is or may be had made or set up in to upon or in respect of the land’<sup>37</sup>;
- South Australia,<sup>38</sup> providing that the title of every registered proprietor shall be ‘absolute and indefeasible’ — without any definition given; and
- Tasmania<sup>39</sup> simply providing that the title of a registered proprietor is ‘indefeasible’ — defined as meaning ‘subject only to such estates and interests as are recorded on the folio of the Register or registered dealing’.

Based on their wording, it is arguable that the statutes in the latter two jurisdictions have the effect of excluding *any* in personam claim whatsoever,<sup>40</sup> and not simply those that involve assertion of an ‘estate’ or ‘interest’ adverse to the statutory

<sup>30</sup> Whalan (n 14) 297.

<sup>31</sup> For overviews, see Butt (n 11) 796–831; *Hinde, McMorland & Sim* (n 11) [9.015]–[9.077].

<sup>32</sup> For a clear statement to this effect, see *Breskvar v Wall* (n 2) 384–5 (Barwick CJ).

<sup>33</sup> As the majority observed in *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2004) 220 CLR 472, 491 [54] (McHugh A-CJ, Hayne and Heydon JJ): ‘The availability of rights in personam is entirely consistent with the Torrens system of title.’

<sup>34</sup> The relevant sections are cited in n 1 above.

<sup>35</sup> Unlike the term ‘indefeasible’, ‘paramount’ does not imply that the title can *never* be defeated.

<sup>36</sup> *Transfer of Land Act* 1958 (Vic) s 42(1).

<sup>37</sup> *Ibid* s 4(1).

<sup>38</sup> *Real Property Act* 1886 (SA) s 69.

<sup>39</sup> *Land Titles Act* 1980 (Tas) s 40.

<sup>40</sup> Conversely, the opposite argument can be made in respect of those statutes which expressly preserve equitable claims. Both the *Land Title Act* 1994 (Qld) s 185(1)(a) and *Land Title Act* 2000 (NT) s 189(1)(a) except ‘an equity arising from the act of the registered proprietor’. In New Zealand, *Land Transfer Act* 2017 (NZ) s 51(5) states that ‘[n]othing in this section affects the in personam jurisdiction of the court.’

protection. However, this interpretation would be a radical one in the sense that it is inconsistent with the longstanding assumption by courts in these jurisdictions that in personam claims remain available.<sup>41</sup>

### III Compatibility with the Statutory Protection

Some commentators have emphasised that the compatibility of equitable claims with the statutory protection depends on the basis of the claim,<sup>42</sup> whereas others have emphasised that this question depends instead on the nature of the remedy.<sup>43</sup> This has generated a conundrum as to whether an in personam claim may ever be proprietary.<sup>44</sup> Preoccupation with such questions averts focus from the all-important wording of the statutory protection.<sup>45</sup> This is the touchstone against which compatibility must be assessed.

Based on the common wording of the statutes as identified above, the overriding question is whether the relevant claim necessarily involves assertion of an unregistered 'estate' or 'interest' against the statutory protection, guaranteeing that the registered proprietor holds the land (or estate or interest in land) 'free' or 'absolutely free' from such estates or interests.<sup>46</sup> This will be referred to throughout as an *estate or interest adverse to the statutory protection*.<sup>47</sup> In order to make this assessment, it is necessary to understand the essential features of equitable liability, and then to categorise the main types of equitable claim.

#### A Equitable Liability

It is trite that a proprietary claim involves direct assertion of an equitable interest in an asset in the hands of the defendant.<sup>48</sup> Liability is strict, subject to the defence of a bona fide purchaser for value of the legal estate without notice. Conversely, a

<sup>41</sup> For recent examples, see (in South Australia) *Perebo Pty Ltd v Wayville Residential Investments Pty Ltd* [2019] SASC 35, [46], *Permanent Mortgages Pty Ltd v Pastro* [2018] SASC 5, [89] and (in Tasmania) *Nightingale v Recorder of Titles* [2018] TASSC 56, [62].

<sup>42</sup> Low (n 6) 219–20; Kelvin FK Low, 'Of Horses and Carts: Theories of Indefeasibility and Category Errors in the Torrens System' in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, 2010) 457–8 ('*Exploring Private Law*'); Moses and Edgeworth (n 5) 113–14.

<sup>43</sup> Barry C Crown, 'Indefeasibility of Title: Developments in Singapore' (2007) 15(1) *Australian Property Law Journal* 91, 103–4; (in relation to knowing receipt) Harding (n 5) 346, 350–65.

<sup>44</sup> Tang (n 7) 679–80; Low in *Exploring Private Law* (n 42) 457–8.

<sup>45</sup> See *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 433 [16].

<sup>46</sup> The same applies to the notice provisions, typically referring to 'any trust or unregistered interest'; see *Land Titles Act* 1925 (ACT) s 59; *Real Property Act* 1900 (NSW) s 43; *Land Title Act* 1994 (Qld) s 184(2)(a) (referring simply to an 'unregistered interest'); *Real Property Act* 1886 (SA) ss 186–7; *Land Titles Act* 1980 (Tas) s 41; *Transfer of Land Act* 1958 (Vic) s 43; *Transfer of Land Act* 1893 (WA) s 134; *Land Title Act* 2000 (NT) s 188(2)(a) (referring simply to an 'unregistered interest'). The *Land Transfer Act* 2017 (NZ) s 51(2) provides that the title of the registered owner is 'free from estates and interests in the land' that are not registered or are not capable of being registered.

<sup>47</sup> Cf *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust*, 'the protection afforded to a registered proprietor by [the central paramountcy section] is only against claims which are adverse to the interests of the proprietor': [2016] 3 NZLR 726, 749 [89] (Court of Appeal). See also Low (n 6) 212, 215.

<sup>48</sup> *Foskett v McKeown* [2001] 1 AC 102, 108 (Lord Browne-Wilkinson), 129 (Lord Millett).

personal claim generally involves asserting that the defendant has breached an equitable duty owed to the plaintiff, or is (personally) accountable to the plaintiff in equity. Importantly, a personal claim is not strict, but depends on there being a reason for equitable intervention, typically on grounds of ‘conscience’.<sup>49</sup> This distinction between proprietary and personal equitable liability is fundamental,<sup>50</sup> although can become somewhat blurred where a remedy in respect of a personal liability has a proprietary effect (such as an order requiring transfer or discharge of an estate or interest).

Entirely consistent with the central role of conscience within equity in general, it has been said that equitable in personam claims in the context of Torrens title are based on grounds or considerations of ‘conscience’ or ‘conscientiousness’.<sup>51</sup> Thus, in *Barry v Heider*,<sup>52</sup> Isaacs J referred to the ‘fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them’. However, the mere characterisation of conduct as ‘unconscionable’ or ‘unconscientious’ has generally been rejected as insufficient to ground a claim.<sup>53</sup> Thus, in *Grgic v Australian & New Zealand Banking Group Ltd* the Court of Appeal of New South Wales (‘NSW’) concluded that the expressions ‘personal equity’ and ‘right in personam’ encompass only ‘known legal causes of action or equitable causes of action’.<sup>54</sup> The same position was taken in three important cases examined in this article, *Koorootang Nominees Pty Ltd v Australian & New Zealand Banking Group Ltd*,<sup>55</sup> *Macquarie Bank Ltd v Sixty-Fourth Throne*

<sup>49</sup> This hallmark notion is ambiguous and complex, but for present purposes may be regarded as a normative standard against which the conduct of the parties is judged: see *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 400 [16]. See also *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 576 [16] (French CJ), 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ) (‘*Hills*’).

<sup>50</sup> The distinction was explicitly recognised in *Grimaldi v Chameleon Mining NL (No 2)*, ‘[w]hile [the proprietary] claim is, potentially, available to be made in *Barnes v Addy* “knowing receipt” cases, it is a separate and distinct liability. It is, in essence, a claim to priority.’: (2012) 287 ALR 22, 81 [251] (‘*Grimaldi*’). See also *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 742 [44] (‘*Fistar*’). It is important to appreciate that where the recipient still holds the property, the personal claim is irrelevant: see Bryan (n 13) 339, 353–5.

<sup>51</sup> See, eg, *Oh Hiam* (n 2) 9453; *Regal Castings* (n 2) 484–5 [155]–[156].

<sup>52</sup> *Barry v Heider* (n 2) 213. See also *Oh Hiam* (n 2) 9453, 9454. The emphasis on conscience is also evident in leading New Zealand decisions: *Duncan v McDonald* [1997] 3 NZLR 669, 683–4 (Court of Appeal) (‘*Duncan*’); *Davies* (n 29) 714–15. See also *Regal Castings* (n 2) 483 [148], 485 [156].

<sup>53</sup> See, eg, *Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd* (2003) 59 NSWLR 312, 339 [103], ‘if the registered proprietor subsequently engages in unconscionable conduct intended to deny or defeat the unregistered interest, the holder of the unregistered interest may obtain relief against the registered proprietor ...’. There are competing views as to whether ‘unconscionability’ is a requirement additional to a relevant cause of action: see Butt (n 11) [20–104.1]. The better view seems to be that it is a requirement only where such conduct is an element of the relevant cause of action, as explained in *Harris v Smith* (2008) 14 BPR 26,223, 26,237–8 [66]–[67].

<sup>54</sup> (1994) 33 NSWLR 202, 222. See generally Butt (n 11) [20–104].

<sup>55</sup> [1998] 3 VR 16, 125 (‘*Koorootang Nominees*’). Justice Hansen dismissed ‘the notion that a person can defeat a registered proprietor’s interest merely by persuading the court that, viewing the circumstances of the case as a whole, the registered proprietor has been guilty of unconscionable conduct.’

*Pty Ltd*,<sup>56</sup> and *LHK Nominees Pty Ltd v Kenworthy*.<sup>57</sup> Despite recent disquiet as to the aptness of the phrase ‘cause of action’,<sup>58</sup> this at least has the merit of turning the focus from mere ‘unconscionability’ or ‘unconscientiousness’ towards the need for articulation of a specific category of jurisdiction within equity.

General descriptions of the basis of in personam claims — whether by reference to ‘conscience’ or ‘unconscionability’ — imply that in personam claims (or ‘in personam exceptions’ or ‘personal equities exceptions’) are homogenous. This is not only false, but tends to stultify analysis of their compatibility with the statutory protection. This is also true in respect of general propositions in the case law to the effect that in personam claims are usually<sup>59</sup> created by, or arise out of, ‘acts’ or ‘conduct’ by the registered proprietor,<sup>60</sup> whether occurring before or after registration.<sup>61</sup>

To the extent that the case law has emphasised that an in personam claim must be based on a known ‘cause of action’, this is constructive in shifting focus away from these general descriptions.<sup>62</sup> Such emphasis alone, however, does not delineate the scope of those in personam claims or exceptions compatible with the statutory protection. It is suggested that such delineation is most constructively achieved with the aid of a basic categorisation of claims, followed by detailed analysis of their compatibility with the statutory protection.

## B Categorisation

Equity recognises a variety of rights, obligations and interests that may ground in personam claims, and dispenses a range of possible remedies in respect of these. The accumulated case law involving claims made in connection with Torrens land reflects these factors. These claims can be broadly categorised according to shared rationales of equitable intervention. The focus of this article is the category of claims based on receipt by a third party of property that is subject to a trust or other fiduciary obligation, to which equity ordinarily responds by declaration of a constructive trust

<sup>56</sup> [1998] 3 VR 133, 162 (Ashley AJA) (*‘Sixty-Fourth Throne’*):

the conduct must be such as should be described as unconscionable or unconscientious, as those words are now understood in the law. But that is not to say that conduct which merits such a description will give rise to an in personam right in the absence of a known legal or equitable cause of action.

See also at 146 (Tadgell JA).

<sup>57</sup> (2002) 26 WAR 517, 556 [216] (Anderson and Steytler JJ) (*‘LHK Nominees’*): ‘The expressions “personal equity” and “right in personam” do not supply a blank canvas on which a plaintiff can paint any picture.’

<sup>58</sup> Gummow (n 4) 552–3. First, the phrase suggests that the requisite claim is akin to an action for damages in tort or contract, whereas with equitable claims it is necessary to articulate the circumstances which should elicit a response from equity. Second, the phrase is unsatisfactory because it underplays the scope of the declaratory remedy in private and public law.

<sup>59</sup> But not exclusively: see *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 46 (Mahoney JA) (*‘Mercantile Mutual v Gosper’*).

<sup>60</sup> See *Frazer v Walker* (n 2) 585; *Breskvar v Wall* (n 2) 384–5; *Bahr v Nicolay (No 2)* (n 2) 613; *Davies* (n 29) 712; *Duncan* (n 52) 683.

<sup>61</sup> See authorities in Butt (n 11) [20–102] n 709.

<sup>62</sup> See Jonathon P Moore, ‘Equity, Restitution and In Personam Claims under the Torrens System’ (1998) 72(4) *Australian Law Journal* 258, 260.



over the property (and related orders) or an order that the third party make personal restitution. These claims are to be distinguished from the two other main<sup>63</sup> categories of claims reflected in the case law, which are briefly outlined next.

## 1 *Consensual or Quasi-Consensual Obligations*

This category of claims involves non-compliance by the registered proprietor with obligations he or she has agreed to or undertaken in respect of the claimant.<sup>64</sup> The prime example is a vendor who refuses or fails to perform a sale and purchase agreement in respect of real property.<sup>65</sup> Although the purchaser has an equitable interest (of an ill-defined sort)<sup>66</sup> pending the conveyance<sup>67</sup> and the extent of this is typically measured by the protection that equity gives the purchaser,<sup>68</sup> the purchaser need not assert this interest in order to obtain a decree of specific performance. Instead, success depends on proof of a valid and binding contract, and on damages being an inadequate remedy.<sup>69</sup> In other words, it is a personal claim, albeit that the implementation of specific performance has a proprietary consequence.<sup>70</sup> This consequence can be reconciled with the statutory protection on the basis that the vendor has *agreed* to convey title under the contract, subject to fulfilment of conditions. This is an application of the maxim that '[e]quity regards as done that which ought to be done'.<sup>71</sup>

<sup>63</sup> This article cannot exhaustively identify and analyse the nature and effect of each and every equitable claim. It is acknowledged that certain in personam claims of an equitable nature do not neatly fit within these categories: examples are the successful claims in *Davies* (n 29) (terms of obligation that an executed mortgage secured altered without the knowledge or authority of mortgagor) and *Duncan* (n 52) (mortgagor and mortgagee shared knowledge that the mortgage was furthering an illegal venture). The former claim would likely be unsuccessful in Australia: see *Paradise Constructors & Co Pty Ltd v Poyser* (2007) 20 VR 294, 301–2 [30]–[31] (Court of Appeal).

<sup>64</sup> See the summary by Skerrett CJ in *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688, 702 (Court of Appeal):

The provisions of the *Land Transfer Act* as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest.

See also *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 13 BPR 24,969, 24,979 [114] ('*Presbyterian Church*').

<sup>65</sup> See authorities collated in Elizabeth Toomey (ed) *New Zealand Land Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2017) 118 nn 382, 385.

<sup>66</sup> Such an interest is less than an entire beneficial interest, since the vendor is entitled to possession and use of the land, and retains a contingent interest in the equitable estate pending payment of the purchase price. As Lord Walker observed in *Jerome v Kelly* (*Inspector of Taxes*), '[b]eneficial ownership of the land is in a sense split between the seller and buyer': [2004] 1 WLR 1409, 1419 [32].

<sup>67</sup> *Lysaght v Edwards* (1876) 2 Ch D 499, 506 (Jessel MR). This interest depends on specific performance being available as a remedy to enforce either an executory or partly executed contract.

<sup>68</sup> See *Hewett v Court* (1983) 149 CLR 639, 665–6 (Deane J).

<sup>69</sup> JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis, 5<sup>th</sup> ed, 2015) [20-025]–[20-050] ('*MGL*'). A breach of contract, or even an anticipatory breach, is not technically required: *Hasham v Zenab* [1960] AC 316.

<sup>70</sup> See also *Moses and Edgeworth* (n 5) 118–19.

<sup>71</sup> As Lord Macclesfield observed in *Frederick v Frederick*, '[w]here one for valuable consideration agrees to do a thing, such executory contract is taken as done; and ... the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he had agreed to.': (1721) 24 ER 582, 583. See also *Re Anstis* (1886) 31 Ch D 596, 605.

A further example is an unregistered agreement to re-sell land,<sup>72</sup> of the type featured in *Bahr v Nicolay (No 2)*.<sup>73</sup> It has been noted that the majority's imposition of a constructive trust sufficed to preserve the defendant's liability,<sup>74</sup> but this does not reveal the *basis* of liability. Notwithstanding the differences among them, it is clear from all three judgments that the relevant event triggering a proprietary consequence was the acknowledgement of the antecedent agreement given by the second respondents, and enforceable<sup>75</sup> by the plaintiff against them directly.<sup>76</sup>

The idea of voluntary undertaking<sup>77</sup> also explains the rationale of claims to compel performance of the obligations of an express trustee who is a registered proprietor.<sup>78</sup> Since it is not possible to impose express trusteeship on a person without his or her consent, the office must be accepted voluntarily. As Lord Browne-Wilkinson recognised in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, a person becomes an express trustee because his *conscience* is affected by the facts that give rise to the trust.<sup>79</sup> From that point, the express trustee holds the land subject to the equitable interest of the beneficiary, and owes a core of obligations to the beneficiary. In making a claim concerning a trustee registered proprietor, the beneficiary need not necessarily assert an equitable proprietary interest in the property,<sup>80</sup> but merely that the trustee is personally liable to perform his or her obligations as trustee.<sup>81</sup>

In the above instances, the plaintiff does not assert a proprietary interest adverse to the statutory protection, but a personal obligation owed by the registered proprietor.<sup>82</sup> An order with the effect of divesting registered title does not contravene the statutory protection because equity is simply compelling the defendant to do what he has agreed or undertaken to do in relation to her or his title,<sup>83</sup> provided the

<sup>72</sup> Further examples of unregistered interests are collated in Butt (n 11) 821 n 727.

<sup>73</sup> *Bahr v Nicolay (No 2)* (n 2).

<sup>74</sup> Low (n 6) 221.

<sup>75</sup> As to enforceability, see *Bahr v Nicolay (No 2)* (n 2) 656 (Brennan J).

<sup>76</sup> Ibid 616 (Mason CJ and Dawson J), 638–9 (Wilson and Toohey JJ), 653 (Brennan J).

<sup>77</sup> For the centrality of voluntary undertakings to fiduciary duties in general, see James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 (April) *Law Quarterly Review* 302.

<sup>78</sup> *Oh Hiam* (n 2) 9454; *Sistrom v Urh* (1992) 40 FCR 550; *Coulton v Coulton* [2008] NSWSC 910. This article does not address the treatment of trusts arising by operation of law, including resulting trusts. On resulting trusts, see Moses and Edgeworth (n 5) 119.

<sup>79</sup> [1996] AC 669, 705 (House of Lords).

<sup>80</sup> In some contexts, including discretionary trusts, the 'interest' may be no more than an 'interest' in the duties owed by the trustees: see *MGL* (n 69) [4-020]–[4-085].

<sup>81</sup> See RC Nolan, 'Equitable Property' (2006) 122 (April) *Law Quarterly Review* 232, demonstrating that while the beneficiary's primary right to exclude others from access to trust assets is properly regarded as a 'proprietary' interest because it is enforceable against an infinite class, the beneficiary's positive claims to benefit from the assets are enforceable against only a limited class, so cannot be regarded in general terms as 'proprietary'.

<sup>82</sup> This category might be expanded to include cases of proprietary estoppel binding the defendant to recognise the interest in land (see *Presbyterian Church* (n 64) as well as unconscionable or unconscientious assertions or denials by the registered proprietor: see *Muschinski v Dodds* (1985) 160 CLR 583 (unconscionable for registered proprietor to assert strict legal entitlement after failure of joint property development); *Baumgartner v Baumgartner* (1987) 164 CLR 137 (unconscionable denial of the fact that relationship property had been financed in part through pooled earnings).

<sup>83</sup> The same conclusion has been supported on the ground that this claim is not one based on notice of an unregistered interest, but on 'notice of wrongdoing or other facts that may give rise to legal liability': Low (n 5) 220. This is not an easy distinction to draw, since the 'wrongdoing' by a vendor

agreement or undertaking is an objectively serious one.<sup>84</sup> The consent on the part of the defendant — a feature not present in receipt-based claims — therefore makes a normative difference.<sup>85</sup>

## 2 *Defective Decisions*

This category of equitable claims involves transfers by a plaintiff in circumstances where the integrity of the plaintiff's decision has been vitiated or impaired, sometimes as a result of conduct by the defendant. The basic response is reversal, either by rescission of the transaction or restitution of the value transferred. Mistake is the hallmark example, although the nature of relief available is less straightforward.<sup>86</sup> Another prominent example is conduct encompassed by the equitable doctrine respecting fraud that falls short of 'fraud' within the meaning of the exceptions in the Torrens statutes.<sup>87</sup> Other examples<sup>88</sup> are cases of misrepresentation, undue influence,<sup>89</sup> unconscionable bargain, and registration as a result of transfers in breach of trust or fiduciary duty. Such transfers are sometimes treated as part of the law of unjust enrichment on the grounds of 'ignorance'<sup>90</sup> or 'fiduciary lack of authority'.<sup>91</sup> Where the transfer is pursuant to an agreement, recovery by the transferor will depend on whether the contract is binding on it (where the transferor is a company, this will depend on principles of agency and company law).<sup>92</sup> It is therefore important to distinguish such cases from those of knowing receipt, falling within the third category of claims below.<sup>93</sup>

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who refuses to perform an agreement for sale and purchase necessarily involves denial of the purchaser's equitable interest with actual notice.

<sup>84</sup> Thus, the acquiescence by a registered proprietor in use of the land by a neighbour 'only in the spirit of neighbourliness' does not suffice: *McGrath v Campbell* (2006) 68 NSWLR 229, 236 [32].

<sup>85</sup> For the significance of consent as a justifying reason in private law, see Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart, 2007) chs 2, 3.

<sup>86</sup> See Lynden Griggs, 'Indefeasibility and Mistake — The Utilitarianism of Torrens' (2003) 10(2) *Australian Property Law Journal* 108. But see Low (n 5) 225–8.

<sup>87</sup> See, eg, *Lissa v Cianci* [1993] NSW ConvR 55-667; *Balani Pty Ltd v Gunns Ltd* [2011] FCAFC 153.

<sup>88</sup> See Gummow (n 4) 551–2.

<sup>89</sup> At least in New Zealand: see *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747, 780 [147]–[148] (Court of Appeal). Contrast, however, the opinion of the majority in *Sixty-Fourth Throne* (n 56) 146–54 on the concept of 'notice' on which undue influence is premised.

<sup>90</sup> See James Edelman and Elise Bant, *Unjust Enrichment* (Hart, 2<sup>nd</sup> ed, 2016) 287–91.

<sup>91</sup> See Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) 93–8.

<sup>92</sup> See *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 (House of Lords), 1848 [4], referred to in *Great Investments Ltd v Warner* (2016) 243 FCR 516, 531 [59].

<sup>93</sup> For an example, see *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (No 2)* (2010) 13 HKCFAR 479. A director of the respondent had, without authority, pledged its shares in favour of the appellant bank to secure a loan. After the respondent defaulted on the loan, the bank sold part of the pledged shares. Delivering the unanimous judgment of the Court, Lord Neuberger NPJ held that the bank was concurrently liable in conversion and knowing receipt, in the same amount. The application of knowing receipt to the facts is criticised by Rebecca Lee and Lusina Ho in "Reluctant Bedfellows: Want of Authority and Knowing Receipt" (2012) 75(1) *Modern Law Review* 91.

In two-party cases<sup>94</sup> involving transfers from plaintiff to defendant in the context of an agreement or transaction, an in personam claim may be regarded as compatible with the statutory protection on the basis that the defect affecting the decision to transfer does not prevent the transferee from acquiring title by registration.<sup>95</sup> As a result, the plaintiff will ordinarily lack any 'estate' or 'interest' adverse to the statutory protection, and will instead challenge the *underlying* agreement or transaction, seeking rescission or reversal (with restoration of property rights, including re-vesting of registered title, being an ancillary consequence).<sup>96</sup> On this view, claims challenging defective decisions are not 'exceptions' to the statutory protection, but simply situations which that protection does not reach.<sup>97</sup>

### C *Receipt-based Claims*

As already noted, the most controversial category of claims involves property subject to a trust or fiduciary obligation that is received by a third party.<sup>98</sup> Such claims may be proprietary or personal, and are to be distinguished from claims in the preceding two categories (Part IIIB(1)–(2) above).

Equitable proprietary claims vindicate equitable ownership,<sup>99</sup> and are necessarily based on assertion of a prior equitable 'interest' of some kind.<sup>100</sup> Such claims directly contradict both the central paramountcy provisions (generally meaning the registered proprietor takes free of unregistered 'interests') and the 'notice' provisions (generally meaning that third parties dealing with the registered proprietor are not to be affected by notice of any 'trust' or unregistered 'interest').<sup>101</sup>

<sup>94</sup> In personam claims against third parties who become registered proprietors, whether innocently or with constructive notice of an equitable interest, are widely regarded as incompatible with the statutory protection. In the context of fraudulent dealings, see *Garafano v Reliance Finance Corporation Pty Ltd* (1992) NSW ConvR 55-640, 59-661; *Vassos v State Bank of South Australia* [1993] 2 VR 316, 332 ('Vassos'); *Story* (n 4); *Pyramid Building Society v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 (Court of Appeal). Contrast *Mercantile Mutual v Gosper* (n 59).

