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Timing of Constitutional Facts

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Abstract

The High Court of Australia is yet to resolve the time when constitutional facts should be assessed. Instead, the Court examines constitutional facts at various points in time, including (1) the legislation's enactment; (2) the relevant application of the legislation to the plaintiff; and (3) the High Court's hearing. The time at which constitutional facts are assessed is important, as legislation can shift from valid to invalid over time where the constitutional facts underpinning the legislation's validity change. This article contends that, generally, constitutional facts should be assessed up until the High Court's hearing. It is argued that doing so is appropriate because such a timeframe is common to all persons, and enables the Court to reflect changing circumstances by assessing the validity of legislation in its most current context.

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I Introduction

The High Court of Australia ('the Court') has acknowledged that facts can be relevant to determining the constitutional validity of legislation.[1] Such facts are defined as 'constitutional facts'.[2] However, despite their importance, the Court has not developed principles to determine the *time* at which constitutional facts should

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1 *Vanderstock v Victoria* (2023) 414 ALR 161, 279 [406] (Gordon J) ('*Vanderstock*'); *Palmer v Western Australia* (2021) 272 CLR 505, 516–17 [15]–[20] (Kiefel CJ and Keane J), 547–8 [125] (Gageler J), 581–2 [227] (Edelman J) ('*Palmer*'); *Clubb v Edwards* (2019) 267 CLR 171, 222 [152] (Gageler J), 334 [470]–[471] (Edelman J) ('*Clubb*'). See also Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* 1, 5.

2 Gordon (n 1) 16; Susan Kenny, 'Constitutional Fact Ascertainment' (1990) 1(2) *Public Law Review* 134, 135; James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 769–70 ('*Zines and Stellios*').

be assessed. That is, the Court has not considered whether the validity of laws should be assessed according to facts existing at the time of (1) the legislation's enactment; (2) the legislation's application to the plaintiff; or (3) the High Court's hearing. Rather, constitutional facts are assessed at varying points in time without justification. Timing is crucial where the relevant constitutional facts are dynamic, as changes in factual circumstances may shift the law's validity.[3] That is, where an initially valid law depends upon a set of factual circumstances, and those circumstances change, the law's validity may also change.[4] Therefore, the time at which constitutional facts are assessed can be critical to determining the law's validity — warranting a principled and transparent approach.

For instance, in *Palmer v Western Australia*, the Court determined whether the severity of COVID-19 rendered Western Australia's border closure measures 'proportionate' or 'reasonably necessary'.[5] The time at which the threat of COVID-19 (a constitutional fact) was assessed became important, as the virus's severity changed over time.[6] The threat posed by COVID-19 could have been assessed from the time of the impugned legislation's enactment, the legislation's application to Mr Palmer, or the High Court's hearing. Assessing the constitutional facts at different points in time may have produced different answers concerning the legislation's validity, as COVID-19's fluctuating severity shifted the strength of the law's justification over time.[7] Nonetheless, the Court refrained from analysing the time at which constitutional facts should be assessed, reflecting a major gap in its approach to constitutional questions. The Court has never analysed the timing of constitutional facts, despite such issues arising in multiple contexts involving characterisation and constitutional guarantees.

This article contends that, generally, constitutional facts should be assessed up until the time of the High Court's hearing. The argument is advanced by five key propositions:

(1) Constitutional adjudication serves a predominantly public function, rather than serving merely private interests.[8]

(2) Orthodox constitutional and statutory interpretation principles enable the denotation or application of words to reflect changing circumstances.[9]

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3 *Hume v Higgins* (1949) 78 CLR 116, 135 (Dixon J) ('*Hume*'); *Clubb* (n 1) 334 [470] (Edelman J).

4 *Australian Textiles Pty Ltd v Commonwealth* (1945) 71 CLR 161, 180 (Dixon J) ('*Australian Textiles*'). See also Ben Ye, 'How and When Can a Constitutionally Valid Statute Become Invalid?' (2019) 30(2) *Public Law Review* 120, 134–9.

5 *Palmer* (n 1) 530 [62] (Kiefel CJ and Keane J), 537 [93] (Gageler J), 597 [264] (Edelman J), 569 [192] (Gordon J); *Quarantine (Closing the Border) Directions 2020* (WA); *Emergency Management Act 2005* (WA) ss 56, 67; *Constitution* s 92.

6 Department of Health and Aged Care (Cth), *COVID-19 Reporting* (Web Page, 2 September 2024) <https://www.health.gov.au/topics/covid-19/reporting#covid19-case-notifications>.

7 *Palmer* (n 1) 517 [20] (Kiefel CJ and Keane J). See also Rosalind Dixon and Anne Twomey, 'State Border Closures and the Section 92 Challenge in the High Court' (Speech, The Sydney Institute, 23 July 2020).

8 See below Part V.

9 See below Part VI.

(3) Due to (1), constitutional facts should generally not be constrained to those existing at the time the legislation applied to the plaintiff (causing their constitutional harm), as such periods are unique to the litigant.[10]

(4) Due to (2), constitutional facts should generally not be constrained to those existing at the time of the legislation's enactment, as doing so precludes consideration of changing circumstances — undermining orthodox principles of interpretation.[11]

(5) Due to (1) and (2), constitutional facts should generally be assessed up until the time of hearing because doing so permits statutory terms to be applied in their most current context, and such dates are common to all persons.[12]

The article is structured in seven parts. Part II examines the defining criteria of constitutional facts. Part III analyses the contexts where the timing of constitutional facts may affect the validity of legislation. Part IV suggests that, despite the importance of timing, the Court inconsistently assesses constitutional facts according to different time periods without justification. Furthermore, it is argued that the current ad hoc and inexplicit approach to timing is deficient, and could be remedied through a principled approach.

Part V argues that constitutional facts should not be constrained to the time of the plaintiff's constitutional harm, as such time periods are unique to the litigant — undermining the Court's general justice mandate in constitutional matters. Part VI contends that constitutional facts should be assessed up until the time of hearing in order to best reflect contemporary circumstances, consistent with orthodox principles of statutory and constitutional interpretation.

Part VII considers challenges and exceptions to the principles considered in Parts V and VI, acknowledging that a flexible and pragmatic approach is ultimately required. Consequently, a principled approach is proposed to resolve the time at which constitutional facts are assessed.

II Defining Constitutional Facts

Constitutional facts are general facts which assist in determining the outcome of a constitutional issue.[13] As Dixon CJ established in *Breen v Sneddon*,[14] constitutional facts possess two key defining characteristics: (1) they are 'matters of fact upon which ... the constitutional validity of some general law may depend';[15] and (2) they cannot be unique to the individual litigant.[16] Constitutional facts can determine the validity of legislation where the applicable legal standard depends upon certain

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10 See below Part V.
11 See below Part VI.
12 See below Part VI.
13 *Vanderstock* (n 1) 279 [406] (Gordon J); *Zines and Stellios* (n 2) 769–70; Kenny (n 2) 135.
14 *Breen v Sneddon* (1961) 106 CLR 406, 411–12 ('*Breen*').
15 Ibid 411, cited in *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) ('*Mineralogy*').
16 *Breen* (n 14) 411; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ) ('*Commonwealth Freighters*'). See also PH Lane, 'Facts in Constitutional Law' (1963) 37(4) *Australian Law Journal* 108, 108; Gordon (n 1) 6.

factual circumstances. As Gordon J explained in *Vanderstock v Victoria*, constitutional facts are therefore relevant to determining validity 'whenever a constitutional issue requires consideration of the "substance and actual operation" of a law'.[17] For instance, in *Palmer*, the validity of the border ban provisions depended upon whether the measures were 'reasonably necessary' — a question that depended upon facts such as the severity of COVID-19.

Constitutional facts arise in various contexts. For example, in *Thomas v Mowbray*, the terrorist threat posed by al-Qaeda in Australia was assessed to affirm the validity of 'continuing detention orders'.[18] In *Ffrost v Stevenson*, the Court assessed whether New Guinea fell within the British dominions to determine the validity of extradition legislation.[19] In *Garnishee Case No 1*, Australia's economic depression was relevant to assessing the Commonwealth's legislative scheme designed to recoup unsatisfied financial liabilities owed by state revenues.[20] And, in *Palmer*, the severity of COVID-19 was considered to determine the necessity of Western Australia's border closure legislation.[21] In each case, constitutional facts provided a basis to assess the law's validity without regard to the parties' personal circumstances.

Constitutional facts fall within a broader genus known as 'legislative facts',[22] which Davis defined as 'general facts which help … decide questions of law and policy and discretion'.[23] As Heydon J held in *Aytugrul v The Queen*, legislative facts assist in deciding 'what a common law rule should be or how a statute should be construed'.[24] Unlike constitutional facts, legislative facts can apply outside the public law context.[25] Australian authorities have largely adopted Davis's terminology,[26] accepting that constitutional facts operate as a subset within the broader category of legislative facts.[27]

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17 *Vanderstock* (n 1) 279 [406].

18 *Thomas v Mowbray* (2007) 233 CLR 307, 349–50 [83]–[88] (Gummow and Crennan JJ), 481–4 [523]–[529] (Callinan J), 523–5 [640]–[649] (Heydon J) ('*Mowbray*'); Jo Lennan, 'How to Find Facts in Constitutional Cases (2011) 30(3) *Civil Justice Quarterly* 304, 309–12.

19 *Ffrost v Stevenson* (1937) 58 CLR 528, 557 (Latham CJ); *Service and Execution of Process Act 1901* (Cth) ss 28(1)(b), 28(1A); *Fugitive Offenders Act 1881* (Imp).

20 *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155, 181–2 (Rich and Dixon JJ) ('*Garnishee Case No 1*'); *Financial Agreements (Commonwealth Liability) Act 1932* (Cth); *Financial Agreements Enforcement Act 1932* (Cth).

21 *Palmer* (n 1) 516–18 [15]–[23] (Kiefel CJ and Keane J); *Palmer v Western Australia [No 4]* [2020] FCA 1221, [363]–[364] (Rangiah J) ('*Palmer No 4*'); *Emergency Management Act 2005* (WA) ss 56, 67; *Constitution* s 92.

22 Stephen Gageler, 'Fact and Law' (2008) 11(1) *Newcastle Law Review* 1, 17.

23 Kenneth Culp Davis, *Administrative Law Text* (West Publishing, 3rd ed, 1972) 160 [7.03].

24 *Aytugrul v The Queen* (2012) 247 CLR 170, 201 [71], citing *Mowbray* (n 18) 512 [614] (Heydon J); Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) 49–50.

25 See, eg, *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 478 [65] (McHugh J) ('*Woods*').

26 *Maloney v The Queen* (2013) 252 CLR 168, 299 [352] (Gageler J) ('*Maloney*'); *Spence v Queensland* (2019) 268 CLR 355, 499 [322] (Edelman J) ('*Spence*'); *Clubb* (n 1) 343 [495]–[496] (Edelman J); *Mowbray* (n 18) 337 [42] (Gummow and Crennan JJ), 386 [226] (Kirby J), 446 [403] (Hayne J), 481 [522] (Callinan J), 514 [620] (Heydon J).

27 See, eg, *Re Day* (2017) 340 ALR 368, 374–5 [21] (Gordon J) ('*Re Day*'); *Maloney* (n 26) 299 [352] (Gageler J).

Unlike constitutional and legislative facts, adjudicative facts are facts which are *unique* to the litigant.[28] That is, adjudicative facts 'relate to the parties, their activities, their properties, [and] their businesses'.[29] For example, in *Palmer*, the plaintiff's personal motivation to travel interstate was an adjudicative fact which could not influence the validity of the border closure legislation.[30] Indeed, Dixon CJ distinguished between[31] (1) personal 'questions of fact which arise between the parties' (adjudicative facts); and (2) general 'matters of fact upon which … the constitutional validity of some general law may depend' (constitutional facts). Courts continue to maintain this distinction.[32] While adjudicative facts cannot determine the validity of legislation, Justice Michelle Gordon has written extra-curially that they can determine whether a constitutional issue is merely 'hypothetical' and, in turn, whether the Court should, according to its 'prudential' approach, refrain from deciding the constitutional issue.[33]

Importantly, not all facts in constitutional litigation are constitutional facts. For example, in *Re Day*, the applicant defined facts about Mr Day's personal circumstances as constitutional facts because the ultimate issue was constitutional in nature.[34] However, Gordon J rejected this submission for 'fail[ing] to recognise the distinction between "adjudicative facts" and "legislative facts"'.[35] Instead, facts which arise in constitutional litigation remain classified as adjudicative facts if they are peculiar to the litigant.

Distinguishing between constitutional and adjudicative facts is important because the common law and statutory uniform rules of evidence do not apply to constitutional facts.[36] That is, as Heydon J explained in *Mowbray*, constitutional facts can be adduced 'independently' of evidential rules,[37] because such 'rules were never directed to constitutional facts'.[38] Instead, constitutional facts are adduced through flexible procedures, such as the Court's expanded conception of 'judicial notice'.[39]

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28 *Mineralogy* (n 15) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Woods* (n 25) 478 [65] (McHugh J). In the American context, see generally David Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford University Press, 2008) ch 1.

29 Kenneth Culp Davis, 'Judicial Notice' (1955) 55(7) *Columbia Law Review* 945, 952–3, cited in Gageler (n 22) 17–18; *Re Day* (n 27) 374–5 [21] (Gordon J).

30 *Palmer* (n 1) 532 [73] (Kiefel CJ and Keane J).

31 *Breen* (n 14) 411, cited in Lane (n 16) 108.

32 *Mineralogy* (n 15) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Re Day* (n 27) 374–5 [21] (Gordon J), citing *Breen* (n 14) 411 (Dixon CJ).

33 Gordon (n 1) 11–16.

34 *Re Day* (n 27) 374 [20] (Gordon J).

35 Ibid 268–9 [21], citing *Breen* (n 14) 411 (Dixon CJ).

36 *Mowbray* (n 18) 517 [629] (Heydon J).

37 Ibid.

38 Ibid 516 [628].

39 Gageler (n 22) 10–11. See also *Deputy Commissioner v Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 794–5 (Evatt J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196 (Dixon J) ('*Communist Party Case*').

III Contexts where the Timing of Constitutional Facts Affects the Validity of Legislation

This Part argues that the timing of constitutional facts is important because legislation can shift from valid to invalid depending upon when the constitutional facts are assessed. An initially valid law may be rendered unlawful where (1) the law's validity depends upon a specific set of factual circumstances; and (2) those factual circumstances change over time.[40] Therefore, timing is critical if the law's validity depends on constitutional facts which are capable of changing over time. Such dynamic constitutional facts may alter the validity of laws by changing the scope of the underlying constitutional head of power; the operation, purpose or practical effect of legislation; and, relatedly, the strength of the law's justification or 'reasonable necessity'. It is therefore argued that the timing of constitutional facts is important because dynamic constitutional facts arise in the contexts of characterisation, constitutional guarantees and inconsistency under s 109 of the *Australian Constitution*.

A *Characterisation*

Timing issues can arise in multiple contexts involving characterisation. The characterisation process involves determining whether legislation is supported by a subject matter or purpose prescribed by s 51 of the *Constitution*.[41] Such processes can engage dynamic constitutional facts, raising temporal issues, as Dixon CJ explained in *Australian Textiles v Commonwealth*: 'A law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further.'[42] The powers concerning trade and commerce, defence, aliens, race and external affairs, and the incidental powers, each rely upon factual circumstances which can change, raising issues relating to the time at which constitutional facts are assessed. For instance, the defence power's scope expands and contracts depending on the threat of hostilities towards Australia.[43] Constitutional facts which impact the defence power's scope include the 'nature and dimensions of the conflict ... actual and apprehended dangers, exigencies and course of the war'.[44] Therefore, as Dixon J established in *Andrews v Howell*, legislation justified under the defence power 'depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law'.[45] Or, as Ye explains, 'the scope of the defence power waxes and wanes as the constitutional facts change'.[46]

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40 *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 81 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ) ('*Foster*').

41 James Stellios, 'Constitutional Characterisation: Embedding Value Judgements about the Relationship between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277, 278.

42 *Australian Textiles* (n 4) 180, cited in JD Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235, 235.

43 *Foster* (n 40) 81; *Communist Party Case* (n 39) 222 (Williams J).

44 *Andrews v Howell* (1941) 65 CLR 255, 278 (Dixon J) ('*Howell*'), quoted in Carter (n 24) 118–19.

45 *Howell* (n 44) 278.

46 Ye (n 4) 134.

The capacity for initially valid legislation to become invalid due to changing constitutional facts is exemplified by contrasting *Australian Textiles* with *R v Foster*.[47] In 1945, the majority in *Australian Textiles* upheld legislation concerning 'Female Minimum Payment Rates'[48] as the war's recent conclusion necessitated a transitionary period.[49] Nonetheless, Dixon J acknowledged that where a power relies upon a set of dynamic facts, the 'measure cannot outlast the facts as an operative law'.[50] That is, once the threat of warfare ceased, the law's validity could be extinguished. Four years later, in *R v Foster*, the same legislative measures upheld in *Australian Textiles* were struck down because 'all the reasons which provided at the time a foundation for this exercise of the defence power have now disappeared'.[51] Therefore, changes to Australia's perceived threat of warfare shifted the legislation from valid to invalid over time.[52]

The timing of constitutional facts can also affect laws justified under the external affairs power.[53] In *XYZ v Commonwealth*, Callinan and Heydon JJ criticised the 'international concern' test for fluctuating according to changing facts because 'at different times a matter may not be of international concern, may then become of international concern, and may then cease to be of international concern again'.[54] Their Honours explained that such tests enabled initially valid legislation to become invalid.[55] For example, in *Polyukhovich v Commonwealth*, Brennan J questioned whether prosecuting World War II war criminals remained an 'international concern' in 1991, thereby enabling the law's validity to 'alter from time to time'.[56] Furthermore, as Ye explains, under the treaty implementation limb of the power, where treaties are entered, and then subsequently revoked, the implementing legislation's validity ceases (as occurred with Australia's bilateral treaty with Nauru).[57]

In the context of the aliens power, Justice James Edelman has noted extra-judicially that the defining features of alienage rely upon dynamic constitutional facts because notions of subjecthood and citizenship have evolved.[58] For instance,

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47 *Foster* (n 40).

48 *National Security Act 1939* (Cth) s 5; *National Security (Female Minimum Rates) Regulations 1944* (Cth) reg 4A.

49 *Australian Textiles* (n 4) 171 (Rich J), 179–80 (Dixon J), 182–3 (McTiernan J). Cf at 174–5 (Starke J).

50 Ibid 181, cited in *Zines and Stellios* (n 2) 776 n 235.

51 *Foster* (n 40) 86–8 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ). See also Ye (n 4) 124.

52 See also (in the context of terrorism) *Mowbray* (n 18) 349–50 [83]–[88] (Gummow and Crennan JJ), 481–4 [523]–[529] (Callinan J), 523–5 [640]–[649] (Heydon J).

53 *Constitution* s 51(xxix).

54 *XYZ v Commonwealth* (2006) 227 CLR 532, 608 [218] ('*XYZ*'), citing *Soulitopoulos v LaTrobe University Liberal Club* (2002) 120 FCR 584, 598 [51], 599 [53] (Merkel J). See also *Zines and Stellios* (n 2) 776 n 235.

55 *XYZ* (n 54) 607–9 [217]–[219]. See also Elizabeth Brumby, 'The Effect of Treaty Withdrawal on Implementing Legislation' (2019) 47(3) *Federal Law Review* 390, 407.

56 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 555, 562; Brumby (n 55) 407.

57 Ye (n 4) 136; *Republic of Nauru v WET040* (2018) 361 ALR 405, 407 [7] (Gageler, Nettle and Edelman JJ) ('*Republic of Nauru*').

58 Justice James Edelman, 'Original Constitutional Lessons: Marriage, Defence, Juries, and Aliens' (2022) 47(3) *Monash University Law Review* 1, 15–16.

modern social values have extinguished the racist 'alien race' concept.[59] Likewise, in *Ame*, Papua New Guinea's independence from Australia expanded the aliens power to include persons from Papua.[60]

In *Kartinyeri v Commonwealth*, Gaudron J similarly held that laws justified under the race power 'may lose [their] constitutional support if circumstances change'.[61] Finally, laws justified under the trade and commerce power can be susceptible to changing constitutional facts. In *Airlines Case No 2*, the regulation of both intrastate and interstate air navigation was held to be valid because separating the two systems was logistically impracticable (in 1965).[62] However, if regulating intrastate and interstate air traffic became viable due to technological advancements, the law's validity could shift. Consequently, timing issues arise in multiple contexts during the characterisation process.

B *Constitutional Guarantees*

Timing issues concerning constitutional facts can also influence the validity of legislation that engages constitutional guarantees. Laws engaging constitutional guarantees such as those in s 92 of the *Constitution*, the implied freedom of political communication and voting rights cases must generally be justified according to a test of 'structured proportionality'[63] or 'reasonable necessity'.[64] Both tests require the balancing of competing interests, and are 'underpinned' by 'questions of fact', raising temporal issues.[65]

In the context of s 92, Dixon CJ acknowledged in *Armstrong v Victoria [No 2]* that changing facts could influence the validity of legislation:

> If now there is no interference with the freedom of inter-State trade commerce and intercourse there cannot be any present violation of s 92. If tomorrow the facts change so that the operation of the enactment changes too and s 92 is violated … then s 92 will doubtless prevail over it.[66]

In the same case, Williams J saw 'no reason why an Act which is valid may not subsequently become invalid from change of circumstances'.[67] Such possibilities materialised in *Sportodds v New South Wales*, where the impugned gambling legislation's initial 'legitimate purpose' of regulating a 'social evil' eroded due to the growing 'use of electronic gambling … the "privatisation" of what were

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59 Ibid.

60 *Ex parte Ame* (2005) 222 CLR 439, 459 [37] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See also *Chetcuti v Commonwealth* (2021) 392 ALR 371, 373 [5]–[6] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 381 [39] (Gordon J), 397 [93]–[94] (Edelman J).

61 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 367 [43], quoted in Brumby (n 55) 407.

62 *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 ('*Airlines Case No 2*'), cited in Kenny (n 2) 136.

63 *Palmer* (n 1) 530 [62] (Kiefel CJ and Keane J), 597 [264] (Edelman J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 615 [42] (Kiefel CJ, Bell and Keane JJ), 638 [110] (Nettle J) ('*Unions NSW*').

64 *Palmer* (n 1) 559–60 [166] (Gageler J), 571 [196] (Gordon J).

65 Carter (n 24) 57. See also Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 100–1.

66 *Armstrong v Victoria [No 2]* (1957) 99 CLR 28, 48–9 ('*Armstrong*').

67 Ibid 73.

government-owned gambling monopolies … and the active promotion by governments of gambling events'.[68]

Other dynamic constitutional facts have appeared in the s 92 context, concerning the fluctuating severity of COVID-19;[69] the diminishing population of crayfish in Tasmania;[70] the increasing environmental threats posed by non-refillable bottles;[71] and the evolving 'cross-elasticity of demand' across the states in Australia's 'national wagering market'.[72] Consequently, the timing of constitutional facts can influence the validity of legislation which engages s 92.

The implied freedom of political communication engages a structured proportionality test which assesses the suitability, necessity and adequacy of the legislative measure.[73] As Appleby and Carter explain, these limbs involve facts concerning the law's purpose, operation and 'likely consequences or effects' and the 'availability of alternative measures' — which can evolve.[74] The Court in *Lange v Australian Broadcasting Corporation* explained that the implied freedom relies upon 'changing circumstances' concerning 'modern competing needs, values and preferences'.[75] For example, in *McCloy v New South Wales*, the threat of political corruption posed by property developers was assessed in order to determine the need for statutory political donation restrictions.[76] If corruption threats diminished over time, the need for such restrictions could be lessened — potentially invalidating the legislation.

Finally, for voting rights cases, McTiernan and Jacobs JJ recognised in *McKinlay* that 'while the essence of representative democracy remains unchanged, the method of giving expression to the concept varies over time and according to changes in society'.[77] Toohey J also held in *McGinty v Western Australia* that Australia's constitutional democracy 'cannot be frozen', but instead must adapt to 'political, social and economic developments'.[78] Similarly, in *Murphy v Electoral Commissioner*, Merkel QC submitted on behalf of the plaintiff that technological

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68 *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63, 78 [38] (Branson, Hely and Selway JJ), cited in *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 235 (Gageler SC) (during argument) ('*Betfair No 2*').

69 *Palmer* (n 1).

70 *Cole v Whitfield* (1988) 165 CLR 360, 383 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

71 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

72 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 481 [122] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) ('*Betfair No 1*'), quoted in Carter (n 24) 131.

73 *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'). Cf at 235–7 [141]–[148] (Gageler J), 288–9 [338]–[339] (Gordon J).

74 Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259, 264.

75 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 565 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27(3) *Federal Law Review* 323, 336.

76 *McCloy* (n 73) 250 [194] (Gageler J), 261–2 [233] (Nettle J), 292–3 [359] (Gordon J).

77 *A-G (Cth) (ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 36 ('*McKinlay*'). See also at 69 (Murphy J).

78 *McGinty v Western Australia* (1996) 186 CLR 140, 200 ('*McGinty*').

developments rendered the week-long closure of the rolls period obsolete because 'the *Constitution* is not blind to changes in facts of constitutional significance'.[79]

C *Inconsistency*

Timing issues also arise in the context of inconsistency between state and Commonwealth laws. Where a Commonwealth statute is inconsistent with state legislation, the Commonwealth statute prevails such that the state law ceases operation 'so long as the inconsistency remains'.[80] Therefore, as Williams J expressed in *Armstrong*, state legislation may shift from operative to inoperative due to the enactment of a 'paramount Commonwealth law'.[81] Conversely, the fact that a Commonwealth law has been repealed can shift the state law back into operation.[82] These events occurred in *Wenn v Attorney-General (Vic)* and *Butler v Attorney-General (Vic)*.[83]

In *Wenn*, Commonwealth legislation was enacted in a manner which was inconsistent with Victorian legislation — rendering the state law inoperative.[84] However, 13 years later in *Butler*, the same Commonwealth law was repealed — resulting in the Victorian legislation regaining operation.[85] That is, due to the changing status of a Commonwealth law, the operation of the Victorian statute shifted from operative to inoperative to operative again. As Higgins J acknowledged in 1920, state laws operate dynamically under s 109 — 'subject to the pressure of the Federal Act — like Jack-in-the-box under his lid'.[86]

Similar issues may occur where state and Commonwealth legislation operates 'concurrently'.[87] In this context, the relevant inconsistency between state and Commonwealth legislation 'emerges only upon their application or exercise'.[88] For example, in the *Kakariki Case*,[89] state and Commonwealth legislation both established powers to remove sunken ships from coastal waters.[90] The Court held that if Commonwealth authorities attempted to remove a particular ship, the state legislation would lose operation over that same wreck.[91]

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79 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 31 (R Merkel QC) (during argument) ('*Murphy*'). See also *Electoral Act 1918* (Cth) ss 94A(4), 95(4), 96(4), 155.

80 *Commonwealth v Western Australia* (1999) 196 CLR 392, 417 (Gleeson CJ and Gaudron J) ('*Mining Act Case*'), citing *Constitution* s 109.

81 *Armstrong* (n 66) 73.

82 *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), quoted in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law* (Federation Press, 7th ed, 2018) 394 [11.5].

83 *Wenn v A-G (Vic)* (1948) 77 CLR 84 ('*Wenn*'); *Butler v A-G (Vic)* (1961) 106 CLR 268 ('*Butler*').

84 *Wenn* (n 83) 113–14 (Latham CJ), 121–2 (Dixon J); *Discharged Servicemen's Preference Act 1943* (Vic); *Re-establishment and Employment Act 1945* (Cth).

85 *Butler* (n 83) 284–6 (Taylor J), 286–7 (Windeyer J).

86 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23, 33 (Higgins J), quoted in *Spence* (n 26) 488 [297] (Edelman J).

87 See, eg, *Victoria v Commonwealth* (1937) 58 CLR 618 ('*Kakariki Case*').

88 Williams, Brennan and Lynch (n 82) 406 [11.28].

89 *Kakariki Case* (n 87).

90 *Marine Act 1928* (Vic) s 13; *Navigation Act 1935* (Cth) s 329.

91 *Kakariki Case* (n 87) 632 (Dixon J).

Similarly, in the *Mining Act Case*,[92] a portion of land was encumbered by a state mining licence,[93] yet was also prescribed by Commonwealth legislation as a 'defence practice area'.[94] The majority held that the state mining licence could only operate if the land was not used for defence purposes.[95] Therefore, depending on the defence force's use of the land, the mining licence would move in and out of operation.[96]

IV The Necessity of a Principled Approach to Timing

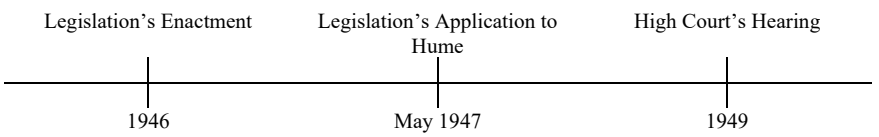
This Part argues that the Court assesses constitutional facts at inconsistent points in time, without justification, and that the current approach is deficient, demanding a principled solution.

A *Assessing Constitutional Facts at Inconsistent Points in Time*

The Court ascertains constitutional facts from varying points in time, including (1) the legislation's enactment; (2) the relevant application of the legislation to the plaintiff; and (3) the High Court's hearing. In some matters, different judges assess constitutional facts at different points of time in the same matter, as occurred in *Hume v Higgins*, a World War II defence power case.[97] *Hume* concerned the validity of a statute passed in 1946 which criminalised the contravention of post-war munitions requirements.[98] On 1 May 1947, Mr Hume violated the statute, resulting in his arrest and conviction. In 1949, the Court heard Hume's appeal against his conviction on the basis that the legislation could no longer be supported by the defence power.

Hume argued that the legislation was invalid because, by 1947, the scope of the defence power had contracted significantly due to the reduced threat of war. As Figure 1 shows, the threat of hostilities in Australia could have been assessed at the time of the legislation's enactment, in 1946; the legislation's application to Hume, causing his arrest (and constitutional harm) on 1 May 1947; or the High Court's hearing, in 1949.

Figure 1: Possible times to assess the threat of hostilities



92 *Mining Act Case* (n 80).
93 *Mining Act 1978* (WA) ss 8(1), 18, 27.
94 *Defence Force Regulations 1952* (Cth) reg 49(1). See also *Lands Acquisition Act 1989* (Cth) pt X.
95 *Mining Act Case* (n 80) 417 (Gleeson CJ and Gaudron J).
96 Ibid.
97 *Hume* (n 3).
98 *Defence (Transitional Provisions) Act 1946* (Cth) s 15; *National Security (Economic Organization) Regulations 1946* (Cth) reg 21(b).

Rich J assessed Australia's threat of hostilities at the time of the legislation's enactment in 1946.[99] In contrast, Williams J assessed the threat of war at the time the legislation applied to the plaintiff, in 1947.[100] Meanwhile, Dixon J assessed different factual issues at varying points in time — including the legislation's enactment and application in 1946 and 1947.[101] No explanation was provided to justify the time at which the constitutional facts were assessed. This is despite their Honours acknowledging that the law's validity could change over time due to the possibility that '[d]uring the year … the defence power had in the meantime contracted and the regulation could no longer be supported under that power'.[102] The timing issue which arose in *Hume* remains unresolved, as examined below.

1 *Time of Enactment*

The orthodox position in Australian constitutional law is to assess validity from the time of the legislation's enactment.[103] Therefore, as Edelman J stated in *Clubb v Edwards*, ordinarily the validity of legislation is 'considered based on the circumstances at the time that the law was enacted'.[104] That is, constitutional facts are often assessed at the time the law was passed.[105] However, the remaining issue is whether the Court can also consider facts which arise *after* the legislation's enactment: 'It is far more controversial for the enquiry to assess [the law's validity] … taking into account unforeseeable subsequent, potentially radical, changes in facts and circumstances.'[106] The argument against assessing facts after the legislation's enactment, which this article seeks to refute in Part VI, is that it may result in legislation shifting from valid to invalid due to changing facts.[107] That is, accounting for subsequent developments may result in the legislation becoming 'invalid only from a future point in time rather than being void ab initio'.[108] Consequently, certain judges claim that facts should be constrained to those existing when the law was enacted.[109] For instance, in *Murphy* Keane J rejected the plaintiff's submission that changing technological circumstances could invalidate certain voting restrictions, stating:

> It is the function of Parliament to make laws in order to change the world. To assert that changes in the world may unmake laws made by Parliament is to assert the existence of an exception to this understanding of the role of Parliament.[110]

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99 *Hume* (n 3) 126–7.
100 Ibid 140–1.
101 Ibid 135–6.
102 Ibid 135 (Dixon J).
103 *South Australia v Commonwealth* (1942) 65 CLR 373, 408 (Latham CJ) ('*First Uniform Tax Case*'); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 564–5 [79] (McHugh J), cited in Ye (n 4) 121 n 13.
104 *Clubb* (n 1) 334 [470].
105 Ibid. See also Holmes (n 42) 235.
106 *Clubb* (n 1) 334 [470] (Edelman J).
107 Ibid 334 [470]–[471] (Edelman J).
108 Ibid. See also Ye (n 4) 121–6.
109 *Murphy* (n 79) 54–5 [42] (French CJ and Bell J), 93 [199] (Keane J); *XYZ* (n 54) 608 [218] (Callinan and Heydon JJ).
110 *Murphy* (n 79) 93 [199]), quoted in Brumby (n 55) 405.

Keane J's use of the word 'exception' highlights the flexibility in this starting position. Furthermore, as contended in Part VI, the Court should, in most cases, not be constrained to facts existing at the time of enactment, as being so constrained would prevent the application or denotation of legislation and the *Constitution* from being interpreted according to contemporary circumstances. Consequently, in other cases, the Court has assessed constitutional facts *after* the legislation's enactment — such as at the time of the plaintiff's constitutional harm and the time of hearing.

2 *Time of Constitutional Harm*

Various judges and counsel have suggested that constitutional facts should be assessed up until the time that the legislation applied to the plaintiff, causing their constitutional harm. For example, in *Betfair No 2* Gageler SC submitted that constitutional facts 'should be determined at the time of the events underpinning the proceeding'.[111] In contrast, McLeish SC submitted in the same case that 'the relevant time for the inquiry as to its practical effect is the *time of enactment*'.[112] The question of timing remained unresolved in *Betfair No 2*, as the Court refrained from deciding the issue.

In *Sportsbet v Victoria*, Gordon J rejected constraining constitutional facts to the point of the legislation's enactment as the 'questions of fact [were] capable of changing over time'.[113] That is, the time of enactment was unsuitable as technological advancements had altered the legislation's 'practical operation'.[114] Therefore, Gordon J assessed the facts up until the time of 'the event which underpinned the constitutional challenge'.[115] In doing so, her Honour assessed facts up until the point of the plaintiff's constitutional harm, consistent with previous authorities such as *Sue v Hill*.[116] In that case, Australia's international relations with the United Kingdom was assessed at the time the impugned legislation applied to the plaintiff, rather than the time of the legislation's enactment.[117] This shows that constitutional facts have been assessed from various points in time.

3 *Time of Hearing*

Finally, constitutional facts have been assessed by the Court up until the time of hearing. For example, in *Garnishee Case No 1*, Rich and Dixon JJ assessed the 'conditions which at *present* prevail' when considering the law's validity.[118] Similarly, in *Combet v Commonwealth* the majority determined that 'no Bill … had been introduced by the time oral argument of the present matter was heard in this court'.[119] Likewise, in *Foster* the Court assessed the diminished threat of war at the

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111 *Betfair No 2* (n 68) 235 (Gageler SC) (during argument).
112 Ibid 237 (McLeish SC) (during argument) (emphasis added).
113 *Sportsbet Pty Ltd v Victoria* (2011) 282 ALR 423, 452 [127].
114 Ibid.
115 Ibid 452 [129].
116 *Sue v Hill* (1999) 199 CLR 462, 487 [49] (Gleeson CJ, Gummow and Hayne JJ) ('*Sue*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 36–7 (Brennan CJ), 62 (Dawson J), 84–5 (Toohey J) ('*Kruger*').
117 *Sue* (n 116) 487 [49] (Gleeson CJ, Gummow and Hayne JJ).
118 *Garnishee Case No 1* (n 20) 181 (emphasis added).
119 *Combet v Commonwealth* (2005) 224 CLR 494, 558 [105] (Gummow, Hayne, Callinan and Heydon JJ).

time of hearing to determine that the defence purposes of the legislation 'have now disappeared'.[120] Most recently, in *Palmer*, the plaintiff made 'factually intensive' submissions that Western Australia's border closure measures could not 'be justified at the time of hearing'.[121]

There also exists some academic support for the consideration of constitutional facts up until the time of hearing. Holmes suggested in 1949 that courts may wish to assess facts 'at the time of challenge to the legislation'.[122] Similarly, Barak explained that proportionality tests 'must be satisfied during enactment as well as during a constitutional review of the limiting law by the courts'.[123]

B *The Necessity for a Principled Approach*

This section argues that the Court's currently inconsistent and non-transparent approach to the timing of constitutional facts is deficient, demanding a principled approach. The problem lies not merely in the Court's inconsistent approach to timing, without explicit justification, but also its failure to consider the issue at all (as in *Palmer*). There are three key reasons why such approaches are unsatisfactory.

First, it is contended that neglecting issues of timing undermines the Court's obligation to ascertain constitutional facts effectively. As Dixon CJ explained in *Commonwealth Freighters*, the Court has a constitutional obligation to ascertain constitutional facts 'as best it can'.[124] That is, as Williams J noted in the *Communist Party Case*, 'it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation'.[125] As Gordon J held in *Vanderstock*, the Court's duty to ascertain constitutional facts effectively lies in its institutional role as 'custodian of the *Constitution*'.[126] This is because poor consideration of constitutional facts can undermine the rectitude of decisions involving constitutional issues:

> The Court's reticence to decide constitutional issues … [applies] where the Court has an incomplete understanding of the constitutional facts that may be relevant to validity; it is undesirable to decide constitutional cases 'where large issues of legal principle and legal policy are at stake', and where the issues have profound significance for the Australian polity. Bad facts — absent facts — can make bad law.[127]

It is contended that a precondition to ascertaining the relevant constitutional facts is determining the time at which the constitutional facts should be assessed. If the Court is unclear or imprecise in identifying the time at which it is assessing constitutional facts, it cannot know which constitutional facts are necessary to resolve the constitutional issue. For instance, in *Palmer*, without a clear conception

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120 *Foster* (n 40) 86–8 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).
121 *Palmer* (n 1) 548 [125] (Gageler J).
122 Holmes (n 42) 235.
123 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 331.
124 *Commonwealth Freighters* (n 16) 292, quoted in *Vanderstock* (n 1) 279–80 [407] (Gordon J).
125 *Communist Party Case* (n 39) 222.
126 *Vanderstock* (n 1) 280 [408].
127 Ibid 280–1 [409] (Gordon J) (citations omitted).

of the time at which constitutional facts should be assessed, it was impossible to gauge the relevant time at which the severity of COVID-19 should be considered. This in turn confused the analysis of whether the border ban was 'reasonably necessary' because it remained unclear whether the necessity of the provision should be assessed according to infection rates as at the time of the legislation's enactment or the time of the hearing. A principled approach to the timing issue would enable the Court to systematically determine which constitutional facts should be considered — and at what time — satisfying its obligation to ascertain constitutional facts as best it can.

Secondly, it is contended that the current approach to timing is unclear and non-transparent, creating uncertainty for litigants and judges. As Justice Michelle Gordon has explained extra-curially, the Court must ensure that 'developments in constitutional law, are principled, coherent and clear'.[128] In this context, constitutional facts are 'important and need better and more considered attention'.[129] It is argued that the Court's currently imprecise, inconsistent and non-transparent approach to the time at which constitutional facts are assessed (and in turn, the time at which the validity of the law is determined) undermines certainty and coherence in the development of constitutional law.

For example, even if the *outcomes* in *Murphy* and *Palmer* were correct, the method by which constitutional facts were assessed remains unclear. That is, it remains uncertain why, in cases such as *Murphy*, technological developments could not be considered beyond the point of the legislation's enactment, but in *Palmer* developments in the severity of COVID-19 were assessed beyond the point of the legislation's enactment. Such diametrically opposed approaches seem unjustified without an explicit explanation as to why a specific time period is appropriate.

Thirdly, and relatedly, where the Court refrains from expressly considering the time at which constitutional facts are assessed, it is unclear at what point in time the validity of the legislation is being assessed — creating the risk that judges are deciding different issues in the same case. In *Betfair No 2* and *Hume*, the Court did not explicitly state the time at which it was assessing the relevant constitutional facts. As acknowledged above in Part IV(a)(2), in *Betfair No 2* Gageler SC submitted that the constitutional facts should be assessed at the time of the constitutional harm, while McCleish SC argued in favour of the time of enactment. Despite these submissions, the Court did not consider the issue of timing, leaving open uncertainty as to the time at which the law's validity was determined.

Failing to consider the issue of timing creates risks that different judges may be deciding the legislation's validity according to different time periods. For instance, as explained above in Part IV(A), in *Hume* Rich J, Williams J and Dixon J each determined the law's validity according to different time periods, without explicitly acknowledging their differences as to timing. Given the capacity for legislation to shift from valid to invalid over time due to changing constitutional facts, the failure to consider the point at which such facts are assessed creates substantial risks of incoherence and inconsistency. Consequently, it is argued that a

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[128] Gordon (n 1) 2.
[129] Ibid 16.

principled and transparent approach to the timing issue is necessary, in order to avoid uncertainty and to ensure that the Court fulfils its obligation to ascertain constitutional facts as best it can.