<sup>95</sup> Compare the argument by Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' [1998] 6 *Restitution Law Review* 126. This is based on the plaintiff having a restitutionary right arising in response to the unjust enrichment of the defendant, with the defendant having notice of the facts giving rise to the claim. The argument was subsequently modified in Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2008) 468–70.

<sup>96</sup> Cf *Moses and Edgeworth* (n 5) 123–4 (unconscionable transactions), 128–30 (mistake).

<sup>97</sup> Contrast *Edelman and Bant* (n 90) 162–3, and *Low* (n 6) 223–5.

<sup>98</sup> As Millett J explained in *Agip (Africa) Ltd v Jackson*, receipt-based claims may be divided into two main classes of case: knowing receipt, and lawful receipt (usually by an agent) followed by misappropriation or inconsistent dealing: [1990] Ch 265, 291 ('*Agip v Jackson*'). This article deals only with knowing receipt, and the separate case of receipt by volunteers.

<sup>99</sup> It is important to appreciate that equitable property has different origins to common law property, and is (arguably) fundamentally different in rationale, operation and effects. In respect of the 'propertisation' of the institution of the trust, see Lionel Smith, 'Transfers' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart, 2002) ch 5; Lionel D Smith, 'Trust and Patrimony' (2008) 38(2) *Revue Generale de Droit* 379.

<sup>100</sup> The concept of 'interest' has several senses and may not always amount to a strict proprietary right: see *MGL* (n 69) [4–060]; *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216, 223–4.

<sup>101</sup> See n 46. Quite apart from these statutory provisions, the third party will have a good defence where he or she is a bona fide purchaser for value without notice. For an illustration, involving acquisition of an equitable interest over land, see *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

Further, a successful equitable proprietary claim will ordinarily result in an order having a proprietary consequence. This is commonly by way of declaration of constructive trust coupled with an order to transfer. The effect will be to divest title in favour of the plaintiff.

On the other hand, personal claims are not so self-evidently incompatible. In the following sections, two types of recipient claims are examined. The status of the first — involving knowing recipients of trust property under the first limb of *Barnes v Addy*<sup>102</sup> — has been strongly contested among courts and commentators alike. The second — involving receipt by volunteers without notice at the time of receipt — is less common and its relationship with the statutory protection has not yet been considered closely.

## IV Knowing Receipt

In both Australia and New Zealand, courts have rejected claims of knowing receipt against a registered proprietor as incompatible with the nature and purpose of the Torrens system. This is also the dominant, although not universal, view among academic commentators.<sup>103</sup> The position taken herein is that this rejection is justified if knowing receipt is regarded as a form of accountability that protects equitable ownership.<sup>104</sup> The claim is therefore predicated on the assertion of an interest adverse to the statutory protection. However, this rejection is not necessarily justified if knowing receipt is regarded as an equitable wrong responding to third party conduct.

### A Rationales of Liability

In broad terms, knowing receipt is a liability affecting third parties to a trust or fiduciary relationship who receive or become chargeable with trust property.<sup>105</sup> The issue of the legitimacy of knowing receipt as an in personam claim against a registered proprietor is complicated by the long-standing controversy as to the rationale of such liability.<sup>106</sup> It is beyond the scope of this article to revisit this debate in any detail. Instead, the main conceptions of the rationale of liability for knowing receipt will be summarily outlined, and their compatibility with the statutory

<sup>102</sup> *Barnes v Addy* (1874) LR 9 Ch App 244, 252 (Lord Selborne LC). The second limb of *Barnes v Addy* — knowing assistance — is not examined herein, for the simple reason that the dishonest assistant will not usually have received property, and if he or she has, then the fraud exception will apply.

<sup>103</sup> See Butt (n 11) [20-105]; Moore (n 62) 263-5; Tang (n 7) 690-92; Low (n 6) 228-32; Moses and Edgeworth (n 5) 121-3. Contrast Harding (n 5) 352-8.

<sup>104</sup> *Grimaldi* (n 50) 82 [254]: 'Distinctly while the proprietary liability referred to depends upon the existence of trust property in the strict sense, "trust property" for *Barnes v Addy* purposes extends beyond it to property held or controlled subject to a fiduciary obligation.' But see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, where the High Court of Australia left the point open: (2007) 230 CLR 89, 141 [113] ('*Farah*').

<sup>105</sup> *Barnes v Addy* (n 102) 252.

<sup>106</sup> For an overview, see Rohan Havelock, 'The Battle over Knowing Receipt' (2015) 26(3) *New Zealand Universities Law Review* 587.

protection assessed. Leaving aside the unjust enrichment model,<sup>107</sup> these conceptions are as follows:<sup>108</sup>

1. Knowing receipt is an equitable accountability functioning to protect trust property,<sup>109</sup> albeit indirectly. More specifically, it may be regarded as the equitable analogue of conversion at common law<sup>110</sup> or of money had and received,<sup>111</sup> or as a custodial liability closely resembling the liability of an express trustee to account for trust property.<sup>112</sup>
2. Knowing receipt is an equitable wrong protecting equitable property interests from interference, and takes the form of a breach of trust management obligations that the third party has assumed.<sup>113</sup> A stronger version of this conception is that liability for knowing receipt is no different from ordinary liability for breach of trust.<sup>114</sup>
3. Knowing receipt is a form of wrongful participation in a breach of another's equitable duty, which should be grouped conceptually with accessory liability, with liability depending on the defendant's conduct and not simply on his or her knowledge.<sup>115</sup>

On the first two conceptions, the claim functions to protect trust property and is an affront to the statutory protection, regardless of whether the remedy is proprietary or personal. It might be objected that the claim in knowing receipt does not involve direct assertion of an equitable estate or interest in the way that an equitable

<sup>107</sup> This model, involving strict liability, will not be examined here given its outright rejection by the High Court in the context of knowing receipt (*Farah* (n 104) 152–9 [140]–[158]) and more widely (*Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516 [30]; *Hills* (n 49) 596–7 [78]). See Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish et al (eds) *Restitution: Past, Present and Future* (Hart, 1998) 231.

<sup>108</sup> There are several accounts with subtle distinctions among them. For convenience, similar views have been grouped together according to their basic premise.

<sup>109</sup> As Stephen J observed in *Consul Development Pty Ltd v DPC Estates Pty Ltd*, recipient liability is based upon 'equity's concern for the protection of equitable estates and interests in property': (1975) 132 CLR 373, 410. In *Zhu v Treasurer (NSW)*, the High Court explained that '[i]ntervention against a third party who obtains trust property from a trustee in breach of trust is based on the need to protect the proprietary interests of the beneficiaries.': (2004) 218 CLR 530, 571 [121]. In the United Kingdom ('UK'), it has been observed that 'receipt of trust property is the gist of the action': *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, 528 [89] (Court of Appeal).

<sup>110</sup> See Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 (July) *Law Quarterly Review* 412; Ross Grantham and Charles EF Rickett, *Enrichment and Restitution in New Zealand* (Hart, 2000) 281–2.

<sup>111</sup> See Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2015) 645.

<sup>112</sup> See Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart, 2010) 115, 129.

<sup>113</sup> See Sarah Worthington, *Equity* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 187–8; Simon Gardner, 'Moment of Truth for Knowing Receipt?' (2009) 125 (January) *Law Quarterly Review* 20, 23.

<sup>114</sup> See Robert Chambers, 'The End of Knowing Receipt' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 1, 4–8.

<sup>115</sup> See Joachim Dietrich and Pauline Ridge, 'The Receipt of What?: Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31(1) *Melbourne University Law Review* 47, 57–62 and the revised account given in Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) 208–16, 252–69. See also PD Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan WM Waters (ed), *Equity, Fiduciaries and Trusts 1993* (Carswell, 1993) 195, 203–6, 208–9, 212–17.

proprietary claim does.<sup>116</sup> Nevertheless, an implicit requirement of the claim is that there is property subject to a trust or fiduciary obligation.<sup>117</sup> In substance, the plaintiff (whether beneficiary or trustee) is indirectly asserting a proprietary 'interest' (if not an 'encumbrance' or 'estate', where the statutes use such terms) adverse to the registered title of the recipient.

This conclusion arguably does not hold if, alternatively, knowing receipt is regarded as wrongdoing by participation or interference in breach of trust or fiduciary duty. On this view, there is liability where the conduct of the defendant amounts to wrongdoing, taking into account the defendant's cognisance of the breach, the nature of the defendant's participation and the degree of the defendant's involvement.<sup>118</sup> This conception is supported by obiter dicta of the Full Court of the Federal Court of Australia in *Grimaldi*:

We do not consider that a property protection rationale for recipient liability (beyond a proprietary claim to a subsisting equitable interest in property, or its proceeds, in the third party's hands) of itself provides a sufficient justification for imposing a personal liability to account. That liability arises as a matter of conscience not of property. As with assistance liability, recipient liability should be seen as fault based and as making the same knowledge/notice demands as in assistance cases.<sup>119</sup>

This implies that a plaintiff need not squarely base his or her claim on an 'estate' or 'interest' adverse to the statutory protection.<sup>120</sup> This is because the focus on participatory or accessorial conduct means the action is about more than the vindication of an equitable property interest in the relevant asset.<sup>121</sup> Before this conclusion can be affirmed, however, it is necessary to address the main reason why the courts have rejected knowing receipt as an in personam claim.

## B The Legacy of Sixty-Fourth Throne

The reasoning adopted in *Sixty-Fourth Throne*<sup>122</sup> has undoubtedly been the most influential in the case law. The facts may be summarised briefly. A debtor used real

<sup>116</sup> This requirement is not one of the three elements of liability articulated in *El Ajou v Dollar Holdings plc* [1994] 2 All ER 685, 700 (Hoffmann LJ), but is included in the expanded version comprising six elements given in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch) [48].

<sup>117</sup> Lynton Tucker et al, *Lewin on Trusts* (Sweet & Maxwell, 2015) [42-023] and see especially [42-034]: 'The establishment of the trust over property is a necessary preliminary to the establishment of liability.' See also *Re Loftus* [2005] 1 WLR 1890, 1922; *Fraser v Oystertec* [2003] EWHC 2787, [35]; *Gold v Rosenberg* [1997] 3 SCR 767, 783; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 3 WLR 1555, 1582 ('*Selangor (No 3)*'). In Australia, see *Grimaldi* (n 50) 82 [254].

<sup>118</sup> Dietrich and Ridge, 'The Receipt of What?' (n 115) 60–61; Dietrich and Ridge, *Accessories in Private Law* (n 115) 234–68.

<sup>119</sup> *Grimaldi* (n 50) 85 [267]. See also the general comments on participatory liability at 80 [247].

<sup>120</sup> But see Tang (n 7) 691; Hughson, Neave and O'Connor (n 6) 494. In respect of the UK, see Matthew Conaglen and Amy Goymour, 'Knowing Receipt and Registered Land' in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart, 2010) 159, 174–7.

<sup>121</sup> See Havelock (n 106) 592–3.

<sup>122</sup> *Sixty-Fourth Throne* (n 56). In an earlier Victorian case, *Koorootang Nominees* (n 55), Hansen J found (at 105–107) that the plaintiff had established an in personam claim against a bank holding a registered mortgage on the basis of the first limb of *Barnes v Addy*. His Honour did not consider the

property owned by the respondent trustee company to secure a guarantee and mortgage in favour of the appellant bank. The instruments facilitating this were forgeries. The bank registered the mortgage and thereby obtained an indefeasible interest in the property.<sup>123</sup> The respondent brought proceedings to set aside the guarantee and the mortgage. There was found to be no fraud by the bank, whether by actual knowledge of the forgery or by wilful blindness. In the alternative, a *Barnes v Addy* claim was made, alleging the bank was a 'constructive trustee' and liable to account to the respondent for the mortgage of the property.

Justice Tadgell (with whom Winneke P agreed)<sup>124</sup> held that the bank was not a 'recipient' of trust property for the purposes of knowing receipt. In a passage worth quoting in full, His Honour explained that

[t]o recognise a claim in personam against the holder of a mortgage registered under the *Transfer of Land Act*, dubbing the holder a constructive trustee by application of a doctrine akin to 'knowing receipt' when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes. It is to be distinctly understood that, until a forged instrument of mortgage is registered, the mortgagee receives nothing: before registration the instrument is a nullity. As Street J pointed out in *Mayer v Coe* at 754, the proprietary rights of a registered mortgagee of Torrens title land derive 'from the fact of registration and not from an event antecedent thereto'. In truth, I think it is not possible, consistently with the received principle of indefeasibility as it has been understood since *Frazer v Walker* and *Breskvar v Wall*, to treat the holder of a registered mortgage over property that is subject to a trust, registration having been honestly obtained, as having received trust property.<sup>125</sup>

The conclusion is undoubtedly correct on the facts of the case, although it is suggested that this is not for the reasons given. It should first be noted that Tadgell JA referred to the 'application of a doctrine *akin to* "knowing receipt"'.<sup>126</sup> On the facts, there could be no knowing receipt of trust property, since there had been no transfer of any land<sup>127</sup> to the bank, let alone any transfer in breach of trust or other fiduciary duty (since the debtor was not the trustee). Instead, the bank had

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compatibility of such a claim with statutorily protected title, perhaps because the fraud exception applied (at 125–6).

<sup>123</sup> *Transfer of Land Act* 1958 (Vic) s 42(1).

<sup>124</sup> In his dissent, Ashley AJA (n 56, 166) criticised the approach of the majority as emasculating the full range of operation of a remedy by way of constructive trust. This judgment was influential in *Tara Shire Council v Garner*, with the Court of Appeal majority stating that it more effectively balances 'the protection afforded to trust property against its knowing receipt by a third party and the protection afforded to the title of registered proprietors': [2002] 1 Qd R 556, 585 [89] (Atkinson J, with whom McMurdo P agreed). This preference may be explained by the fact Queensland's statute expressly provides that 'an equity arising from the act of the registered proprietor' overrides indefeasibility: *Land Title Act 1994* (Qld) s 185(1).

<sup>125</sup> *Sixty-Fourth Throne* (n 56) 157.

<sup>126</sup> *Ibid* 157 (emphasis added).

<sup>127</sup> 'Land' being defined in *Transfer of Land Act* 1958 (Vic) s 4(1) as including 'any estate or interest in land'.



simply registered a mortgage instrument, and thereby created a mortgage interest in its favour.<sup>128</sup>

When applied to actual cases where there has been a disposition of land in breach of trust or other fiduciary duty, the reasoning is narrow and artificial. The proposition that proprietary rights derive from the act of registration and not from an antecedent event is technically correct, but does not say anything about whether the registered proprietor has *received* a benefit for the purposes of knowing receipt.<sup>129</sup> In order for the third party to become the registered proprietor, the third party must be specified as transferee on the relevant instrument of transfer (or authority and instruction form in the case of electronic transactions) to be executed. The result of registration of that instrument is that the third party becomes the new registered proprietor and is benefited accordingly.

Ultimately, the majority in *Sixty-Fourth Throne* fixated upon the requirement of ‘beneficial receipt’ and did not explain why an in personam remedy in response to knowing receipt is, in substance, incompatible with the statutory protection. Nevertheless, in the course of its judgment in *Farah*,<sup>130</sup> the High Court approved, in obiter dicta, the majority approaches in *Sixty-Fourth Throne*, as in turn adopted by a majority of the Supreme Court of Western Australia in *LHK Nominees*.<sup>131</sup> The High Court did not examine the scope of the in personam exception, or the reasoning in those cases, in any detail. *Sixty-Fourth Throne* therefore represents the law on this issue in Australia,<sup>132</sup> and has routinely been adopted or followed by lower courts,<sup>133</sup> with one notable exception.

In *Super 1000 Pty Ltd v Pacific General Securities Ltd*,<sup>134</sup> White J questioned the correctness of two aspects of the reasoning in *LHK Nominees*, despite its being approved by the High Court in *Farah*. First, his Honour referred to the proposition of Anderson and Steytler JJ to the effect that where a registration of title was not dishonestly obtained, it is not possible to treat the holder of the registered title that was subject to a trust as having received trust property.<sup>135</sup> Justice White did not consider that this explained why neither limb of *Barnes v Addy* is available.<sup>136</sup> Second, his Honour referred to the statement by Pullin J in *LHK Nominees* that the

<sup>128</sup> The fact it was forged is not sufficient to ground an in personam claim: see *Vassos* (n 94) 332–3; *Eade v Vogiazopoulos* [1999] 3 VR 89; *Kukutai v Dyer* (2008) 9 NZCPR 803, 816–18 [61]–[62].

<sup>129</sup> See also Low (n 6) 230–31.

<sup>130</sup> *Farah* (n 104) 169–71 [193]–[196].

<sup>131</sup> (n 57) 549 [185]–[186] (Murray J), 555–6 [210]–[213] (Anderson and Steytler JJ), 568–72 [273]–[292] (Pullin J).

<sup>132</sup> And in New Zealand: see *JEB Management Ltd v Grubz United Whanau Trust* (2015) 15 NZCPR 705, 714–17 [37]–[46] in which *Sixty-Fourth Throne* was cited in support. Cf *Smith v Hugh Watt Society Inc* in which the respondent was transferee of real property with knowledge that the property was trust property transferred in breach of trust: [2004] 1 NZLR 537. A ‘constructive trust’ was imposed on the basis that the respondent had been unjustly enriched at the expense of the plaintiffs: [2004] 1 NZLR 537, 553–4 [66]–[73].

<sup>133</sup> See *Bli Bli No 1 Pty Ltd v Kimlin Investments Pty Ltd* [2008] QSC 289, [36]; *Fletcher v George (No 6)* [2009] FMCA 69, [175]; *Merrell Associates Ltd v HL (Qld) Nominees Pty Ltd* (2010) 241 FLR 49, 55 [13]; *Sze Tu v Lowe* (2014) 89 NSWLR 317, 361 [240] (‘*Sze Tu*’).

<sup>134</sup> (2008) 221 FLR 427, 477 [229]–[230] (‘*Super 1000*’).

<sup>135</sup> *Ibid* 476–7 [228] citing *LHK Nominees* (n 57) 555 [210].

<sup>136</sup> *Super 1000* (n 134) 477 [229].

cases relied on by Ashley AJA in *Sixty-Fourth Throne* were distinguishable.<sup>137</sup> Justice White did not regard this as explaining why either limb of *Barnes v Addy* is not within the in personam exception.<sup>138</sup> For the reasons above, it is suggested that White J was justified in raising these doubts, despite being bound to follow *LHK Nominees*.<sup>139</sup>

In sum, the reasoning of the majority in *Sixty-Fourth Throne* in relation to the requirement of beneficial receipt is not convincing, and does not rule out the compatibility of knowing receipt with the statutory protection, assuming the liability is regarded in substance as a form of wrongdoing.

## V Volunteer Recipients

Where a party has obtained registered proprietorship as a volunteer, the dominant view is that he or she enjoys the benefits of the statutory protection.<sup>140</sup> The volunteer is, however, vulnerable to three personal claims. The first is a traditional ground of equitable liability. The second, and recently recognised claim, is a common law claim functioning to protect equitable ownership. It is discussed herein, given this function. The third, which will not be discussed, is a strict liability claim in unjust enrichment for restitution of value.<sup>141</sup>

### A The Traditional Equitable Claim

Where a volunteer innocently receives funds or property subject to an equitable interest, but subsequently acquires notice of the equitable interest, he or she then comes under a personal obligation to restore such funds or property (or their traceable proceeds) to the extent they have been retained. This liability was recognised from at least the 19<sup>th</sup> century,<sup>142</sup> and has been reaffirmed recently.<sup>143</sup> It is

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<sup>137</sup> Ibid 477 [230].

<sup>138</sup> Ibid.

<sup>139</sup> Ibid 478 [234].

<sup>140</sup> In NSW, see *Bogdanovich v Koteff* (1988) 12 NSWLR 472; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 302–3 [81]–[83] (Court of Appeal); *Sze Tu* (n 133) 361 [241]. The High Court of Australia also assumed this in *Farah* (n 104) 166 [188], 172 [198]. In Western Australia, see *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Gadsdon v Gadsdon* [2003] WASC 48, [43]. The position in Victoria differs: see Butt (n 11) [20–119]. New Zealand has adopted the NSW position: see *Regal Castings* (n 2) 478–80 [130]–[136]. In some jurisdictions, volunteers are expressly deprived of the protection: see *Land Titles Act* (Singapore, cap 157, 2004 rev ed) s 46(3), but contrast *Land Titles Ordinance* (Hong Kong) cap 585, s 27(1).

But see Chambers (n 95).

<sup>142</sup> *Sheridan v Joyce* (1844) 7 Ir Rep Eq 115; *Andrews v Bousfield* (1847) 10 Beav 511; 50 ER 678; *Locke v Prescott* (1863) 32 Beav 261; 55 ER 103; *Hennessey v Bray* (1863) 33 Beav 96; 102–3, 55 ER 302, 305. In Australia, the foundational case is *Black v S Freedman & Co* (1910) 12 CLR 105, 109 (wife liable to repay money received from her husband once she acquired notice that he had stolen this from his employer and was accordingly a constructive trustee). Although no trust was imposed over money in the hands of the wife, it was suggested in *Sze Tu* (n 133) 348 [157]–[158] that proprietary relief against a volunteer recipient is available if ‘appropriate.’

<sup>143</sup> See *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 266 [154] (*‘Heperu’*):

To call the volunteer recipient a constructive trustee and to call upon him or her to account as a constructive trustee (because he or she upon discovery of the fund or asset belonging to another

distinct from liability in knowing receipt since: (a) the touchstone of liability is notice, not knowledge; and (b) the volunteer is not personally liable to pay the full value of the funds or property received.

It has been assumed in at least two cases in Australia that the statutory protection is a defence to the traditional equitable claim. In *Break Fast Investments Pty Ltd v Giannopoulos (No 5)*,<sup>144</sup> Black J referred to the line of authorities holding that knowing receipt does not constitute an in personam exception and then concluded:

In my view, that the same result [i.e. the non-availability of an in personam exception] must follow in respect of a claim [against a volunteer] under *Black v S Freedman & Co* which arises from the fact that a person is placed on notice of an unauthorised receipt of funds, which does not amount to an allegation of fraud in the sense of dishonesty, as distinct from an allegation that that person is bound in conscience to recognise the claimant's rights once they are placed on notice of them.<sup>145</sup>

Shortly after, in *Sze Tu*, the NSW Court of Appeal described this as a 'correct application of principle'<sup>146</sup> without elaboration. Nevertheless, a different bench of the same Court expressed the opposite view in *Fistar*.<sup>147</sup> Justice Leeming stated:

It makes no difference whether a third party recipient of trust property (say, money) buys shares or Torrens title land or a motor vehicle: his or her personal liability is unaffected. To be clear, I do not understand the passage in *Farah Constructions* at [190]–[198] about the inapplicability of principles governing the receipt of trust property to title derived from registration under Torrens legislation to qualify the principles governing tracing in equity, or the personal liability of a volunteer to account for the value of the traceable proceeds of trust property retained by him or her.<sup>148</sup>

Whether the traditional equitable claim against a volunteer is incompatible with the statutory protection turns on whether that claim indirectly protects trust property. The two leading Australian cases differ as to the basis of liability. In *Heperu*, Allsop P viewed the obligation of the volunteer as grounded on the touching of his or her conscience upon acquiring notice:

*Black v S Freedman* is clear authority for the equitable obligation upon the innocent volunteer to restore to the plaintiff the fund identified and remaining (whether in original form or traceable product) in his or her hands. The equitable obligation arises from the later discovered position, not from wrongful conduct. Therefore, the extent of the personal equity involved, created by the circumstance in question, is the touching of the conscience of

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has become one) does not mean the volunteer comes under personal liabilities, independently of, or beyond, the obligation to restore the fund or asset and any attendant obligation.

See also *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91, 123 [81] (Court of Appeal); *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 474 (Court of Appeal); *Agip v Jackson* (n 98) 291.

<sup>144</sup> [2011] NSWSC 1508.

<sup>145</sup> *Ibid* [102].

<sup>146</sup> *Sze Tu* (n 133) 361 [243] Gleeson JA (with whom Meagher JA and Barrett JA agreed).

<sup>147</sup> *Fistar* (n 50).

<sup>148</sup> *Ibid* 749 [82] (Leeming JA, with whom Bathurst CJ and Sackville AJA agreed).

the volunteer recipient to deal with the property of another conformably with the interests of the owner, now discovered.<sup>149</sup>

By contrast, in *Fistar*, Leeming JA emphasised the conduct of the volunteer: ‘Although this is similar to first limb *Barnes v Addy* liability, it is conceptually distinct, because it is the *subsequent dealing*, rather than the *receipt of property*, that founds liability’.<sup>150</sup>

It is respectfully suggested that the view of Allsop P is to be preferred. Pending notice, a volunteer recipient is able to deal with the property freely.<sup>151</sup> Once he or she has notice, the volunteer is obliged to restore the property to or for the benefit of the beneficiaries, and not to part with it otherwise. Subsequent dealing is therefore a breach of a duty which has already arisen. Like knowing receipt, this personal liability protects equitable ownership, and is incompatible with the statutory protection.

## B The Heperu Common Law Claim

In *Heperu*,<sup>152</sup> the NSW Court of Appeal recognised the aforementioned equitable claim,<sup>153</sup> but also found that the volunteer could be personally liable at common law, without the need for notice. This was on the basis of an obligation to restore, in monetary terms, the value of the *retained* proprietary benefit derived from the receipt of funds traceable in equity from misappropriated funds<sup>154</sup> or the value of the remaining interest in land held by the volunteer.<sup>155</sup> The Court found support for the availability of such a claim in *Banque Belge pour l’Etranger v Hambrouck*<sup>156</sup> and in the judgment of Lord Templeman in *Lipkin Gorman v Karpnale Ltd.*<sup>157</sup> The claim may be regarded as an example of common law recognition of equitable ownership.<sup>158</sup>

The *Heperu* claim has been praised by one commentator as a common law ancillary liability that protects equitable rights: the claim is to the value of the equitable property, identified through equitable means, but enforced by the common law. It represents an integration of the common law and equity par excellence in which the common law/equitable appellation becomes unhelpful as a description of the cause of action.<sup>159</sup>

<sup>149</sup> *Heperu* (n 143) 265 [154].