V Against the Time of the Plaintiff's Constitutional Harm

This Part argues that the Court's predominantly general justice mandate in constitutional matters makes it inappropriate to constrain constitutional facts to those existing at the time of the plaintiff's constitutional harm. The principles concerning general justice are rarely expressly articulated, but are intuitive to most constitutional lawyers and scholars. General justice requires constitutional adjudication to be conducted according to factors which are common to all persons.[130] That is, general justice principles require legal issues to be adjudicated according to considerations which apply to all persons — not merely the individual litigants.[131]

The Court's general justice mandate in constitutional matters is highlighted by its unique function in such matters. As Gordon J has explained, the

> Court, as custodian of the *Constitution*, has a duty to enforce the *Constitution*, and fulfilment of that duty (and, therefore determining the validity of a law …) cannot be made to depend on which litigant is better prepared or better resourced.[132]

For this reason, as Kirby J explained in *Wurridjal v Commonwealth*, the Court's duty 'in constitutional cases … necessarily goes beyond the interests and submissions of the particular parties to litigation'.[133] In contrast to the Court's general justice mandate in constitutional matters, individual justice enables the Court to consider factors which are unique to the litigant.[134]

The time of the plaintiff's constitutional harm inhibits the Court's general justice function because such a timeframe is unique to the individual. Consequently, subject to limited exceptions, constitutional facts should not be constrained to those existing up until the time the legislation caused the plaintiff's constitutional harm. This is primarily because, as Justice Michelle Gordon has explained, 'constitutional validity cannot be made to depend upon the conduct of parties to private litigation'.[135]

It is contended in the next sections that the Court's general justice function in constitutional matters is evidenced by the general application of constitutional interpretations to the entire Australian body politic;[136] the Court's special leave and

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130 *Communist Party Case* (n 39) 276 (Kitto J); *Gerhardy v Brown* (1985) 159 CLR 70, 141–2 (Brennan J) ('*Gerhardy*').
131 *Communist Party Case* (n 39) 276 (Kitto J); *Gerhardy* (n 130) 141–2 (Brennan J).
132 *Vanderstock* (n 1) 280 [408] (citations omitted). See also Gordon (n 1) 20.
133 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 313, quoted in Gordon (n 1) 20.
134 *Breen* (n 14) 411 (Dixon CJ); *Commonwealth Freighters* (n 16) 292 (Dixon CJ).
135 Gordon (n 1) 18 (citations omitted).
136 *Communist Party Case* (n 39) 276 (Kitto J), cited in Lane (n 16) 112–13.

jurisdictional requirements;[137] and the general framing of constitutional guarantees.[138]

A *General Application of Constitutional Adjudication*

General justice is necessary in constitutional matters because the Court's interpretation of the *Constitution*, and its ruling on the validity of legislation, apply to the entire Australian body politic.[139] Or, as Gordon J put it in *Vanderstock*, constitutional issues are not the 'exclusive concern of the litigating parties' because 'the interpretation of the *Constitution* affects all people in Australia'.[140] That is, as Kitto J established in the *Communist Party Case*, the Court's ruling on the validity of legislation applies to everyone — not just the individual litigant: 'Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce.'[141]

The Court's general justice approach is reflected by its sole reliance upon constitutional facts, as Kitto J established that only facts 'common to all persons' can 'affirm the validity of a measure'.[142] That is, as Brennan J held in *Gerhardy v Brown*, the 'validity and scope of a law cannot be made to depend on the course of private litigation'. And the Court justifies a general justice approach on the basis that the 'legislative will is not surrendered into the hands of the litigants'.[143] Therefore, due to the general application of constitutional decisions, deciding constitutional facts at the time of constitutional harm is likely impermissible, as it depends on factors unique to the litigant. It is nonetheless acknowledged below in Part VII that exceptions to this general principle exist. For instance, there may be situations where the time of harm coincided with a general harm which had receded by the time of hearing.

B *Special Leave and Jurisdiction*

The Court's general justice approach is further exemplified by its special leave and jurisdictional rules. Constitutional appeals are heard not as of right, but instead rely on general factors such as the matter's 'public importance' before special leave is provided.[144] Sir Anthony Mason explained that the special leave requirements highlight that the High Court's predominant function is to 'serve [the] public interest' rather than litigants' private interests.[145] Similarly, as Dawson J provided

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137 *Judiciary Act 1903* (Cth) s 35A ('*Judiciary Act*'); Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 20.

138 *Wotton v Queensland* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 23–4 [54] (Heydon J), 31 [80] (Kiefel J) ('*Wotton*'); *Palmer* (n 1) 564 [180] (Gordon J).

139 *Communist Party Case* (n 39) 276 (Kitto J).

140 *Vanderstock* (n 1) 280 [408].

141 *Communist Party Case* (n 39) 276.

142 Ibid; Leslie Zines, *The High Court and the Constitution* (Butterworths, 2nd ed, 1987) 101.

143 *Gerhardy* (n 130) 141–2, cited in *Mowbray* (n 18) 519 [634] (Heydon J).

144 *Judiciary Act* (n 137) s 35A(a)(i).

145 Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 4, 10. See also Pam Stewart and Anita Stuhmcke, 'Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia' (2019) 41(1) *Sydney Law Review* 35, 39.

in *Morris v The Queen*, the Court must 'place greater emphasis upon its public role in the evolution of the law than upon the private rights of the litigants before it'.[146]

The Court's original and appellate jurisdiction similarly reflects the Court's general justice function.[147] The 'matter' requirement ostensibly prioritises consideration of the plaintiff's individual circumstances by examining the plaintiff's 'right or privilege or protection given by law'.[148] However, such requirements have been broadly construed in the constitutional context because a matter 'cannot be identified without regard to the remedies available in the court where it is litigated'.[149] Therefore, as Lindell explains, the definition of a 'matter' has been expanded by 'the broad scope which the High Court has given to the declaratory judgment remedy in public law litigation'.[150] Consequently, as the majority held in *Palmer v Ayres*, irrespective of whether an individual right has been established, only a '*claim* is necessary'.[151] Therefore, the matter requirement highlights that general justice can only be achieved through an individual bringing a claim and enlivening the Court's jurisdiction.[152] Nonetheless, the special leave and jurisdictional requirements reflect the Court's predominantly 'public role', rather than focusing upon the individual claimant's rights.

C *Framing of Constitutional Guarantees*

The importance of general justice is further reflected by the Court's framing of constitutional guarantees in general rather than individual terms. Australia's *Constitution* lacks an 'express conferral of rights which individuals may enforce'.[153] Instead, Australia's constitutional guarantees establish general constraints on governmental power. That is, as Dawson J established in *Brown v The Queen*, Australia's *Constitution* 'almost without exception, deals with the structure and relationships of government rather than with individual rights or freedoms'.[154] Dixon J similarly stated in *Melbourne Corporation* that the *Constitution* primarily 'deals with government and governmental powers'.[155] Such views are consistent with the Court's interpretation of constitutional guarantees including the implied freedom of political communication, s 92 and the right to trial by jury.

For example, in *Wotton v Queensland*, the Court acknowledged that the implied freedom of political communication operates as 'a limitation upon

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146 *Morris v The Queen* (1987) 163 CLR 454, 475.
147 *Constitution* ss 73, 75, 76.
148 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265–6 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
149 *Abebe v Commonwealth* (1999) 197 CLR 510, 529 [36] (Gleeson CJ and McHugh J). See *Re McBain* (2002) 209 CLR 372, 407 [67]–[69] (Gaudron and Gummow JJ).
150 Lindell (n 137) 20.
151 *Palmer v Ayres* (2017) 259 CLR 478, 491 [27] (Kiefel, Keane, Nettle and Gordon JJ) (emphasis in original).
152 *University of Wollongong v Metwally* (1984) 158 CLR 447, 457–8 (Gibbs CJ).
153 *Levy v Victoria* (1997) 189 CLR 579, 646 (Kirby J), quoted in *Coleman v Power* (2004) 220 CLR 1, 51 [95] (McHugh J) and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 290–1 [318] (Callinan J).
154 *Brown v The Queen* (1986) 160 CLR 171, 208 ('*Brown*'). See also *Kruger* (n 116) 61 (Dawson J).
155 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

legislative power'[156] and not as 'a personal right'.[157] That is, as Stone suggests, the implied freedom has been described as an 'institutional freedom' since it serves the 'larger interest' of protecting Australia's representative and responsible government.[158] Therefore, as Nettle J held in *Clubb v Edwards*, and as the majority reiterated in *Comcare v Banerji*, the implied freedom of political communication requires consideration of the law's 'effect on political communication *as a whole* rather than on an individual or group's preferred mode of communication'.[159] Consequently, the inquiry engages facts which apply to everyone. Therefore, constitutional facts should not be limited to those existing at the time of the plaintiff's constitutional harm because it excludes other facts which are common to all persons.

The same logic applies to the freedom under s 92 of the *Constitution*. As Brennan J held in *Australian Capital Television*, s 92 establishes 'an immunity consequent on a limitation of legislative power'.[160] That is, as Gordon J explained in *Palmer*, s 92 'does not confer a personal right' but instead operates to limit legislative power.[161] The section's general inquiry is further reflected by the Court's rejection of submissions which merely explain how the legislation impedes the plaintiff's *personal* ability to engage in interstate trade.[162] That is, as the majority held in *Betfair No 2*, the section is not concerned with whether an individual's 'particular circumstances are … adversely affected'.[163] Rather, the issue centres upon whether interstate trade is infringed *generally*. Thus, subject to limited exceptions, constitutional adjudication must involve facts which are common to all persons.

Other constitutional guarantees, such as the right to trial by jury, also establish general rather than individual rights. As the majority in *Brown* established, the right to trial by jury concerns 'the structure of government rather than the grant of a privilege to individuals'.[164] The general justice view of s 80 led to the confirmation in *Alqudsi v The Queen* that the right to trial by jury does not confer 'a personal right capable of waiver by the accused'.[165] Instead, the right operates as a general 'safeguard of the public interest in the administration of justice'.[166]

Consequently, constitutional guarantees in Australia ordinarily operate as a structural limitation on parliamentary power rather than a conferral of individual

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156 *Wotton* (n 138) 14–15 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also at 23–4 [54] (Heydon J).

157 Ibid 31 [80] (Kiefel J).

158 Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 375–8.

159 *Clubb* (n 1) 256 [247]; *Comcare v Banerji* (2019) 267 CLR 373, 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis in original).

160 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150.

161 *Palmer* (n 1) 564 [180]; *Betfair No 2* (n 68) 266–7 [42]–[44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

162 See, eg, *Betfair No 2* (n 68) 266 [42] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

163 *Betfair No 2* (n 68) 267 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ), quoting *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356, 388 [104] (Keane CJ, Lander and Buchanan JJ).

164 *Brown* (n 154) 214 (Dawson J). See also at 197 (Brennan J), 202 (Deane J).

165 *Alqudsi v The Queen* (2016) 258 CLR 203, 231 [59] (French CJ) ('*Alqudsi*').

166 Ibid 232 [59] (French CJ) (citations omitted). See also at 251 [116] (Kiefel, Bell and Keane JJ).

rights.[167] Therefore, constitutional facts should be applicable to all persons — not just the individual litigant. The time of the plaintiff's constitutional harm is generally unique to the litigant. Such a timeframe may exclude important facts which are common to all persons subject to the legislation, thereby impeding the Court's general justice function. For example, in *Palmer*, if the factual inquiry was restricted to the time that the border ban prevented Mr Palmer from travelling to Western Australia, COVID-19 developments after April 2020 could not be considered. Therefore, the time of constitutional harm will rarely be a suitable period to constrain the assessment of constitutional facts, subject to the limited exceptions outlined in Part VII below. Instead, the Court should assess the relevant constitutional facts at a time period which applies to everyone — not just the immediate litigants.

VI Against the Time of the Legislation's Enactment and Towards the Time of Hearing

This Part argues that orthodox principles of statutory and constitutional interpretation support a flexible consideration of changing circumstances, thereby rendering the time of hearing, rather than the time of the legislation's enactment, as the generally appropriate time to assess constitutional facts.

The appropriateness of either time period depends upon whether the Court's statutory and constitutional interpretive models favour flexibility or certainty in the face of changing circumstances. Where the Court's interpretive model permits the application or denotation of words to adapt to contemporary circumstances, constitutional facts should generally be assessed up until the time of hearing, to enable the text to apply in its most current context. In contrast, where the interpretive model is averse to permitting the application of words to new circumstances, and favours certainty over flexibility, the Court may choose to confine the available constitutional facts to those existing at the time of the legislation's enactment.

Consequently, there cannot be one absolute approach to the timing question, reflecting the Court's broader rejection of a 'single all-embracing theory of constitutional interpretation'.[168] Instead, it is argued that judges should be explicit about how their approach to interpretation in a particular case impacts the time at which constitutional facts are assessed.

Nonetheless, the orthodox 'always speaking' and connotation–denotation approaches to statutory and constitutional interpretation, discussed in Parts VI(A) and (B) below, support a *flexible* consideration of contemporary circumstances.[169] Both approaches permit the application of statutory or constitutional terms to adapt

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[167] Cf certain constitutional cases involving *Constitution* ss 116–17. In the context of s 116, see *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116; *A-G (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559. In the context of s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461 ('*Street*'); *Davies v Western Australia* (1904) 2 CLR 29.

[168] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455 [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Marriage Equality Act Case*').

[169] Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43(1) *Statute Law Review* 79, 93 ('Always Speaking'); *Aubrey v The Queen* (2017) 260 CLR 305, 321–2 [29]–[30] (Kiefel CJ, Keane, Nettle and Edelman JJ) ('*Aubrey*').

to changing circumstances, subject to a core immutable meaning.[170] Such orthodoxy reflects the Court's generally 'flexible approach to ascertaining constitutional facts'.[171] Therefore, orthodox interpretive principles generally require consideration of recent factual developments — warranting examination of constitutional facts up until the time of hearing.

However, as explored below, rare exceptions exist where certainty is prioritised through the *contemporanea expositio* and strict originalist approaches — which constrain the meaning *and application* of words to the point of enactment. These interpretive models value certainty above flexibility, limiting constitutional facts to those existing at the time of enactment. While such approaches are rarely applied, they are occasionally employed, highlighting the role of interpretive theories in influencing the solution to the timing question. Therefore, judges should be explicit in explaining how their interpretive approach influences the time at which they assess constitutional facts. Consequently, orthodox interpretive theory suggests that constitutional facts should be assessed up until the point of hearing — subject to exceptions outlined below.

A *Statutory Interpretation*

This section argues that the orthodox approach to statutory interpretation supports the consideration of constitutional facts up until the time of the High Court's hearing. Australia's modern approach to statutory interpretation requires consideration of the legislation's text, context and purpose.[172] A corollary to the modern approach is the doctrine that statutes are 'always speaking'.[173] The always speaking approach enables the application of statutes to adapt to changing social, economic, political and scientific advancements — subject to a fixed core meaning.[174] That is, as Bell and Gageler JJ acknowledged in *R v A2*, the 'application of a statutory word or phrase may change over time',[175] however the essential 'meaning of the expression itself cannot change'.[176] The always speaking principle therefore reflects the orthodox 'distinction, familiar to the law, between the meaning of a word and its application to things'.[177] As Goldsworthy explains, the application of a word includes everything 'it denotes or refers to' while its 'meaning consists of the criteria or function that determine its application'.[178]

Therefore, the application of statutory words and phrases can evolve depending upon contemporary 'judgments of fact or value'.[179] That is, as Goldsworthy suggests, the always speaking approach 'provides additional scope for

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170 Goldsworthy, 'Always Speaking' (n 169); *Aubrey* (n 169).
171 Gordon (n 1) 18.
172 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow J).
173 *Aubrey* (n 169) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *R v A2* (2019) 269 CLR 507, 552 [141] (Bell and Gageler JJ), 562 [169] (Edelman J) ('*A2*').
174 *Aubrey* (n 169) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *A2* (n 173) 552 [141] (Bell and Gageler JJ), 562 [169] (Edelman J).
175 *A2* (n 173) 552 [141].
176 Ibid 553 [144], quoting *R v G* [2004] 1 AC 1034, 1054 [29] (Lord Bingham).
177 Goldsworthy, 'Always Speaking' (n 169) 92.
178 Ibid.
179 Ibid 93.

legitimate temporal variation in the application of unchanging legal provisions'.[180] Notably, as examined further below, the always speaking approach is distinguished from a 'wholly dynamic' approach, which enables the application *and meaning* of words to change according to evolving facts. Consequently, the orthodox approach to statutory interpretation is flexible to changing circumstances — suggesting that constitutional facts should be assessed up until the time of hearing. In doing so, the application of statutory phrases can adapt to new circumstances not previously envisaged by Parliament at the time of enactment, while maintaining the essential meaning or core.[181]

For example, in *Lake Macquarie v Aberdare*, Barwick CJ applied the statutory term 'gas' to liquified petroleum gas, despite only coal gas existing when the impugned legislation was enacted.[182] His Honour expanded the application of the term 'gas' by assessing technological advancements *after* the legislation's enactment.[183] Similarly, in *Aubrey v The Queen*, the application of 'actual bodily harm' was broadened to include the infliction of sexual diseases by considering scientific advances in the 'aetiology and symptomology of infection'.[184] Furthermore in *A2*, Edelman J applied the offence of 'otherwise mutilat[ing]' another person to the practice of female genital mutilation — reflecting changing social and cultural attitudes towards the practice.[185] Each case required a consideration of recent social, political and technological developments. Therefore, the always speaking approach promotes the assessment of constitutional facts up until the time of hearing.

Despite the orthodoxy of the always speaking principle, there are rare instances where certainty is prioritised through the *contemporanea expositio* approach.[186] This maxim, as reiterated by Brennan J in *Corporate Affairs Commission v Yuill*, provides that 'the best and surest mode' of interpretation is to read the words as they were understood when 'drawn up'.[187] Similarly, as Lord Esher established, the 'words of a statute must be construed as they would have been the day after the statute was passed'.[188] The *contemporanea expositio* principle therefore requires facts to be constrained to those existing at the time of enactment. This approach may be required where the law's text, context and purpose support a 'fixed time construction' or if 'the words in question had a clear legal meaning at the time of their enactment'.[189] If such an approach were to be adopted, the relevant time to assess constitutional or legislative facts would prima facie be the time of enactment.

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180 Ibid.

181 Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 22.

182 *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, 330–1 ('*Lake Macquarie*'); *Local Government Act 1919* (NSW) s 418(1)(b).

183 *Lake Macquarie* (n 182) 329–32 (Barwick CJ).

184 *Aubrey* (n 169) 320 [24] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Crimes Act 1900* (Cth) s 35(1)(b) ('*Crimes Act*').

185 *A2* (n 173) 562 [169].

186 D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 150–1 [4.15].

187 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322–3 ('*Yuill*').

188 *Sharpe v Wakefield* (1888) 22 QBD 239, 242, cited in Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 9 ('Originalism').

189 Pearce (n 186) 152 [4.16], citing *Yuill* (n 187) 322–3 (Brennan J). See also *Kenneally v New Zealand* (1999) 91 FCR 292, 302 [53] (Burchett, Weinberg and Gyles JJ).

Such instances arose in *Forsyth v Deputy Commissioner of Taxation*.[190] Here, the legislation concerned a monetary cap on the District Court's jurisdiction,[191] which was defined by reference to the caps pertaining to the Common Law Division of the Supreme Court.[192] Subsequent legislation changed the monetary caps concerning the Supreme Court,[193] leaving the question of whether the cap under the District Court's legislation should also change. Under the always speaking approach, the District Court's monetary cap would evolve in accordance with changes to the Supreme Court's jurisdiction. However, the majority refused to apply the always speaking principle — preferring the *contemporanea expositio* approach for three reasons: first, the text provided no reason to assume the Court's jurisdiction 'should be construed in an ambulatory or "always speaking" manner';[194] secondly, an always speaking approach would undermine the legislation's purpose of 'removing doubts as to the District Court's jurisdiction';[195] and finally, the surrounding provisions did not permit 'an ambulatory construction'.[196] Therefore, the majority restricted the District Court's jurisdiction to caps existing at the time of the legislation's enactment.

Similarly, in *Joyce v Grimshaw*, the concept of 'imposing upon' could only be understood in its earlier 18th and 19th century application concerning 'cheating or deceiving by false representations'.[197] In doing so, the Court rejected contemporary applications of the term, such as 'to place a burden upon' or 'to inflict upon'.[198] Therefore, *Forsyth* and *Joyce* suggest that a *contemporanea expositio* method can operate consistently with the modern approach to interpretation. While the *contemporanea expositio* method would constrain constitutional facts to those existing at the time of the legislation's enactment, as Pearce explains, these instances are rare.[199]

Instead, Australia's orthodox approach to statutory interpretation supports a flexible consideration of contemporary circumstances and values. For this reason, the Court should generally assess constitutional facts up until the time of hearing to reflect recent developments.

B *Constitutional Interpretation*

This section argues that the orthodox approach to constitutional interpretation also supports the consideration of constitutional facts up until the time of the High Court's hearing. Similar to the always speaking approach, the Court's orthodox connotation–denotation distinction in constitutional interpretation permits the application of constitutional words to adapt to new circumstances, subject to a fixed

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190 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 ('*Forsyth*').
191 *District Court Act 1973* (NSW) s 44(1)(a).
192 *Supreme Court Act 1970* (NSW) ss 52–5.
193 *Courts Legislation Further Amendment Act 1998* (NSW) sch 10.
194 *Forsyth* (n 190) 548 [41] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
195 Ibid 548–9 [42] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
196 Ibid 549 [44]–[45] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
197 *Joyce v Grimshaw* (2001) 105 FCR 232, 244 [63] (Miles, Mathews and Weinberg JJ) ('*Joyce*'); *Crimes Act* (n 184) s 29B.
198 *Joyce* (n 197) 244 [62] (Miles, Mathews and Weinberg JJ).
199 Pearce (n 186) 150–1 [4.15].

essential meaning.[200] As Goldsworthy suggests, 'a term's connotation is the criteria that define the term, while its denotation is made up of all the things in the world to which the term refers'.[201] Therefore, as Dawson J explained in *Street v Queensland Bar Association*, words and phrases in the constitutional context have 'a fixed connotation but their denotation may vary from time to time'.[202] The denotation of constitutional words can adapt to changing circumstances because, as O'Connor J established in *Jumbunna Coal Mine v Victorian Coal Miners' Association*, Australia's *Constitution* was flexibly designed 'to apply to the varying conditions which the development of our community must involve'.[203] Thus, as Barwick CJ held in *King v Jones*, 'changing events and attitudes may in some circumstances extend the denotation' of constitutional words.[204] Kirk suggests that such adaptation is necessary to ensure that the *Constitution* remains 'in tune with modern Australian society'.[205] Consequently, constitutional terms may apply to new circumstances which the 'framers of the Constitution could not be expected to foresee'.[206]

The Court's predominantly 'moderate originalist' approach to constitutional interpretation therefore suggests that constitutional facts should be assessed up until the time of hearing — to ensure constitutional words are applied in their contemporary context.[207] For instance, as McHugh J explained in *Eastman*, the denotation of 'internal carriage' in s 92 has expanded to include 'carriage of goods … by aeroplane' rather than merely 'transport by horse-drawn carriages and trains'.[208] Similarly, in *Jones v Commonwealth [No 2]*, technological advancements permitted Parliament to regulate television activity under the 'postal, telegraphic, telephonic and other like devices' power.[209] Furthermore, in *Grain Pool of Western Australia*, the term 'patents of invention' in s 51(xviii) was expanded to include 'breeding' of new plant species, despite such scientific methods not existing in 1900.[210] In each instance, the Court expanded the denotation of constitutional terms by considering modern scientific and technological advancements.

Political and social changes may also expand or contract the denotation of constitutional terms. In *Sue*, the essential meaning of 'aliens' and 'foreign power' remained unchanged,[211] despite the application of both terms expanding to include British subjects following Australia's independence from the United Kingdom.[212]

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200 *King v Jones* (1972) 128 CLR 221, 229 (Barwick CJ) ('*Jones*'), quoted in Goldsworthy, 'Originalism' (n 188) 12; Justice James Edelman, '2018 Winterton Lecture: Constitutional Interpretation' (2019) 45(1) *University of Western Australia Law Review* 1, 17 ('Winterton Lecture').

201 Goldsworthy, 'Originalism' (n 188) 31–2.

202 *Street* (n 167) 537.

203 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8, quoted in *Betfair No 1* (n 72) 453 [19] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

204 *Jones* (n 200) 229, cited in Goldsworthy, 'Originalism' (n 188) 12.

205 Kirk (n 75) 353.

206 *Brown* (n 154) 183 (Gibbs CJ), quoted in *Alqudsi* (n 165) 229 [51] (French CJ).

207 Goldsworthy, 'Originalism' (n 188) 3–4.

208 *Eastman v The Queen* (2000) 203 CLR 1, 45 [143].

209 *Jones v Commonwealth [No 2]* (1965) 112 CLR 206, 222 (McTiernan J), 226 (Kitto J), 229 (Menzies J).

210 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 496 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), cited in *Zines and Stellios* (n 2) 20.

211 Goldsworthy, 'Always Speaking' (n 169) 92; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173 (Gleeson CJ). See also Kirk (n 75) 334.

212 *Sue* (n 116) 490 [59], 496 [78] (Gleeson CJ, Gummow and Hayne JJ), 526 [166]–[168] (Gaudron J).

Similarly, in *Cheatle v The Queen*, the Court expanded the denotation of 'trial … by jury' to include women in order to reflect social 'contemporary standards and perceptions'.[213] Furthermore, in *McGinty*, the majority expanded voting rights to include women by reflecting 'developments in democratic standards' and transcending 'circumstances as they existed at federation'.[214] Therefore, Australia's connotation–denotation approach suggests that constitutional facts should be assessed in their most current context — up until the time of hearing.

While the Court currently adopts a flexible 'moderate originalist' approach, alternative modes of interpretation are possible. For instance, 'strict originalism' aims to constrain the meaning and application of words to those existing at the time of the *Constitution*'s framing.[215] Strict originalist interpretations are rare in the modern Australian constitutional context.[216] An early example is the *Union Label Case*, where the majority refused to expand the application of 'trade marks' under s 51(xviii) beyond those recognised in 1900.[217]

More recent strict originalist interpretations may include Dawson J's judgment in *McGinty*, where his Honour provided that 'the qualifications of electors … may amount to less than universal suffrage, however politically unacceptable that may be today'.[218] This position may be considered strict originalist because his Honour refused to incorporate changing societal values in relation to universal suffrage. Therefore, a strict originalist interpretation of the *Constitution* would prima facie support the constraining of constitutional facts to those existing in 1900. However, as Goldsworthy explains, Dawson J did not consistently promote a strict originalist approach.[219] For instance, in *Cheatle*, his Honour rejected the notion existing in 1900 that 'women or unpropertied persons' should be excluded from being jury members.[220] Consequently, strict originalist modes of interpretation are not currently supported by the Court. Similarly, there exists almost no support for the 'non-originalist' or 'living tree' approach, which permits both the application and meaning of constitutional terms to change over time.[221]

In summary, the Court's flexible interpretive approach suggests that constitutional facts should be assessed up until the time of hearing — to reflect social, economic, political and scientific developments. However, if an alternative interpretive theory were adopted, the approach might be different. Where a

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213 *Cheatle v The Queen* (1993) 177 CLR 541, 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*').

214 *McGinty* (n 78) 221 (Gaudron J), cited in Goldsworthy, 'Originalism' (n 188) 3.

215 Lawrence B Solum, 'What is Originalism? The Evolution of Contemporary Originalist Theory' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 12, 16–20.

216 Goldsworthy, 'Originalism' (n 188) 4–6.

217 *A-G (NSW) ex rel Tooth & Co Ltd v Brewery Employees Union of NSW* (1908) 6 CLR 469, 512–13 (Griffith CJ), 526–9 (Barton J), 538–41 (O'Connor J) ('*Union Label Case*'). Cf at 610–11, 616 (Higgins J).

218 *McGinty* (n 78) 183, quoting *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 199 (McHugh J), quoted in Goldsworthy, 'Originalism' (n 188) 4.

219 Goldsworthy, 'Originalism' (n 188) 4.

220 Ibid 3, citing *Cheatle* (n 213) 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

221 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 145 [423] (Heydon J), quoted in Edelman, 'Winterton Lecture' (n 200) 28.

contemporanea expositio or strict originalist approach is used, facts may be constrained to those existing at the time of enactment. By contrast, if a wholly dynamic or 'non-originalist' approach is engaged, the Court could assess facts up until the time of hearing to update the application *and meaning* of words. Consequently, the interpretive approach adopted by the Court will ultimately guide the time at which constitutional facts are assessed. Therefore, based on the Court's current practice, constitutional facts should be assessed up until the time of hearing, subject to the exceptions discussed in the next Part.

VII Challenges and Exceptions

This Part analyses the challenges and exceptions to the above guiding principles. The main challenge to assessing facts up until the time of hearing is that doing so can produce legal instability, as changing facts may shift the law's validity. Nonetheless, it is argued that a degree of instability is not only tolerated by the Court but required by orthodox interpretive theories. The Court's approach to the timing question may also be influenced by the parties' submissions, case management principles and procedural fairness.

A *Challenges of Shifting Validity*

A potential, albeit somewhat weak, criticism of assessing facts up until the time of hearing is that it may create instability, as it enables an initially valid law to become invalid due to changing facts. For instance, in *Murphy*, Keane J rejected the proposition that 'a law valid when made may become invalid by changes in the milieu in which it operates'.[222] His Honour provided that the validity of laws should not shift due to changing constitutional facts, with the exception of the defence power and potentially ss 92 and 109.[223] In the same case, French CJ and Bell J refused to permit the law's validity to change as it would impermissibly 'pull the constitutional rug from under a valid legislative scheme'.[224] Similarly, in *XYZ*, Heydon and Callinan JJ rejected the 'international concern' test as its 'volatility and elusiveness … would operate antithetically to the rule of law'.[225] It is accepted that assessing constitutional facts up until the time of hearing may invite instability towards the law's validity. However, there are three answers to this objection.

First, stability is not an absolute or unyielding constitutional value.[226] Instead, as Coper explains, 'the achievement of certainty is one but not the only object of the law'.[227] Therefore, as acknowledged in *Re Heagney*, '[a] degree of uncertainty is

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222 *Murphy* (n 79) 91 [194]. Cf *Betfair No 1* (n 72) 452 [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

223 *Murphy* (n 79) 92–3 [196]–[200].

224 Ibid 54–5 [42].

225 *XYZ* (n 54) 608 [218]. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 123 (Mason J).

226 See above Part VI.

227 Michael Coper, 'Joint Judgments and Separate Judgments' in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

permissible'.[228] For example, a degree of instability is tolerated by the Court in the context of s 109 by permitting inconsistent state legislation to shift in and out of operation over short periods of time.[229] Similarly, evolving wartime circumstances can alter the defence power's scope — shifting the law's validity.[230] Therefore, as Stone argues, the Court must balance 'certainty and democratic legitimacy on the one hand, and flexibility and adjustment to changing circumstances on the other'.[231] Consequently, as Dixon J expressed in *Australian Textiles*, flexibility in reflecting contemporary circumstances may outweigh priorities of legal certainty in factually dynamic cases, because '[where] a power applies to authorise measures only to meet facts, the measure cannot outlast the facts as an operative law'.[232]

The second reason that instability should not preclude assessing facts up until the time of hearing is that, under this article's model, dynamic constitutional facts can only affect the *application* of statutory or constitutional words — not their essential meaning. That is, this article does not promote an 'updating' or 'wholly dynamic' approach to statutory or constitutional interpretation, where contemporary facts may change the essential *meaning* of terms.[233] Instead, this article's model operates within Australia's orthodox principle that statutes and constitutions can apply to new circumstances which could not be envisaged at the time of enactment.[234] Assessing facts up until the time of hearing is therefore the optimal method to achieve the Court's mandate of flexibly applying contemporary circumstances to statutory and constitutional words.

Finally, where facts are assessed up until the time of hearing, the Court is not bound to use those facts to invalidate a law. Instead, depending on the interpretive approach, contemporary circumstances may hold little or no weight in determining the law's validity.[235] Such a result occurred in *Murphy*, where the Court assessed recent technological developments, yet refused to consider those facts as determinative or even relevant to the law's necessity or validity.[236] Therefore, arguments concerning legal uncertainty are better directed towards theories of interpretation and the extent to which constitutional standards permit the consideration of dynamic constitutional facts.[237] Consequently, while issues of

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228 *Re Heagney; Ex parte ACT Employers Federation* (1976) 137 CLR 86, 87 (Marks QC) (during argument), citing *Reg v Williams; Ex parte Pressed Metal Corporation* (1973) 47 ALJR 130, 131 (Menzies, Gibbs and Stephen JJ).

229 *Wenn* (n 83) 113–14 (Latham CJ), 121–2 (Dixon J); *Butler* (n 83) 284–6 (Taylor J), 286–7 (Windeyer J).

230 *Australian Textiles* (n 4) 179–81 (Dixon J); *Foster* (n 40) 86–8 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).

231 Adrienne Stone, 'Constitutional Interpretation' in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

232 *Australian Textiles* (n 4) 181.

233 Cf William N Eskridge, 'Dynamic Statutory Interpretation' (1987) 135 *University of Pennsylvania Law Review* 1479; T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87(1) *Michigan Law Review* 20; *Yemshaw v Hounslow London Borough Council* [2011] 1 WLR 433, 441–2 [24] (Lady Hale).

234 Goldsworthy, 'Always Speaking' (n 169) 93; *A2* (n 173) 552 [141] (Bell and Gageler JJ); *Aubrey* (n 169) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Jones* (n 200) 229 (Barwick CJ).

235 See above Part VI; Goldsworthy, 'Originalism' (n 188) 4–5.

236 *Murphy* (n 79) 75 [116], 82 [159] (Keane J).

237 *Zines and Stellios* (n 2) 775–6.

stability are important, they do not undermine the general principles proposed in this article.

B *Nature of Pleadings and Submissions*

The time at which constitutional facts are assessed may be limited by the nature of the parties' pleadings and submissions. In the Court's original jurisdiction, facts are often introduced by way of 'special case' which requires the relevant facts and questions of law to be agreed between the parties.[238] Therefore, the timing of constitutional facts may be limited by the parties' submission of evidence. That is, if the parties fail to adduce information existing at the time of the plaintiff's constitutional harm or hearing, the Court may not inquire into constitutional facts at those respective points in time.

For instance, in *Wilcox Mofflin v New South Wales*, the majority criticised counsel's failure to provide adequate evidence, yet nonetheless constrained its analysis to the limited constitutional facts provided.[239] That is, the Court restricted its inquiry despite more 'formal or full proof' of the attendant facts being 'indispensable to a satisfactory solution'.[240] Such issues continue to arise. Recently, in *Vanderstock*, Gordon J criticised counsel's failure to place any constitutional facts concerning the effect of a tax on dampening or depressing market demand.[241] Furthermore, in *Unions NSW*, the majority refused to adduce constitutional facts provided by amicus curiae as '[t]hose facts did not form part of the special case agreed by the parties'.[242]

However, Justice Gordon has noted extra-curially that special case procedures can undermine the Court's access to all relevant constitutional facts where there is an imbalance in resources between parties, because one side may be better equipped to gather the relevant constitutional facts.[243] Therefore, due to the Court's 'general justice' function in constitutional matters, the Court may in rare circumstances 'discover the constitutional fact through its own inquiries'.[244] Furthermore, as Justice Gordon has explained, the involvement of amicae may ensure that relevant constitutional facts are adduced which the parties 'consciously omit, or merely "overlook or neglect"'.[245] Additionally, as Edelman J acknowledged in *Mineralogy v Western Australia*, the Court can invite further written or oral submissions to elicit greater information.[246] Finally, the parties' submissions may be

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238 *Mineralogy* (n 15) 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also Gordon (n 1) 9–10.

239 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 507 (Dixon, McTiernan and Fullagar JJ) ('*Wilcox*'). See also Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4(1) *Federal Law Review* 65, 71.

240 *Wilcox* (n 239) 507 (Dixon, McTiernan and Fullagar JJ).

241 *Vanderstock* (n 1) 279–80 [407].

242 *Unions NSW* (n 63) 619 [55] (Kiefel CJ, Bell and Keane JJ).

243 Gordon (n 1) 10.

244 Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129, 138; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 493, 496.

245 Gordon (n 1) 21.

246 *Mineralogy* (n 15) 853 [105].

inherently limited by the nature of the challenged statutory provision. For instance, in the rare circumstance that the impugned statute is no longer in operation, the parties may be confined to assessing constitutional facts up until the point that the statute ceased operation.[247] Consequently, while not determinative, the nature of the parties' submissions may influence the timing issue in a particular case — necessitating a flexible approach.

C *Procedural Fairness and Case Management Principles*

Notions of procedural fairness and the Court's case management principles may also influence the time at which constitutional facts are assessed. Despite the flexible procedures used to admit constitutional facts, parties must be afforded procedural fairness.[248] As Heydon J established in *Mowbray*, procedural fairness requires that parties are (1) advised of any constitutional facts which have not been 'tendered', but are relied upon by the Court to resolve the legal issue;[249] and (2) afforded sufficient opportunities to challenge the materiality, accuracy and trustworthiness of the impugned constitutional facts.[250] Issues of procedural fairness arise in the context of assessing constitutional facts up until the time of hearing as parties may not be afforded sufficient opportunities to comment upon fresh evidence. Such issues have historically arisen in the context of judicial notice, where parties are unsure of the information the Court has relied upon.[251] Therefore, assessing constitutional facts up until the time of hearing may be impermissible if such a timeframe would compromise the parties' capacity to comment upon new evidence.

However, the Court's flexible procedural rules can likely accommodate temporal pressures created by emerging facts or circumstances. For example, as in *Republic of Nauru v WET040*, the Court may flexibly 'enlarge' or 'abridge' the date of filing of submissions or hearing if required.[252] Therefore, if important evidence emerges close to the hearing date, the Court can extend the hearing date to afford parties sufficient opportunity to comment on the facts. For instance, in *Clodumar v Nauru Lands Committee*, the Court extended the 'time for appeal' due to 'new evidence' coming to light before the hearing.[253] Consequently, while it is important to acknowledge the interaction between issues of timing and case management principles, the Court is procedurally well equipped to assess constitutional facts up until the time of hearing.

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247 Barak (n 123) 312. See, eg, *Jerger v Pearce* (1920) 28 CLR 588, 589–90 (Starke J); *War Precautions Act 1914–1918* (Cth). See also *Williams v Commonwealth* (2012) 248 CLR 156, 291 [327] (Heydon J).

248 Gageler (n 22) 26–7.

249 *Mowbray* (n 18) 521 [636]. See also *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 622 (Jacobs J).

250 *Mowbray* (n 18) 521 [636]. See also Gageler (n 22) 27.

251 Holmes (n 42) 236. See also JD Heydon, 'Constitutional Facts' (2011) 23 *Samuel Griffith Society Proceedings* 85, 91.

252 *Republic of Nauru* (n 57) 407–9 [10]–[18] (Gageler, Nettle and Edelman JJ); *High Court Rules 2004* (Cth) r 4.02.

253 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561, 574–5 [35]–[37] (French CJ, Gummow, Hayne and Bell JJ), 587 [78] (Heydon J). See also Gageler (n 22) 26–7, 29.

VIII Conclusion

Solutions to constitutional issues often depend upon balancing context and principles.[254] Questions concerning the timing of constitutional facts are no exception. The Court must grapple with timing issues in multiple contexts — requiring general principles to guide the solution in a particular case. That is, there cannot be a 'one size fits all' solution to the issue of timing, as the answer depends on various contingencies. The timing of constitutional facts can influence the validity of laws where the attendant constitutional facts are dynamic. Therefore, a principled and transparent approach to the timing issue is required to guide litigants in effectively adducing facts in constitutional matters. A major gap in the reasoning of *Palmer* was the Court's reluctance to consider the time at which constitutional facts should be assessed.[255] Such gaps are emblematic of Australia's historical reluctance to consider temporal questions relating to constitutional facts.

This article seeks to provide guidance as to the time at which constitutional facts should be assessed. Constitutional facts could be assessed up until the point of the legislation's enactment, the application of the legislation to the plaintiff, or the time of the High Court's hearing. It is argued that the appropriateness of constraining constitutional facts to each time period largely depends upon whether the Court (1) performs a general or individual justice function in constitutional matters; and (2) prioritises certainty or flexibility when reflecting contemporary circumstances in statutory and constitutional interpretation. Ordinarily, the Court's general justice mandate in constitutional matters precludes the time of the plaintiff's constitutional harm because such periods are unique to the litigant.

Furthermore, the Court's 'always speaking' and connotation–denotation interpretive approaches suggest that facts should not be limited to those existing at the time of the legislation's enactment. Therefore, constitutional facts should generally be assessed up until the time of the High Court's hearing — satisfying its responsibility to adjudicate constitutional issues according to modern circumstances. Nonetheless, there are exceptions and limitations to these principles, requiring consideration of the parties' submissions and notions of procedural fairness. Therefore, the principles established in this article are not absolute, but are instead subject to the nature of the relevant statutory and constitutional provisions. Consequently, this article proposes a flexible yet principled framework to facilitate the Court in ascertaining constitutional facts 'as best it can'.[256]

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254 Gageler (n 22) 26.

255 *Palmer* (n 1) 516 [15] (Kiefel CJ and Keane J); *Palmer No 4* (n 21) [5]–[6] (Rangiah J).

256 *Commonwealth Freighters* (n 16) 292 (Dixon CJ), quoted in *Mowbray* (n 18) 517–18 [631] (Heydon J). See also *Gerhardy* (n 130) 142 (Brennan J).