<sup>150</sup> *Fistar* (n 50) 742 [45] (emphasis in original), citing *Accessories in Private Law* (n 116) 203. No authority is cited in that work in support of this proposition. See also *Fistar* (n 50) 742–3 [47].

<sup>151</sup> See *Independent Trustee Services Ltd* (n 143) 124 [84]: ‘the volunteer is (for the time being) able to mix the trust assets with his own, with impunity, and to dispose of them freely, despite the beneficiaries’ continuing beneficial interest’.

<sup>152</sup> (n 143). Notably, no proprietary relief was sought (at 260 [126]). Such a claim was made in *Fistar*, but failed as the recipient was found not to be a volunteer: *Fistar* (n 50) 746–9 [65]–[81].

<sup>153</sup> *Heperu* (n 143) 265 [154].

<sup>154</sup> *Ibid* 263 [144], 265 [153].

<sup>155</sup> *Ibid* 263 [144].

<sup>156</sup> [1921] 1 KB 321.

<sup>157</sup> [1991] 2 AC 549 (House of Lords).

<sup>158</sup> See, eg, JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis, 7<sup>th</sup> ed, 2006) 670; *MGL* (n 69) [1–205].

<sup>159</sup> Pauline Ridge, ‘Modern Equity: Revolution or Renewal from Within?’ in Sarah Worthington, Andrew Robertson and Graham Virgo (eds) *Revolution and Evolution in Private Law* (Hart, 2018)

While the claim is not a proprietary one, equitable ownership of the relevant interest is a prerequisite to making the claim. It therefore functions to protect equitable ownership indirectly. As a result, it falls to be treated in the same way as knowing receipt: it is incompatible with the statutory protection.

## VI Remedies: Receipt-based Claims

### A *Knowing Receipt*

The appropriate remedy in respect of knowing receipt has proved controversial. This is largely because the expressions ‘constructive trustee’ and ‘accountable as a constructive trustee’ — implying that remedies may go beyond personal orders — are frequently used in the case law in connection with this liability.<sup>160</sup> Such language is notoriously ambiguous<sup>161</sup> and has long been criticised.<sup>162</sup> Lord Sumption has observed that, ‘there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees’.<sup>163</sup>

Nevertheless, this language does reveal something crucial about the nature of personal liability in knowing receipt: it resembles the liability of the express trustee to account for trust property he or she holds.<sup>164</sup> As Ungood-Thomas J observed in *Selangor (No 3)*:

‘[‘constructive trusteeship’ as applied to those whom a court of equity will treat as trustees by reason of their action] is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in

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251, 260. It is beyond the scope of this article to address whether recognition of this claim was necessary or desirable, but two problems may briefly be mentioned. First, where the volunteer retains property (other than Torrens land), an equitable proprietary claim will be available, even if the volunteer is innocent: *Foskett v McKeown* (n 48) 132A–B, 132F–133B, 133D, 139H–140A. A personal claim will usually be unnecessary. Second, the claim mirrors the restitutionary claim articulated by Lord Templeman in *Lipkin Gorman v Karpnale Ltd* (n 157) 563. On this approach, restitution is limited to the net amount of the funds retained. By contrast, the claim articulated by Lord Goff involves a prima facie obligation to make restitution of all funds received, subject to a change of position defence (at 578–82). It is this latter claim which has long been orthodox in England and other common law jurisdictions.

<sup>160</sup> See *Morgan v Stephens* (1861) 3 Giff 226, 237; 66 ER 392, 397; *Sheridan v Joyce* (1844) 7 Ir Rep Eq 115, 119; *Jesse v Bennett* (1856) 6 De G M & G 609, 612; 43 ER 1370, 1371; *Re Blundell* (1888) 40 Ch D 370, 381; *John v Dodwell & Co Ltd* [1918] AC 563 (Privy Council) 569.

<sup>161</sup> See *Grimaldi* (n 50) 161 [667], distinguishing the ‘strictest sense’ and a ‘more general sense’.

<sup>162</sup> See *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, 409 (Court of Appeal) (‘*Paragon*’). The expression ‘accountable in equity’ is preferred: see *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [142] (Lord Millett); *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [4] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* [1999] 1 VR 584, 636–7.

<sup>163</sup> *Williams v Central Bank of Nigeria* [2014] AC 1189, 1197 [7] (‘*Williams*’). For an example of such confusion in the context of an in personam claim, see *Super 1000* (n 134) 471 [209], 472 [213].

<sup>164</sup> Mitchell and Watterson (n 112) 120, 128–31.

accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee.<sup>165</sup>

Importantly, the recipient, although not an express trustee, is treated *as if he or she was one*, with equivalent duties.<sup>166</sup> As with an express trustee, the core duty of the knowing recipient is to restore the trust property immediately. Ordinarily, the recipient will no longer hold the property, so will be ordered instead to pay the current monetary value of the property.<sup>167</sup> Consistent with the argument made above, the award of such a remedy is not inconsistent with the statutory protection if knowing recipient is regarded as a wrong.<sup>168</sup> The recipient may of course *choose* to satisfy the personal liability by transferring the property to the plaintiff; but he cannot be compelled to transfer without the statutory protection necessarily being contravened.

## B (Remedial) Constructive Trust?

Given the rejection of a knowing receipt claim as an in personam claim in Australia, it is difficult to find an instance of a court imposing a constructive trust (whether institutional or remedial)<sup>169</sup> over real property in response to a knowing receipt claim. There are two cases touching on the availability of a remedial constructive trust which warrant brief examination.

First, in *LHK Nominees*,<sup>170</sup> Murray J suggested that the appellant could seek a declaration of remedial constructive trust of the type in *Muschinski v Dodds*<sup>171</sup> based on ‘fraudulent conduct in the equitable sense’. His Honour explained:

It can be seen that ... a declaration of trust, involves no detracton from the principle of indefeasibility of title of Torrens system land and the equitable remedies might be available in an appropriate case, and in an appropriate form, where property is to be traced or followed into the hands of a third party. The remedy of the Court, in whatever form is judged appropriate, will be applied to give effect to the personal equity established by the plaintiff and will proceed upon the basis that the defendant has, to the point of judgment, title to the property *which may be qualified where necessary by the exercise of curial power in the form of a declaration of trust*.<sup>172</sup>

The making of a mere declaration may seem innocuous, but a declaration is rarely sought for its own sake. If granted the declaration sought, the plaintiff may make a

<sup>165</sup> *Selangor (No 3)* (n 117) 1582. See also *Paragon* (n 161) 413.

<sup>166</sup> Mitchell and Watterson (n 112) 157–8. See also *Williams* (n 164) 1197–8 [9] (Lord Sumption).

<sup>167</sup> Ibid 135.

<sup>168</sup> It has been objected that ‘it is a hollow victory for the registered proprietor to retain the land if they have to pay a sum equivalent to the value of the land’: see Tang (n 7) 691. This seems to presume that the registered proprietor must ‘win’ as against a plaintiff with an equitable claim. In any event, this is the unavoidable effect of the legislation on the approach proposed herein.

<sup>169</sup> It is beyond the scope of this article to examine the variety of circumstances in which ‘remedial’ constructive trusts have been imposed, or their legitimacy. It seems clear, however, that such trusts are to an extent discretionary, or only to be granted ‘if appropriate’: see *Grimaldi* (n 50) 82 [255], 125–7 [504]–[511], *Sze Tu* (n 133) 346–8 [151]–[158], and the classic statement by Deane J in *Muschinski v Dodds* (n 82) 612–17.

<sup>170</sup> *LHK Nominees* (n 57) 551–2 [194]–[200].

<sup>171</sup> *Muschinski v Dodds* (n 82).

<sup>172</sup> *LHK Nominees* (n 57) 551–2 [196] (emphasis added). To similar effect, see Harding (n 5) 363–4.

legitimate demand that the title or interest be transferred, or that an equitable lien be imposed over it. Alternatively, the plaintiff may use the declaration to extract a settlement having either of these consequences. As a result, a title that is qualified by a declaration of trust is susceptible to loss of the statutory protection.

Second, in *Robins v Incentive Dynamics Pty Ltd*<sup>173</sup> the NSW Court of Appeal had no qualms about imposing a remedial constructive trust for knowing receipt. The directors of the respondent company, in breach of fiduciary duty, had unilaterally transferred funds to a company ('Coldwick') that the respondent used as a property investment vehicle.<sup>174</sup> This transaction conferred no benefit on the respondent. Coldwick used the funds towards the purchase of two properties. After it went into liquidation, the respondent alleged that Coldwick was in knowing receipt of the funds and sought a declaration of remedial constructive trust over these properties.

Delivering the judgment of the Court,<sup>175</sup> Mason P accepted the submission that there was knowing receipt by Coldwick.<sup>176</sup> In relation to the form of remedy, his Honour stated:

The recipient cause of action [under the first limb of *Barnes v Addy*] may generate a personal obligation to make restitution with interest of moneys received. In a proper case the unjustified receipt can also be made the springboard for a proprietary claim such as a (remedial constructive) charge or trust ...<sup>177</sup>

The authority cited for the latter proposition was *Bathurst City Council v PWC Properties Pty Ltd*.<sup>178</sup> This, however, was not a knowing receipt case,<sup>179</sup> and did not support the availability of a proprietary remedy in respect of that action. Subsequently, the case of *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*<sup>180</sup> was cited and characterised as demonstrating that

the (remedial) constructive trust capable of being imposed by the court as the springboard for a personal or proprietary remedy is not precluded merely because the recipient took the money under a transaction having a particular form such as a gift, loan or purchase.<sup>181</sup>

A perusal of the judgments in *Belmont Finance* reveals that no proprietary remedy was contemplated, let alone ordered. Instead, Buckley LJ held that the

<sup>173</sup> (2003) 175 FLR 286, 301–2 [71]–[79] ('*Robins*'). Although not a knowing receipt case, in *Regal Castings* the trustees were ordered to transfer their half-share in the property to the Official Assignee: *Regal Castings* (n 2) 450 [23] (Elias CJ) 465 [78]–[79] (Blanchard J, Wilson J agreeing), 486 [162]–[163] (Tipping J). This pragmatic imposition of a remedial constructive trust created a proprietary interest for the benefit of unsecured creditors.

<sup>174</sup> Two of the directors were also directors and shareholders of Coldwick at the time.

<sup>175</sup> Justice Giles disagreed on a narrow point as to whether the requirement of rescission stood in the way of proprietary relief: see 302–303 [81]–[85].

<sup>176</sup> *Robins* (n 173) 297 [50]–[51].

<sup>177</sup> *Ibid* 297 [45].

<sup>178</sup> (1998) 195 CLR 566, 585 [42].

<sup>179</sup> The issue was whether land vested in the council was 'land subject to a trust for a public purpose' under the *Local Government Act 1993* (NSW) and dealt with beyond the council powers. The High Court characterised this as a 'statutory trust', not a private trust: *ibid* 592 [67].

<sup>180</sup> [1980] 1 All ER 393 ('*Belmont Finance*').

<sup>181</sup> *Robins* (n 173) 300 [65].

recipient of the misapplied money was ‘accountable to Belmont as a constructive trustee’.<sup>182</sup> Similarly, Goff LJ held the recipient ‘liable in damages as constructive trustees’.<sup>183</sup> The order ultimately made was that the recipient was ‘accountable for the whole of the £489,000’, being the amount that had been received.<sup>184</sup> This was personal relief only.

President Mason concluded that a remedial constructive trust was appropriate on the facts, on the basis that this remedy was designed to ‘stop unconscionable conduct that would result in unjust enrichment’.<sup>185</sup> Although Coldwick did not advance any defence based on the statutory protection,<sup>186</sup> it is difficult to reconcile the imposition or declaration of a remedial constructive trust with this protection. The imposition or declaration is premised on the notion that the property ought to belong beneficially to the plaintiff. The typical means by which the new trust is implemented is by way of an order that the defendant transfer the relevant title or interest, divesting the title or interest.

### C A Contrary Argument

Where any receipt-based claim has as its ‘terminal point’<sup>187</sup> orders that require the registered proprietor to divest the title or interest in whole or part, this necessarily contravenes the statutory protection. As a result, it is not plausible to maintain that the in personam claim concerns only personal obligations in conscience and not sanctity of title.<sup>188</sup>

It has nevertheless been argued<sup>189</sup> that an order in response to a successful *Barnes v Addy* claim, which requires the defendant to execute and register a discharge of mortgage, represents ‘no unusual or special threat to the principle of indefeasibility of title’.<sup>190</sup> This is because:

such an order cannot be distinguished from other uncontroversial in personam orders with proprietary consequences for the registered proprietor of an interest in Torrens land. Orders requiring acts of specific performance of contracts for the sale and purchase of interests in Torrens land are the best example. Moreover, a case where a court orders the defendant to execute and lodge a form of discharge of a mortgage, but where the defendant refuses to do so, may not be distinguished sensibly from a case where a court orders the defendant to pay to the plaintiff a sum of money, but where the defendant refuses to do so.<sup>191</sup>

The comparisons to ‘other uncontroversial in personam orders’ made here are not apt. Taking the first, an order for specific performance requires the defendant to

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<sup>182</sup> *Belmont Finance* (n 180) 405.

<sup>183</sup> *Ibid* 412.

<sup>184</sup> *Ibid* 419 (Buckley LJ for the Court).

<sup>185</sup> *Robins* (n 173) 302 [76]. See also 297 [50]–[51].

<sup>186</sup> By the time of judgment, Coldwick had sold the properties (*Robins* (n 173) 296 [43], 302 [79]), and the competing claims were over the proceeds of sale.

<sup>187</sup> To use the expression of Barwick CJ in *Breskvar* (n 2) 385.

<sup>188</sup> Justice Tipping in *Regal Castings* (n 2) 483 [148]. See also *Davies* (n 29) 712.

<sup>189</sup> *Contrast Harding* (n 5) 359–60.

<sup>190</sup> *Ibid* 360.

<sup>191</sup> *Ibid*.



do no more than what he or she has *agreed or undertaken* to do in relation to his or her title; here equity simply compels performance. Such agreement or undertaking is absent in the case of a *Barnes v Addy* claim. If the defendant still holds the title or other interest, an order that he or she transfer this is *imposed* on him or her regardless of intentions, with the effect of divesting the title or interest.

The second comparison made does not detract from the point that an order that the defendant discharge a mortgage requires him or her to divest himself or herself of an interest in land, as opposed to merely pay a sum of money. Unless a prescribed statutory exception applies, this is not only a threat to the statutory protection but the negation of it.

## VII Conclusion

Whenever legislation is enacted that affects or interferes with existing rights or interests recognised by private law, the courts are left with the difficult task of determining the overall impact of the legislation on such rights or interests, in a necessarily incremental manner. Although the Torrens system statutes have never been interpreted by the courts as ousting all equitable claims adverse to registered titles,<sup>192</sup> their relationship with receipt-based equitable claims or exceptions remains an uneasy one. This has been an enduring source of uncertainty for those using or administering the Torrens system, as reflected in the level of litigation in this area (with many cases reaching the highest appellate courts), and the pattern of inconsistency in the case law.

This article has made two suggestions in an effort to overcome this uncertainty. The first relates to the importance of precise terminology. It is not helpful to regard the title created by registration as 'indefeasible' because this falsely implies that such title can never be divested from the registered proprietor. Registration in accordance with the statute creates a title protected against unregistered estates and interests, but the fact of registration does not oust the in personam jurisdiction, which exists in parallel with it. It is therefore not helpful to regard in personam claims as an 'exception' to 'indefeasibility'.<sup>193</sup> The existing terminology may be engrained, but its continued (and uncritical) use impedes constructive analysis.

The second argument made relates to the necessity of a systematic, yet nuanced, approach to delineating the legitimate scope of equitable in personam claims. Such claims are not homogenous, and it is necessary to determine whether the nature of each is incompatible as a matter of justificatory principle with the statutory protection, or falls outside it altogether. For this purpose, it is of fundamental importance to categorise the main claims by their underlying rationale. Applying this approach, it may be concluded that any receipt-based equitable claim

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<sup>192</sup> In *Cuthbertson v Swan*, Stow J observed of the original Torrens legislation in South Australia, 'we should not expect that the Legislature even in so great an alteration in the law as that contained in the Real Property Acts would interfere with the existing law as regards trusts and equities, except so far as is necessary to give full effect to the new system': (1877) 11 SALR 102, 110. This sentiment was echoed by Isaacs J in *Barry v Heider* (n 2) 213.

<sup>193</sup> The simple and unqualified phrase 'compatible legal or equitable claim' might be preferable.

(whether a proprietary claim or a personal claim) resulting in a proprietary remedy is incompatible with the statutory protection. If knowing receipt is regarded as a participatory wrong, a personal remedy (payment of value) is arguably compatible with the statutory protection. In relation to volunteers, the traditional equitable liability and the *Heperu* common law claim are equally incompatible with the statutory protection.

The category of receipt-based equitable claims is to be distinguished from those based on consensual or quasi-consensual obligations, and those arising from defective decisions. This proposed division of claims might seem complicated and even convoluted, but it reflects the analytic travails necessary to rationalise the effects of the Torrens system on equitable claims and interests.

# Legislative Constitutional Baselines

Lael K Weis\*

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## Abstract

‘Constitutional baselines’ are interpretive tools that are widely used in constitutional reasoning, although often implicit and unarticulated. They provide standards for measure that enable courts to evaluate the adequacy of the state’s provision of constitutionally guaranteed goods. This article identifies constitutional baselines as a distinctive issue in constitutional interpretation, and it examines an important but under-theorised way that the High Court of Australia defines constitutional baselines: namely, by adopting *legislatively-defined* norms or standards. The best-known example of this is the electoral franchise line of cases: in determining what the constitutional guarantee of representative government requires, the High Court frequently consults Commonwealth electoral legislation. However, while other commentators have observed and criticised this interpretive practice, it has not been properly understood or evaluated. This article clarifies how legislative constitutional baselines function, refines objections to their use, and develops an analytical framework for their evaluation. It ultimately argues that, at least under some circumstances, legislative constitutional baselines are justified because they provide a more plausible and more defensible method of defining constitutional baselines than methods that rely on other sources of constitutional meaning.

## I Introduction

‘Baselines’ are starting points or points of departure that are used in a variety of different types of reasoning and analysis. They provide a standard *for* — although not necessarily *of* — measure. In the context of moral reasoning and analysis, baselines establish a frame of reference for what might otherwise be an unstructured, all-things-considered evaluation of possible ends or states of affairs.<sup>1</sup> For example, philosophical theories of distributive justice rely on baselines to analyse whether existing patterns of wealth distribution are justified, and under what circumstances redistribution is justified. A baseline is what allows such theories to make sense of the notion of ‘redistribution’. Although baselines are often associated with the status

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<sup>1</sup> It is perhaps worth noting that baselines are often conspicuously absent when it would be helpful to have them. Consider, for example, the recent report on levels of sexual harassment in universities in Australia: Australian Human Rights Commission, *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017) <<https://www.humanrights.gov.au/node/14533>>. Levels of harassment were mainly presented as ‘very high’, but without much by way of reference to a baseline. In evaluating the result, it would be helpful to know, for instance, whether levels of sexual harassment are higher in universities than in other kinds of institutions.

quo — and where they are misapplied, with forms of status quo bias — this is not necessarily the case. Thus a distributive baseline might identify a distribution that in fact obtained prior to the enactment of some policy, or it might identify a distribution that is argued would obtain under an idealised set of circumstances, such as a ‘state of nature’ or a ‘veil of ignorance’. At the same time, however, baselines do not, in general, purport to identify an optimal standard. While this is a possible feature of a baseline, it is not a necessary feature. For example, non-ideal theories of justice use baselines to specify a set of minimum conditions of justice, such as the satisfaction of basic needs.

Baselines also play an important role in constitutional reasoning. One such role lies in analysing state compliance with constitutional requirements in relation to ‘constitutionally guaranteed goods’, broadly defined.<sup>2</sup> How do we know whether state actions taken in relation to a constitutionally guaranteed good or that affect the provision of that good are consistent with constitutional requirements? Baselines help provide answers to interpretive problems of this kind because they help make sense of the constitutional requirement. They define standards against which state actions can be evaluated for adequacy. At the same time, they avoid the need to determine an optimal measure or method of provision.

This article examines a specific type of constitutional baseline that has been used in Australian constitutional jurisprudence: namely, *legislative constitutional baselines*. A ‘legislative constitutional baseline’, in the precise sense used here, is:

1. a legislatively-defined norm or standard
2. that a court deems to have constitutional significance
3. as a measure for the adequacy of the provision of a particular constitutionally guaranteed good.<sup>3</sup>

Understanding legislative constitutional baselines has great importance for both the theory and practice of constitutional adjudication. When they are used, courts define constitutional requirements by reference to legislation. This appears to invert the foundational hierarchy of constitutional law over ordinary legislation, and to violate the fundamental principle that ordinary legislative enactments cannot legally bind future parliaments. In this respect, legislative constitutional baselines complicate conventional understandings of legal norm hierarchies within legal constitutionalism, as traditionally understood. They complicate the distinction that is standardly drawn between ordinary legislation and constitutional law *within* the domain of legal constitutionalism. Moreover, they complicate the distinction that is standardly drawn *between* legal and political constitutionalism.

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<sup>2</sup> I use this term in a capacious sense to refer to any constitutionally guaranteed interest, including but not limited to rights and freedoms.

<sup>3</sup> The phenomenon examined here is therefore distinct from the legislative baselines described by Eskridge and Ferejohn in their work on ‘super-statutes’: William N Eskridge Jr and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press, 2010). For Eskridge and Ferejohn, a legislative baseline is a social fact that exists independently of the interpretive practices of courts: it exists where a statutory standard ‘sticks’ in public culture, meaning that it is difficult to change (and is in this respect, they claim, ‘entrenched’), forming a widely assumed point of departure against which subsequent policies are evaluated and adopted: at 6–9.

This article does not attempt to address these theoretical puzzles. Before they can be addressed, legislative constitutional baselines must be properly identified and understood. Accordingly, the objectives of this article are to provide greater clarity about the nature of this interpretive practice, and to develop a set of conceptual tools for analysing and evaluating legislative constitutional baselines.

Part II of the article sets up this analysis by clarifying the use of constitutional baselines in general and contextualising them in Australian constitutional jurisprudence. Although constitutional baselines are a pervasive feature of constitutional reasoning, they are often implicit and unarticulated. As a result, scholarship to date has not articulated them as presenting a specific problem of constitutional interpretation, and they are largely under-theorised and under-unexamined. This Part identifies constitutional baselines as an interpretive tool that raises a distinct set of interpretive issues.

Part III of the article then shifts to the examination of legislative constitutional baselines in particular. The article focuses on a central example that has attracted significant commentary and criticism. This is the High Court's constitutional jurisprudence on elections and the electoral franchise, where the Court has frequently used Commonwealth electoral legislation to give content to the constitutional requirement that Parliament be 'chosen by the people'. Here the article describes the electoral franchise line of cases, situating them within the constitutional and interpretive context that informs the Court's jurisprudence in this area. Drawing on this line of cases, the article then goes on to examine how constitutional baselines function, identifying objections to using legislation to define them, and ultimately arguing that this interpretive practice may nevertheless be justified.

Part IV considers and refines objections to legislative constitutional baselines. It distinguishes two different ways that constitutional baselines can function: as 'strict' constitutional baselines, whereby departures are determinative of invalidity, and as 'threshold' constitutional baselines, whereby departures are only *prima facie* invalid, and can be justified. The article accepts that using legislation to define a strict constitutional baseline is clearly objectionable because it is inconsistent with the principles of parliamentary and constitutional supremacy. Identifying the strict approach is helpful for crystallising objections to legislative constitutional baselines. However, strict constitutional baselines are rarely used in practice: most courts, including the High Court, use the threshold approach. Moreover, objections to using legislation to define a threshold constitutional baseline are not as severe. Accordingly, once the usual function of constitutional baselines in judicial reasoning is taken into account, judicial use of legislation to define constitutional baselines is at least potentially capable of justification.

Part V of the article proposes an approach for evaluating legislative constitutional baselines. The analytical framework that it develops rests on two core contentions. First, it is contended that some interpretive problems call for using a constitutional baseline, and that the task of defining a constitutional baseline often, if not typically, requires consulting extrinsic sources. Second, it is contended that legislative constitutional baselines must be evaluated by assessing the relative strengths and weaknesses of the non-statutory extrinsic sources that would otherwise

be needed to define the constitutional baseline. Applying this approach, the article ultimately argues that in the context of the specific interpretive problem presented in the electoral franchise cases, legislation provides the High Court with a more plausible and more defensible way of defining the relevant constitutional baseline than the alternative sources of constitutional meaning that are available for this purpose. This demonstrates that there are at least some circumstances where legislative constitutional baselines are justified, and that this interpretive practice merits further examination and study.

## II Constitutional Baselines in the Australian Constitutional Context

Constitutional baselines are interpretive tools that permit a meaningful evaluation of state compliance with otherwise indeterminate constitutional requirements in relation to constitutionally guaranteed goods. They provide a standard of measure that answers the ‘compared to what?’ question. At the same time, constitutional baselines help courts avoid the need to articulate an ideal standard — something that is often thought to be undesirable for reasons having to do with the relative capacity and competency of the judiciary versus the legislature. Constitutional baselines are focused on adequacy, not optimality.