Unmet Need for Building, Home Contents and Comprehensive Car Insurance among Uninsured Australians: Survey Findings and Options for Reform

Evgenia Bourova,* Ian Ramsay† and Paul Ali‡

Abstract

Home contents and comprehensive car insurance are not legally mandated in Australia. With the exception of strata title properties, there is also no legal requirement for homeowners to purchase building insurance. While these insurance products are widely regarded as 'essential' for managing the risk of disasters and other unexpected events causing property damage, significant proportions of Australians lack these types of coverage. In this article, we examine the extent of unmet need for insurance among this group, who remain vulnerable to devastating financial losses despite the availability of social security and other safety nets in the disaster context and beyond. In doing so, we draw upon the findings of a survey of uninsured Australians whose limited financial resources indicate a high level of exposure to financial loss in case of emergencies causing severe property damage. By contrast to industry assumptions of limited interest in insurance among those without coverage, our findings suggest most uninsured Australians would prefer to have some cover if it was affordable. We examine law and policy reforms that could address such unmet need, arguing that direct subsidies for Australians on low incomes, perhaps supported by statutory recognition of insurance as an 'essential' service, would be the most effective means of improving premium affordability for this group.

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I Introduction

In Australia, building, home contents and comprehensive car insurance are widely regarded as 'essential' financial products, alongside 'a transaction account' and 'a moderate amount of credit'.[1] The Senate Economics References Committee describes 'adequate' insurance as 'integral to protecting consumers' most valuable assets and to maintaining and protecting the living standards of all Australians'.[2] While acknowledging the necessity of government assistance to 'support the immediate emergency needs'[3] of communities affected by increasingly frequent and severe bushfires, floods, storms and cyclones,[4] Australian governments regard individual households as having primary responsibility to manage disaster risk by insuring their property. As the Royal Commission into National Natural Disaster Arrangements states in its 2020 report, 'individuals cannot rely on public and charitable entities to restore their positions following a natural disaster. Government funding does not take the place of insurance, and nor should this be expected'.[5] Insurance is also employed to spread the costs of recovery from more commonplace events such as house fires, theft, vandalism, burst pipes and car accidents. The latter especially are a fact of life in Australia, where there are 19.8 million registered motor vehicles,[6] and where 64.0% of drivers licence holders have been involved in at least one car accident in their life time.[7]

Of course, as articulated by Booth, O'Hare and others, private insurance is far from a 'benign tool' for managing risk.[8] Its increasingly central positioning in climate adaptation policy is symptomatic of a broader risk shift from the neoliberal

1 See Chris Connolly, 'Measuring Financial Exclusion in Australia' (Report, Centre for Social Impact for National Australia Bank, June 2013) 6, 8. See also Peter Saunders, *Down and Out: Poverty and Exclusion in Australia* (Policy Press, 2011) 99.

2 Senate Economics References Committee, Parliament of Australia, *Australia's General Insurance Industry: Sapping Consumers of the Will to Compare* (Report, August 2017) 2 [1.9].

3 Department of Home Affairs (Cth), *Disaster Recovery Funding Arrangements 2018* (June 2018) 49.

4 Bureau of Meteorology (Cth) and CSIRO, *State of the Climate 2020* (Report, 2020).

5 *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 416 [20.2] ('*Natural Disaster Royal Commission Final Report*').

6 International Transport Forum, *Road Safety Report 2021: Australia* (OECD Publishing, 2021) 2.

7 'Car Accidents Survey and Statistics 2021', *Budget Direct* (Web Page, 15 September 2021) <https://www.budgetdirect.com.au/car-insurance/research/car-accident-statistics/2021.html>.

8 Kate Booth, Chloe Lucas, Christine Eriksen, Eliza de Vet, Bruce Tranter, Shaun French, Travis Young and Scott McKinnon, 'House and Contents Underinsurance: Insights from Bushfire-Prone Australia' (2022) 80 *International Journal of Disaster Risk Reduction* 103209: 1–11, 3; Paul O'Hare, Iain White and Angela Connelly, 'Insurance as Maladaptation: Resilience and the "Business as Usual" Paradox' (2016) 34(6) *Environment and Planning C: Government and Policy* 1175.

state to the individual 'consumer'.[9] The normalisation of insurance as a requirement for responsible, self-reliant homeownership — and even citizenship — marginalises uninsured householders, particularly renters, as 'less worthy'.[10] It also legitimises the withdrawal of social protections — through narrower eligibility criteria and stricter activity requirements for accessing social security safety nets — on the assumption that their role will be compensated by greater access to financial markets, or 'financial inclusion', for low-income earners.[11] Yet as highlighted by the Australian Securities and Investments Commission ('ASIC'),[12] and in the hearings of the 2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry,[13] insurance is also not a perfectly operational tool. There is extensive evidence that claims handling by insurers, particularly in the aftermath of widespread disasters,[14] can be plagued by delays, poor communication, invasive investigation tactics,[15] and inadequate settlement offers that leave many policyholders unable to cover their repair or rebuilding costs despite being insured.[16]

Nonetheless, it is undeniable that those who forego building, home contents or comprehensive car insurance, particularly on affordability grounds, are especially vulnerable to devastating losses in case of severe property damage. News stories documenting the plight of uninsured householders who 'lost everything'[17] and face 'financial ruin'[18] following bushfires and house fires highlight the perils of foregoing such coverage. Estimates of non-insurance rates in Australia vary, but, according to Booth and Tranter, 4.0% of Australian homeowners lack building insurance, while 7.0% to 12.0% of homeowners and 67.0% to 74.0% of renters lack home contents

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[9] O'Hare, White and Connelly (n 8) 1185–6; Marcus Banks and Dina Bowman, 'Juggling Risks: Insurance in Households Struggling with Financial Insecurity' (Report, Brotherhood of St Laurence, 2017) 9–13.

[10] Kate Booth, Aidan Davison and Kath Hulse, 'Insurantial Imaginaries: Some Implications for Home-Owning Democracies' (2022) 136 *Geoforum* 46, 50.

[11] Craig Berry, 'Citizenship in a Financialised Society: Financial Inclusion and the State before and after the Crash' (2015) 43(4) *Policy & Politics* 509.

[12] ASIC, *Roadblocks and Roundabouts: A Review of Car Insurance Claim Investigations* (Report No 621, July 2019); ASIC, *Navigating the Storm: ASIC's Review of Home Insurance Claims* (Report No 768, August 2023).

[13] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1, 309, vol 2, 415–55 ('*Banking Royal Commission Final Report*').

[14] Evgenia Bourova, Ian Ramsay and Paul Ali, 'The Arduous Work of Making Claims in the Wake of Disaster' (2022) 60(4) *Geographical Research* 534; Financial Rights Legal Centre ('FRLC'), *Exposed: Insurance Problems after Extreme Weather Events* (Report, 2021).

[15] Evgenia Bourova, Ian Ramsay and Paul Ali, '"Honest, Fair, Transparent and Timely"? Experiences of Australians Who Make Claims on Their Building, Home Contents or Comprehensive Car Insurance Policies' (2020) 46(3) *Monash University Law Review* 1, 40 ('Honest, Fair, Transparent and Timely?'); ASIC, *Roadblocks and Roundabouts* (n 12); FRLC, *Guilty Until Proven Innocent*: *Insurance Investigations in Australia* (Report, March 2016).

[16] Bourova, Ramsay and Ali, 'The Arduous Work of Making Claims in the Wake of Disaster' (n 14) 541–4.

[17] Paige Cockburn, 'Bushfire Financial Aid "a Slap in the Face" as Family Receives $1,280 after Their Wytaliba Home Burned Down', *ABC News* (online, 17 January 2020) <https://www.abc.net.au/news/2020-01-17/bushfire-recovery-financial-aid-too-little-too-late/11869252>; Katie Robertson, 'Fire Devastates Uninsured Kelmscott Home', *The West Australian* (online, 12 October 2011) <https://www.perthnow.com.au>.

[18] 'Lockridge Woman Loses Uninsured House after Fire', *NT News* (online, 24 December 2015) <https://www.ntnews.com.au>.

insurance.[19] Meanwhile, approximately 25.2% of Australian vehicles are not comprehensively insured.[20] Non-insurance is most pronounced among people with low income and asset levels.[21] According to the South Australian Council of Social Service ('SACOSS'), 6.6% to 10.0% of low-income homeowners lack building insurance; 30.0% to 50.0% of low-income earners lack home contents insurance; and 25.0% of low-income car owners lack comprehensive car insurance.[22] Other factors associated with non-insurance include being a renter; being aged under 35 years; being born in a non-English-speaking country; having lower levels of education or paid employment; and being Aboriginal or Torres Strait Islander.[23]

As with other costs of living, insurance costs in Australia are rising substantially relative to wages.[24] In 2023, 12.0% of Australian households faced home insurance affordability stress following a 28.0% rise in premiums over the previous year.[25] Growing concern about insurance accessibility, particularly in areas where more frequent and severe disasters are driving the steepest premium increases, has prompted several government inquiries into the matter. These include the Natural Disaster Insurance Review by Treasury in 2010–11;[26] a 2014 review of Australia's natural disaster funding arrangements by the Productivity Commission;[27] and the inquiry by the Australian Competition and Consumer Commission ('ACCC') into insurance accessibility in northern Australia.[28] These inquiries, together with national surveys measuring non-insurance and other forms of financial exclusion in the population,[29] and a series of studies by community organisations,[30]

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19 Kate Booth and Bruce Tranter, 'When Disaster Strikes: Under-Insurance in Australian Households' (2018) 55(14) *Urban Studies* 3135, 3137.

20 Tony Robinson, 'Pranged: The Real Cost of Optional Vehicle Insurance in Australia' (Report, Brotherhood of St Laurence, 2017) 9, 16.

21 Chant Link & Associates, 'A Report on Financial Exclusion in Australia' (Report, Australia and New Zealand Banking Group, 2004) 12, 130, 133 ('ANZ Report'); Connolly (n 1) 22, 28, 30; MJ Powling Research Consulting, 'Home and Motor Vehicle Insurance: A Survey of Australian Households' (Report, NRMA Insurance, October 2001) 17, 20, 28 ('NRMA Report'); Richard Tooth and George Barker, 'The Non-Insured: Who, Why and Trends' (Report, Insurance Council of Australia, May 2007) 16–17.

22 Toby Freeman, 'Protecting the Basics: Insurance Access for People on Low Incomes at Risk from Climate Emergencies' (Report, South Australian Council of Social Service, February 2022) 10.

23 ANZ Report (n 21) 85, 135; Australian Competition and Consumer Commission, *Northern Australia Insurance Inquiry* (Final Report, November 2020) 283–5 ('ACCC Report'); Connolly (n 1) 22–4, 29; Kristy Muir, Rebecca Reeve, Chris Connolly, Axelle Marjolin, Fanny Salignac and Kerrie-Anne Ho, 'Financial Resilience in Australia 2015' (Report, Centre for Social Impact and National Australia Bank, 2016) 945; NRMA Report (n 21) 79, 11; Tooth and Barker (n 21) 4, 12–13, 18–26.

24 Senate Economics References Committee (n 2) 15–16.

25 Sharanjit Paddam, Calise Liu and Saroop Philip, 'Home Insurance Affordability Update' (Report, Actuaries Institute, August 2023) 4.

26 Treasury (Cth), *Natural Disaster Insurance Review: Inquiry into Flood Insurance and Related Matters* (Report, September 2011) ('*Natural Disaster Insurance Review*').

27 Productivity Commission, *Natural Disaster Funding Arrangements* (Inquiry Report No 74, 17 December 2014).

28 ACCC Report (n 23).

29 ANZ Report (n 21) 74; Connolly (n 1) 31; NRMA Report (n 21) 22, 29; Tooth and Barker (n 21) 17, 38.

30 Banks and Bowman (n 9) 14–16; Dominic Collins, 'Reducing the Risks: Improving Access to Home Contents and Vehicle Insurance for Low-Income Australians' (Report, Brotherhood of St Laurence, 2011) v–vii, 5; Susan Maury, Zara Lasater and Maggie Mildenhall, 'The Perceived Value of Insurance for Low-Income Households' (Report, Good Shepherd Australia New Zealand, 2021) 23, 30, 83, 99; Genevieve Sheehan and Gordon Renouf, 'Risk and Reality: Access to General Insurance for People on Low Incomes' (Report, Brotherhood of St Laurence, 2006) 78.

identify affordability as the major driver of non-insurance rates. Insurance affordability has two dimensions: (1) each policyholder's 'ability to fund the premium, or "cash flow"'; and (2) 'the size of the premium' itself.[31] Both of these dimensions of affordability disproportionally impact Australians on low incomes, whose ability to cover the cost of premiums is constrained by their limited financial resources, and who are also, given the 'geographic overlap' between frequency of disasters and socio-economic disadvantage,[32] especially likely to be living in disaster-prone locations.[33]

While the community sector has campaigned extensively for the development of appropriate, low-cost insurance products for people on low incomes,[34] insurers have not been proactive in targeting this market. Reasons for this include the assumptions that low-cost policies for low-income earners will carry additional risk, and that low-income earners are uninterested in insurance and unaware of its benefits.[35] Yet these assumptions may not reflect reality, with most uninsured participants surveyed by Collins indicating they did want more insurance cover,[36] and only small minorities of low-income earners interviewed by Maury, Lasater and Mildenhall indicating that they did not regard building, home contents and car insurance as valuable.[37] Rather, research indicates that only a minority of uninsured Australians forego insurance on principle, for example because they do not believe in insurance or prefer to carry the risk themselves, while far larger proportions are motivated by affordability concerns.[38]

In this article, we analyse the findings of a study examining 'unmet need' for insurance among Australians without building, home contents or comprehensive car insurance. In designing this study, we focused on objective and subjective dimensions of unmet need, including (1) limited financial resources — such as income, savings and potentially sellable assets — that could be used to cover the cost of repairing or replacing lost or damaged property; (2) self-perceived exposure to the risk of financial loss in case of an emergency causing severe property damage; and (3) self-expressed interest in purchasing insurance if it was accessible. In Part II, we introduce the legal and policy context for building, home contents and

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31 *Natural Disaster Insurance Review* (n 26) 86 [11.16].

32 Thomas Sewell, Ruby Stephens, Dale TM Dominey-Howes, Eleanor Bruce and Sarah Perkins-Kirkpatrick, 'Disaster Declarations Associated with Bushfires, Floods and Storms in New South Wales, Australia between 2004 and 2014' (2016) 6(1) *Scientific Reports* 36369:1–11, 9. See also Sonia Akter and R Quentin Grafton, 'Do Fires Discriminate? Socio-Economic Disadvantage, Wildfire Hazard Exposure and the Australian 2019–20 "Black Summer" Fires' (2021) 165 *Climatic Change* 53.

33 Siqin Wang, Mengxi Zhang, Xiao Huang, Tao Hu, Qian Chayn Sun, Jonathan Corcoran and Yan Liu, 'Urban–Rural Disparity of Social Vulnerability to Natural Hazards in Australia (2022) 12(1) *Scientific Reports* 13665.

34 See generally Tanya Corrie, 'Microfinance and the Household Economy: Financial Inclusion, Social and Economic Participation and Material Wellbeing' (Report, Good Shepherd Youth & Family Service, 2011); Collins (n 30); Good Shepherd Microfinance, 'Insurance for Low-Income Australians: Taking Innovative Action' (Discussion Paper, March 2013); Freeman (n 22).

35 Good Shepherd Microfinance (n 34) 12–13, 18.

36 Collins (n 30) 25.

37 Maury, Lasater and Mildenhall (n 30) 23, 30.

38 Evgenia Bourova, Ian Ramsay and Paul Ali, 'Unaffordable, Untrustworthy or Unnecessary? Reasons for Foregoing Building, Home Contents and Comprehensive Car Insurance in Disaster-Prone Australia' (Working Paper, Melbourne Law School, 2024) 17–18. See also NRMA Report (n 21) 22, 29.

comprehensive car insurance purchase in Australia. In Part III, we outline the safety nets available for uninsured Australians and document their limitations in protecting against financial loss in an emergency scenario.

In Parts IV and V, we introduce our study, which employed an online survey to gauge unmet need for insurance among 'uninsured'[39] Australians, and draw upon our findings to evaluate some measures that could address such need by improving insurance accessibility. The measures examined in this article include taxation measures; government reinsurance; microfinance; insurance-with-rent schemes; and direct subsidies or concessions. Historically, there has been a reluctance by Australian governments to intervene in private insurance markets, with Treasury describing such intervention as 'justifiable only where, and to the extent that there is clear failure by those private markets to offer appropriate cover at affordable premiums'.[40] We argue that particularly in relation to low-income earners, such intervention — preferably in the form of direct, targeted subsidies or concessions, and perhaps supported by statutory recognition of insurance as an 'essential service' — is necessary to ensure the most vulnerable are not left open to devastating financial losses when disaster strikes.

II Legal and Policy Context for Building, Home Contents and Car Insurance Purchase in Australia

In Australia, a complex framework of legislation applies to the relationship between an insurer and a policyholder who purchases building, home contents or comprehensive car insurance.[41] Insurance contracts are governed by the *Insurance Contracts Act 1984* (Cth) ('*ICA*'), s 13(1) of which imposes a duty 'requiring each party to [an insurance contract] to act towards the other party … with the utmost good faith'. Insurers are also subject to the *Australian Securities and Investments Commission Act 2001* (Cth), which governs consumer protection in relation to financial services. Further obligations relating to claims handling are contained in the General Insurance Code of Practice (2023), which prescribes timeframes for resolving claims and communicating with policyholders, and in ch 7 of the *Corporations Act 2001* (Cth) ('*Corporations Act*'), which sets out a uniform licensing and disclosure regime and requires all 'financial services', including 'claims handling and settling' services,[42] to be provided 'efficiently, honestly and fairly'.[43] Reforms implementing the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry have expanded ASIC's powers to take enforcement action in response to breaches of these obligations by insurers, including breaches of the duty of utmost good

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39 We refer to people taking part in our survey of Australians without building, home contents or comprehensive car insurance as 'uninsured respondents' even though some had other types of insurance, including third party car insurance ('TPCI'), private health insurance and life insurance.

40 *Natural Disaster Insurance Review* (n 26) ii.

41 Bourova, Ramsay and Ali, 'Honest, Fair, Transparent and Timely?' (n 15) 6–18.

42 See *Corporations Act 2001* (Cth) ss 766A(1)(eb), 766G ('*Corporations Act*').

43 Ibid s 912A(1)(a). For more information on what this requirement entails in the claims handling context, see ASIC, 'Claims Handling and Settling: How to Comply with Your AFS Licence Obligations' (Information Sheet No 253, May 2021).

faith,[44] and breaches of 'enforceable' Code provisions.[45] Below is an overview of the legal and policy context surrounding building, home contents or comprehensive car insurance purchase in Australia.

A *Building and Home Contents Insurance*

Building insurance covers the physical structure of a home, including permanent fixtures such as walls, roofs, garages and fences. Home contents insurance covers personal possessions and household items including whitegoods, furniture, clothing and carpets. Both products cover loss or damage caused by disasters and weather events (in some cases, excluding flood),[46] vandalism and theft, house fire and accidental damage. They can be purchased as a combined policy, or separately, with some insurers offering 'renters' insurance' or contents-only policies for renters whose belongings would not be covered under their landlord's building insurance policy.[47] Meanwhile, for properties on a strata title, such as units, apartments or flats, the building itself — alongside any lifts, car parks, pools and gardens — is considered common property under the management of a strata title or body corporate entity, and is covered by strata insurance mandated by each state and territory's relevant strata legislation.[48] Strata managers or body corporates typically negotiate strata cover through a broker or specialist underwriting agency,[49] while owners of strata titles share the premium costs as part of their strata fees.

With the exception of strata title properties, there is no legal requirement for homeowners to purchase building insurance in Australia. Most lenders require prospective borrowers to have a policy equal to the amount recommended on the property valuation in place before settlement. For strata title properties, lenders typically require a certificate of currency provided by the body corporate. Yet

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[44] See *Insurance Contracts Act 1984* (Cth) s 13(2A) ('*ICA*'), which provides for a civil penalty of 5,000 penalty units where an insurer fails to comply with the duty of utmost good faith in s 13(1).

[45] ASIC may identify a provision of the General Insurance Code of Practice (2023) as 'enforceable' where (a) 'the provision represents a commitment to a person by a subscriber to the code relating to transactions or dealings performed for, on behalf of or in relation to the person; and (b) breach of the provision is likely to result in significant and direct detriment to the person; and (c) [any] additional criteria prescribed by the regulations ... are satisfied; and (d) it is appropriate to identify the provision … as an enforceable code provision ...': *Corporations Act* (n 42) s 1101A(2). Civil penalties of up to 300 penalty units may apply for breaches of an enforceable code provision: at s 1101AC.

[46] Historically, building and home contents insurance policies in Australia covered damage caused by stormwater but excluded or allowed policyholders to opt out of flood cover. The lack of flood cover for many residents of flood-affected areas prompted Treasury's 2011 review of natural disaster insurance, which called for the inclusion of mandatory flood cover in all building insurance policies. This recommendation was rejected by the federal government and while approximately 94% of building and home contents insurance policies purchased in 2019 covered flood, policyholders may still opt out of flood coverage, or purchase policies that exclude flood: Insurance Council of Australia, 'Townsville Catastrophe Insurance Claims Rising By the Hour' (Media Release, 5 February 2019).

[47] Aimed primarily at young renters and students living in shared accommodation, renters' insurance combines lower premiums with a reduced level of cover: Collins (n 30) 7. Most renters' insurance policies do not cover alternative accommodation if the dwelling becomes uninhabitable or if the landlord claims against rental bonds for accidental damage.

[48] *Unit Titles (Management) Act 2011* (ACT) s 100; *Strata Schemes Management Act 2015* (NSW) pt 9 div 1; *Unit Title Schemes Act 2017* (NT) div 3 sub-div 6; *Body Corporate and Community Management Act 1997* (Qld) pt 6; *Strata Titles Act 1988* (SA) pt 3 div 4; *Strata Titles Act 1998* (Tas) pt 8; *Owners Corporation Act 2006* (Vic) pt 3 div 6; *Strata Titles Act 1985* (WA) s 97.

[49] Senate Economics References Committee (n 2) 5 [1.19].

homeowners are not required to maintain insurance for the duration of their mortgage, and are not subject to any requirements to remain insured once their mortgage is paid off.[50]

While approximately 4.0% of Australian homeowners lack building insurance,[51] non-insurance rates are higher in disaster-prone locations, with up to 40.0% of homes in some flood and cyclone-prone areas of northern Western Australia not covered by building insurance.[52] Non-insurance rates are higher for home contents insurance, with 7.0% to 12.0% of homeowners and 67.0% to 74.0% of renters lacking home contents coverage.[53] There is no requirement for the majority of policyholders whose policies cover loss or damage up to a specific 'sum insured' to ensure this amount remains adequate to cover their rebuilding costs if the home is destroyed in a 'total loss' event. Consequently, many Australian homes are underinsured, as the sum insured under their insurance policy would not cover the full extent of the damage in such a scenario.[54]

B *Comprehensive Car Insurance*

There are several levels of car insurance available in Australia. Only the minimum level — compulsory third party ('CTP') insurance cover — is legally mandated.[55] CTP only provides compensation for bodily harm caused by a vehicle in an accident. In New South Wales, the Australian Capital Territory, Queensland and South Australia, CTP is underwritten by private insurers. In Victoria, Western Australia, Tasmania and the Northern Territory, it goes directly through the state government and is automatically included in car registration costs.

The most basic form of non-mandatory car insurance is third party car insurance ('TPCI'), which covers damage to someone else's cars or property, but, unlike comprehensive insurance, does not cover loss or damage to the policyholder's own car if it is stolen, vandalised, or involved in an accident.[56] Third party fire and theft policies do cover the policyholder's car, but only in respect of fire or theft. However, uptake of these policies remains limited, with around two-thirds of all TPCI policies in Australia being the basic version with no fire and theft cover.[57]

The highest and most expensive tier of car insurance is comprehensive car insurance, which covers damage to the policyholder's own car and cars belonging to third parties, regardless of whether an accident is the policyholder's fault.[58] It also covers the policyholder's car for accidental damage, fire and theft. Approximately

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50 *Natural Disaster Insurance Review* (n 26) 88–90 [11.31]–[11.37].
51 Booth and Tranter (n 19) 3137.
52 ACCC Report (n 23) xii, 155.
53 Booth and Tranter (n 19) 3137.
54 ASIC, *Getting Home Insurance Right: A Report on Home Building Underinsurance* (Report No 54, 2005) 15–17.
55 See *Motor Accident Injuries Act 2019* (ACT) s 289; *Motor Accident Injuries Act 2017* (NSW) s 2.1; *Traffic Act 1987* (NT) s 34; *Motor Accident Insurance Act 1994* (Qld) s 20; *Motor Vehicles Act 1959* (SA) s 102; *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) s 29; *Transport Accident Act 1986* (Vic) s 109; *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 4.
56 Robinson (n 20) 23; Senate Economics References Committee (n 2) 4 [1.17].
57 ASIC, *Review of General Insurance Claims Handling and Internal Dispute Resolution Procedures* (Report No 245, August 2011) 12.
58 Senate Economics References Committee (n 2) 4 [1.17].

74.8% of Australian vehicles are comprehensively insured; 13.3% are only covered by TPCI; 10.6% are only covered by CTP insurance; and 1.3% are unregistered and lacking even CTP insurance.[59]

III Safety Nets for Uninsured Australians

In an emergency causing severe damage to their home, contents or car, those without building, home contents or comprehensive car insurance face enormous costs and limited options. Highest are the costs of rebuilding a home destroyed in a 'total loss' event such as a fire, flood or cyclone. Such costs are notoriously difficult to predict. Rebuilding costs can skyrocket in the wake of widespread disasters causing damage to large numbers of homes, while high demand for alternative accommodation puts upwards pressure on rental prices in affected areas.[60] Lower-income householders in particular can find themselves struggling to replace household appliances, furniture and other essentials, even those acquired second-hand or through low-cost retailers, despite previously assuming they had no valuables to speak of.[61] By way of illustration, in a survey by the ACCC, 15.0% of Townsville residents who suffered property damage in the devastating floods of 2019 estimated their losses as over $100,000.[62]

Car accidents, too, can be financially devastating, particularly for low-income earners without comprehensive insurance. The average cost of car repairs following an accident in Australia was approximately $3,000 in 2017;[63] however, repairs for some car models can amount to 70.0% of their purchase price.[64] If the car was purchased using a personal or unsecured car loan that is still being repaid, drivers without comprehensive insurance may be left owing thousands of dollars to the lender, even when the car is damaged or written off.[65] Drivers without TPCI who are at fault in an accident may also be liable to pay the 'reasonable cost' of damage to the property of third parties, including repair costs, towing and storage, hire car costs and even lost wages if the other driver's vehicle is used to earn an income.[66] Disputes over property damage caused by at-fault drivers without TPCI frequently progress to court, incurring court and legal fees.[67]

In the face of such costs, any savings are quickly depleted. In another survey by the ACCC, only 41.0% of uninsured residents of northern Australia who suffered losses in an insurable event were able to manage their loss using savings, and 26.0% found it 'extremely' or 'very' difficult to cover their repair and replacement costs.[68] Other avenues for financing purchases, repairs, accommodation and other expenses

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59 Robinson (n 20) 8–9.
60 ASIC, *Getting Home Insurance Right* (n 54) 57.
61 Sheehan and Renouf (n 30) 23.
62 ACCC Report (n 23) 198.
63 Robinson (n 20) 13.
64 Graham Byrne, 'Small Vehicle Repair Costs', *CHOICE* (online, 2 September 2014) <https://www.choice.com.au/transport/cars/maintenance/articles/small-vehicle-repair-costs>.
65 Katie Fraser, 'Out of Africa and into Court: The Legal Problems of African Refugees' (Report, Footscray Community Legal Centre, June 2009) 27.
66 FRLC, 'Car Accident When Uninsured' (Fact Sheet, January 2024).
67 Robinson (n 20) 20.
68 ACCC Report (n 23) 290.

include credit cards and short-term loans, although they attract high interest rates, particularly for those forced to borrow from fringe lenders.[69] Ultimately, many uninsured low-income earners carry out necessary repairs themselves, or simply go without cars and household items that they cannot afford to repair or replace.[70]

A *Financial and In-Kind Assistance from Governments and Charities*

While governments emphasise the importance of savings, insurance and other 'self-help strategies' in anticipation of emergencies,[71] Australia also recognises the right to social security,[72] with the Commonwealth government responsible for distributing benefits, pensions and other payments as part of the social safety net for all Australians. Disaster relief is an area where additional safety nets are in place to assist those without insurance. Below, we outline the assistance available for uninsured Australians in the disaster context and beyond.

1 *State Governments*

In Australia, disaster relief is primarily the responsibility of the state, territory and local governments.[73] Under the Disaster Recovery Funding Arrangements 2018 ('DRFA'), the Commonwealth government provides funding directly to the states in respect of particularly severe disasters, while the states determine the relief measures to make available.[74] State and local government assistance in the aftermath of disaster can take many forms. Immediately following the event, governments provide 'material aid to address basic needs', including water, food, clothing and shelter.[75] Subsequent support may include financial assistance such as grants, loans, payments and vouchers for individuals and businesses, or services such as legal assistance and financial counselling.[76] Typically, the larger payments available under state frameworks are subject to income and asset limits and confined to individuals who (1) are uninsured; (2) have insurance that excludes the particular disaster event; or (3) have had a claim under the policy declined.

For example, in Victoria, anyone significantly affected by a specified disaster can apply for a one-off Emergency Relief Payment of up to $2,240 per family 'to help meet immediate needs, including emergency food, shelter, clothing, medication

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69 Corrie (n 34) 36.
70 Collins (n 30) 1; Corrie (n 34) 116.
71 National Emergency Management Agency (Cth), 'Disaster Recovery Funding Arrangements 2018' (Fact Sheet, 2018) 1.
72 Contained in art 9 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) and given effect in legislation such as the *Social Security Act 1991* (Cth) and *Social Security (Administration) Act 1999* (Cth).
73 Productivity Commission (n 27) vol 2, iv–v, 300–2.
74 *Disaster Recovery Funding Arrangements 2018* (n 3) 14 [3.1.1]–[3.1.2].
75 *Natural Disaster Royal Commission Final Report* (n 5) 457 [22.14].
76 Ibid.

and accommodation'.[77] Uninsured Victorians whose principal residence is damaged, destroyed or rendered inaccessible for over seven days may also be eligible for Emergency Re-establishment Assistance totalling up to $43,850 (as at October 2022) to help pay for clean-up, emergency accommodation, repairs, rebuilding and replacement of damaged contents.[78]

In Queensland, the Structural Assistance Grant provides up to $80,000 for uninsured, low-income owner-occupiers affected by eligible disaster events occurring since January 2023 (or up to $50,000 for eligible disaster events occurring prior to January 2023) to address structural damage to their home.[79] The Essential Household Contents Grant provides uninsured low-income earners with up to $1,765 (for single adults) or $5,300 (for couples and families) to assist with repairing or replacing essential home contents, while the Essential Services Safety and Reconnection Scheme Grant contributes towards reconnecting essential electricity, gas, water or sewerage services.[80] Smaller payments that are neither income-tested nor limited to uninsured householders include Emergency Hardship Assistance ($180 per person to assist with purchasing food, clothing and medical supplies or securing temporary accommodation), and Essential Services Hardship Assistance ($150 per person to assist with immediate needs following loss of essential services at their home).[81] Finally, through the Resilient Homes Fund, the Queensland government has provided funding for homeowners to repair, retrofit or raise — or demolish and rebuild or relocate — flood-affected homes.[82]

In New South Wales, low-income earners whose primary residence was damaged or destroyed by a disaster may access Essential Household Contents Grants, which assist with replacing essential household items; or Structural Repairs Grants, which contribute toward essential structural repairs, in some cases extending to fully rebuild homes rendered uninhabitable.[83] Following a series of severe storm

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77 'Personal Hardship Assistance Program', *Department of Families, Fairness and Housing (Vic)* (Web Page, 2023) <https://services.dffh.vic.gov.au/personal-hardship-assistance-program>; Murray Watt, Minister for Emergency Management, 'Jointly Funded Disaster Assistance for Storm and Bushfire-Impacted Communities in Victoria' (Media Release, 17 February 2024).

78 Jacinta Allan, Premier of Victoria, 'Supporting Victorians through Flood Clean-up' (Media Release, 19 October 2022).

79 'Structural Assistance Grant', *Queensland Government* (Web Page, August 2024) <https://www.qld.gov.au/community/disasters-emergencies/disasters/money-finance/types-grants/structural-assistance>.

80 'Essential Household Contents Grant', *Queensland Government* (Web Page, March 2024) <https://www.qld.gov.au/community/disasters-emergencies/disasters/money-finance/types-grants/essential-household-contents>; 'Essential Services Safety and Reconnection Scheme', *Queensland Government* (Web Page, July 2024) <https://www.qld.gov.au/community/disasters-emergencies/disasters/money-finance/types-grants/essential-serv-safety-reconnect>.

81 'Emergency Hardship Assistance', *Queensland Government* (Web Page, July 2024) <https://www.qld.gov.au/community/disasters-emergencies/disasters/money-finance/types-grants/emergency-hardship-assist>; 'Essential Services Hardship Assistance Grant', *Queensland Government* (Web Page, July 2024) <https://www.qld.gov.au/community/disasters-emergencies/disasters/money-finance/types-grants/essential-serv-hardship-assist>.

82 'About the Resilient Homes Fund', *Queensland Government* (Web Page, 2023) <https://www.qld.gov.au/housing/buying-owning-home/financial-help-concessions/resilient-homes-fund/overview/about>.

83 New South Wales Government, 'Disaster Relief Grant Terms and Conditions', *Apply for the Disaster Relief Grant* (Document, 2023) <https://www.nsw.gov.au/sites/default/files/noindex/2022-11/Disaster_Relief_Grant_Terms_and_Conditions.pdf>.

and flooding events in 2022, uninsured residents who had not received a Disaster Relief Grant — for example, because their income or assets exceeded the prescribed limits — could also apply for a one-off Back Home Grant.[84] Now closed to new applicants, this grant provided up to $20,000 for owner-occupiers to replace essential items or restore housing to a habitable condition; or $5,000 for tenants to replace essential items or relocate to a new property. Stamp duty relief may also be provided on the replacement of cars written off due to a declared disaster, but only for comprehensively insured vehicles.

2 *Commonwealth Government*

Australians adversely affected by disasters may also apply for assistance through Centrelink. Two payments funded by the DRFA may be available when the magnitude of a disaster requires additional Commonwealth government support. These are the Australian Government Disaster Recovery Payment (a one-off, non-means-tested payment of $1,000 per adult and $400 per child);[85] and the Disaster Recovery Allowance (an income support payment for up to 13 weeks to assist those whose income is affected by a disaster).[86] Those ineligible for these payments may apply for a Crisis Payment for people who are in 'severe financial hardship', receiving or eligible for income support and experiencing an 'extreme circumstance' (which includes having to leave their home because of a disaster).[87] People facing financial hardship who are ineligible for any other payment may apply for a fortnightly Special Benefit, paid at the same rate as the JobSeeker unemployment benefit.[88]

3 *Charity Organisations*

Charities such as the Australian Red Cross, St Vincent de Paul and the Salvation Army also provide emergency relief services to disaster survivors — as well as others in a crisis situation, such as illness or family violence — which may include food hampers, clothing and furniture, or fuel and grocery vouchers. Charities also distribute financial assistance, partially funded by donations from businesses, communities and the Commonwealth government.[89] During the catastrophic Black Summer bushfires of 2019–20, the Salvation Army provided significant loss grants (up to $3,000 per family) and total loss of residence grants (up to $3,500 per

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84 'Flood Recovery Back Home Grant: Guidelines', *Service NSW* (Web Page, 2023) <https://www.service.nsw.gov.au/flood-recovery-back-home-grant-guidelines>.

85 Department of Home Affairs (Cth), 'Disaster Recovery Payment' (Fact Sheet) <https://www.disasterassist.gov.au/Documents/Fact-sheets/Disaster-Recovery-Payment-Factsheet.pdf>.

86 Department of Home Affairs (Cth), 'Disaster Recovery Allowance' (Fact Sheet) <https://www.disasterassist.gov.au/Documents/Fact-sheets/Disaster-Recovery-Allowance-Factsheet.pdf>.

87 'Crisis Payment for Other Extreme Circumstances', *Services Australia* (Web Page, 2023) <https://www.servicesaustralia.gov.au/crisis-payment-for-other-extreme-circumstances>.

88 'Special Benefit', *Services Australia* (Web Page, 2023) <https://www.servicesaustralia.gov.au/special-benefit>.

89 *Natural Disaster Royal Commission Final Report* (n 5) 458–60 [22.16]–[22.22].

household).[90] The Australian Red Cross provided emergency grants of up to $20,000 to support those whose primary residence was destroyed.[91]

4 *Limitations of the Existing Safety Nets for the Uninsured*

These safety nets have major limitations when it comes to reducing exposure to financial loss for uninsured Australians. First, with certain exceptions, such as Centrelink Crisis Payments, they are unavailable in case of non-disaster events such as house fire or car accident. Secondly, these payments fall far short of the total costs incurred by someone whose home is severely damaged or destroyed in a disaster. As such, these safety nets are not so much an exception from the rhetoric of personal responsibility as an extension of it, with governments describing their role in disaster recovery as secondary to that of private insurers. The Royal Commission into National Natural Disaster Arrangements states:

> Recovery support is intended to assist people in need [to] … 'get back on their feet', not cover the cost of replacing lost assets or income. It is not a substitute for being properly prepared for disasters … by obtaining appropriate insurance.[92]

According to the Northern Territory government, disaster relief aims to 'help' meet 'immediate and recovery needs, but is not a substitute for insurance' and will not cover the full extent of survivors' losses.[93]

Unequal distribution of financial assistance under these frameworks exacerbates existing socio-economic inequalities. According to Ulubasoglu, disaster recovery funding is predominantly channelled towards businesses rather than households, widening the gap between survivors on high and low incomes, as the latter are more likely to be unemployed, undertaking unpaid care work or otherwise unable to benefit from assistance targeting businesses.[94] There is also a disparity between the levels of funding directed towards homeowners and renters. The bulk of the disaster relief payments listed in Parts III(A)(1) and (2) are aimed at homeowners. Yet renters also face significant costs in the wake of disasters, especially if their home is rendered uninhabitable.[95] As Booth, Davison and Hulse write:

> In home-owning democracies, uninsured renters fulfill a role of irresponsible and marginal subjects … [and] may not be considered worthy of specific attention in disaster planning and recovery. Having abrogated a perceived responsibilized duty to insure, governments may feel justified to leave this cohort to face the consequences of their 'choices', particularly as increases in the frequency and intensity of disaster events due to climate change continue to strain public resources.[96]

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90 Ibid 459 [22.21].

91 Ibid.

92 Ibid 456 [22.9].

93 Northern Territory Government, 'Financial Help for Residents', *SecureNT* (Web Page, 2023) <https://securent.nt.gov.au/recover-from-an-emergency/getting-help/financial-help-for-residents>.

94 Mehmet Ulubasoglu, 'Natural Disasters Increase Inequality: Recovery Funding May Make Things Worse', *The Conversation* (online, 27 February 2020) <https://theconversation.com/natural-disasters-increase-inequality-recovery-funding-may-make-things-worse-131643>.

95 CHOICE, *Weathering the Storm: Insurance in a Changing Climate* (Report, August 2023) 14.

96 Booth, Davison and Hulse (n 10) 51.

B *The Importance of Community Networks*

Friends, family, neighbours and broader community networks also provide vital support for uninsured households in the disaster context. Moreton describes 'hundreds of examples' of financial and in-kind assistance within disaster-affected communities, including free temporary housing, clothing and food; free services through local businesses such as grocery stores and hairdressers; sharing of tools and equipment; handyman support; and assistance with rebuilding and securing livestock.[97] Online crowdfunding platforms such as GoFundMe and MyCause enable community fundraising campaigns rivalling appeals by established charities.[98] Acknowledging the importance of such support, Young, Lucas and Booth describe residents in some disaster-prone areas as having 'a sense of insurance … based on community networks … that may or may not include purchase of an insurance policy'.[99]

Yet such mechanisms for raising much-needed funds are not always available for uninsured residents lacking large social networks and experiencing disadvantage on multiple fronts.[100] Young, Lucas and Booth document a phenomenon where previous residents in bushfire-affected areas on the urban periphery are pushed into less fire-prone locations when their policies fail to cover rebuilding costs, while cheaper land prices and housing affordability issues in the inner and outer suburbs draw newer residents into precisely those areas that are at highest risk of bushfire.[101] Newer residents may lack social connections in their area, their isolation compounded by lengthy commutes and limited local employment opportunities.[102] If they forego insurance, as Booth and Harwood note, their decision may be viewed with 'harsh judgment' by neighbours who identify as 'good insured-type people'.[103] Assistance from community networks is contingent upon many factors, and cannot compensate for the vulnerability that comes with being unable to access insurance, particularly on affordability grounds.

IV Our Study

As part of a broader project covering themes of financial exclusion, insurer claims handling practices and consumer protection, we conducted an online survey of

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97 Margaret Moreton, '"We Needed Help, but We Weren't Helpless": The Community Experience of Community Recovery after Natural Disaster in Australia' (2018) 33(1) *Australian Journal of Emergency Management* 19, 20.

98 Caitlin Fitzsimmons, 'Crowdfunding Campaigns Rival Traditional Charities: Millions Raised in Flood Relief', *The Sydney Morning Herald* (online, 12 March 2022) <https://www.smh.com.au/national/nsw/crowdfunding-campaigns-rival-traditional-charities-millions-raised-in-flood-relief-20220303-p5a1b3.html>.