The concept of a ‘minimum core’, associated with debates about social and economic rights, is a familiar example from the global constitutional context.<sup>4</sup> Although there are a variety of ways of understanding ‘minimum core’, the basic function of the concept is to help courts identify a standard for evaluating the adequacy of legislative and executive actions in relation to the provision of a good guaranteed by a constitutional right. In this way, ‘minimum core’ provides a standard for evaluating whether the state has met its constitutional obligations, but does not tell us what beyond this is feasible, desirable, or optimal.

Beyond this example, however, it is fair to say that constitutional baselines have not been a focal point in debates about constitutional interpretation. Indeed, although baselines feature pervasively in judicial reasoning about constitutionally guaranteed goods, they are often implicit and unarticulated. Courts may simply rely on analogies to findings across a line of decided cases without averring to the existence of a baseline, or rely on an established doctrinal test without explaining that test in terms of a baseline.

For example, even the most basic interpretive questions concerning constitutional guarantees of ‘liberty’ or ‘equality’, which are widely found in constitutions throughout the world, cannot be meaningfully assessed without a baseline. ‘Free’ or ‘equal’ compared to what? Yet, the focal point of jurisprudential analysis and critique typically concerns the kinds of constitutionally suspect ‘burdens’, ‘classifications’ and the like that trigger judicial scrutiny, and the manner in which judicial scrutiny is exercised — for example, whether to apply a strict prohibition or to use some form of balancing that accounts for competing interests,

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<sup>4</sup> See Katharine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33(1) *Yale International Law Journal* 113.

and if so how that balancing ought to be structured. The relevant baseline — which may simply be the status quo ante (that is, the state of affairs that obtained prior to the relevant state action under review) — is not often identified as a distinctive site of contention.

Similarly, baselines have not been identified as a central controversy or topic of debate in Australian constitutional jurisprudence. In the Australian context, however, inattention to constitutional baselines is also a function of the fact that the *Australian Constitution* has few express ‘rights’ or ‘rights-like’ guarantees. Whereas rights typically do raise questions about baselines, baselines are less frequently at issue in the central interpretive questions that Australian courts grapple with, which more commonly concern powers and structure. Issues of powers and structure do not, in general, present interpretive questions about the adequacy of state action that require reference to a baseline. For example, whether a Commonwealth law falls within a head of legislative power is a matter of characterisation: the law either bears a sufficient connection to the subject matter of a head of power (and is *intra vires*), or it does not (and is *ultra vires*). There is no further question concerning the adequacy of Commonwealth action taken in relation to that subject matter.

Even so, it is evident that constitutional baselines do play a significant, if underappreciated, role in Australian constitutional jurisprudence. For example, even in the legislative power context, there are exceptional cases that may present a baseline problem. The race power, *Australian Constitution* s 51(xxvi), which authorises the enactment of ‘special laws’ for ‘the people of any race’ is one possible example. Although the precise scope of the power is unsettled, on at least one approach — that advocated by Gaudron J in *Kartinyeri v Commonwealth*<sup>5</sup> — analysing whether a Commonwealth law falls within the head of power has a ‘discrimination’ element that requires a standard of measure. More specifically, to enliven the power ‘there must be some difference’ that warrants singling out persons of a particular race for special treatment,<sup>6</sup> or a ‘*real and relevant* difference necessitating the making of a special law’.<sup>7</sup> Defining what counts as ‘real and relevant’ in this context requires a baseline. Is it current community standards? A standard based on principles of morality? Or something else?

More broadly, as Simpson has pointed out in her work on the constitutional concept of discrimination, there are various provisions in the *Australian Constitution* that require similar ‘assessments of who is relevantly “like” whom’, and therefore present ‘considerable room for debate about appropriate baselines’.<sup>8</sup> As Simpson argues, a baseline issue arises whenever ‘constitutional rules invoke comparative concepts such as equality, discrimination, uniformity and preference’<sup>9</sup> — whether

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<sup>5</sup> (1998) 195 CLR 337.

<sup>6</sup> *Ibid* 366 [39].

<sup>7</sup> *Ibid* 367 [43] (emphasis added).

<sup>8</sup> Amelia Simpson, ‘The High Court’s Conception of Discrimination: Origins, Applications, and Implications’ (2007) 29(2) *Sydney Law Review* 263, 274, discussing *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388.

<sup>9</sup> Simpson 274. See also 264–5.

expressly by the terms of their text (*Australian Constitution* ss 51(ii),<sup>10</sup> 99,<sup>11</sup> 102,<sup>12</sup> 117<sup>13</sup>), or implicitly through the development of doctrinal tests interpreting their text (*Australian Constitution* ss 51(xxvi),<sup>14</sup> 92<sup>15</sup>). However, as Simpson's discussion demonstrates, the issue of how to identify and define the relevant baseline is not treated as presenting a distinctive interpretive question and is often suppressed and unexamined in judicial reasoning.

Finally, the baseline problem is often present in interpretive questions raised by constitutional guarantees, whether express or implied. This includes ss 92, 99, and 117 of the *Australian Constitution* — all examples discussed by Simpson.<sup>16</sup> It also includes implications from representative government, discussed below. Another possible example is s 51(xxvi), the constitutional requirement that the Commonwealth acquisition of property be 'on just terms'. Determining whether a regulatory law (as opposed to a law that directly expropriates property) effects an 'acquisition' requires a point of departure for assessing *which* variations in rights, liberties, powers, privileges and immunities enliven the 'on just terms' guarantee. Practically all regulatory laws have this effect. However, it is accepted that not all such legislative variation amounts to an 'acquisition' of property. Here, too, the baseline problem is evident, and yet suppressed and unexamined.<sup>17</sup>

In summary, the question of how to identify and define a constitutional baseline poses a distinctive interpretive problem for courts, even if it is not often identified as such. As the foregoing examples suggest, there are many different ways that a constitutional baseline could be identified and defined. Moreover, the interpretive problem cannot be avoided by simply relying on the status quo ante. For, even if treating the status quo ante as the relevant baseline is unproblematic, there is a further question concerning what features of the status quo ante should count toward defining the baseline. This article focuses on one way that courts sometimes define constitutional baselines, which singles out one particular feature of the status quo ante: namely, norms and standards defined by legislation.

<sup>10</sup> Conferring the power to make laws 'with respect to ... taxation; but so as *not to discriminate* between States or parts of States' (emphasis added).

<sup>11</sup> 'The Commonwealth *shall not*, by any law or regulation of trade, commerce, or revenue, *give preference* to one State or any part thereof over another State or any part thereof' (emphasis added).

<sup>12</sup> Conferring the power to make laws that 'forbid, as to railways, *any preference or discrimination* by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State' (emphasis added).

<sup>13</sup> 'A subject of the Queen, resident in any State, *shall not be subject* in any other State *to any disability or discrimination* which would not be equally applicable to him if he were a subject of the Queen resident in such other State.' (emphasis added).

<sup>14</sup> As discussed in this article above at 485.

<sup>15</sup> Through the application of the test adopted in *Cole v Whitfield*, where the High Court unanimously held that the s 92 requirement that interstate trade be 'absolutely free' prohibits laws that *discriminate* against interstate trade and that are *protectionist* in effect, in the sense of conferring a competitive advantage: (1988) 165 CLR 360, 393, 407–8. The analysis of both elements requires a baseline.

<sup>16</sup> Simpson (n 8) 265–6, 268–9, 285–6 (discussing s 92 and leading cases); 265, 273–7 (discussing s 99 and leading cases); 265, 267–8, 292–4 (discussing s 117 and leading cases).

<sup>17</sup> Although the High Court has acknowledged the baseline problem in this context, rather than attempting to define a standard for measure, the Court has instead focused on defining categories of exemption: see Lael K Weis, 'Property' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1013, 1018–20; Lael K Weis, "'On Just Terms,' Revisited' (2017) 45(2) *Federal Law Review* 223, 240–5.



### III The High Court's Use of Legislative Constitutional Baselines

Having identified and situated the interpretive problem presented by constitutional baselines, I now turn to the consideration of *legislative* constitutional baselines. A central example of the High Court of Australia's use of legislative constitutional baselines comes from the body of jurisprudence concerning implications from the constitutionally prescribed form of government. This includes, in particular, the constitutional requirement that Parliament be 'directly chosen by the people'.<sup>18</sup> These implications limit the Commonwealth Parliament's power to define the electoral franchise, including who votes and the manner of voting. In this sense, they function as a constitutional guarantee of a representative and democratic form of government. I refer to this line of cases as the 'electoral franchise cases', and use 'the implied guarantees' to refer to the relevant set of constitutional guarantees, which includes the implied freedom of political communication as well as implications concerning elections and the electoral franchise.

#### A Interpretive Context

Before examining how legislation has been used to define a constitutional baseline in the electoral franchise cases, it is imperative to say a few words about interpretive context in order to situate the specific issues raised by this method of defining constitutional baselines. A key methodological assumption underlying this article's analysis is that understanding and evaluating practices of constitutional interpretation are tasks that require taking account of contextual features, including constitutional and interpretive tradition.<sup>19</sup> Although these will no doubt be familiar to most readers, it is important to be clear about the features of Australian constitutionalism that inform the analysis.

When compared with other, similarly situated, common law jurisdictions, the Australian tradition of constitutional interpretation is best described as highly 'legalistic'.<sup>20</sup> This is marked by the High Court's tendency to approach constitutional interpretation in the same manner as ordinary statutory interpretation, albeit with due regard for the distinctive subject matter and drafting considerations that set the *Australian Constitution* apart from ordinary statutes. Emphasis is on text and structure, read in light of enactment history. By contrast, approaches that treat constitutions as 'living' instruments, the meaning of which evolves to reflect society's changing needs and values, are generally regarded with scepticism.

This legalistic approach to constitutional interpretation bears a close relationship to the distinctive character of the *Australian Constitution*, which is best

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<sup>18</sup> *Australian Constitution* ss 7, 24.

<sup>19</sup> To be clear: in adopting this methodological stance, the article takes no position on whether this approach is desirable or correct.

<sup>20</sup> See Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106; Adrienne Stone, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472, 474–5.

described as a practical charter of government.<sup>21</sup> It establishes the basic framework for the exercise of powers by the Federal Government (the Commonwealth of Australia), and the division of powers between the Commonwealth and the states. The *Australian Constitution* famously does not include a bill of rights, and despite high levels of public involvement in the constitutional drafting process (especially for that time), Australian constitutionalism is generally thought to lack a central ‘founding moment’ that can be said to have ‘constituted’ the Australian people. The absence of these features makes it more difficult to contend that the *Constitution* has broader normative significance as a founding document or source of popular aspirations.<sup>22</sup>

The foregoing description is not, of course, uncontested.<sup>23</sup> Nevertheless, it is fair to say that it represents an orthodox view of Australian constitutionalism. It is this view that informs conceptions of judicial role, and the High Court’s interpretive practices ought to be understood and evaluated from this perspective. Importantly for present purposes, these contextual features help explain why constitutional guarantees implied from representative democracy are controversial. Understanding these features therefore helps situate the High Court’s approach to interpreting and applying the implied guarantees.

For example, although now well established, early cases recognising the implied freedom of political communication were heavily criticised for lacking a firm basis in the text and structure of the *Australian Constitution*.<sup>24</sup> Although the *Constitution* clearly establishes a form of representative government, by design it does not contain a bill of rights. Moreover, interpreting and applying the freedom of political communication appears to require the Court to draw upon the kinds of interpretive resources and techniques used in jurisdictions with express constitutional rights of free speech, which sits uneasily with legalism and modest conceptions of judicial role. The contextual features just described help make sense of the development of the High Court’s jurisprudence in this area, which can be understood as an ongoing effort to align the freedom of political communication with constitutional and interpretive tradition, by tethering the implied freedom to its textual basis and to the prevailing understanding of the *Constitution* as a practical charter of government.<sup>25</sup> Thus, ever since the decision in *Lange v Australian Broadcasting Corporation*,<sup>26</sup> the Court has steadfastly maintained that the implied freedom is not a ‘constitutional right’, but rather a structural feature of the constitutional system, the content of which is to be determined in relation to the *Constitution*’s text and structure.

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<sup>21</sup> See Elisa Arcioni and Adrienne Stone, ‘The Small Brown Bird: Values and Aspirations in the *Australian Constitution*’ (2016) 14(1) *International Journal of Constitutional Law* 60, 75–6.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Patrick Emerton, ‘Ideas’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 141.

<sup>24</sup> See Jeffrey Goldsworthy, ‘Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghy’ (1997) 23(2) *Monash University Law Review* 367; Tom Campbell, ‘Democracy, Human Rights and Positive Law’ (1994) 16(2) *Sydney Law Review* 195.

<sup>25</sup> Adrienne Stone, ‘Expression’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 952, 958–60.

<sup>26</sup> (1997) 189 CLR 520.

The electoral franchise cases have been criticised on similar grounds. However, in contrast to the political communication line of cases, what is particularly striking about the Court's jurisprudence in this area is the fact that much of the implied guarantee's content appears to be derived *from legislation*. The High Court has relied upon both current electoral legislation and legislative developments over time to interpret the constitutional requirement that Parliament be 'chosen by the people', a criterion which is then used to evaluate whether particular ways of regulating elections or restricting the electoral franchise are constitutionally valid. In the same way that jurisprudential developments within the political communication line of cases reflect contextual features of Australian constitutionalism and interpretive tradition, I ultimately suggest that this jurisprudential development, too, ought to be understood and evaluated in light of contextual features that inform the specific interpretive problem.

## B     *The Electoral Franchise Cases*

Turning to the electoral franchise cases, the case that provides the most compelling illustration of the High Court of Australia's use of legislation as a source of constitutional meaning in this area is *Rowe v Electoral Commissioner*.<sup>27</sup> *Rowe* concerned an amendment to the *Commonwealth Electoral Act 1981* (Cth) that shortened the window of time for new voter enrolments and transfers in existing voter registrations in the period leading up to an election. Prior to 1983, the Act stated that the electoral roll closes on the day that the writs issue for an election. However, by longstanding convention, elections were announced well in advance of issuing writs — thereby giving eligible voters a pre-election window to enrol or transfer.<sup>28</sup> Then in 1983, the Fraser Government departed from this convention, leaving only one day between announcing the election and issuing the writ. This event ultimately led to an amendment to the Act giving voters seven days to enrol or transfer.<sup>29</sup> At dispute in *Rowe* was a 2006 amendment that shortened that seven-day window, requiring enrolment by 8pm on the day that the writs issue, and transfer by 8pm on the third working day after the writs issue — thereby effectively reducing the pre-election enrolment period by seven days, and the pre-election transfer period by four days. A 4:3 High Court majority held that these changes offended the constitutional guarantee of representative government because it would result in a Parliament that was not 'chosen by the people'.

A critical aspect of the majority reasoning in *Rowe* was the notion that, in determining whether or not a law regulating elections or the electoral franchise is compatible with the constitutional requirement of choice 'by the people', the relevant constitutional baseline is universal adult suffrage (more precisely, universal adult *citizen* suffrage).<sup>30</sup> While acknowledging that universal adult suffrage is not expressly mandated by the *Australian Constitution*, the majority emphasised that legislative developments since the framing have established this constitutional

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<sup>27</sup> (2010) 243 CLR 1 ('*Rowe*').

<sup>28</sup> *Ibid* 12 [3] (French CJ), 79 [235] (Hayne J).

<sup>29</sup> *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) ss 29, 45.

<sup>30</sup> Citizenship is an important qualification. As the case law and commentary generally refer to the baseline without this qualification, however, I follow that practice.

baseline.<sup>31</sup> Choice ‘by the people’ is thus a constitutional concept that appears to derive its content from legislation. As French CJ explained,

[t]he content of ... ‘chosen by the people’ ... is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law. The development of the franchise was authorised by ... the *Constitution* ... [and] [i]mplicit in that authority was the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at Federation. *That content, being constitutional in character ... cannot now be diminished.*<sup>32</sup>

Importantly, however, the proposition that universal adult suffrage is the relevant constitutional baseline, and the Court’s use of legislation to define that baseline, were not without precedent.

In *Attorney-General (Cth) ex rel McKinlay v Commonwealth*, an electoral districting case decided prior to cases establishing the implied guarantees, McTiernan and Jacobs JJ had suggested that ‘the long established universal adult suffrage may now be recognized as a *fact* and as a result it is doubtful whether ... anything less than this could now be described as a choice by the people’, referring to provisions of the *Commonwealth Electoral Act*.<sup>33</sup> This suggestion received some initial support from three justices in *McGinty v Western Australia*,<sup>34</sup> another electoral districting case, and was ultimately adopted in *Roach v Electoral Commissioner*.<sup>35</sup>

In *Roach*, a law that disqualified all prisoners from voting, irrespective of the nature of the offence or the length of sentence, was found to be constitutionally invalid. In reaching this conclusion, the majority held that universal adult suffrage is the constitutional baseline that is used to determine whether a disqualification is consistent with the constitutional requirement of choice ‘by the people’.<sup>36</sup> In their joint reasons, Gummow, Kirby and Crennan JJ asserted that universal adult suffrage is a standard that reflects contemporary understandings and values.<sup>37</sup> Their Honours emphasised that representative government is not a ‘static concept’ and acknowledged legislative evolution, but they were otherwise not explicit about exactly how the relevant baseline is defined.<sup>38</sup> However, a key point of emphasis in the reasons of Gleeson CJ is the idea that legislation provides the relevant set of ‘facts’ — as averred to by McTiernan and Jacobs JJ in *McKinlay* — that are in turn used to define the constitutional baseline.<sup>39</sup> This was the approach adopted in *Rowe*.

Most recently, this understanding of *Rowe* as adopting and applying a legislative constitutional baseline was reinforced by *Murphy v Electoral Commissioner*.<sup>40</sup> *Murphy* involved a challenge to the seven-day window for new enrolments and transfers that had been reinstated after *Rowe* invalidated the

<sup>31</sup> *Rowe* (n 27) 18–19 [18]–[22] (French CJ), 48–9 [121]–[123] (Gummow and Bell JJ), 116–17 [366]–[367] (Crennan J).

<sup>32</sup> *Rowe* (n 27) 18 [18] (emphasis altered).

<sup>33</sup> *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (emphasis added), 37 (‘*McKinlay*’).

<sup>34</sup> (1996) 186 CLR 140, 166–7 (Brennan CJ), 201 (Toohey J), 287 (Gummow J).

<sup>35</sup> (2007) 233 CLR 162 (‘*Roach*’).

<sup>36</sup> *Ibid* 174 [7] (Gleeson CJ); 198 [83], 199 [85] (Gummow, Kirby and Crennan JJ).

<sup>37</sup> *Ibid* 186–7 [45], 197 [77], 198 [82]–[83] (Gummow, Kirby and Crennan JJ).

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* 173–4 [5]–[7].

<sup>40</sup> (2016) 261 CLR 28 (‘*Murphy*’).

shortening of that period. The plaintiffs argued that a longer period was required to give effect to the constitutional requirement of choice ‘by the people’.<sup>41</sup> Accepting this argument would have required the High Court to adopt an ideal measure (that is, an optimal standard) — namely, a criterion of maximal participation — rather than a baseline (that is, a standard of adequacy) for the purpose of evaluating the constitutional validity of laws regulating elections and the electoral franchise.

The High Court in *Murphy* unanimously rejected the adoption of an ideal measure to determine constitutional validity in favour of using a constitutional baseline.<sup>42</sup> Moreover, *Rowe* was distinguished on the basis that it had involved a *departure* from the constitutional baseline. All of the justices emphasised that Commonwealth electoral legislation has always provided for a suspension of new enrolments and transfers prior to the closure of the electoral roll, and that for over three decades (since 1983) that suspension period has been seven days. At the same time, however, at least some members of the Court were equivocal about the use of *legislation* to define the constitutional baseline. Four members of the Court appeared to endorse the use of legislation for this purpose.<sup>43</sup> Two appeared to be agnostic, simply accepting *Rowe* as authority for the legislative constitutional baseline.<sup>44</sup> Finally, Gordon J expressed some reservations, noting that ‘[a]s a matter of constitutional interpretation, treating legislative diminution as a criterion raises complicated issues.’<sup>45</sup> At the same time, however, her Honour appeared to accept that this is an area where legislation is relevant to discerning constitutional meaning.<sup>46</sup> Indeed, this was a recurrent theme, if not a basic premise, underlying all of the judgments.

## IV Objections to Legislative Constitutional Baselines

The High Court of Australia’s use of electoral legislation to interpret the constitutional requirement that Parliament be ‘chosen by the people’ has not escaped attention. Within the electoral franchise line of cases, *Rowe* in particular has attracted controversy. One reason for the focus on *Rowe* is the contentious nature of the disqualification argument in that case. Unlike the total ban on prisoner voting at issue

<sup>41</sup> Ibid 39 [5], 53 [39] (French CJ and Bell J); 58 [51] (Kiefel J); 73–4 [108]–[109] (Gageler J); 75 [116], 82–3 [159]–[162] (Keane J); 102 [233] 105–6 [241] (Nettle J); 111–2 [259], 126–7 [316] (Gordon J).

<sup>42</sup> Ibid 54–5 [42] (French CJ and Bell J); 44 [56], 60 [58] (Kiefel J); 73–4 [108]–[110] (Gageler J); 75 [116], 86–7 [177]–[178], 87 [180], 91–2 [195] (Keane J); 105 [239]–[240], 111 [255] (Nettle J); 125 [309]–[310], 126–7 [316] (Gordon J).

<sup>43</sup> Ibid 39 [5], 46–7 [24]–[25], 53–5 [39]–[42] (French CJ and Bell J); 68–70 [87]–[93], 72–3 [103]–[105] (Gageler J); 74 [112]–[113], 76 [119], 90–2 [191]–[196] (Keane J). It should be noted that, while endorsing the legislative constitutional baseline, Keane J expressed disagreement with how it was applied in *Rowe: Murphy* (n 40) 99–100 [222]–[225]. At the same time, his Honour suggested that longstanding legislative enactments, at least in the area of electoral law, cannot become constitutionally invalid due to ‘changes in the world’ — a proposition that appears to be even more radical than the notion of a legislative constitutional baseline: *Murphy* (n 40) 92–3 [196]–[199].

<sup>44</sup> *Murphy* (n 40) 60 [60] (Kiefel J); 105 [239]–[240], 111 [255] (Nettle J).

<sup>45</sup> Ibid 125 [309] (Gordon J).

<sup>46</sup> This aspect of her Honour’s judgment is discussed further in Part V, below. See *ibid* 114 [264] (emphasising that fundamental features of representative democracy are legislatively-defined), 120 [288] (suggesting that the electoral scheme is constitutive of ‘choice by the people’), 123 [301]–[302] (suggesting that electoral legislation has special status as ‘constitutionally obligatory’ legislation).

in *Roach*, it is not obvious that shortening the window of opportunity for voter enrolment and transfer in the period leading up to an election diminishes choice ‘by the people’. In this respect, *Rowe* drew attention to the legislatively-defined character of the constitutional baseline in a way that previous cases had not.

Indeed, this aspect of the *Rowe* majority’s reasoning was singled out for criticism by the dissenting judges,<sup>47</sup> and has been criticised by commentators since.<sup>48</sup> Most of these criticisms do not appear to object to the proposition that discerning what choice ‘by the people’ requires is an interpretive task where it makes sense to utilise a constitutional baseline. Or, at the very least, critics do not endorse defining an ideal measure or optimal standard.<sup>49</sup> Nor do critics necessarily object to the proposition that universal adult suffrage is an appropriate constitutional baseline.<sup>50</sup> Rather, the principal objection is to the manner in which the High Court has relied upon legislation to define this point of departure. For instance, Twomey has written that:

To suggest that the enactment of ordinary legislation ... amounts to changed facts which require the interpretation of the *Constitution* to change ... is to take a radical new approach to constitutional interpretation that is not justified by the text or structure of the *Constitution*.<sup>51</sup>

It is imperative to be clear about the precise nature of the criticism. The objection is not against the use of extra-textual or ‘extrinsic’ sources to interpret the constitutional requirement. Nor is the objection against the use of a constitutional baseline per se. The text and structure of ss 7 and 24 — even when read in the context of other constitutional provisions and in light of enactment history — do not provide definitive answers to the interpretive question. The High Court has variously described the constitutional requirement of choice by the people embedded in the guarantee of representative democracy as: ‘a question of degree’ that ‘cannot be determined in the abstract’;<sup>52</sup> a concept that ‘is not fixed and precise’;<sup>53</sup> and ‘a very large constitutional idea’.<sup>54</sup> Even McHugh J, a moderate but committed textualist, once described the phrase ‘chosen by the people’ as ‘words of inexact application, dependent upon matters of fact and degree and always involving a value judgment’, and the term ‘the people’ to which that phrase refers as a ‘vague but emotionally powerful abstraction ... whose content will change from time to time.’<sup>55</sup>

<sup>47</sup> See, eg, *Rowe* (n 27) 89 [266] (Hayne J); 102 [311] (Heydon J); 130–31 [422]–[423] (Kiefel J).

<sup>48</sup> See especially Anne Twomey, ‘*Rowe v Electoral Commissioner* — Evolution or Creationism?’ (2012) 31(2) *University of Queensland Law Journal* 181.