99 Travis Young, Chloe Lucas and Kate Booth, 'Insurance, Fire and the Peri-Urban: Perceptions of Changing Communities in Melbourne's Rural–Urban Interface' (2022) 53(1) *Australian Geographer* 41, 49.

100 See, eg, Matthew Wade, 'Crowdfunding Disaster Relief Offers Hope in Desperate Times. But Who Gets Left Behind?', *The Conversation* (online, 9 March 2022) <https://theconversation.com/crowdfunding-disaster-relief-offers-hope-in-desperate-times-but-who-gets-left-behind-178632>.

101 Young et al (n 99) 49–51, 55.

102 Michael Buxton and Andrew Butt, *The Future of the Fringe* (CSIRO Publishing, 2020).

103 Kate Booth and Andrew Harwood, 'Insurance as Catastrophe: A Geography of House and Contents Insurance in Bushfire-Prone Places' (2016) 69 *Geoforum* 44, 50.

Australians without building, home contents or comprehensive car insurance. The survey was delivered through the research company Pureprofile, which maintains a database of panellists who complete surveys in return for a small cash payment. The survey explored multiple themes, including the extent of unmet need for building, home contents and comprehensive car insurance among uninsured Australians.

A *Methodology*

The survey comprised 52 mostly quantitative multiple-choice questions. Screener questions sought to ensure that respondents (1) drove a car owned or paid off by them or someone in their household (as car insurance is only relevant for car owners); (2) did not have a building, home contents or comprehensive car insurance policy; (3) had some responsibility for making household financial decisions; and (4) were aged over 18.

Following a set of demographic questions, in order to evaluate unmet need for insurance in our sample, the survey asked respondents to estimate the value of any financial resources that could be used to cover repair or replacement costs, including their annual household income and other financial assets including savings. Respondents were asked if they could raise $2,000 within a week in an emergency,[104] and asked to describe their ability to make ends meet.[105] The survey then sought to measure to what extent respondents regarded themselves as exposed to the risk of financial loss in case of an emergency causing severe property damage. Respondents were asked to imagine a scenario where their home, home contents or car were severely damaged or destroyed, and asked how likely they would be to cover their costs and resume their current standard of living. They were asked how likely they would be to employ various strategies to get by financially in such a situation. They were also asked what the consequences would be for them and their families. Finally, respondents were asked to what extent various factors would make them more likely to take out building, home contents or comprehensive car insurance, and what type of insurance they would most like to have if it was affordable. They were also asked if they were aware of several existing products or features designed for those who could not afford standard insurance policies.

Following receipt of ethics approval, the survey was launched in August 2019 when Pureprofile distributed generic recruitment emails to eligible members of its panel. Respondents provided consent by clicking on a link and completing the survey. The survey initially received 1,000 completed responses. We subsequently excluded 103 respondents as they owned apartments and units set on a strata title, and would have purchased building insurance indirectly through their body corporate, leaving a final sample of 897 respondents. The survey data was analysed by a statistician using the software platform SPSS Statistics.

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[104] See Muir et al (n 23) 104 (question C10).

[105] See Claire Whyley, James McCormick and Elaine Kempson, *Paying for Peace of Mind: Access to Home Contents Insurance for Low-Income Households* (Policy Studies Institute, 1998).

B *Findings*

1 *Demographics*

Of our sample of 897 Australians without building, home contents or comprehensive car insurance, 56.4% were female and 43.6% were male. Respondents included residents of all Australian states and territories, with the largest proportions living in New South Wales, Victoria and Queensland. Most (65.1%) lived in 'major cities',[106] with smaller proportions living in 'inner regional' (20.4%), 'outer regional' (12.7%) and 'remote' or 'very remote' (1.8%) locations. Respondents were aged 18–24 years (18.4%); 25–34 years (28.9%); 35–44 years (23.3%); 45–54 years (11.6%); 55–64 years (11.1%); and 65 and over (6.7%).

Most respondents rented, either from a private landlord or agent (57.0%) or in public or community housing (10.9%). Only a quarter owned their home, either 'outright' (10.5%) or 'with a mortgage' (15.1%), while 5.4% lived 'rent-free with family or friends'.[107] When asked to indicate their highest level of formal education completed, responses included 'Year 10 or less' (12.6%); Year 11 (3.6%); Year 12 (16.1%); bachelor's degree (28.9%); TAFE (27.8%); and postgraduate degree (11.1%). Only 35.1% were employed on a 'permanent full-time' basis; others selected 'permanent part-time' (8.5%); 'casual full-time' (3.2%); 'casual part-time' (8.7%); and 'self-employed or working in a family business' (6.0%). Others selected 'home duties' (12.0%); 'studying' (10.6%); 'unemployed' (9.4%); 'retired' (8.5%); 'caring for a child or another person' (7.8%); and 'looking for work or extra work' (6.7%).[108]

2 *Financial Resources*

All respondents (n = 897) were asked to identify their household's main source of income. Responses included 'wages paid by an employer' (55.3%); some form of Centrelink payment (the most common being the Disability Support Pension followed by the JobSeeker Payment for the unemployed and the Age Pension) (30.9%); 'earnings from own business' (5.4%); 'savings in a bank account' (3.9%); 'investment income' (1.6%); 'workers' compensation' (1.1%); 'superannuation' (1.0%); and 'other' (0.9%).[109] When asked to estimate their total annual household income before tax, including wages, Centrelink payments and child support, responses included 'less than $25,000' (16.7%); '$25,000–$49,999' (21.4%); '$50,000–$74,999' (17.8%); '75,000–$99,999' (18.1%); '$100,000–$124,999' (10.3%); '$125,000–$149,999' (4.7%); '$150,000 or more' (5.4%); and 'do not

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[106] Under the Australian Statistical Geography Standard, 'major cities' include Melbourne, Sydney, Brisbane, the Gold Coast, Newcastle and the Sunshine Coast: Australian Bureau of Statistics ('ABS'), *Australian Statistical Geography Standard (ASGS): Volume* 5 — *Remoteness Structure, July 2016* (Catalogue No 1270.0.55.005, March 2018).

[107] By comparison, in 2017–18, 30.0% of Australian households owned their home outright; 37.0% owned their home with a mortgage; 27.0% rented privately; and 3.0% lived in public or community housing: ABS, *Housing Occupancy and Costs 2017–18* (Catalogue No 4130.0, July 2019).

[108] For this question, respondents were able to select more than one response.

[109] By comparison, in 2020, the main income sources for Australians were wages paid by employer (62.8%), earnings from own business (2.6%), Centrelink payment (23.0%), and other income (10.8%): ABS, *Household Financial Resources, December 2020* (30 June 2021) <https://www.abs.gov.au/statistics/economy/finance/household-financial-resources/latest-release>.

know or prefer not to say' (5.7%).[110] When asked how much their household income had varied week to week over the previous 12 months, 20.5% said 'a lot'; 44.9% said 'a bit'; and 34.6% said 'not at all'.

Nearly all (89.6%) of respondents had a bank account. Smaller proportions had superannuation (53.1%); a credit card (36.3%); TPCI (28.9%); private health insurance (17.3%); and life insurance (6.0%). When asked to estimate the total value of their financial assets, including savings, shares, managed funds or investment properties, but not superannuation or their residential home, 27.6% said 'less than $500'. Smaller proportions selected '$500–$999' (6.5%); '$1,000–$4,999' (12.2%); '$5,000–$9,999' (10.8%); '$10,000–$19,999' (14.2%); '$20,000–$49,999' (9.3%); '$50,000–$99,999' (4.6%); '$100,000 or more' (4.8%); and 'do not know' (10.1%). When asked to estimate the total value of their home contents, responses included 'less than $1,000' (6.0%); '$1,000–$4,999' (17.1%); '$5,000–$9,999' (18.1%); '$10,000–$19,999' (26.5%); '$20,000–$49,999' (17.8%); '$50,000 or more' (7.4%); and 'do not know' (7.1%).

When asked to describe their overall ability to make ends meet, only 36.2% were managing 'very well' or 'quite well'; 39.6% were 'just getting by'; and 24.2% were experiencing 'some' or 'a lot of' financial difficulties. When asked if they could raise $2,000 within a week in an emergency, just 34.8% said 'yes'; most said 'no' (53.1%) or 'do not know' (12.2%). Of those who answered 'yes' or 'do not know' (n = 421), 64.8% would raise the money by using their savings. Others would 'borrow from family or friends' (13.8%); 'use a credit card' (10.0%); 'borrow from the bank' (5.2%); or 'use a payday, online or shopfront lender' (2.4%). A further 0.5% said 'other'; and 3.3% said 'do not know'.

3 *Capacity to Weather an Emergency Without Insurance*

All respondents were asked to imagine a scenario where their home, home contents or car were severely damaged or destroyed in an emergency such as a bushfire or flood. When asked how likely they would be to cover their costs and resume their current standard of living, responses included 'not at all likely' (21.7%); 'unlikely' (28.7%); 'neither likely nor unlikely' (27.8%); 'likely' (18.5%); and 'extremely likely' (3.3%).

All respondents were asked how likely they would be to use a range of strategies to get by financially in such a scenario. Their responses are shown in Table 1.

[110] At the time of the survey, according to the latest available data from the 2016 Census, the median household income for all Australians was $74,776 per annum: ABS, *2016 Census All Persons QuickStats* (Web Page) <https://www.abs.gov.au/census/find-census-data/quickstats/2016/0>.

Table 1: What respondents would do to get by financially in an emergency causing severe property damage

In this situation, how likely would you be to do the following to get by financially?	'Extremely likely' or 'Likely'	'Neither likely nor unlikely'	Unlikely' or 'Not at all likely'
	% of all respondents (n = 897)		
Apply for a Centrelink payment	55.4	20.2	24.4
Apply for government emergency assistance or disaster relief	54.7	19.7	25.5
Use my savings	49.6	21.2	29.2
Contact a charity or emergency relief organisation	42.5	23.1	34.4
Stay rent-free with family or friends	40.9	21.6	37.5
Borrow from family or friends	37.5	24.4	38.1
Apply for public housing	35.3	22.0	42.7
Borrow from a bank, building society or credit union	22.4	24.9	52.7
Borrow from a payday lender	16.4	15.8	67.8

All respondents were asked what the consequences of such a situation would be for them and their families. Their responses are shown in Table 2.

Table 2: Consequences of an emergency causing severe property damage

In this situation, what consequences would be likely for you and your family?	'Extremely likely' or 'Likely'	'Neither likely nor unlikely'	'Unlikely' or 'Not at all likely'
	% of all respondents (n = 897)		
Have to move into lower quality accommodation	57.6	22.9	19.5
Have to go without essential household goods or appliances because I could not afford to replace them	53.0	23.0	24.0
Have to go without a car	50.4	25.2	24.4
Lose my home because I could not afford to rebuild	39.9	17.8	42.3
Have to move away from my community (eg, because of lack of housing or transport options)	32.5	25.7	41.9
Go bankrupt	30.8	18.3	50.9
Lose my job (eg, because I need a car to get to work)	30.0	19.1	50.9
Become homeless	26.2	20.5	53.4

4 *Interest in Purchasing Insurance*

All respondents were asked which factors would make them more likely to take out building, home contents or comprehensive car insurance. Their responses are shown in Table 3.

Table 3: Factors that would make respondents more likely to take out building, home contents or comprehensive car insurance

To what extent would the following factors make you more likely to take out building, home contents or comprehensive car insurance?	'Extremely likely' or 'Likely'
	% of all respondents (n = 897)
Increase in my household income	63.6
Lower premium prices	59.0
Ability to pay premiums in smaller, more frequent instalments (eg, fortnightly)	56.0
Free, independent online or telephone insurance advice service	48.9
Shorter, less complex documents	48.8
Simpler, less complex insurance products	47.8
Option of paying premiums through Centrepay	45.0
Option of paying premiums with rent	39.9
Specialised insurance for bushfire or flood-prone areas	33.6

All respondents were asked to select one type of insurance they would most like to have if it was affordable. Responses included comprehensive car insurance (27.3%); home contents insurance (19.2%); private health insurance (12.2%); building insurance (6.9%); and life insurance (6.1%). Only 12.6% selected 'None of the above — I do not want any insurance cover'. Respondents were also asked if they had previously heard of some existing options designed for those unable to afford standard home contents and comprehensive car insurance. When asked if they had heard of renters' insurance, 58.3% said 'Yes' while 41.7% said 'No'. When asked if they had heard of low-cost car and home contents insurance for people on low incomes (for example, Essentials by AAI), only 24.1% said 'Yes' while 75.9% said 'No'.

V Unmet Need for Insurance and Possible Solutions

In this Part, we draw upon the findings outlined in Part IV(B) to evaluate 'unmet need' for insurance in our sample of Australians without building, home contents and comprehensive car insurance. Unmet need for insurance has objective and subjective dimensions, including (1) limited financial resources that could be used to cover repair, replacement or rebuilding costs; (2) self-perceived exposure to financial loss in case of an emergency causing severe property damage; and (3) interest in purchasing insurance if it was accessible.

Objectively, the financial resources of most uninsured Australians taking part in our study were extremely limited, putting them in jeopardy in case of any unexpected property damage. As shown in Parts IV(B)(1) and (2), by contrast to the general Australian population, our respondents had lower levels of homeownership and paid employment; and higher rates of reliance on social security incomes paid by Centrelink. Most had very limited financial buffers in case of emergencies, with 27.6% reporting 'less than $500' in savings and other financial assets. Just 34.8% said they could raise $2,000 within a week in an emergency using savings, a credit card or other means, compared to 80.9% of Australians generally.[111]

Most respondents regarded themselves as highly exposed to financial loss due to their uninsured status. When asked to imagine a hypothetical scenario where their home, home contents or car were severely damaged or destroyed in an emergency, most were less than optimistic regarding their capacity to recover financially. As shown in Part IV(B)(3), only 21.8% considered themselves 'extremely likely' or 'likely' to cover their costs and resume their current standard of living, and only 49.6% expected to rely upon savings to get by financially in such an event. As shown in Table 1, many anticipated leaning upon their social networks for support — for example, by borrowing money from family or friends (37.5%) or staying rent-free with family or friends (40.9%). Most expected to rely upon government or the community sector by applying for a Centrelink payment (55.4%), seeking government emergency assistance or disaster relief (54.7%), or contacting a charity or emergency relief organisation (42.5%). Yet because most respondents were renters, they would in reality be eligible for only the lesser types of payments under the safety nets outlined in Part III(A)(4), which would fall far short of the costs of securing alternative accommodation and re-establishing a household. They would also be unable to draw upon any such safety nets in case of some emergencies outside the disaster context, such as the total loss of a car in an accident.

As shown in Table 2, most respondents anticipated the potential consequences of a hypothetical emergency to be quite severe for them and their families. High proportions anticipated having to move into lower quality accommodation (57.6%); go without a car (50.4%); or go without essential household goods or appliances (53.0%) because they could not afford to replace them. Concerningly, 32.5% anticipated having to move away from their community, and 30.0% expected to lose their job for reasons such as limited transport options in their area. Substantial proportions even said they would be likely to become homeless (26.2%) or become bankrupt (30.8%).

Finally, as shown in Part IV(B)(4), by contrast to industry assumptions of limited interest in insurance among those without coverage,[112] most respondents expressed a preference to have some insurance cover if it was affordable, and only 12.6% did 'not want any insurance cover'. For most, the decision to forego insurance was cost driven, with 63.6% saying an increase in their household income would make them more likely to take out building, home contents or comprehensive car insurance, and 59.0% saying the same about lower premiums.

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[111] Axelle Marjolin, Kristy Muir and Megan Weier, 'Financial Security and the Influence of Economic Resources' (Report, Centre for Social Impact for NAB, December 2018) 21.

[112] Good Shepherd Microfinance (n 34) 12–13, 18.

These findings indicate a high level of unmet need for insurance among those without building, home contents and comprehensive car insurance cover. In light of these findings, below we evaluate a range of strategies for meeting such unmet need by improving insurance affordability and addressing other barriers to insurance ownership.

A *Measures to Improve Insurance Affordability*

There is extensive evidence identifying affordability as a major driver of non-insurance in Australia.[113] As stated by Treasury, insurance affordability has two dimensions: (1) each policyholder's 'ability to fund the premium, or "cash flow"'; and (2) 'the size of the premium' itself.[114] Below, we discuss a range of measures that target the second of these dimensions of affordability by reducing the cost of insurance premiums for Australians generally, or specifically for those living on low incomes.

However, without addressing the first dimension of affordability — capacity to 'fund the premium' through an adequate and reliable cash flow — such measures will not succeed in improving insurance uptake for low-income Australians. According to Banks and Bowman, low-income earners regularly 'interact with a range of failing markets that heighten their risks of financial harm', including precarious labour markets and 'an increasingly frayed, inadequate, quasi-marketised welfare system provid[ing] meagre and unstable incomes and support'.[115] The current rates of payment for recipients of student and unemployment benefits in particular are considered inadequate to cover the rising costs of even basic living essentials such as rent, food and utilities, let alone insurance.[116] Yet all of the measures outlined below would require households to incur some additional expenditure on a regular basis in order to access insurance coverage. For those living on low, often fluctuating incomes from Centrelink or casual or seasonal jobs,[117] any additional financial commitment may prove impossible. Hence the measures discussed below must be accompanied by other policy interventions, such as 'less conditional, higher welfare payments' and legislation to 'enhance job security and wage certainty',[118] if they are to meaningfully assist Australians experiencing the highest non-insurance rates.

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113 ANZ Report (n 21) 74; Collins (n 30) v–vii, 5; Connolly (n 1) 31; Maury, Lasater and Mildenhall (n 30) 23, 30, 83, 99; NRMA Report (n 21) 22, 29; Tooth and Barker (n 21) 17, 38; Sheehan and Renouf (n 30) 7–8.

114 *Natural Disaster Insurance Review* (n 26) 86 [11.16].

115 Banks and Bowman (n 9) 5–6.

116 See Anglicare Australia, *Rental Affordability Snapshot* (National Report, April 2021) 11; Peter Davidson, Peter Saunders, Bruce Bradbury and Melissa Wong, 'Poverty in Australia 2020: Part 1 Overview' (Australian Council of Social Service and UNSW Sydney Poverty and Inequality Partnership Report No 3, 2020); Peter Saunders and Megan Bedford, 'New Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians' (Social Policy Research Centre, SPRC Report No 11/17, August 2017).

117 Banks and Bowman (n 9) 23–9.

118 Ibid 7.

1 *Taxation Measures*

With the above caveat in mind, we first consider reforms to the taxes and levies that apply to building and home contents insurance premiums. In Australia, premiums are subject to a range of taxes including the goods and services tax ('GST') at a flat rate of 10.0% and — in all states and territories except the Australian Capital Territory — stamp duty ranging between 9.0% and 11.0%.[119] New South Wales also charges a 21.0% Emergency Services Levy on home insurance policies. These taxes and levies make up between 9.0% and 31.0% of a policyholder's total premium, depending on location.[120] They are proportional to the size of the premium, with people living in higher risk locations paying more in taxes than those living elsewhere.[121]

Insurers have long regarded state stamp duties and emergency services levies on premiums as major contributors to non-insurance rates in Australia.[122] Several government reviews echoed this position, calling for the abolition of such taxes, including Treasury's 2010 review of Australia's future tax system;[123] the Productivity Commission's 2014 review of Australia's natural disaster funding arrangements;[124] the Royal Commission into National Natural Disaster Arrangements;[125] and, most recently, the ACCC's northern Australia inquiry.[126] Yet state governments have been reluctant to forego this source of revenue,[127] some of which could arguably be compensated by increases in municipal land taxes.[128] There is also a question as to whether insurers would pass on the price reduction to consumers: the Victorian Fire Services Levy Monitor found insurers and brokers had over-collected $12.4 million following the abolition of the Fire Services Levy in Victoria in 2013.[129]

Yet the primary reason against relying upon the abolition of state taxes on premiums to increase insurance uptake is that such changes would primarily benefit wealthier households who pay a larger amount in stamp duty, and not lower income households, who are the group more likely to be uninsured.[130] For this reason, it is our view that while abolishing state taxes on premiums may benefit consumers overall, it would not meaningfully impact insurance accessibility for the majority of

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119 Actuaries Institute, 'Property Insurance Affordability: Challenges and Potential Solutions' (Research Paper, November 2020) 9.

120 Ibid.

121 ACCC Report (n 23) 54.

122 See Richard Tooth, 'Analysis of Demand for Home and Contents Insurance' (Report, Insurance Council of Australia, August 2015) xii; Insurance Council of Australia, *Building a More Resilient Australia: Policy Proposals for the Next Australian Government* (Report, February 2022) 18.

123 Treasury (Cth), *Australia's Future Tax System: Part Two — Detailed Analysis* (Final Report, December 2009) vol 2, 474.