<sup>49</sup> Most commentators expressly reject this, wanting to resist the notion that there is a constitutional imperative to maximise participation in voting or opportunities for participation: see, eg, Graeme Orr, ‘The Voting Rights Ratchet: *Rowe v Electoral Commissioner*’ (2011) 22(2) *Public Law Review* 83, 87–9; Twomey, *ibid* 184. As discussed above, the High Court unanimously rejected this reading of *Rowe* in *Murphy* in favour of the baseline reading.

<sup>50</sup> Although some, of course, do. I would count Hayne and Heydon JJ in this camp. It is also the view of James Allan: ‘The Three ‘R’s of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No) ‘Riginalism’ (2012) 36(2) *Melbourne University Law Review* 743, 745–6, 750–77.

<sup>51</sup> Twomey (n 48) 185.

<sup>52</sup> *McKinlay* (n 33) 36 (McTiernan and Jacobs JJ).

<sup>53</sup> *Ibid* 56 (Stephen J).

<sup>54</sup> *Murphy* (n 40) 69 [89] (Gageler J).

<sup>55</sup> *Langer v Commonwealth* (1996) 186 CLR 302, 342 (‘*Langer*’).

Facing interpretive challenges of this kind, Australian judges frequently *do* consult extrinsic sources of constitutional meaning, notwithstanding legalist orthodoxy. Moreover, it is precisely interpretive challenges of this kind that lend themselves to utilising a constitutional baseline. A constitutional baseline, howsoever defined, provides a needed frame of reference for an interpretive question that otherwise invites a wide array of moral, political, philosophical and sociological inquiries about the meaning of representative democracy. Importantly, it also avoids positing an ideal criterion, such as a requirement of maximal participation — an approach that the High Court and most commentators appear to agree would be undesirable in this context.

What we need to do, then, is to try to isolate the objection to using legislation to define a constitutional baseline. Assuming that a constitutional baseline is an appropriate doctrinal tool in this context and that extrinsic sources are needed to define it, what makes putting *legislation* to this interpretive use so objectionable?

### A ‘Entrenchment’ of the Legislative Status Quo Ante and the ‘One-Way Ratchet’ Effect

Focusing on *Rowe*, the central objection, at least as articulated by leading commentators, has to do with the apparent inflexibility or rigidity of the legislative constitutional baseline. The concern is that, by treating a legislatively-defined norm or standard as a constitutional baseline, this interpretive practice effectively ‘entrenches’ the legislative status quo ante and sets in motion what is sometimes referred to as a ‘one-way ratchet’.<sup>56</sup> In other words, although it permits subsequent parliaments to make the relevant legislative norm or standard *more* demanding, it appears to prohibit them from making that norm or standard *less* demanding (that is, Parliament can ‘ratchet up’, but not down).

For example, since 1973 the electoral franchise has extended to ‘all persons who have attained 18 years of age’.<sup>57</sup> The rationale for this extension appears to have been based upon: a recognition that 18 is the legal age of adulthood for a variety of other purposes; a belief that 18 year olds are no less adults than 21 year olds in terms of their maturity and independence; and the notion that with adulthood comes the right and obligation to vote.<sup>58</sup> Let us suppose, however, that new sociological studies indicate that young persons in their late teens to early 20s today typically exhibit a degree of immaturity and dependency that is inconsistent with actual (if not legal) adulthood due to a variety of life circumstances that have become increasingly common for persons of this age (for example, undertaking university study, living at home, relying on parents for financial support, etc). Relying on this evidence, could Parliament *now* amend the *Electoral Act* to restrict the franchise to persons 21 years of age and older, as was the case prior to 1973?

<sup>56</sup> Twomey (n 48) 184–5, 187 (describing the Court’s approach as a ‘one-way evolutionary track’). See also Orr (n 49) 87–8 (acknowledging this concern, but suggesting that the Court’s approach falls well short of this).

<sup>57</sup> *Commonwealth Electoral Act 1973* (Cth); *Commonwealth Electoral Act 1918* (Cth) s 93(1)(a).

<sup>58</sup> Commonwealth, *Parliamentary Debates*, House, 28 February 1973, 40–3 (Fred Daly).

The concern is that by treating current legislation as defining the constitutional baseline, a decision to deny the franchise to 18 to 20 year olds would be invalid despite Parliament having (at least arguably) good reasons for the change. On the other hand, Parliament would be free to extend the franchise to 16 year olds.<sup>59</sup> Once extended, however, it would appear that the electoral franchise could not then subsequently be restricted to return to 18 years of age consistently with the constitutional requirement of choice ‘by the people’.<sup>60</sup>

This method of evaluating legislative changes for constitutional validity is contentious for reasons that are aptly captured by Heydon J’s dissenting judgment in *Rowe*. His Honour objected that:

The constitutional validity of legislation depends on compliance with the *Constitution*, not on compliance with ‘higher’ standards established by the course of legislation . . . . The question is not whether an impugned legislative provision ‘regresses’ from some ‘higher’ standard established by the status quo. It is only whether it fails to meet a constitutional criterion. Legislative development, durable or otherwise, does not create constitutional validity or invalidity which would not otherwise exist. Otherwise the legislature could enact itself into validity.<sup>61</sup>

Here we can disaggregate two distinct objections to legislative constitutional baselines, implicit in this quoted passage. Each appeals to a well-established principle of constitutional law.

The first objection, which I will call the ‘parliamentary supremacy objection’, is that this approach to constitutional interpretation results in a state of affairs where ordinary legislation is legally binding on future parliaments. A legislatively-defined norm or standard is used to define a constitutional requirement against which the validity of other legislation — or, indeed, the validity of any variation of the legislation used to define the baseline — will be determined. In this respect, legislative constitutional baselines appear to violate the principle of parliamentary supremacy that a parliament cannot bind its successors. This is highly controversial. Absent a compelling reason to think that legislatively-defined norms and standards represent points on a teleological trajectory toward a maximally optimal end-state, we want parliaments to be able to revise those norms and standards in response to new and emerging developments in information, resources, technology, social needs and values, and so on.<sup>62</sup>

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<sup>59</sup> A proposal that has recently been given some consideration. A Bill to this effect was introduced by Greens Senator Jordan Steele-John on 18 June 2018: Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018.

<sup>60</sup> Twomey alludes to this possibility: (n 48) 187–8.

<sup>61</sup> *Rowe* (n 27) 102 [311].

<sup>62</sup> Another variation on this complaint is that legislative constitutional baselines circumvent the *Constitution*’s formal amendment procedure, and thereby ‘usurp’ the power of the people to amend the *Constitution*: see Twomey (n 48) 181. However, this is a complaint about *any* interpretive practice that relies on extrinsic sources: see, eg, Jeffrey Goldsworthy, ‘The Case for Originalism’ in Grant Huscroft and Bradley W Miller (eds) *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 42, 57–60. As discussed below, taken any further, this objection becomes an argument against legal constitutionalism.



The second objection, which I will call the ‘constitutional supremacy objection’, is that the interpretive use to which legislation is being put violates the principle that constitutional law is ‘fundamental’ law, in the sense that it governs the validity of ordinary legislation. Treating ordinary legislation as having constitutional significance collapses the hierarchy of constitutional law over ordinary legislation that is foundational to legal constitutionalism. This, too, is highly controversial. If ordinary legislation is a source of constitutional meaning, then there is a sense in which legislative enactments establish the criteria for their own validity, violating the well-known maxim that ‘the stream cannot rise above its source’.<sup>63</sup>

## B *Refining the Objections*

These are serious objections. The question, then, is whether they can be overcome. Is using legislation to define a constitutional baseline *ever* permissible or justified? In order to evaluate this interpretive practice, it is necessary to consider how constitutional baselines, however defined, function in judicial reasoning. My suggestion is that once this is properly understood, it is apparent that the objections to courts using legislation to define constitutional baselines are not as strong as they first appear.

One possibility, implicit in concerns about ‘entrenchment’ and the ‘one-way ratchet’ effect, is that constitutional baselines function as an absolute minimum standard for the adequacy of the state’s actions in relation to constitutionally guaranteed goods, such that any ‘legislative departure’ (that is, legislation giving effect to something *less than* that standard) is constitutionally invalid. I will refer to this as a ‘strict’ constitutional baseline. The ‘strict’ approach clearly raises the objections to legislative constitutional baselines outlined above. Using legislation to define a strict constitutional baseline effectively ‘entrenches’ the legislative status quo ante: it turns an ordinary legislatively-defined norm or standard into an inflexible or rigid norm or standard that is incapable of downgrade.

But this is not the only, or indeed even the usual, way that constitutional baselines function in judicial reasoning. It is far more common for courts to use constitutional baselines to establish a *prima facie* case of constitutional invalidity. I will refer to this as a ‘threshold’ constitutional baseline. A threshold constitutional baseline functions as a ‘rule of thumb’: it indicates the minimum adequate provision of a constitutionally guaranteed good that can ordinarily be expected, other things being equal. Legislative departures from a threshold constitutional baseline indicate that judicial scrutiny is required, but are not determinative of invalidity. Which is to say, legislative departures can be justified and therefore constitutionally valid. The method that courts standardly use to undertake this evaluation involves some form of ‘limitations analysis’. This includes proportionality testing and, in the Australian context, the ‘reasonably appropriate and adapted’ criterion and related methods.

This description of threshold constitutional baseline reasoning is consistent with the High Court’s approach in the electoral franchise cases, including *Rowe*. As even the strongest critics of *Rowe* acknowledge, the majority’s conclusion of

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<sup>63</sup> James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 332.

invalidity did not rest exclusively upon legislative departure from the constitutional baseline, but also upon the lack of a compelling justification by applying a form of limitations analysis that the franchise cases refer to as the ‘substantial reason’ test.<sup>64</sup> That test requires examining whether the legislative end is consistent with the constitutional guarantee of representative democracy and evaluating the ‘fit’ between that end and the legislative means adopted (including whether there is a rational connection between means and end, and whether there are less restrictive means available).

One of the difficulties with relying on *Rowe* to evaluate legislative constitutional baselines, however, is that it obscures the usual function of constitutional baselines. Due to the contentious nature of the disqualification issue, the majority’s analysis of the justification issue is relatively thin. *Rowe* required far more argument and analysis than *Roach* to make the threshold determination that there had been a legislative departure from the constitutional baseline. In *Roach*, this threshold determination was straightforward: the Act diminished the adult citizen franchise by expressly disqualifying previously qualified electors. Accordingly, the focal point of the majority judgments in *Roach* concerned the application of the ‘substantial reason’ test. In *Rowe*, by contrast, the threshold determination was complicated: it was not obvious that the Act’s procedural changes to enrolment and transfer diminished the adult citizen franchise, and therefore whether the ‘substantial reason’ test needed to be applied at all.

The difficulty with the relative ‘thinness’ of the *Rowe* majority’s reasoning on the justification issue is that it creates the impression that the constitutional baseline is much stricter than it is. In particular, the contentious nature of the majority’s finding on the disqualification issue makes it appear as if *all* legislative changes that result in a less inclusive electoral regime are constitutionally invalid. In this sense, the ‘entrenchment’ and ‘one-way ratchet’-type concerns raised about *Rowe* seem better understood as an effort to crystallise why the High Court’s use of legislation to define the constitutional baseline is objectionable, and not as an effort to describe how the baseline in fact functions. However, while this characterisation may be helpful in sharpening objections to legislative constitutional baselines by presenting them in their strongest possible form, it is not obvious that these objections apply with the same force once we account for how constitutional baselines more commonly function in judicial reasoning: namely, as threshold rather than strict baselines.

To begin with, while it is true that legislative constitutional baselines privilege the legislative status quo ante by imposing justificatory demands on legislative departures, they do not *prevent* legislative change. Constitutional baselines function as a ‘trigger’ for the judicial scrutiny of constitutional validity. Assuming that it is possible in both principle and practice for legislation to survive judicial scrutiny — a point that I will return to in a moment — it therefore remains possible for Parliament to enact legislation that departs from the baseline.

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<sup>64</sup> See *Roach* (n 35) 174 [7]–[8] (Gleeson CJ), 199 [85] (Gummow, Kirby and Crennan JJ); *Rowe* (n 27) 19–20 [23]–[24] (French CJ), 58 [157], 59 [161], 61 [166]–[167] (Gummow and Bell JJ), 119 [376], 120–1 [384] (Crennan J).

Moreover, once the function of constitutional baselines in judicial reasoning is accounted for, it is evident that there is also greater flexibility in the manner in which legislative constitutional baselines are defined than is assumed by ‘entrenchment’ and ‘one-way ratchet’-type concerns. It is true that once a court defines a constitutional baseline, the doctrine of precedent dictates that it will not be easily overturned. But it does not follow from this that it is unrevisable or irreversible. Whether a constitutional baseline is revised or reversed is always a matter of judicial reasoning, and the weight that courts give to the interpretive sources used to define the baseline — legislative or otherwise.

Accordingly, it is not necessarily the case that *all* legislative developments that result in a more demanding standard will move the baseline. For example, even if the Commonwealth Parliament expands the electoral franchise to include 16 year olds, the baseline might remain universal adult suffrage, with the recognition that some non-adults are now part of the franchise.<sup>65</sup> Nor is it necessarily the case that *only* legislative developments that result in a more demanding standard are capable of altering the baseline. In the same way that a court might revise an established constitutional baseline by reconsidering other extrinsic sources — say, framing understandings, or new social attitudes — that reflect a more restrictive standard, there is nothing that rules out the possibility that a court might determine that *legislative developments* which reflect a more restrictive standard are not only justified departures from the baseline (and therefore constitutionally valid), but that they provide sound reasons for revising the constitutional baseline itself.

Now, as noted above, an important assumption in the foregoing analysis is that it is possible both in principle and in practice for Parliament to discharge its justificatory burden. If the justification required for departing from a constitutional baseline is extremely demanding, then it may operate in effect as a strict baseline.<sup>66</sup> In these circumstances, using legislation to define the constitutional baseline will likely be inconsistent with the principles of parliamentary and constitutional supremacy, and should be rejected on that basis. On the other hand, in order to count as a constitutional baseline at all, judicial scrutiny must impose real demands of justification upon Parliament to provide reasons for legislative departure.<sup>67</sup> For these reasons, analysing the applicable method of limitations analysis will be a necessary preliminary step in evaluating legislative constitutional baselines. It is important to emphasise, however, that these issues turn on the method of judicial scrutiny applied once ‘triggered’ by legislative departure. There is therefore a sense in which objections to legislative constitutional baselines that *always* result in the invalidity of legislative departures are better directed, at least in the first instance, to the form

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<sup>65</sup> Contra Twomey (n 48) 184, 202. Indeed, this is true even on a strict approach.

<sup>66</sup> This is a complaint, for example, that is often made about the application of ‘strict scrutiny’ in American constitutional jurisprudence: namely, that it is “‘strict” in theory, but fatal in fact”: Gerald Gunther, ‘The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection’ (1972) 86(1) *Harvard Law Review* 1, 8.

<sup>67</sup> This complaint is often made about the application of the first stage of the *Oakes* test in certain areas of Canadian constitutional jurisprudence: namely, that it effectively treats all legislative activity as a *prima facie* burden on a constitutionally protected interest. See, eg, Grégoire Webber, ‘Rights and Persons’ in Grégoire Webber et al, *Legislated Rights: Securing Rights through Legislation* (Cambridge University Press, 2018) 27, 36–9.

of limitations analysis deployed and not to the use of legislation to define the baseline *per se*.

In summary, then, legislative constitutional baselines impose burdens of justification on Parliament to provide reasons for legislative departures from established legislatively-defined norms and standards that a court has deemed to have constitutional significance. This may ultimately result in the constitutional invalidity of legislative departures from the baseline. Unless the baseline is strict, however, the legislatively-defined content of the baseline is not rigid or inflexible in the sense of imposing a standard that is conclusive of invalidity or incapable of becoming less demanding. It is therefore inaccurate to say that when courts use legislation to define a constitutional baseline it results in a state of affairs where future parliaments are legally 'bound' by prior parliaments. Future parliaments are burdened by requirements of justification when they enact legislation that departs from the baseline, but they are not strictly bound. Similarly, it is overly simplistic to think of legislative constitutional baselines as 'entrenching' legislatively-defined norms and standards.<sup>68</sup> As with any other constitutional rule that requires interpretation, the process of defining a baseline is always mediated by judicial reason and the weight given to interpretive sources.

This is not to suggest that using legislation to define constitutional baselines is unobjectionable. Rather, it is to suggest that a different strategy for evaluation is required. Legislative constitutional baselines evidently do function as constraints on legislative power, and they do so by treating legislatively-defined norms and standards as having constitutional significance. And, like other judicially-defined constitutional rules, they are not directly revisable through the enactment of ordinary legislation. However, these kinds of concerns arise any time that a court relies on extrinsic sources to define a constitutional baseline. Accepting that there are legitimate sources of constitutional meaning outside the 'four corners' of the constitutional text, why should certain kinds of norms and standards, but not others, be treated as having constitutional relevance?

The objection to legislative constitutional baselines therefore becomes an objection to legislation as an interpretive source *as against other available extrinsic sources*. Pressed any further, the objection becomes an argument against using extrinsic sources in constitutional interpretation. Or — pressed even further — the objection becomes an argument against legal constitutionalism altogether: that is, it becomes an argument against constitutional supremacy and in favour of parliamentary *sovereignty*, as opposed to the weaker parliamentary supremacy.<sup>69</sup>

The foregoing considerations thus permit us to refine the objections to legislative constitutional baselines as follows:

*The status quo bias objection:* legislative constitutional baselines privilege the legislative status quo ante. Absent good reasons for thinking that the legislative status quo has constitutional significance, courts should rely on other sources to define the baseline.

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<sup>68</sup> Twomey acknowledges this, conceding that while 'it is true that the form of entrenchment is not absolute ... it is still a significant limitation on Commonwealth legislative power': Twomey (n 48) 189.

<sup>69</sup> See n 62.

*The norm-hierarchy objection:* legislative constitutional baselines give ordinary legislation constitutional standing. Absent good reasons for thinking that legislatively-defined norms and standards are needed to interpret the constitutional requirement, courts should rely on other sources to define the baseline.

Thus refined, these objections focus attention on the decision of courts to draw upon *legislative* as opposed to *other* sources of constitutional meaning in defining a constitutional baseline. Evaluating legislative constitutional baselines in light of these objections is the task I turn to next.

## V Evaluating Legislative Constitutional Baselines

So far, I have drawn upon the electoral franchise cases to illustrate a characteristic way that the High Court uses legislation to define constitutional baselines, and I have clarified and refined the objection to using legislation to define constitutional baselines. In this Part, I propose a framework for evaluation. I will ultimately argue that, at least under some circumstances, using legislation to define constitutional baselines can be justified.

As discussed in Part IIIA above, which set out the relevant interpretive context, the default starting point for constitutional interpretation in Australian constitutional practice is the *Constitution's* text and structure, read in light of its enactment history. But they are not, of course, the ending point. When text and structure, read in light of enactment history, do not yield a determinate answer to the interpretive question, then courts must consult extrinsic sources, purely as a matter of practical necessity. As the electoral franchise cases demonstrate, legislation is among the possible extrinsic sources available

The principal claim I advance is this: evaluating legislative constitutional baselines requires a comparison of the merits of using legislation to define the baseline with the merits of using other available extrinsic sources to define the baseline.

Evaluating those alternative sources requires, in turn, examining the parameters of the specific interpretive problem posed by the constitutionally guaranteed good being interpreted and applied, having regard for contextual features of Australian constitutionalism and interpretive tradition that inform the interpretive problem. Substantively, I argue that the constitutional guarantee of representative democracy, and the specific requirement of choice 'by the people', provides an example of circumstances where a legislative constitutional baseline is both a plausible and defensible method of evaluating constitutional validity.

### A Compared to What? Non-Statutory Extrinsic Sources

In developing a framework for evaluating legislative constitutional baselines, it is helpful to recall the discussion above in Part II. There we saw that the utility of constitutional baselines as an interpretive tool lies in providing a way for courts to meaningfully evaluate state compliance with otherwise indeterminate constitutional

requirements in relation to constitutionally guaranteed goods. Constitutional baselines provide courts with a frame of reference for what would otherwise be an unstructured, all-things-considered evaluation of any number and variety of factors that bear on the nature of the good and the reasons for affording it constitutional status. At the same time, they help courts avoid making contentious determinations about the optimal measure or method of provision: they define a standard for adequacy, not optimality. Moreover, drawing on the discussion above in Part IV, we have seen that the usual way that constitutional baselines function is to indicate what is ordinarily required by way of adequacy and not what is necessarily required in all circumstances. They ‘trigger’ judicial scrutiny of legislative departures but are not conclusive of invalidity.

Bearing in mind the role of constitutional baselines in judicial reasoning, the evaluation of *legislative* constitutional baselines therefore turns on how well legislation fares in defining a workable constitutional baseline for courts to use in this manner when compared with other extrinsic sources. If courts do not use legislation to define the constitutional baseline, then what are the alternatives? And what are their relative strengths and weaknesses? What objections are courts likely to face when using them? This Part maps out these alternative non-statutory extrinsic sources and considers their status as interpretive sources within the Australian context. Table 1 below summarises these sources and the objections that courts are likely to face when using them, in light of key assumptions about judicial role specific to Australian constitutional and interpretive practice.

Without purporting to be definitive or exhaustive, the main possible alternative non-statutory extrinsic sources appear to fall within two broad categories: (1) social understandings and values, and (2) substantive views. Within the first category, social understandings and values, we can include:

- (a) Founding understandings and values: that is, evidence of what the founding generation thought was adequate; and
- (b) Contemporary understandings and values: that is, evidence of what the Australian people today think is adequate.

Notice that both (a) and (b) refer to the beliefs and attitudes actually held by groups of persons whose understandings and values are sometimes thought to bear on constitutional meaning, for one reason or another.<sup>70</sup> They are said to bear on constitutional meaning *because they were* (in the case of the founding generation) or *because they are* (in the case of the Australian people today) *in fact held* by those persons. In this respect, these sources can be distinguished from the second category, substantive views, which includes:

- (c) Substantive moral views: that is, views about the good or the right that are grounded in notions of constitutionalism, in philosophical doctrines, and so on; and

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<sup>70</sup> To these groups, we could also add any number of various other groups across time whose understandings and values are thought to bear on constitutional meaning: for instance, to show the progression or evolution of social understandings and values.

- (d) Substantive non-moral views (that is, views about what is the case or what exists that are grounded in natural science, in human psychology, and so on).

Sources (c) and (d) refer to views that, while held by some persons, may not be widely held (if held at all) by members of the founding generation or even by members of the Australian public today. They are said to bear on constitutional meaning not because they reflect the attitudes and beliefs of persons whose understandings and values bear on constitutional meaning, but *because they provide the best account* (that is, the most plausible or correct account) of a relevant topic. Deploying these sources thus requires identifying a particular ‘epistemic community’ or the group of experts which is well-placed to provide the best account of the topic in question.

Having identified these basic categories, we can turn to the question of their relative merits. The extent to which Australian courts are inclined to regard these as plausible and permissible sources of constitutional meaning, I want to suggest, turns on both practical considerations and normative considerations. Clearly, these are interrelated: for example, practical difficulties with using a particular source may bear on whether it is regarded as normatively defensible. Nevertheless, it will be helpful to disaggregate these considerations. For, whereas practical considerations present general operational challenges for courts wishing to use a particular interpretive source, normative considerations draw attention to specific features of Australian constitutionalism that inform established interpretive practice.

Starting with practical considerations, each source presents courts with operational challenges. The challenge lies in providing evidence to prove certain facts upon which key assumptions that establish the source’s relevance to constitutional meaning rely. Starting with social understandings and values, the key operational challenge here is attribution-driven and lies in providing evidence to demonstrate that certain beliefs and attitudes are, or were, *in fact held by* the relevant group of persons. Thus, other things being equal, these sources of meaning are more difficult to justify where there is a lack of reliable evidence that persons within that group actually held certain beliefs and attitudes, or where the available evidence is insufficient to demonstrate that those beliefs and attitudes were sufficiently widely held that they can be attributed to the entire group.

The key operational challenge for substantive views, by contrast, is soundness-driven. The challenge here lies in identifying the relevant epistemic community and articulating the view that is defended within that community as the best account of the relevant topic, in the sense of being the account that is most plausible or most widely regarded as correct. Other things being equal, then, the more contentious the substantive view is within the relevant epistemic community, the more difficult it will be for a court to justify its use as a source of constitutional meaning.

Bearing these operational challenges in mind, it is a further question whether using these sources is *normatively defensible*. For instance, even if establishing the beliefs and attitudes held by members of the Australian public on a particular topic is empirically uncontentious, it is a further question whether a court *ought to use*

those beliefs and attitudes as an interpretive resource. Normative defensibility is informed by the parameters of the specific interpretive problem: it is a function of both the source's relevance to the subject matter of the provision being interpreted, and how the source is regarded within the interpretive community. It is therefore an issue that is not possible to analyse in the abstract.

For one thing, different constitutional guarantees pose different interpretive challenges simply by virtue of their subject matter. For example, interpreting the freedom of interstate trade, guaranteed by s 92 of the *Australian Constitution*, requires making assumptions about economic theory, including how markets function, and how regulation affects production and exchange.<sup>71</sup> Moreover, the provision is drafted in a way — as an unqualified imperative that interstate trade 'shall be absolutely free' — that makes its prohibition opaque unless consideration is given to its purpose and place within the project of Federation.<sup>72</sup> Accordingly, in the s 92 context substantive non-moral views have greater interpretive relevance than moral views (that is, views concerning the right or the good), and the framers' beliefs and attitudes have greater interpretive relevance than those of the public today.

But subject matter does not provide a complete picture. How courts understand a particular constitutional guarantee, and therefore how the interpretive problem is framed, is highly sensitive to constitutional and interpretive context. For instance, courts in other jurisdictions often interpret and apply constitutional guarantees of free speech by drawing upon popular beliefs about the value of speech and expression, as well as moral views about the significance of speech and expression for democracy and human flourishing.<sup>73</sup> However, the High Court of Australia has held that such an approach to the implied freedom of political communication misapprehends the nature of the constitutional guarantee. In particular, the Court has insisted that extrinsic sources that courts in other jurisdictions use to interpret express guarantees of free speech are inapplicable in the Australian context because the implied freedom is not a 'right', but rather a structural feature of the constitutional system of representative government.<sup>74</sup> How far this legalistic, 'structural' understanding of the implied freedom goes to distinguish it from express guarantees found in other constitutional systems as a conceptual or normative matter is subject to debate.<sup>75</sup> However in terms of constitutional practice, as discussed above in Part IIIA, it manifestly *has* influenced how the High Court approaches the implied freedom, which, in turn, influences the interpretive resources that the Court is willing to draw upon.

What the foregoing discussion underscores is that evaluating the judicial use of a particular extrinsic source to interpret a constitutionally guaranteed good cannot

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<sup>71</sup> See, eg, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 480–2 [114]–[122] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

<sup>72</sup> *Cole v Whitfield* (n 15) 392.

<sup>73</sup> See generally Eric Barendt, 'Freedom of Expression' in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 891, 895–900.

<sup>74</sup> See *McCloy v New South Wales* (2015) 257 CLR 178, 202–3 [29]–[30] (French CJ, Kiefel, Bell, and Keane JJ); 228–9 [119]–[120] (Gageler J); 258 [219] (Nettle J); 283–4 [316]–[319] (Gordon J).

<sup>75</sup> See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 37.



be viewed narrowly in terms of subject matter. Even if subject matter establishes the *prima facie* relevance of particular extrinsic sources, constitutional and interpretive context — which inform a court's understanding of the good and the interpretive problem that it presents — are the more fundamental considerations at play.

Focusing specifically on Australian interpretive practice, a few generalisations about the judicial reception of the non-statutory extrinsic sources identified in this Part can be offered. In offering these generalisations, it is important to bear in mind the discussion of interpretive context in Part IIIA and, in particular, the High Court of Australia's consistent and long-standing emphasis on the primacy of text and structure — a core tenet of Australian legalism. It is also important to bear in mind that the following discussion is meant to be descriptive: the aim is to understand the defensibility of relying on legislative sources from within the Australian constitutional and interpretive tradition. The article does not offer a view about whether the High Court's approach to extrinsic sources is normatively desirable.

To begin with, the strength of legalism as an interpretive tradition means that the High Court of Australia is generally far more reluctant than its counterparts elsewhere in the common law world to draw upon contemporary understandings and values. For example, Australian interpretive practice stands in sharp contrast to the Supreme Court of Canada's 'living tree' approach, which not only permits but requires drawing on contemporary values and understandings.<sup>76</sup> On the other hand, founding understandings and values are now a well-established and relatively uncontroversial source of constitutional meaning.<sup>77</sup> Unlike contemporary understandings and values, founding understandings and values are regarded as consistent with legalism insofar as they bear upon the *Australian Constitution's* enactment meaning, so long as they do not amount to a quest to identify the framers' subjective intentions.

Similarly, the High Court is often willing to draw upon substantive non-moral views, as the s 92 example demonstrates.<sup>78</sup> By contrast, the Court generally resists drawing upon substantive moral views (that is, views about the right or the good) unless there is evidence that the framers held a moral view that bears upon a provision's enactment meaning. Even then, such views are often characterised as non-moral in the sense that they fall within the special lawyerly expertise held by the framers as an epistemic community. An example of this is the debate among members of the High Court throughout the 1980s and 90s about the purpose of s 90

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<sup>76</sup> Consider, for instance, the following statement in the Supreme Court of Canada by Dickson J:

A constitution is drafted with an eye to the future . . . . It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

*Hunter v Southam* [1984] 2 SCR 145, 155.

<sup>77</sup> See Stone, 'Judicial Reasoning' (n 20) 477–8. This is not, of course, to suggest that the High Court *ought* to be relatively more confident in relying on founding understandings and values. As Irving has persuasively argued, there is an important difference between consulting historical sources and doing history, and there are good reasons for being skeptical about how good judges are at the latter: Helen Irving, 'Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning' (2015) 84(3) *Fordham Law Review* 957.

<sup>78</sup> Again, this is not to suggest that the High Court *ought* to be confident in relying on this source.

of the *Australian Constitution* in giving the Commonwealth the exclusive power to levy duties of excise. Although the central debate turned on competing normative views of fiscal relations within a federation, it proceeded as a debate about which of those two views better described the framers' design.<sup>79</sup>

In summary, then, evaluating the use of a given extrinsic source to define a constitutional baseline will always be case-specific. Evaluation must have regard to: the character of the constitutional good being interpreted and applied; features of the constitutional and interpretive context that inform that interpretive problem; and operational challenges involved in deploying the particular interpretive source. Likewise, I want to suggest, evaluating *legislative* constitutional baselines requires examining how statutory sources hold up against the available alternatives.

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<sup>79</sup> Compare the majority and dissenting judgments in *Ha v New South Wales* (1997) 189 CLR 465, 491–5 (Brennan CJ, McHugh, Gummow and Kirby JJ), 505–7 (Dawson, Toohey and Gaudron JJ).

**Table 1:** Summary of Non-Statutory Extrinsic Sources

Source category	Nature of source	Variations	Objections
Social understandings and values	Beliefs and attitudes actually held by a group of persons.	Framing understandings and values  Contemporary understandings and values	<u>Operational objections:</u> evidence of beliefs/attitudes is unreliable or insufficient.  <u>Normative objections:</u> insufficiently related to subject matter or inconsistent with interpretive commitments and understanding of judicial role.  <i>Contemporary understandings and values generally regarded as more objectionable.</i>
Substantive views	The best account of a topic, as defended within an epistemic community.	Substantive moral views  Substantive non-moral views	<u>Operational objections:</u> insufficient consensus within epistemic community to establish plausibility/correctness.  <u>Normative objections:</u> insufficiently related to subject matter or inconsistent with interpretive commitments and understanding of judicial role.  <i>Substantive moral views generally regarded as more objectionable.</i>

## B *Are Statutory Sources Defensible? Approach to Evaluation*

In this final section, I outline an analytical framework for evaluating legislative constitutional baselines. Here I return to the electoral franchise cases, where we have seen that the High Court predominantly relies upon legislation to define the constitutional baseline. Developing an evaluative approach by working through a specific example will help clarify the steps that are required by making the discussion more concrete: the same framework can be applied in other cases where legislative constitutional baselines feature in judicial reasoning.

In developing this evaluative framework, the objective is to identify reasons why legislation may provide courts with a more attractive, and indeed more defensible, interpretive resource for defining constitutional baselines than non-statutory extrinsic sources. My central claim is that this interpretive practice is both plausible and permissible insofar as it helps courts overcome objections to using non-statutory extrinsic sources in circumstances where the specific interpretive problem otherwise seems to require relying on those sources. The electoral franchise cases, I suggest, present precisely such a scenario. These cases therefore demonstrate that there are at least some circumstances where legislative constitutional baselines are defensible.

Let us return, then, to the interpretive problem presented by the requirement that Parliament be chosen ‘by the people’. As argued above, this phrase presents precisely the kind of interpretive problem that calls for defining a constitutional baseline. Moreover, the text and structure of the *Australian Constitution* do not provide ready answers. As Gageler J has recently remarked, it is a concept that ‘defies being diced or squashed to fit within a judicially constructed box’.<sup>80</sup> Extrinsic sources are required. So, which sources should the High Court use? And is the Court’s current practice of using legislative sources legitimate?

### *Step 1: Identify Relevant Non-Statutory Extrinsic Sources*

Our first step is to identify the *non-statutory* extrinsic sources that seem relevant to the task of defining the constitutional baseline, in light of the subject matter of the constitutional guarantee. The concept of choice ‘by the people’ is a normative concept grounded in the theory and practice of representative government. It reflects moral views about the body politic, including membership within the polity and participation in self-governance. As observed above, even mainstream, moderate Australian judges have described it as a ‘vague but emotionally powerfully abstraction’,<sup>81</sup> and as embodying ‘a very large constitutional idea’.<sup>82</sup> Substantive *non-moral* views thus appear to have limited relevance. However, all three of the other sources are at least potentially in play.

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<sup>80</sup> *Murphy* (n 40) 69 [89].

<sup>81</sup> *Langer* (n 55) 342 (McHugh J).

<sup>82</sup> *Murphy* (n 40) 69 [89] (Gageler J).

To begin with, the constitutional requirement could be understood in terms of founding understandings and values. Those understandings and values were evidently quite different at the time of the *Australian Constitution*'s framing, nearly 120 years ago, than they are today. For instance, women and Indigenous peoples were excluded from the electoral franchise in a majority of the colonies and, thus, it is arguable that they were not among 'the people' contemplated by the constitutional requirement. Although it is uncommon to rely on founding understandings and values in this context, there are at least some critics of *Rowe* who adopt this approach.<sup>83</sup> This would evidently result in a much different baseline than the one that the High Court has adopted, however. Accordingly, for present purposes this source can be left aside.

By contrast, contemporary understandings and values (which appeal to beliefs and attitudes held by members of the Australian public today), and substantive moral views (which here encompasses positions found in normative political theory), both provide support for the established constitutional baseline. Without attempting to offer an argument, it is plausible to think that the proposition that representative democracy ordinarily requires universal adult suffrage is reflected in widely held popular beliefs and attitudes about representative democracy, and in the most widely accepted views about representative democracy that are defended by contemporary political theorists.

### *Step 2: Assess the Relative Merits of Non-Statutory Extrinsic Sources*

Having established the relevance of these non-statutory extrinsic sources to the interpretive problem, the next step is to consider their relative merits as sources of constitutional meaning. Both appear to converge upon the same constitutional baseline. But so, too, does Commonwealth electoral legislation. Why, then, might legislation provide a more attractive, and potentially more defensible, source of constitutional meaning? Answering this question requires considering contextual factors that inform the interpretive problem. In particular, it requires appreciating why contemporary understandings and values and substantive moral views are regarded as suspect sources of constitutional meaning within the Australian constitutional and interpretive tradition, and why they are particularly fraught in this context.

To begin with, both interpretive sources are at least *prima facie* in tension with the basic commitments of legalism.<sup>84</sup> Treating them as legitimate sources of constitutional meaning suggests that constitutional meaning turns on considerations that are independent of text and structure, and that constitutional meaning evolves over time to reflect new social understandings and values. From this perspective

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<sup>83</sup> See Allan (n 50); *Rowe* (n 27) 71–2 [203]–[204], 76 [221]–[222], 89 [266] (Hayne J), 97–100 [292]–[304] (Heydon J). It is somewhat unclear, however, whether these critics are proposing a different constitutional baseline or simply refusing to define one.

<sup>84</sup> See above Part IIIA in this article.

alone, they seem objectionable and potentially difficult to justify when applied to the interpretive problem.<sup>85</sup>

Moreover, both interpretive sources involve inquiries that go beyond the extremely modest understanding of judicial role and the strict separation between judicial and legislative power that colour Australian constitutionalism. Relying on contemporary understandings and values appears to require judges to make freestanding inferences about beliefs and attitudes held by society at large. Relying on substantive moral views appears to invite, if not require, judges to make determinations about the right or the good — or, at the very least, to take sides in contentious moral debates. These are the kinds of tasks that invoke accusations that judges are simply asserting their own preferences and opinions rather than engaging in constitutional interpretation. They are also the kinds of tasks that the High Court of Australia has consistently held to belong to the domain of legislative power and not judicial power. The subject matter at issue in the electoral franchise cases is particularly apt to attract these kinds of objections: representative democracy is a topic that is extremely complicated, highly contested, and widely debated.

### *Step 3: Assess the Relative Merits of Statutory Sources*

The last step in the analysis is to consider the relative merits of statutory sources. My suggestion here is that appreciating the objections to using contemporary understandings and values and substantive moral views to define the constitutional baseline that Australian judges are likely to encounter in this context — as I have just outlined — helps us see the attraction of a *legislative* constitutional baseline. I also want to suggest that understanding how statutory sources provide an alternative to these non-statutory extrinsic sources, which otherwise seem to be required to define the constitutional baseline, demonstrates that there are circumstances where legislative constitutional baselines may well be justified.

The High Court of Australia has not explicitly defended its use of legislation to define the constitutional baseline. Nevertheless, the Court has made several observations about the relevance of legislation in interpreting and applying the implied constitutional guarantee of representative democracy. These observations are also helpful in making sense of this interpretive practice. Generalising from the reasoning in the Court's two most recent electoral franchise cases, *Rowe* and *Murphy*, legislation has been used in three different ways:

1. *Evolution of the concept in response to social change:* The High Court has used legislative developments to show how the concept of representative democracy has evolved over time, at least in part in response to changing social values and understandings about

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<sup>85</sup> This is not, of course, to suggest that they *cannot* be justified within such a perspective: see, eg, Patrick Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution* — An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38(2) *Federal Law Review* 169.

membership in the body politic. This includes the expansion of the electoral franchise through amendments to the *Electoral Act*.<sup>86</sup>

2. *Stability of the concept in the contemporary era:* The High Court has presented the inclusiveness of the current electoral franchise, as defined by the *Electoral Act*, as a durable and readily identifiable social fact. It is significant in this regard that the electoral franchise has remained relatively unchanged for at least three decades, with the notable exception of the amendments challenged in *Roach* and *Rowe*.<sup>87</sup>
3. *Constitutional division of labour in defining the concept:* The High Court has emphasised that representative government is an abstract concept, the concrete conception of which is largely defined by legislation. In doing so, the Court has suggested that this is a division of labour that is not only practically unavoidable, but that the *Australian Constitution* itself expressly contemplates, by conferring wide powers upon the Commonwealth Parliament to define the incidents of the electoral system.<sup>88</sup>

Drawing on this set of observations about the relevance of legislation to the central interpretive problem posed by the constitutional requirement of choice ‘by the people’, I now want to advance two theses about why it is both plausible and defensible to use legislation for the purpose of defining a constitutional baseline in this context.

My first and primary thesis is that statutory sources can provide an alternative and less contentious means of relying on contemporary understandings and values and substantive views (and substantive *moral* views in particular). In effect, legislation functions as a ‘proxy’ for these otherwise problematic sources of constitutional meaning and helps overcome objections that beset invoking them directly. I will refer to this as the ‘proxy source thesis’.

My second and more tentative thesis is that, in some circumstances, there is an independent rationale for using statutory sources to define a constitutional baseline, which I suggest is analogous to the idea of ‘legitimate expectations’.<sup>89</sup> This rationale is based on the premise that, for at least *some* constitutionally guaranteed goods:

<sup>86</sup> See, eg, *Rowe* (n 27) 18 [18]–[19] (French CJ), 105–6 [325]–[328] (Crennan J); *Murphy* (n 40) 69–70 [89]–[93] (Gageler J).

<sup>87</sup> See, eg, *Rowe* (n 27) 18–19 [20]–[21] (French CJ); *Murphy* (n 40) 39 [5], 53 [39], 54 [41] (French CJ and Bell J); 69–70 [91]–[93], 72–3 [103]–[104] (Gageler J); 74 [112]–[113] (Keane J). See also *McKinlay* (n 33) 36 (McTiernan and Jacobs JJ), *Roach* (n 35) 173–4 [5]–[7] (Gleeson CJ).

<sup>88</sup> See, eg, *Rowe* (n 27) 48–50 [121]–[126] (Gummow and Bell JJ); *Murphy* (n 40) 69–70 [92]–[93], 70–1 [95] (Gageler J); 76 [119], 81 [156], 82 [158], 86–7 [177]–[179] (Keane J); 106 [243] (Nettle J); 113–4 [263]–[264], 120 [288], 123 [301]–[303] (Gordon J).

<sup>89</sup> To be clear: I am invoking this concept in a general way to explain why legislation might be a plausible interpretive source for defining a constitutional baseline. This is not to be confused with the idea of ‘legitimate expectations’ as a ground for judicial review of administrative action, which the High Court of Australia has rejected: see Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32(2) *Melbourne University Law Review* 470.

- (i) legislation more or less comprehensively defines the set of norms that structure human interaction concerning that good, and
- (ii) the *Australian Constitution* expressly contemplates that legislation play this role, by allocating powers and responsibilities to the Commonwealth Parliament to give effect to that good.

I will refer to this as the ‘legitimate expectations thesis’. Although this article will not attempt to provide a full analysis or defence of this rationale for legislative constitutional baselines, it will suggest that the electoral franchise cases provide a fruitful starting point for interrogating this possibility.

(a) *The Proxy Source Thesis: Legislation as a Proxy for Non-Statutory Extrinsic Sources*

To begin with, legislation can potentially provide a more reliable and, therefore, less objectionable source of evidence about contemporary understandings and values than freestanding judicial determinations about popular beliefs and attitudes. Legislation is the product of the representative branches of government. It thus arguably reflects the understandings and values of the body politic — particularly when it is regularly amended and updated, as is the case with electoral legislation. Indeed, the relative ease of revising legislation in response to changing social needs and public opinion is one reason for allocating the institutional responsibility for certain goods, as a matter of constitutional design, to Parliament in the first place (a point that I will return to below in discussing the legitimate expectations thesis).

To be sure, these points also count against legislative constitutional baselines insofar as they hold Parliament to standards defined by the legislative status quo ante. However, Parliament is not strictly bound: legislative departures can be justified. Moreover, judicial scrutiny of legislative departures, conducted through limitations analysis, can, and typically does, account for the need for legislation to respond to changes in social needs and public opinion. For instance, this is a central consideration in judicial analysis of whether legislation pursues a ‘legitimate end’: a core component of both the ‘reasonably appropriate and adapted’ criterion and its variants, and of proportionality testing.<sup>90</sup> This includes the ‘substantial reason’ test,<sup>91</sup> where restrictions on the electoral franchise are examined in light of whether they are responsive to widely held notions of community membership, the rights and obligations of citizenship, and the capacity to exercise choice.

Therefore, where contemporary understandings and values are relevant to the meaning of a constitutionally guaranteed good — as they are in the context of the electoral franchise cases — consulting legislatively-defined norms and standards is arguably defensible because it helps courts overcome evidentiary hurdles that they would otherwise confront in attributing attitudes and beliefs to the body politic. In

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<sup>90</sup> For a detailed account of how proportionality reasoning and its constituent elements figure in Australian constitutional jurisprudence, see Anne Carter, ‘Proportionality in Australian Constitutional Law’, *Proportionality and the Proof of Facts in Australian Constitutional Adjudication*, ch 5 (PhD Thesis, The University of Melbourne, 2018).

<sup>91</sup> See above n 64 and accompanying text.



other words, courts *do better* by relying on legislation as a proxy for contemporary understandings and values than they do by trying to directly ascertain what beliefs and attitudes the public holds.

It is unclear, however, whether relying on legislation as a proxy for contemporary understandings and values renders this source of constitutional meaning more normatively defensible absent independent reasons for thinking that it is relevant to the interpretive problem. This is reflected in the dissenting judgment of Hayne J in *Rowe*, where his Honour complained that:

The content of the constitutional expression ‘directly chosen by the people’ neither depends upon, nor is informed by ... ‘common understanding’ or ‘generally accepted Australian standards’ ... . The ambit of the relevant constitutional powers is not set by the political mood of the time, or by what legislation may have been enacted in exercise of the powers. Political acceptance and political acceptability have no footing in established doctrines of constitutional interpretation.<sup>92</sup>

The essence of this criticism is that, while legislation may well provide more reliable evidence of contemporary understandings and values, more reliable evidence of an illegitimate and therefore irrelevant source of constitutional meaning does not transform it into a legitimate source.

This is not the only way that legislation can serve as a proxy for non-statutory extrinsic sources, however. Legislation concerning the provision of a constitutionally guaranteed good can also be understood as giving effect to a substantive view on a topic related to that good. In the context of the electoral franchise cases, we are focused on substantive moral views. The same considerations arguably also apply to substantive non-moral views. As discussed above, however, these are generally not regarded with the same degree of suspicion in Australian interpretive practice. Using legislation as a proxy for substantive non-moral views thus may not provide as strong a justification for a legislative constitutional baseline, the idea being that there is no need to rely on a legislative ‘proxy’ where there is no real objection to relying on the source directly. Nevertheless, this possibility is worth bearing in mind.

Relying directly on a substantive view, whether moral or non-moral, to define a constitutional baseline requires judges to resolve several matters. They must identify the relevant epistemic community for the topic. They also must articulate the view and defend the attribution of the view to that epistemic community, explaining why the view is thought to be the most plausible or correct account of the topic within the epistemic community. As suggested above in Part IV, this presents the greatest difficulties for judges where the topic is contentious and subject to disagreement and debate within the epistemic community. Here, too, we should add that there may also be debate about what the relevant epistemic community is — for example, where there are multiple sources of expertise with different methodological commitments, assumptions, and objectives.

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<sup>92</sup> *Rowe* (n 27) 89 [266].

Legislation can help overcome these difficulties because it permits judges to rely on substantive views in an indirect way. By relying on statutory sources, judges can defer to parliamentary determinations about these matters. Moreover, given the deliberative capacities and informational resources that importantly distinguish legislatures from courts, Parliament is arguably better positioned to make these determinations. In the case of the implied guarantee, this means that the High Court can avoid taking sides in debates about the best account of representative democracy and why it requires universal adult suffrage — a task that sits uncomfortably with the modest conception of judicial role in Australian constitutionalism. Instead, the Court only needs to demonstrate that electoral legislation instantiates or gives effect to a particular substantive view — a task that uses ordinary methods of statutory interpretation that belong to the core judicial function. By giving the Court a way to defer to parliamentary judgment, relying on legislation as a ‘proxy’ makes invoking a substantive moral view to interpret a constitutional requirement more like invoking a substantive non-moral view.

(b) *The Legitimate Expectations Thesis: Legislation as an Independent Source*

When legislation serves as a proxy for interpretive sources that would otherwise be needed to define a constitutional baseline, it effectively ‘borrows’ the rationale for its relevance as a source of constitutional meaning from those other sources. Thus, in the example that we have been considering, one reason why electoral legislation is relevant to what choice ‘by the people’ requires is because it provides evidence both of popular beliefs and attitudes and of the best contemporary accounts of representative democracy. I now want to suggest, somewhat more tentatively, that there may be an independent rationale for legislative constitutional baselines that does not rely on legislation serving as a proxy for other interpretive sources.

The independent rationale for legislative constitutional baselines that I want to put forward here has to do with the concept of ‘legitimate expectations’.<sup>93</sup> The basic idea is this: there are some subjects where legislation can be said to define a relatively comprehensive set of legal norms coordinating human conduct and, in doing so, to establish a network of mutually-reinforcing social expectations regarding that subject. Where that subject concerns a constitutionally guaranteed good — I want to suggest — legislation of that kind may be said to establish a set of ‘legitimate expectations’ with respect to the state’s provision of, and actions taken in relation to, that good, such that departures from the legislative status quo ante require justification. If this suggestion is sound, it would provide a distinctive rationale for legislative constitutional baselines (as opposed to other interpretive uses of legislation that might be imagined).

A few points of clarification about this proposal are in order. In the first place, the legitimate expectations rationale would only apply where there is legislation that can be said to perform the kind of social coordination function just described. In general terms, this plausibly describes the type of legislation sometimes referred to

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<sup>93</sup> Again, to be clear: I am invoking this concept in a general way. The argument presented here is unrelated to issues concerning ‘legitimate expectations’ as ground of judicial review of administrative action: see n 89.

as ‘super-statutes’.<sup>94</sup> The term ‘super-statutes’ refers to legislation that establishes a normative or institutional framework with respect to some subject, such that it defines a set of ‘default’ or ‘background’ assumptions against which government conduct in relation to that subject is evaluated (both by members of the public and legal officials) as a matter of sociological fact. A second point is that the legitimate expectations rationale seems most compelling where it is the case not only that legislation in fact plays this role, but also that a constitution expressly contemplates that legislation play this role. This might be said to occur, for example, where a constitution allocates specific powers or even imposes duties on Parliament to enact legislation that defines the norms and standards, creates the institutions, and so on, which are necessary to realise or otherwise give effect to a particular constitutionally guaranteed good.

This situation plausibly describes Commonwealth electoral legislation in relation to the constitutional guarantee of representative democracy and the requirement of choice ‘by the people’. Indeed, these considerations help make sense of an observation that the High Court of Australia has often made about the relevance of legislation in the electoral franchise cases. As noted above, the High Court has emphasised the idea that the *Australian Constitution*, by design, allocates the primary institutional responsibility for defining the incidents of representative democracy — an otherwise abstract and indeterminate constitutional concept — to Parliament. This idea, I suggest, can be understood to go beyond the observation that, as a purely descriptive matter, most features of representative democracy are legislatively-defined. Consider, for example, some of Gordon J’s comments in *Murphy*. Despite sounding a note of caution about legislative constitutional baselines, her Honour emphasised the idea of a constitutionally-mandated division of labour. In particular, her Honour suggested that there is a sense in which the legislatively-defined electoral scheme is constitutive of choice ‘by the people’.<sup>95</sup> Moreover, her Honour indicated that Commonwealth electoral legislation has a special status — or at least a different constitutional standing — that sets it apart from legislation regulating the incidents of political speech in the context of the implied freedom, because Parliament is under a constitutional obligation to enact and maintain electoral legislation.<sup>96</sup>

This is not yet to defend the view that the High Court’s use of a legislative constitutional baseline in this context can be justified on a legitimate expectations basis. Nevertheless, I do want to suggest that it provides at least a partial and supporting justification. More importantly, I want to suggest that it provides fertile ground for exploring this rationale for legislative constitutional baselines in greater depth.

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<sup>94</sup> Eskridge and Ferejohn (n 3). An important qualification in drawing this connection is that Eskridge and Ferejohn’s work on this topic has a different objective: whereas this article’s focus is on how courts use legislation to define constitutional baselines, their aim is to demonstrate that this particular genre of statutes should be regarded as ‘constitutional’ in their own right, irrespective of whether they play this kind of interpretive role: at 1–28.

<sup>95</sup> *Murphy* (n 40) 120 [288].

<sup>96</sup> *Ibid* 123 [301]–[302]. The suggestion appears to be that electoral legislation therefore warrants greater deference when exercising judicial scrutiny for compliance with the implied guarantee.

## VI Conclusion

This article has drawn attention to constitutional baselines as an interpretive tool, and it has examined how the High Court of Australia uses legislation to define constitutional baselines. In doing so, it has deepened understanding of this interpretive practice, clarifying how constitutional baselines function and the challenge that using legislation to define them poses for traditional principles of constitutional law. Finally, the article has proposed an approach for evaluating legislative constitutional baselines, which requires identification of:

1. The categories of non-statutory extrinsic sources that are relevant to the interpretive problem;
2. The possible objections to the use of those sources; and
3. The extent to which legislation can either:
  - a. overcome those objections (the proxy source thesis); or
  - b. provide an independent basis for a constitutional baseline (the legitimate expectations thesis).

Applying this evaluative framework to the electoral franchise cases, I have demonstrated why legislation appears to provide the High Court with a plausible alternative to the non-statutory extrinsic sources that would otherwise be required to define the constitutional baseline, and why it may be justified on independent grounds as well.

This is not to suggest that legislative constitutional baselines will always (or even often) be defensible, but rather that they are capable of justification in at least some circumstances and therefore merit greater attention. I also do not mean to suggest that using legislation as a source of constitutional meaning, whether as a proxy or otherwise, is without operational challenges of its own. It is worth briefly mentioning some of these here, as they present issues that a more complete study of legislative constitutional baselines — one that surveys their use in other common law jurisdictions besides Australia — would need to address.

One difficulty has to do with commensurability. Legislation that purports to concern the same topic as a constitutionally guaranteed good may in fact concern a qualitatively distinct set of issues. Thus, to import its content into the constitutional domain may distort the distinctive constitutional content of the good. Another difficulty lies in determining which elements of a legislative scheme constitute the baseline. For instance, the dissenting judgments in *Rowe* suggested that the Act's procedural changes to voter enrolment and transfer did not amount to a departure from the baseline because the affected individuals were in breach of their statutory obligations to enrol or transfer in a timely manner.<sup>97</sup> This can be understood as a criticism about cherry-picking the statutory provisions that are relevant to defining the constitutional baseline. It is unclear whether these concerns pose more serious

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<sup>97</sup> See, eg, *Rowe* (n 27) 77 [225] (Hayne J), 93 [284], 95–6 [287] (Heydon J). Justice Gordon raises the same concern in a more general way in *Murphy*: (n 40) 123–4 [303]–[304].

issues for statutory sources than for non-statutory extrinsic sources, which also give rise to incommensurability and cherry-picking problems. Nevertheless, both concerns have merit and require further consideration.

Finally, a more complete study would also need to consider the extent to which there are specific features of constitutional and interpretive practice that vary between different common law jurisdictions and that lend themselves to utilising legislative constitutional baselines. This article's analysis suggests that within the Australian context, legislative constitutional baselines are responsive to a set of competing pressures that courts face when interpreting constitutional guarantees. On the one hand, the *Australian Constitution* is very old and has proven difficult to amend. This puts pressure on judges to update constitutional meaning to reflect changed circumstances. On the other hand, Australia's legalistic interpretive tradition puts pressure on judges to resist this, and to be wary of interpretive sources that go beyond constitutional text and structure. The tensions that arise from these competing pressures are particularly acute in the case of the article's central example: the concept of representative democracy and what choice 'by the people' requires are necessarily informed by social understandings and values, substantive views, and other facts that have changed over time.

A more comprehensive study thus might examine whether legislative constitutional baselines are utilised less frequently in jurisdictions where courts do not face these competing pressures. If so, then perhaps the Australian context provides the most fertile ground for evaluating this interpretive practice. Alternatively, if legislative constitutional baselines are used with the same frequency in other jurisdictions, then perhaps the practice is better understood as responsive to a species of a generic interpretive problem encountered by common law courts.

This article therefore provides an important foundation and starting point for future research that examines legislative constitutional baselines across different common law jurisdictions. Its analysis, while confined to Australian constitutional practice, holds broad interest for constitutional law and theory.



# Case Note

## Responsible Government and Parliamentary Intention: The Impact of *Wilkie v Commonwealth*

Angus Brown\*

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### *Abstract*

In *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance*, the High Court of Australia upheld the validity of the arrangements through which the Australian Government conducted a postal survey on the question of whether same-sex marriage should be legalised. These arrangements involved the use of a power available to the Finance Minister in the *Appropriation Act (No 1) 2017–2018* (Cth) to allocate a prescribed amount of money for certain purposes if a number of preconditions are satisfied. At first, the case appeared to one of straightforward statutory interpretation. However, the Court's decision has broader implications for understanding the capacity of the executive arm of government to spend public funds. The Court's reasoning appears to undermine prior High Court authority in relation to the issue of executive spending and responsible government. It is argued that the interpretation of the powers available to the Finance Minister to spend public moneys should be revisited in the context of these authorities.

### I Introduction

On 8 December 2017, the Commonwealth Parliament enacted the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), legalising marriage in Australia between same-sex partners. The enactment of this legislation followed a national postal survey designed to gauge the views of electors on whether Australia's existing marriage laws ought to be amended. Given the social and political significance of this legislation, and the celebrations that accompanied its passing, one might be forgiven for forgetting the cases brought before the High Court of Australia to challenge the Australian Government's authority to conduct the survey: *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance*.<sup>1</sup> Despite not attracting significant public attention, one commentator has noted that '[t]he real complexity of *Wilkie*, and its precedential significance, is revealed by what the Court did not say, and by analysing the decision in the trajectory of High Court jurisprudence about appropriations and public expenditure more generally'.<sup>2</sup> This

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<sup>1</sup> (2017) 263 CLR 487 ('*Wilkie*').

<sup>2</sup> Michael Wait, 'The Appropriation Power and the Same Sex Marriage Postal Survey: *Wilkie v Commonwealth*' (Speech, 2018 UNSW Constitutional Law Conference and Dinner, Sydney,

case note explores three issues stemming from the Court's decision in *Wilkie*. Following a brief outline of the Court's decision, Part II examines the practical impact of *Wilkie* on the Government's ability to spend public funds. It is argued that the case creates an avenue for the Executive to fund policies and programmes in a manner that undermines the will of Parliament. Part III compares *Wilkie* with earlier High Court authorities on executive spending. It argues that the Court's analysis undermines the importance accorded to the principle of responsible government in these authorities when it comes to questions of executive spending. In light of these arguments, Part IV argues for the continued exercise of judicial scrutiny in this area to limit the abuse of the Executive's power to spend.

## II The Case

### A Background

In 2015, the Australian Government announced that, if re-elected, it would hold a plebiscite to gauge the views of electors on the question of whether marriage between same-sex partners should be legalised. Following its successful re-election, the Government drafted the Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) ('Plebiscite Bill'), which passed the House of Representatives in October 2016.<sup>3</sup> However, the Bill was subsequently defeated in the Senate in November 2016,<sup>4</sup> and again in August 2017.<sup>5</sup> If it was to deliver on its election promise, the Government had to find another way to survey the views of the Australian public.

In a move described as 'ingenious',<sup>6</sup> the Government abandoned its attempts to conduct a plebiscite by way of new legislation, instead drawing on existing statutory provisions to conduct a postal survey. On 9 August 2017,<sup>7</sup> the Treasurer issued a direction under s 9(1)(b) of the *Census and Statistics Act 1905* (Cth) to the Australian Statistician to collect statistical information about 'the proportion of participating electors who are in favour of [or against] the law being changed to allow same-sex couples to marry'.<sup>8</sup> The Government also drew on s 16A of the *Australian Bureau of Statistics Act 1975* (Cth) and s 7A(1) of the *Commonwealth Electoral Act 1918* (Cth). These enabled the Australian Bureau of Statistics ('ABS') to collaborate with the Australian Electoral Commission ('AEC') to implement the *Treasurer's Direction* by carrying out a postal survey.<sup>9</sup>

However, insufficient funding had been allocated to the ABS under sch 1 of the *Appropriation Act (No 1) 2017–2018* (Cth) ('*Appropriation Act*'). In order to

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23 February 2018) <<http://thebox.unsw.edu.au/video/2018-unsw-constitutional-law-conference-session-2>> 00:49:30–01:10:30.

<sup>3</sup> *Wilkie* (n 1) 509 [8].

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid* 514 [27].

<sup>6</sup> Anne Twomey, 'Wilkie v Commonwealth: A Retreat to *Combet* over the Bones of *Pape*, *Williams*, and Responsible Government' on *AUSPUBLAW* (Blog Post, 27 November 2017) <<https://auspublaw.org/2017/11/wilkie-v-commonwealth/>>.

<sup>7</sup> *Wilkie* (n 1) 514 [28].

<sup>8</sup> *Census and Statistics (Statistical Information) Direction 2017* (Cth) s (3)(1)(b)–(c) ('*Treasurer's Direction*').

<sup>9</sup> *Wilkie* (n 1) 519 [44]–[45].



conduct the survey, the ABS would need an injection of additional funds. Crucially, cl 40 of the Plebiscite Bill would have had the effect of appropriating funds from the Consolidated Revenue Fund ('CRF') for the purpose of conducting the plebiscite. However, as noted above, the Bill, and thus the appropriation of funds for that purpose, was twice rejected by the Senate. Notwithstanding this specific rejection, the Government was able to finance the survey through a provision known as the Advance to the Finance Minister ('AFM'), contained in s 10 of the *Appropriation Act*. Schedule 1 of the *Appropriation Act* sets out as 'items' the services for which money is appropriated. If certain preconditions are satisfied, the AFM enables the Finance Minister to make a determination under s 10(2), which has the effect of allocating up to \$295 million to an item specified in sch 1. On 9 August 2017, the Finance Minister made a determination in accordance with s 10(2), allocating \$122 million to the ABS.<sup>10</sup> The ABS was thus provided with the necessary funds to carry out the *Treasurer's Direction*.

## B The Challenge

The following day, proceedings were commenced in the High Court of Australia challenging the Government's actions on a number of grounds.<sup>11</sup> The four grounds that survived to judgment were as follows:

1. Section 10 of the *Appropriation Act* impermissibly delegated Parliament's power of appropriation to the Finance Minister;<sup>12</sup>
2. If the first ground failed, the Finance Minister's determination was not authorised by s 10 because the preconditions required before the determination could be made did not exist;<sup>13</sup>
3. The *Treasurer's Direction* exceeded the power given by s 9(1)(b) of the *Census and Statistics Act 1905* (Cth);<sup>14</sup> and
4. The AEC's functions under the *Commonwealth Electoral Act 1918* (Cth) did not extend to assisting the ABS to conduct the postal survey.<sup>15</sup>

Sidelining the questions of standing raised by the proceedings,<sup>16</sup> a unanimous Court dismissed these submissions.<sup>17</sup> The third and fourth grounds were briefly dismissed,<sup>18</sup> and are not the focus of this case note. The remainder of this Part will therefore only deal with the Court's responses to the first and second grounds.

According to the first submission, by permitting the Finance Minister to allocate funds to the services specified in sch 1 of the *Appropriation Act*, Parliament

<sup>10</sup> Minister for Finance (Cth), *Advance to the Finance Minister Determination* [No 1 of 2017–2018], 9 August 2017, item 1.

<sup>11</sup> Andrew Damien Wilkie, Felicity Jennifer Marlowe and PFLAG Brisbane Inc, 'Plaintiffs' Annotated Submissions', Submission in *Wilkie v Commonwealth*, M105/2017, 23 August 2017, 2–20 [12]–[86] ('*Plaintiffs' Submissions*'); Commonwealth of Australia et al, 'Submissions of the First to Third Defendants', Submission in *Wilkie v Commonwealth*, M105/2017, 30 August 2017, 4–20 [16]–[82].

<sup>12</sup> *Wilkie* (n 1) 526 [72].

<sup>13</sup> *Ibid* 532 [96].

<sup>14</sup> *Ibid* 544 [140].

<sup>15</sup> *Ibid* 546 [149].

<sup>16</sup> *Ibid* 522 [59].

<sup>17</sup> *Ibid* 522 [58].

<sup>18</sup> *Ibid* 544–6 [139]–[148] (ground three), 546–7 [149]–[150] (ground four).

had abdicated its power under ss 81 and 83 of the *Australia Constitution*. Section 81 provides that:

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*.

Section 83 provides that '[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law'. These sections embody the fundamental principle of responsible government 'that no money can be taken out of the consolidated Fund ... excepting under a distinct authorization from Parliament itself'.<sup>19</sup> The plaintiffs submitted that the effect of this principle, and the requirement in s 83 that an appropriation be made 'by law', means that it is impermissible for an appropriation to be made by subordinate legislation.<sup>20</sup> Section 10 of the *Appropriation Act*, it was argued, permitted the appropriation of funds by 'executive fiat'.<sup>21</sup>

The Court held this argument was 'based on a fundamental misconstruction'.<sup>22</sup> The power to make a determination under s 10(2) was not a power to appropriate funds; the funds available under s 10(3) were already appropriated by s 12 when the *Appropriation Act* commenced operation.<sup>23</sup> This interpretation is consistent with previous commentary on the AFM.<sup>24</sup> However, in response to a submission that the AFM failed to comply with the constitutional requirement that an appropriation must be for a legislatively determined purpose,<sup>25</sup> the Court noted that 'the degree of specificity of the purpose of an appropriation is for Parliament to determine'.<sup>26</sup> This comment evokes an earlier statement made by the Court in *Combet v Commonwealth*.<sup>27</sup> That decision has been subject to academic criticism on the basis that it undermined responsible government by eroding parliamentary scrutiny of legislation.<sup>28</sup> The Court's acknowledgement of this statement in *Wilkie* puts to rest doubts previously expressed about the validity of the AFM on the basis that it does not comply with the requirement that there can be no appropriation 'merely

<sup>19</sup> *Brown v West* (1990) 169 CLR 195, 205, 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), quoting *Auckland Harbour Board v The King* [1924] AC 318, 326 (Viscount Haldane).

<sup>20</sup> *Plaintiffs' Submissions* (n 11) 5 [24], citing *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 23 [8], 45 [81], 55 [111] (French CJ), 82 [209] (Gummow, Crennan and Bell JJ) ('*Pape*'); *Brown v West* (n 19) 205; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 580 (Brennan J), 599 (McHugh J) ('*Northern Suburbs*').

<sup>21</sup> *Plaintiffs' Submissions* (n 11) 5 [24].

<sup>22</sup> *Wilkie* (n 1) 530 [87].

<sup>23</sup> *Ibid* 530–1 [88].

<sup>24</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Payment of a Minister's Legal Costs* (Parliamentary Paper No 184 of 1995, 1995) 42 [3.54].

<sup>25</sup> *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 253 (Latham CJ) ('*Pharmaceutical Benefits Case*').

<sup>26</sup> *Wilkie* (n 1) 532 [91].

<sup>27</sup> (2005) 224 CLR 494, 522 [5] (Gleeson CJ), 577 [160] (Gummow, Hayne, Callinan and Heydon JJ) ('*Combet*').

<sup>28</sup> Geoffrey Lindell, 'The *Combet Case* and the Appropriation of Taxpayers' Funds for Political Advertising — An Erosion of Fundamental Principles?' (2007) 66(3) *Australian Journal of Public Administration* 307; Graeme Orr and William Isdale, 'Responsible Government, Federalism and the School Chaplaincy Case: God's Okay, it's Mammon that's Troublesome' (2013) 38(1) *Alternative Law Journal* 3, 6.

authorizing expenditure with no reference to purpose'.<sup>29</sup> However, as discussed below, the High Court's reasoning, insofar as it has implications for parliamentary control over executive spending, arguably marks a divergence of approach (if not direct authority) from the case law in this area that has developed following the decision in *Combet*.

In the event that its first submission was unsuccessful, the plaintiffs argued that the Finance Minister's determination was invalid because it failed to comply with the requirements set out in s 10(1) of the *Appropriation Act*. Before a determination under s 10(2) can be made, the Minister must be satisfied that:

- (1) there is a *need* for expenditure that is not provided for, or is insufficiently provided for in sch 1;<sup>30</sup>
- (2) that need for expenditure is *urgent*;<sup>31</sup> and
- (3) the expenditure was not provided for, or was insufficiently provided for because it was *unforeseen* until after the last day on which it was practicable to provide for it in the Bill for the *Appropriation Act* before that Bill was introduced into the House of Representatives.<sup>32</sup>

The plaintiffs argued that these elements were not satisfied.

The High Court dismissed this argument by construing each element in turn. First, the Court noted that 'need' simply refers to 'expenditure which ought to occur, whether for legal or practical or other reasons'.<sup>33</sup> It rejected a submission that the need should 'arise from some source external to Government'.<sup>34</sup> Second, the Court held that, in context, the term 'urgent' merely required the Minister to consider why the expenditure could not be delayed until it could be included in either Appropriation Bills No 3 or No 5.<sup>35</sup> The Court rejected the suggestion that the Minister must consider whether it would be reasonable or practicable for the Government to introduce a Bill for special appropriation for consideration by Parliament.<sup>36</sup> Finally, the Court held that what must be 'unforeseen' is the specific payments to be made: '[t]he question is not whether some other expenditure directed to achieving the same or a similar result might have been foreseen'.<sup>37</sup>

Bringing these factors together, the High Court held as follows:

- (1) the ABS *needed* the \$122 million to conduct a postal survey to comply with the *Treasurer's Direction*;<sup>38</sup>

<sup>29</sup> *Pharmaceutical Benefits Case* (n 25) 253 (Latham CJ). See Enid Campbell, 'Parliamentary Appropriations' (1971) 4(1) *Adelaide Law Review* 145, 156; Geoffrey Lindell, 'Parliamentary Appropriations and the Funding of the Federal Government's Pre-Election Advertising in 1998' (1999) 2(2) *Constitutional Law and Policy Review* 21, 23; *Northern Suburbs* (n 20) 600 (McHugh J).

<sup>30</sup> *Appropriation Act* s 10(1).

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* s 10(1)(b).

<sup>33</sup> *Wilkie* (n 1) 537 [111].

<sup>34</sup> *Ibid* 537 [112].

<sup>35</sup> *Ibid* 537–8 [113].

<sup>36</sup> *Ibid* 538 [114].

<sup>37</sup> *Ibid* 539 [120].

<sup>38</sup> *Ibid* 542–3 [133]. Chronologically, the Finance Minister's determination was, in fact, made before the *Treasurer's Direction*.

- (2) that need was *urgent* because the Government had imposed a deadline on knowing the results of the survey by 15 November 2017;<sup>39</sup> and
- (3) \$122 million was not allocated to the ABS in sch 1 to conduct the postal survey because that expenditure was *unforeseen* as at 5 May 2017, which was the last day on which the Bill containing sch 1 could have included that expenditure.<sup>40</sup>

Thus, the plaintiffs' second ground failed.

### III Legislative Intention: The Impact of *Wilkie*

The immediate relevance of the High Court's decision in *Wilkie* will be as much a matter of political importance as it will be of legal precedent. As discussed below, it allows the Executive to manufacture the conditions in which expenditure under the AFM and its future equivalents is justified. The Court's interpretation of s 10(1) of the *Appropriation Act* thus subverts the intention of Parliament in enacting the AFM. Of course, given recent High Court jurisprudence on the concept of legislative intention,<sup>41</sup> it may be imprecise to speak of Parliament, as a collective body, having an 'intention' capable of being subverted. The Court has stated that judicial findings as to the intention of Parliament in enacting a piece of legislation are 'an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.<sup>42</sup> The intention of Parliament is thus a conclusion about a statute that is reached by courts adopting and applying principles of interpretation that have been accepted 'as legitimate in a representative democracy' between the different arms of government.<sup>43</sup> However, even on this understanding, the Court's construction of s 10 is arguably inconsistent with these principles of interpretation.

#### A The Requirement of Necessity

As noted above, the High Court interpreted the requirement of 'need' as confined to an inquiry as to whether expenditure '*ought to occur*'.<sup>44</sup> This was distinguished from expenditure that is 'critical or imperative'.<sup>45</sup> The Court noted that to set the bar that high 'would tend to render the other considerations of which the Finance Minister

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'); *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) ('*Zheng*'); Joseph Campbell and Richard Campbell, 'Why Statutory Interpretation is Done as it is Done' (2014) 39(1) *Australian Bar Review* 1, 20–5; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39; Jim South, 'Are Legislative Intentions Real?' (2014) 40(3) *Monash University Law Review* 853.

<sup>42</sup> *Zheng* (n 41) 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 8–9.

<sup>43</sup> *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–11 [430] (French J) ('*NAAV*'), citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 (Gaudron J); *Zheng* (n 41) 455 [28].

<sup>44</sup> *Wilkie* (n 1) 537 [111] (emphasis added).

<sup>45</sup> Ibid.

must be satisfied contradictory, not complementary'.<sup>46</sup> However, in its attempts to avoid this consequence, the Court's interpretation of 'need' arguably renders this requirement almost completely otiose. The Minister's power in s 10(2) of the *Appropriation Act* is enlivened on the basis of a subjective assessment of the facts, as the Minister must be satisfied that the elements in s 10(1) are met.<sup>47</sup> This satisfaction must, of course, be reasonable and reached through a correct understanding of the law.<sup>48</sup> There is no suggestion that the Court's interpretation of 'need' has subverted this procedural element of the test in s 10(2). However, by merely requiring the Minister to be satisfied of what 'ought to occur', the Court has construed the word 'need' such that it effectively imposes no substantive limitation on the Minister's power. It is difficult to envisage, for example, a situation in which a Finance Minister would not consider a policy promoted by their own party to be something that 'ought to occur'.

The High Court's interpretation pays insufficient attention to the centrality of purpose as a principle of statutory construction. The plaintiffs in *Wilkie* submitted that the 'need' in question should arise from a source external to government.<sup>49</sup> Wait has characterised this submission as 'sensible',<sup>50</sup> as otherwise the Government would be able to manufacture a need for its own policy. The Court's rejection of this limitation is, in one sense, understandable on the bases that it preserves the Government's ability to respond to both internal and external needs and that, in any event, it is somewhat artificial to distinguish between needs arising from sources internal and external to government.<sup>51</sup> However, this was not the only constructional option available to the High Court. In recent times, the Court has placed increasing importance on 'constructional choice' as a principle of statutory interpretation,<sup>52</sup> which finds expression in s 15AA of the *Acts Interpretation Act 1901* (Cth).<sup>53</sup> That section provides that 'the interpretation [of a statutory provision] that would best achieve the purpose or object of the Act ... is to be preferred to each other interpretation'.<sup>54</sup> The search for statutory purpose forms an important part of a court's approach to discerning legislative intention.<sup>55</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid 533 [98], citing *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 599 [39] (Gageler J).

<sup>48</sup> *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651–4 [130]–[137] (Gummow J); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), cited in *Wilkie* (n 1) 537 [109].

<sup>49</sup> *Wilkie* (n 1) 537 [112].

<sup>50</sup> Wait (n 2).

<sup>51</sup> *Wilkie* (n 1) 537 [112].

<sup>52</sup> *Momcilvoic v The Queen* (2011) 245 CLR 1, 50 [50] (French CJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [38]–[40] (Gageler J) ('SZTAL'); *Coverdale v West Coast Council* (2016) 259 CLR 164, 172–3 [22]–[23] (French CJ, Kiefel, Keane, Nettle and Gordon JJ).

<sup>53</sup> Gordon Brysland and Suna Rizalar, 'Statutory Interpretation: Constructional Choice' (2018) 92(2) *Australian Law Journal* 81, 84.

<sup>54</sup> *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>55</sup> See *Lacey* (n 41) 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *NAAV* (n 43) 410–11 [430] (French J).

In construing the meaning of ‘need’, the Court in *Wilkie* referred to a 1988 Parliamentary Committee report on the AFM.<sup>56</sup> It was noted in a submission to that report that:

The [AFM] commits to the Minister ... the power to form an opinion that particular expenditure meets the requirements set out in [a prior equivalent of s 10(1)]. ... However, the Minister is not free to form any opinion he pleases. His opinion must be not unreasonable and it must be formed having regard to relevant considerations — including the correct legal meaning of the expressions ‘urgently required’ [as the provision then provided] and ‘unforeseen’ ...<sup>57</sup>

In addressing this concern, the Committee noted that ‘[i]t is clear from this advice that there are constraints to giving approval to applications for funds from the AFM and that the Minister does not have a wide-ranging discretion’.<sup>58</sup> Thus, although the Committee considered that the AFM would allow a government a sufficient ‘level of flexibility to enable [it] ... to meet contingencies’,<sup>59</sup> at least some substantive limitation was contemplated by the words chosen. The interpretation of that limitation need not have been informed by the origin of the need — that is, whether or not the need arose from a source external to government. As the Court noted, there was nothing pointed to by the plaintiffs in the context or history of the AFM that warranted such a construction.<sup>60</sup>

However, two points are to be borne in mind in construing the word ‘need’ in s 10(1) of the *Appropriation Act*. The first is that ‘need’ appears in s 10(1) prefaced by the adjective ‘urgent’ (the High Court’s interpretation of this term is also discussed separately below in Part IIIB). As noted above, the Court refrained from interpreting ‘need’ as referring to spending that was ‘critical or imperative’.<sup>61</sup> But the use of the adjective ‘urgent’ gives the need for expenditure a temporal quality that suggests the obligation it expresses exists at a particularly high level. Second, the word ‘ought’ admits of a greater variety of meanings than ‘need’. Used as a noun, ‘need’ refers to a ‘case or instance in which some necessity or want exists; a requirement’,<sup>62</sup> or, elsewhere, a ‘necessity, requirement’.<sup>63</sup> The word ‘ought’ is a modal verb,<sup>64</sup> and the strength of the obligation it expresses appears to vary. For instance, it is defined in one source as ‘to be bound in duty or moral obligation’,<sup>65</sup> whereas another defines it as ‘that which *should* be done, the obligatory’.<sup>66</sup> The spectrum of meaning that ‘ought’ appears to occupy can be expressed as, on the one hand, something being desirable or recommended and, on the other, something being required or essential. Admittedly, the latter end of the spectrum reflects a meaning

<sup>56</sup> Joint Committee of Public Accounts, Parliament of Australia, *Advance to the Finance Minister* (Report 289, 1988).

<sup>57</sup> *Ibid* 36, quoted (in part) in *Wilkie* (n 1) 535 [103].

<sup>58</sup> Joint Committee of Public Accounts (n 56) 11 [2.33].

<sup>59</sup> Standing Committee on Finance and Public Administration, Parliament of Australia, *Transparency and Accountability of Commonwealth Public Funding Expenditure* (2007) 35 [4.24].

<sup>60</sup> *Wilkie* (n 1) 537 [112].

<sup>61</sup> *Ibid* 537 [111].

<sup>62</sup> *Macquarie Dictionary* (online at 27 September 2019) ‘need’ (def 1).

<sup>63</sup> *Oxford English Dictionary* (online at 12 October 2019) ‘need’ (def 1).

<sup>64</sup> See MAK Halliday, *Halliday’s Introduction to Functional Grammar* (Routledge, 4<sup>th</sup> ed, 2014) 695–6.

<sup>65</sup> *Macquarie Dictionary* (online at 12 October 2019) ‘ought’ (def 1).

<sup>66</sup> *Oxford English Dictionary* (online at 12 October 2019) ‘ought’ (def 1) (emphasis added).

closer to need. However, the fact that the word exists on a spectrum arguably grants the Minister a power to adopt a meaning of the word ‘ought’ that imposes no substantive limitation. By construing ‘need’ as imposing no substantive limitation, the Court neglected to seriously consider constructions better reflecting the purpose of the AFM. In doing so, it is difficult to conclude that the High Court’s construction of ‘need’ adequately reflects the intention of the legislature in enacting the AFM.

## **B     *The Requirement of Urgency***

A similar point may be made with respect to the High Court’s interpretation of ‘urgent’. The Court interpreted the requirement for expenditure to be ‘urgent’ as being limited to an inquiry into whether the expenditure could or could not await inclusion in a later appropriation Act. In contrast, it has been suggested by a Parliamentary Committee that use of the AFM ‘should be restricted to cases of genuine urgency’,<sup>67</sup> contemplating events such as ‘natural disasters’.<sup>68</sup> In contrast, the Committee did not consider the payment of a Minister’s legal bills ‘prior to specific approval by the Parliament of such a payment’ to be sufficiently ‘urgent’ for use of the AFM.<sup>69</sup> In 2007, a Standing Committee remarked that ‘[a]n advance from the AFM is only issued if it is the last available legal source of funding’.<sup>70</sup> It was partly on this understanding that the Committee subsequently commented that the AFM is ‘now much less significant as a source of funds than in the past’.<sup>71</sup> It is clear that an understanding of at least some members of the Parliament in the past has been that the level of urgency required to justify use of the AFM is more than urgency in the context of the regular enactment of appropriation Acts.

This Committee commentary did not influence the High Court in *Wilkie*. The Court rejected the plaintiffs’ submission that the Minister should consider whether it would be practicable to introduce a Bill to appropriate the necessary funds, rather than relying on the AFM,<sup>72</sup> noting:

The history of the use of the [AFM], at least since 1957, contradicts [this submission]. Were needed expenditure to exceed the amount of the [AFM], the Government would have no option but to introduce a Bill for a further appropriation outside the ordinary sequence of annual Appropriation Acts. Where needed expenditure does not exceed the amount of the [AFM], that amount is already immediately available to meet the expenditure provided only that the precondition in s 10(1) is met. That is the reason the amount — specified in s 10(3) — was appropriated in the first place.<sup>73</sup>

As Twomey has observed, the Court’s reliance on the history of the AFM’s use is puzzling: ‘[i]t is hard to see ... that past abuse of the requirement for urgent necessity should justify present abuse of the requirement. Past practice cannot undo

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<sup>67</sup> Senate Legal and Constitutional References Committee (n 24) 40 [3.47].

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> Standing Committee on Finance and Public Administration (n 59) 34 [4.17].

<sup>71</sup> *Ibid.* 35 [4.23].

<sup>72</sup> *Wilkie* (n 1) 538 [114].

<sup>73</sup> *Ibid.*

illegality or correct jurisdictional error.<sup>74</sup> Furthermore, the suggestion that the amount appropriated by s 10(3) carries weight for the purposes of construing the term ‘urgent’ is debatable. The Court’s reasoning is based on the proposition that if the preconditions in s 10(1) are met, it is irrelevant whether or not it is ‘practicable to seek a special appropriation from the Parliament’.<sup>75</sup> However, it is clear from the plaintiffs’ written submissions that their argument was intended to give content to the meaning of ‘urgent’ in s 10(1), not to consider whether, even if s 10(1) *was satisfied*, it would nevertheless be practicable for Parliament to pass legislation instead of using the AFM.<sup>76</sup> That is, the plaintiffs argued that if it was practicable to seek an appropriation from Parliament, then the expenditure in question would not be relevantly ‘urgent’.

In rejecting this argument, the High Court paid insufficient attention to statutory purpose. As the Court noted, urgency ‘is a relative concept’.<sup>77</sup> In the context of statutory interpretation, this renders ‘urgent’ a term that is ‘insufficiently precise to provide definitive guidance as to how [it] is to be understood and applied in [a] particular statutory setting’.<sup>78</sup> Such terms give rise to a constructional choice, and ‘integral to making such a choice is discernment of statutory purpose’.<sup>79</sup> It is unlikely that the qualifier of urgency would have been attached to the requirement of need if it was intended to permit the Government to spend money on a particular matter ‘simply because the government decides it should be dealt with before the next scheduled Appropriation Act’.<sup>80</sup> Rather, it is evident from the inclusion of these requirements that some substantive limit was intended to be imposed on use of the AFM. Indeed, the Committee’s reference to a need for a ‘genuine urgency’<sup>81</sup> may reflect an understanding that situations of confected crisis would not satisfy the conditions for the Minister to exercise his or her power. This understanding is reinforced by the fact that the Standing Committee suggested that the AFM was considered to be a less significant source of funds than others available to the Government.<sup>82</sup> Furthermore, under the Government’s own guidelines, ‘an urgent need for expenditure is expenditure that is required within two weeks’.<sup>83</sup> Although such guidelines cannot constrain the Minister’s discretion,<sup>84</sup> that does not mean that, in addition to parliamentary reports, they could not inform the Court’s understanding of the purpose of s 10(1).<sup>85</sup>

*Wilkie* will permit successive governments to manufacture conditions to pursue their own policies, irrespective of the will of Parliament. This is evident from the facts of *Wilkie*. In setting up the postal survey, the Government indicated that

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<sup>74</sup> Anne Twomey, ‘A Tale of Two Cases: *Wilkie v Commonwealth* and *Re Canavan*’ (2018) 92(1) *Australian Law Journal* 17, 19.

<sup>75</sup> *Plaintiffs’ Submissions* (n 11), 11 [47].

<sup>76</sup> *Ibid.*

<sup>77</sup> *Wilkie* (n 1) 537 [113].

<sup>78</sup> *SZTAL* (n 52) 375 [40] (Gageler J).

<sup>79</sup> *Ibid* 375 [39].

<sup>80</sup> Twomey (n 74) 18–19.

<sup>81</sup> Senate Legal and Constitutional References Committee (n 24) 40 [3.47].

<sup>82</sup> Standing Committee on Finance and Public Administration (n 59) 35 [4.23].

<sup>83</sup> Explanatory Memorandum, Appropriation Bill (No 1) 2008–2009 (Cth) 15 [54].

<sup>84</sup> *Wilkie* (n 1) 538 [115].

<sup>85</sup> See *Acts Interpretation Act 1901* (Cth) s 15AB.



‘the final result of the voluntary postal plebiscite is to be known no later than 15 November 2017’.<sup>86</sup> This deadline was self-imposed and it was, at best, unclear whether there would be any consequences if the Government failed to know the results of the survey by this date. However, according to the High Court, this was sufficient indication that the Finance Minister was satisfied the expenditure was urgent.<sup>87</sup> Additionally, assuming a government is able to find the necessary powers in existing legislation, *Wilkie* will also enable the Executive to bypass parliamentary approval of appropriations for purposes to which the Parliament has refused to assent. The Court’s reasoning thus appears to confirm comparisons that have been made between the AFM and the United Kingdom Contingency Fund, the latter of which has been criticised on the grounds that it ‘is as effective a method of bypassing prior parliamentary sanction of expenditure as could be imagined ... [giving] the Executive substantial freedom from prior parliamentary scrutiny of its policy decisions’.<sup>88</sup>

## IV Executive Spending and Responsible Government

Beyond these immediate consequences, *Wilkie* has deeper ramifications for the principle of responsible government. Early responses to the Court’s decision have argued that it amounts to a retreat from earlier jurisprudence on executive spending.<sup>89</sup> To understand the impact of *Wilkie* in this context, it is necessary to consider two important cases: *Pape*,<sup>90</sup> and *Williams v Commonwealth*.<sup>91</sup>

Both these cases altered earlier understandings of the nature of appropriations and Commonwealth executive power. Prior to 2009, and although there were contrary opinions,<sup>92</sup> a ‘long held’ view was that s 81 of the *Australian Constitution* allowed the Commonwealth to spend money appropriated from the CRF.<sup>93</sup> However, in *Pape*, the High Court held that s 81 confers no such power; s 81 only enables Parliament to authorise the appropriation of money from the CRF. Any subsequent expenditure must be validly supported by another law.<sup>94</sup> Thus, ‘it is now settled that [ss 81 and 83 of the *Australian Constitution*] ... do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the *Constitution* or the laws of the Commonwealth’.<sup>95</sup>

*Williams* involved a similar reversal of previously accepted understandings of the nature of executive power. Prior to that case, it had been assumed that

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<sup>86</sup> *Wilkie* (n 1) 516 [32].

<sup>87</sup> *Ibid* 542 [133].

<sup>88</sup> Gordon Reid, *The Politics of Financial Control: The Role of the House of Commons* (Hutchinson, 1966) 82, quoted in Campbell (n 29) 152; Lindell (n 29) 24.

<sup>89</sup> Twomey (n 74) 19; Twomey (n 6); Wait (n 2).

<sup>90</sup> *Pape* (n 20).

<sup>91</sup> (2012) 248 CLR 156 (‘*Williams*’).

<sup>92</sup> *Northern Suburbs* (n 20) 601 (McHugh J).

<sup>93</sup> James Stellios, *Zines’s the High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 384.

<sup>94</sup> *Pape* (n 20) 55 [111] (French CJ), 74 [183] (Gummow, Crennan and Bell JJ), 104 [292], 105 [296] (Hayne and Kiefel JJ), 210–12 [601]–[604] (Heydon J).

<sup>95</sup> *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 [41] (French CJ, Gummow and Crennan JJ).

the executive power of the Commonwealth included a power to do what the Commonwealth legislature could authorise the Executive to do by enacting legislation, whether or not the Commonwealth legislature had actually enacted the legislation.<sup>96</sup>

This ‘common assumption’ was rejected in *Williams*.<sup>97</sup>

On its face, *Wilkie* does not appear to be directly inconsistent with these prior decisions. As the High Court upheld the validity of the legislation used to implement the postal vote, there was no question of the Executive’s spending lacking legislative support. Moreover, following *Combet*, the Court held that the AFM was not an appropriation ‘in blank’,<sup>98</sup> because ‘the degree of specificity of the purpose of an appropriation is for Parliament to determine’.<sup>99</sup> As Wait has noted, if Parliament is satisfied with the terms of the appropriation of the AFM, this is not inconsistent with ss 81 and 83 of the *Australian Constitution*, or with responsible government, because ‘it is for Parliament to dictate the level of scrutiny required’.<sup>100</sup> This view appears arguable, as the principle espoused in *Combet* was accepted as accurate in *Pape*.<sup>101</sup>

However, this argument belies the principles underpinning the reasoning in *Pape*. In *Combet*, a majority of the High Court held that, although an appropriation must be for a purpose, ‘[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified’.<sup>102</sup> In *Pape*, Gummow, Crennan and Bell JJ referred to this statement as giving rise to the consequence that ‘the description given to items of appropriation provides an insufficient textual basis for the determination of issues of constitutional fact and for the treatment of s 81 as a criterion of legislative validity’.<sup>103</sup> This consequence was said to add additional support to the conclusion that s 81 did not give rise to a legislative spending power.<sup>104</sup> Their Honours’ reference to *Combet* was not, then, a simple acknowledgement of the view that responsible government requires only formal parliamentary scrutiny of legislation. Rather, the practical consequences flowing from *Combet* were relied upon as justifying, in support of responsible government, the separation of the power of appropriation from the power of spending.

This reasoning may be contrasted with the High Court’s treatment of responsible government in *Wilkie*. In *Wilkie*, the Court relied on the above statement from *Combet* as legitimising the terms of the appropriation of the AFM and, by extension, the Government’s subsequent use of the AFM.<sup>105</sup> However, the

<sup>96</sup> *Williams* (n 91) 295 [340]. See also *Williams* (n 91) 295–313 [341]–[385] (Heydon J); Geoffrey Lindell, ‘The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case’ (2013) 39(2) *Monash University Law Review* 348, 355; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7<sup>th</sup> ed, 2018) 493.

<sup>97</sup> *Williams* (n 91) 205 [60] (French CJ), 232 [134]–[136] (Gummow and Bell JJ), 351–2 [516] (Crennan J).

<sup>98</sup> *Pharmaceutical Benefits Case* (n 25) 253 (Latham CJ).

<sup>99</sup> *Wilkie* (n 1) 532 [91].

<sup>100</sup> Wait (n 2).

<sup>101</sup> *Pape* (n 20) 78 [197] (Gummow, Crennan and Bell JJ).

<sup>102</sup> *Combet* (n 27) 577 [160] (Gummow, Hayne, Callinan and Heydon JJ), citing *Pharmaceutical Benefits Case* (n 25) 253 (Latham CJ). See also *Combet* (n 27) 522 [5] (Gleeson CJ).

<sup>103</sup> *Pape* (n 20) 78 [197], citing *Victoria v Commonwealth* (1975) 134 CLR 338, 411 (Jacobs J).

<sup>104</sup> *Pape* (n 20) 78 [197]. See also *Williams* (n 91) 261 [222] (Hayne J).

<sup>105</sup> *Wilkie* (n 1) 531–2 [91].

Government's attempts to enact legislation — and, crucially, to appropriate funds — to carry out a plebiscite had already twice been rejected by the Senate. Thus, *Combet* was used by the Court to support an odd proposition: the Government's use of the AFM to give effect to its policy was valid on the basis that Parliament had assented to that use, despite the fact that the Parliament had twice rejected spending on that specific policy and the appropriation of funds underpinning it. This result, while perhaps not inconsistent at the level of legal precedent, sits uneasily alongside the *Pape* majority's approach to the role of responsible government in controlling executive spending.

In *Williams*, the High Court placed importance on the role of the Senate in reviewing legislation as a basis for undermining the common assumption. Justice Crennan explained that '[t]he principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend'.<sup>106</sup> Thus, one reason for doubting the 'common assumption' was said to be that if the Executive were able to engage Parliament only at the stage of appropriation, then Parliament's role would be frustrated, for it would be excluded from 'the formulation, amendment or termination of any programme for the spending of ... moneys'.<sup>107</sup> In other words, allowing executive expenditure on matters over which Parliament had legislative competence would allow the Executive to bypass the process of legislative scrutiny. Further, as Stellios has noted,

[t]he House of Representatives is dominated by the executive, the appropriation process provides no effective control and, if *prior* parliamentary scrutiny of spending were limited to the appropriation process, then the Senate, as a House of Parliament, would have a limited role to control the executive-dominated House of Representatives ...<sup>108</sup>

In contrast, *Wilkie* removed the Parliament's — and especially the Senate's — capacity to scrutinise the purpose of the expenditure. As the High Court acknowledged in *Commonwealth v Australian Capital Territory*,<sup>109</sup> the Parliament has the legislative power to legalise same-sex marriage. Further, the Parliament's legislative power to enact the Plebiscite Bill, which was twice rejected by the Senate, was never challenged. By effectively enabling the Executive not only to bypass Parliament's competence over these matters, but to subvert its will in rejecting such a Bill, *Wilkie* undermines the importance accorded to responsible government in *Williams*. It was precisely this kind of use of the AFM that prompted a Senate Committee to comment in 1995:

The importance of the principle that all expenditure by the Executive should first be approved by way of an appropriation is so fundamental that it should not be undermined by a provision which, if interpreted broadly, could give a *carte blanche* to a Minister to make payments without the express approval of Parliament for the *particular purpose of the payments*.<sup>110</sup>

<sup>106</sup> *Williams* (n 91) 351–2 [516] (Crennan J).

<sup>107</sup> *Ibid* 235 [145] (Gummow and Bell JJ).

<sup>108</sup> Stellios (n 93) 397 (emphasis in original).

<sup>109</sup> (2013) 250 CLR 441, 461 [33], 462 [37], cited in *Wilkie* (n 1) 508 [4].

<sup>110</sup> Senate Legal and Constitutional References Committee (n 24) 40 [3.46] (emphasis added).

The fact that *Wilkie* is formally consistent with *Pape* and *Williams* should not divert attention from the fact that it entails a departure from the underlying spirit of the High Court's reasoning in those cases.

## V Judicial Oversight of Executive Expenditure

*Wilkie* weakens parliamentary oversight of executive spending. In light of the decision, it has been remarked that '[i]t may be that there will not be many more challenges to the expenditure of public moneys'.<sup>111</sup> This reflects a sentiment that responsible government is offered sufficient protection by the precedents established in *Pape* and *Williams*. However, as argued above, such a view adopts too narrow a focus on what the High Court decided in those cases.

Some years prior to his appointment as a Justice of the High Court, Gageler set out his 'vision' of the structure and function of the *Australian Constitution*. Relevantly, that vision contained a particular conceptualisation of the role of the federal judiciary. In light of the issues raised by *Wilkie* — particularly the potential of the decision to undermine parliamentary control of executive spending — this latter aspect of Gageler's vision is worth considering:

You start with the notion that the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.<sup>112</sup>

As Gageler notes,

[t]his will not give you the answer to a particular case ... But it can give you a framework for understanding at a very broad level why a great deal of modern constitutional doctrine might take the form that it does and how aspects of that doctrine might possibly develop in the future'.<sup>113</sup>

Gageler's vision is a useful framework for understanding trends in the Judiciary's approach to constitutional cases where the issue to be decided engages questions of political accountability. Indeed, he points to a number of areas where judicial deference has given way to judicial vigilance. Two particular areas of constitutional law raised by Gageler are worth mentioning here. The first area is the jurisprudence that has been developed by the High Court regarding the implied freedom of political communication. This is an area of constitutional law where the Court continues to exercise a fairly high degree of judicial vigilance, leading some

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<sup>111</sup> Robert French AC, 'Executive Power in Australia — Nurtured and Bound in Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 41.

<sup>112</sup> Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 152.

<sup>113</sup> *Ibid.*

members of the Court to develop a strict test that must be undertaken where an exercise of legislative power burdens the freedom.<sup>114</sup> Gageler comments in relation to the implied freedom generally:

A government which relies for the constitutional legitimacy of an exercise of legislative power on political accountability to the people of Australia cannot, in Sir Maurice's language, be allowed to commit a 'fraud on the power'. It is the crucial function of the judicial power to ensure that does not occur.<sup>115</sup>

The second area concerns the power of the legislature to alter the franchise 'in the face of the requirement of ss 7 and 24 of the *Constitution* that Senators and members of the House of Representatives be "directly chosen by the people"'.<sup>116</sup> Both these areas concern the accountability of Parliament to the Australian people. However, the exercise of judicial vigilance is not limited only to cases involving accountability of the Parliament to the people. Indeed, a third example of this trend towards judicial vigilance where political accountability is weak has arguably developed, as discussed earlier, in cases involving the accountability of the Executive to the legislature such as *Pape* and *Williams*.

The identification of this area as one in which judicial vigilance ought to be exercised thus offers the basis of an alternative or revised approach to the construction of future AFM provisions. Three further points may be raised in support of this view. First, as discussed in Part III, *Wilkie* has revealed a gap in the system of executive accountability to Parliament. Even where the Parliament has seen fit to reject a particular piece of legislation, the effect of *Wilkie* is that there is no inconsistency at the level of legal precedent with this fact and the subsequent use of the AFM to give effect to the same policy that was rejected by Parliament. The suggestion that this is somehow the product of parliamentary acquiescence evidences Parliament's inability to exercise adequate control over the Executive in this area. Second, the fact that Parliament has seen fit to prescribe some degree of constraint on the Minister being able to make a determination under s 10(2) ought not be circumvented. To proffer a liberal construction in favour of one that accords the words substantive effect cannot be explained as 'judicial deference where ... political accountability is inherently strong',<sup>117</sup> as such a construction inherently undermines political accountability.

The final reason offered here as justifying judicial vigilance in relation to use of the AFM relates to practical aspects of Australian political institutions. As Mantziaris writes:

Even though it does not always control the Senate, the executive nevertheless dominates the Parliament and directs most exercises of the legislative power. This allows the executive to control the choice of its own legal form and, by extension, the manner in which it will be accountable to Parliament.<sup>118</sup>

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<sup>114</sup> See *Brown v Tasmania* (2017) 261 CLR 328, 364 (Kiefel CJ, Bell and Keane JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 (French CJ, Kiefel, Bell and Keane JJ).

<sup>115</sup> Gageler (n 112) 155.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid* 152.

<sup>118</sup> Christos Mantziaris, 'The Executive: A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 125, 130.

The Senate's lack of power vis-à-vis the Executive-controlled lower House was an important factor underlying the reasoning in *Williams*.<sup>119</sup> The majority judges were willing to intervene where it was clear that the actions of the Executive were inherently capable of subverting existing channels of parliamentary scrutiny.<sup>120</sup> For Gummow and Bell JJ, the fact that the Senate would only play a limited role if the High Court gave effect to the 'common assumption' was a significant justification for doubting its existence.<sup>121</sup> In the context of the AFM, Lawson has observed that the fact that determinations made under s 10(2) are not disallowable instruments limits 'the opportunity for Parliament to prevent the anticipated expenditure'.<sup>122</sup> This argument can be put more strongly in light of *Wilkie*, as the Court's decision demonstrates the Senate's total incapacity to intervene in a determination made under the AFM. While not necessarily exhaustive, these points demonstrate a reasonable basis for expecting judicial scrutiny of the use of the AFM to ensure the accountability of government to the legislature, and to bolster the constitutional importance placed on responsible government in *Pape* and *Williams*.

## VI Conclusion

*Wilkie* raises fundamental questions as to the appropriate relationship between the Parliament, the Executive and the Judiciary. The decision has the potential to allow the Executive to circumvent parliamentary scrutiny over its use of public funds. It also raises questions as to its consistency with earlier authorities on the topic of executive expenditure. Whereas responsible government has, in the past, played an important role in influencing the High Court's approach to questions of executive accountability to Parliament, *Wilkie* may suggest that the Court sees no further role for responsible government to play in this context. Despite this, there are good reasons for thinking that the Judiciary still has a strong role to play in ensuring the Government is not able to bypass or subvert ordinary channels of parliamentary scrutiny. As Sir Maurice Byers once observed, responsible government 'springs from and is moulded by what has been done, by what is being done and by what is likely to be acceptably done'.<sup>123</sup> It is not inherently inimical, or even unusual that the Court should be willing to assert 'judicial authority to examine and, if necessary, control wider and wider areas of executive authority'<sup>124</sup> in defence of responsible government.<sup>125</sup>

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<sup>119</sup> *Williams* (n 91) 205–6 [61] (French CJ), 232–3 [136], 235 [145] (Gummow and Bell JJ).

<sup>120</sup> Orr and Isdale (n 28) 5; Amanda Sapienza, 'Comments: Using Representative Government to Bypass Representative Government' (2012) 23(3) *Public Law Review* 161, 162.

<sup>121</sup> *Williams* (n 91) 235 [145].

<sup>122</sup> Charles Lawson, 'Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32(3) *Melbourne University Law Review* 879, 909.

<sup>123</sup> Sir Maurice Byers, 'The Australian Constitution and Responsible Government' (1985) 1(3) *Australian Bar Review* 233, 233.

<sup>124</sup> *Ibid* 237.

<sup>125</sup> For a recent case, albeit one decided in a different jurisdiction, demonstrating the central role of the judiciary in defending responsible government and the role of Parliament, see *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] 4 All ER 299.