124 Productivity Commission (n 27) vol 1, 45.

125 *Natural Disaster Royal Commission Final Report* (n 5) 424 [20.43].

126 ACCC Report (n 23) 57–8.

127 Ibid 57.

128 John Freebairn, Miranda Stewart and Pei Xuan Liu, 'Reform of State Taxes in Australia: Rationale and Options' (Report, Melbourne School of Government, July 2015) 21.

129 FRLC, Submission to Emergency Services Levy Monitor, *Emergency Services Levy Insurance Monitor Act 2016 Draft Guidelines* (August 2016) 5.

130 Freeman (n 22) 35.

Australians who are currently entirely excluded from coverage due to affordability concerns.

2 *Government Reinsurance*

Secondly, we consider government reinsurance pools — government-run or funded entities offering reinsurance for specific risks such as natural catastrophes or terrorism. Approximately 9.0% of the technical price of general insurance premiums covers reinsurance costs.[131] By intervening to provide reinsurance, governments can theoretically reduce such costs as the government forgoes a commercial profit margin on selling the reinsurance and backs the reinsurance with a guarantee to ensure the pool has capacity to cover the cost of rare catastrophic events.[132] Reinsurance pools have been introduced overseas in areas where rising disaster risks caused premium prices to reach unaffordable levels, or where private insurers were becoming reluctant to cover the relevant perils.[133]

In March 2022, the Commonwealth government passed the Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022 (Cth) to establish a reinsurance pool for cyclone and related flood damage, covering residential, strata and small business property insurance policies. The pool is administered by the Australian Reinsurance Pool Corporation ('ARPC') with backing from a $10 billion government guarantee. Insurers pay premiums to the pool and receive coverage for losses in excess of a 'retention level'[134] 'from the time a cyclone begins until 48 hours after the cyclone ends'.[135] The pool was intended to reduce premiums in cyclone-prone areas by allowing insurers to reinsure cyclone risks at a lower cost than if they purchased reinsurance through the private market.[136] It was projected to deliver average savings of around 13.0% on home insurance premiums across northern Australia, and 32.0% in high-risk areas.[137]

Consumer advocates have recommended expanding the cyclone reinsurance pool to include other types of disaster risks — such as flooding and bushfire — and geographical areas beyond northern Australia.[138] This is because concerns about rising disaster risk are not 'uniquely limited' to this region,[139] and nor are concerns about premium affordability for low-income earners. However, even though 65% of Australian home insurance policies were covered by the cyclone pool by July 2023,[140] inflation in building costs and increasingly frequent disasters across

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131 ACCC Report (n 23) 161.

132 Treasury (Cth), 'Reinsurance Pool for Cyclones and Related Flood Damage' (Consultation Paper, May 2021) 3.

133 Ibid.

134 Ibid 12–13.

135 'The Cyclone Pool', *Australian Reinsurance Pool Corporation* (Web Page) <https://arpc.gov.au/reinsurance-pools/cyclone/>.

136 Explanatory Memorandum, Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022 (Cth) 4 [1.6]–[1.8].

137 Joint Select Committee on Northern Australia, Parliament of Australia, *Inquiry into the Cyclone Reinsurance Pool* (First Report, March 2023) 16.

138 CHOICE (n 95) 20; FRLC, Submission to Treasury (Cth), *Reinsurance Pool for Cyclones and Related Flood Damage* (22 June 2021) 24.

139 FLRC, Submission to Treasury (Cth) (n 138) 23.

140 Stephen Jones MP, 'More Insurers Join the Cyclone Reinsurance Pool Ahead of the 2023–24 Cyclone Season' (Media Release, 13 July 2023).

Australia — which drive up the cost of non-pool reinsurance — have so far undermined its capacity to meaningfully reduce premiums for consumers.[141] According to the Joint Select Committee on Northern Australia, it is still too early to determine whether the pool will deliver the anticipated reductions in premium costs.[142]

Another reason against expanded reliance upon government reinsurance pools to improve insurance affordability, according to SACOSS, is that they involve 'privatising the profits while socialising the losses'.[143] That is, private insurers continue to profit from selling insurance while transferring the risk of large-scale payouts in case of widespread disasters to governments, and therefore to taxpayers.[144] For this reason, combined with uncertainty about the capacity of reinsurance pools to meaningfully improve insurance affordability for consumers, it is our view that other measures are needed to enable uninsured Australians to access coverage.

3 *Microfinance*

In Parts V(A)(1) and (2), we considered measures that seek to improve insurance affordability for consumers generally. Below, we consider measures that target those especially at risk of non-insurance, being people living on low incomes.

The first of these measures falls into the category of 'microfinance', or low-cost financial products designed for disadvantaged groups who would otherwise be excluded from mainstream financial services. Microfinance initiatives in Australia have generally involved voluntary partnerships between the community and corporate sectors under the umbrella of corporate social responsibility ('CSR'), at times with government funding.[145] They include the No-Interest Loan Scheme ('NILS') launched by Good Shepherd Youth & Family Service;[146] the StepUP low-interest loan scheme developed by Good Shepherd and National Australia Bank ('NAB'); and the AddsUP matched savings program. While 'microinsurance' is a growing industry in many developing countries,[147] Australian insurers have not been proactive in entering the microfinance space, assuming that low-income policyholders — being more likely to live in disaster-prone areas, or to fall behind with premium payments — will carry additional risk.[148] The commissions system for remunerating insurance brokers also incentivises sales of comprehensive products to wealthier consumers,[149] while the need to use non-traditional channels

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141 Joint Select Committee on Northern Australia (n 137) 1, 28, 57, 64.
142 Ibid 28, 57, 64.
143 Freeman (n 22) 40.
144 ACCC Report (n 23) xvi, 165.
145 Ingrid Burkett and Genevieve Sheehan, 'From the Margins to the Mainstream: The Challenges for Microfinance in Australia' (Brotherhood of St Laurence and Foresters Community Finance, 2009) 23.
146 NILS operates on the idea of 'circular credit', where short-term, small-amount loans are repaid by borrowers and the funds then lent out to others in the community. NILS is funded by sources including government, philanthropic organisations and corporate partnerships: Corrie (n 34) i, 2.
147 Craig Churchill, 'Insuring the Low-Income Market: Challenges and Solutions for Commercial Insurers' (2007) 32(3) *The Geneva Papers on Risk and Insurance* 401, 403.
148 Good Shepherd Microfinance (n 34) 12–13.
149 Collins (n 30) 13.

such as community organisations to distribute microinsurance presents additional challenges.[150] Finally, insurers are sceptical that there is a critical mass of potential policyholders, despite indications that most people on low incomes would like to hold some or additional insurance.[151]

Features that would make a 'microinsurance' product suitable for Australians on low incomes include reduced premiums; minimal or no excesses; lower minimum sums insured for households with limited assets; and inclusions appropriate for low-income renters, including at least some alternative accommodation cover.[152] Also important are alternative options for paying premiums, including allowing fortnightly payments, by contrast to the quarterly, annual or bi-annual payments required by most insurers; and payment through Centrepay[153] for social security recipients.[154] As shown in Part IV(B)(4), 56.0% of our respondents said the option of paying premiums in smaller, more frequent instalments would make them more likely to purchase insurance, while 45.0% said the same of payment through Centrepay.

Some of these features were implemented in the few examples of microinsurance in Australia to date, including the StepUP Insurance initiative launched in 2006 by Good Shepherd with NAB and Allianz.[155] Developed for participants in the StepUP Loans scheme and later expanded to include all Centrelink healthcare card holders, StepUP Insurance featured lower premiums payable fortnightly, a reduced sum insured and a halved standard excess. It covered alternative accommodation, new-for-old replacement on most goods, a hire car in the event of the policyholder's car becoming unusable, and some emergency car repairs.[156] Potential policyholders were informed about the product by microfinance workers, and referred to a specialist call centre operated by NAB to purchase it. StepUP Insurance was eventually discontinued as 'not being financially viable', its low sales attributed to 'poor marketing' and regulatory limits on the capacity of microfinance workers to promote the product.[157]

Current examples of microinsurance in Australia include Insurance 4 That — a single-item home contents policy developed by Good Shepherd and IAG to cover critical items such as technology, medical devices and whitegoods. Another example is the Essentials by AAI low-cost car and home contents insurance by Good Shepherd and Suncorp, which offers lower premiums with a reduced level of cover — up to $10,000 or $20,000 for home contents and up to two cars valued at $3,000 and $5,000.[158] Policyholders may make two excess-free claims, with a low excess applying to subsequent claims. Essentials by AAI is available to healthcare card

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150 Good Shepherd Microfinance (n 34) 13, 20.

151 Ibid 12–13; Churchill (n 147) 405.

152 Collins (n 30) ix–x, 412; Sheehan and Renouf (n 30) 27.

153 Centrepay is a voluntary system that facilitates 'bill smoothing' by allowing expenses such as rent and bills to be taken directly out of social security incomes before they are paid to their recipients: Corrie (n 34) iv.

154 Collins (n 30) 30, 41; Freeman (n 22) 9; Sheehan and Renouf (n 30) 20, 27; *Natural Disaster Insurance Review* (n 26) 88 [11.26].

155 Collins (n 30) 7.

156 Good Shepherd Microfinance (n 34) 10.

157 Ibid.

158 Desmond Lim, 'Essentials by AAI Case Study' (Report, Suncorp Group and Good Shepherd Microfinance, 2016).

holders, Centrelink recipients and those with annual household incomes of $48,000 or less. While it has received positive feedback as to price, claims handling and trust, uptake remains low, perhaps due to insufficient awareness. [159] As shown in Part IV(B)(4), 75.9% of our respondents had never heard of low-cost car and home contents insurance, including Essentials by AAI.

The low uptake and limited lifespan of such initiatives reflects the fact that, as Burkett and Sheehan note, many microfinance initiatives are 'never going to be financially sustainable' for the corporate provider: 'the more disadvantaged the target group … the more difficult it will be to cover costs or generate a surplus'.[160] Insurers have argued that due to the costs of development, marketing and administration, a low-cost policy may need to be held for several years without a claim for the company to break even.[161] To reach consumers with more complex needs, microfinance may need to be supported by regulation making financial inclusion 'more central to the core business of financial institutions' rather than the subject of 'symbolic', 'CSR focused' initiatives.[162] For example, under the *Community Reinvestment Act 1977* in the United States, financial service providers are required to disclose their community lending practices, enabling them to be monitored and rated on their performance.[163] Their performance is made public and can be taken into account by regulatory agencies when assessing requests for mergers, acquisitions or branch openings. However, particularly in the absence of specific obligations and penalties for non-compliance, performance monitoring has limitations: an insurer's failure to offer specially designed policies for low-income earners is unlikely to generate sufficient negative publicity to motivate change in this regard.

In the United Kingdom, under pt 7 of the *Corporation Tax Act 2010* (UK), tax relief is offered to organisations that invest in 'community development finance' or microfinance institutions.[164] Yet building, home contents and comprehensive car insurance are broadly considered 'essential' to full socio-economic participation in Australia,[165] particularly in light of their central role in Australia's national strategy for disaster resilience. It is therefore our view that alongside other industries providing 'essential' services such as energy, water and telecommunications, the insurance industry — rather than taxpayers — should bear more of the burden of ensuring access for those with limited capacity to pay. In support of this principle, Burkett and Sheehan argue for a statutory obligation to provide basic financial services to all Australians, similarly to other 'essential' services where corporate players cannot deny access to 'unprofitable' consumers.[166] Energy and water are

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159 Freeman (n 22) 17.

160 Burkett and Sheehan (n 145) 12.

161 Collins (n 30) 13.

162 Burkett and Sheehan (n 145) 22, 31.

163 Ibid 22–3. For recent changes to this legislation, see Office of the Comptroller of the Currency (US), 'Community Reinvestment Act: Interagency Final Rulemaking to Implement the CRA', *OCC Bulletin 2023–32* (24 October 2023) <https://www.ots.treas.gov/news-issuances/bulletins/2023/bulletin-2023-32.html>.

164 See HM Revenue & Customs (UK), 'CITR: A Brief Guide for Investors', *Community Investment Tax Relief Manual* (CITM9900, March 2022) <https://www.gov.uk/hmrc-internal-manuals/community-investment-tax-relief-manual/citm9900>.

165 Connolly (n 1) 6; Saunders (n 1) 99; Freeman (n 22) 21.

166 Burkett and Sheehan (n 145) 23.

already recognised as essential services in legislation and industry guidelines in Australia,[167] providing the basis for legal protections for consumers facing payment difficulties due to financial hardship,[168] and telecommunications too is 'now considered an essential service'.[169] There has been increased recognition that general insurance and other financial services such as banking are similarly essential.[170] Expressly recognising building, home contents and comprehensive car insurance as essential services — for example, within the General Insurance Code of Practice — could facilitate stronger protections for vulnerable policyholders as well as facilitate ongoing commitment to the development of appropriate products for low-income earners.

While we support the statutory recognition of insurance as an 'essential' service, as well as more ongoing industry investment in microinsurance, the problem of financial sustainability remains. As an alternative to traditional commercial insurance and existing microinsurance products by for-profit insurers, SACOSS has proposed a not-for-profit mutual microinsurance scheme, which could offer even lower premiums by foregoing a profit margin altogether.[171] As an example, SACOSS cites the Center for Agriculture and Rural Development ('CARD'), a microfinance NGO in the Philippines, which partners with a private insurer to provide a disaster insurance product for USD$1 per week to over 250,000 policyholders.[172] The product's success has been attributed to its 'solidarity-focused, member-run' structure.[173] Perhaps, as recommended by SACOSS, community organisations providing financial counselling, emergency relief and other services could become a starting point for delivering a mutual microinsurance model in Australia, 'couched within a community disaster resilience collective' involving face-to-face meetings, participation opportunities and planning for disaster mitigation.[174]

4 *Insurance-with-Rent Schemes*

Another measure recommended by consumer advocates is the development of insurance-with-rent schemes, under which public and community housing tenants pay premiums as part of their rent for a basic level of home contents cover.[175] The housing provider collects the premiums and forwards the bulk amount to the insurer, retaining a fraction in recompense. These schemes ensure savings by allowing

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[167] See, eg, *Essential Services Act 1988* (NSW) s 4; *National Energy Retail Law (South Australia) Act 2011* (SA) sch s 45(3); *Gas Industry Act 2001* (Vic) s 43(1A); Economic Regulation Authority (WA), *Financial Hardship Policy Guidelines: Electricity Licences* (May 2023) 1.

[168] Paul Ali, Evgenia Bourova and Ian Ramsay, 'Financial Hardship: The Legal Frameworks' (University of Melbourne Legal Studies Research Paper No 691, June 2014).

[169] Australian Communications and Media Authority, *Consumer Vulnerability: Expectations for the Telecommunications Industry* (Statement, May 2022) 2.

[170] See Emma O'Neil, 'Exploring Regulatory Approaches to Consumer Vulnerability' (Report for the Australian Energy Regulator, February 2020) 4; Financial Conduct Authority (UK), *Guidance for Firms on the Fair Treatment of Vulnerable Customers* (FG21/1, February 2021) 13 [2.22].

[171] Freeman (n 22) 29–34.

[172] Ibid 31.

[173] Ibid 32.

[174] Ibid 33.

[175] Collins (n 30) 9–11; Freeman (n 22) 27–9.

housing providers' buildings to be insured under the same contract.[176] Good Shepherd Microfinance suggests such a scheme could function in two ways. The first model is an 'opt-in scheme' where tenants are offered insurance by their housing provider and choose between different levels of cover.[177] Such opt-in schemes have been trialled in the United Kingdom, Ireland and Canada. In Scotland, as documented by Hood, Stein and McCann, insurance-with-rent schemes were offered by 75.0% of local authorities.[178] They included basic cover for theft, fire, flood and water damage 'comparable to any other home policy',[179] but sums insured were limited to account for policyholders' low asset levels, there were no excesses, and premiums were as little as 7.0% of what would have been payable through a commercial insurer.[180] Yet these schemes had fairly low uptake, which was attributed to insufficient marketing, as most tenants regarded insurance as 'valuable', were aware of their low likelihood of replacing lost, stolen or damaged items 'without insurance support', and viewed the schemes as 'good value for money'.[181]

In Australia, where there have been no such initiatives, an insurance-with-rent scheme could be highly beneficial to public and community housing tenants, who currently forego insurance at higher rates. As shown in Part IV(B)(1), public and community housing tenants made up 10.9% of respondents taking part in our study, compared to only 3.0% of Australians generally.[182] Of our sample, as shown in Part IV(B)(4), 39.9% said they would be more likely to take out building or home contents insurance if given the option of paying premiums with rent (although this cohort included homeowners and private renters, who would in practice be ineligible to benefit from such a scheme). However, the major barrier to such a scheme in Australia is the very low level of income available to most public and community housing tenants, which would leave most unable to 'choose' between different levels of cover and could discourage many from 'opting in' to the scheme altogether. For this reason, in preference to the opt-in model described above, we support arguments in favour of the 'group insurance' model described by Good Shepherd Microfinance,[183] where social housing providers purchase basic contents insurance on behalf of all their tenants and incorporate the costs into their rent, similarly to rental arrangements incorporating utilities such as electricity, water and gas.[184] Such a scheme would be better placed to ensure universal coverage for a very vulnerable group of low-income Australians and reduce the risk of low uptake due to insufficient awareness-raising measures.

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176 Collins (n 30) 9.

177 Good Shepherd Microfinance (n 34) 19.

178 John Hood, William Stein and Claire McCann, 'Insurance with Rent Schemes: An Empirical Study of Market Provision and Consumer Demand' (2005) 30(2) *The Geneva Papers on Risk and Insurance: Issues and Practice* 223, 238.

179 Ibid 238.

180 Ibid 239; John Hood, William Stein and Claire McCann, 'Low-Cost Insurance Schemes in Scottish Social Housing: An Empirical Study of Availability and Tenants' Participation' (2009) 46(9) *Urban Studies* 1807, 1817.

181 Hood, Stein and McCann, 'Low-Cost Insurance Schemes in Scottish Social Housing' (n 180) 1821.

182 ABS (n 110).

183 Good Shepherd Microfinance (n 34) 19.

184 Freeman (n 22) 28–9. Such a scheme was successfully trialled by one United Kingdom social housing provider in 2012: Stuart Bishop, 'Why Housing Providers Have a Responsibility to Insure Their Tenants', *The Guardian* (online, 9 October 2012) <https://www.theguardian.com/housing-network/2012/oct/09/contents-insurance-social-tenants>.

5 *Direct Subsidies or Concessions*

Another measure recommended by the ACCC in its northern Australia inquiry — and favoured by consumer advocates[185] — is the provision of targeted, direct subsidies to low-income earners.[186] Such subsidies could be paid (1) directly to consumers, through the existing taxation or welfare systems or a custom-designed system; (2) to insurers, who could claim the subsidy from the government and pass it on to eligible consumers through reduced premiums; or (3) through additional funding supplied to a reinsurance pool, which would allow insurers to offer discounts on their premiums.[187] Each method 'carries different risks in ensuring the full value of the subsidy reaches consumers … and different costs' for insurers and governments.[188] While any of these methods would require the government to assume some of the cost of premiums, these costs would presumably be offset by a reduction in non-insurance rates, which would in turn enable less spending on post-disaster relief to uninsured households.[189]

Subsidies were previously considered by the Productivity Commission in its 2014 review of disaster funding arrangements, and rejected on the basis that 'subsidising premiums … would reduce policy holders' incentives to reduce their exposure to risks, either through mitigation or moving away from high-risk areas'.[190] However, this argument could be addressed by making such concessions or subsidies available only to low-income earners, who generally lack the financial resources and bargaining power to reduce their risk exposure by investing in home security improvements or implementing flood or bushfire mitigation measures.[191] People on low incomes are also more likely to move into disaster-prone areas due to housing affordability issues, and less able to respond to premium price signals by moving elsewhere when their property value plummets in the wake of disaster, or when rents in surrounding areas rise due to higher demand. In order to minimise the distortion of price signals and discourage development in high-risk areas, subsidies could be confined to insurance for existing homes and unavailable to newly constructed ones.[192]

For the reasons discussed above, it is our view that subsidies would be the most effective means of reducing premium costs for those who are most in need of such assistance. Substantial subsidies are already used in Australia to assist with the cost, and encourage uptake, of other services such as childcare and private health insurance.[193] There are also overseas examples of subsidies for property insurance, such as those provided to rural households in Fujian, China, where the provincial and municipal governments contract commercial insurers to provide blanket housing

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185 CHOICE (n 95) 8; Freeman (n 22) 26; FRLC, *Exposed: Insurance Problems after Extreme Weather Events* (n 14) 38.
186 ACCC Report (n 23) 175–82.
187 Ibid 176.
188 Ibid.
189 Ibid 182.
190 Productivity Commission (n 27) vol 1, 222.
191 Sheehan and Renouf (n 30) 10, 23.
192 ACCC Report (n 23) 181; Actuaries Institute (n 119) 18.
193 ACCC Report (n 23) 176.

insurance to all rural households, or in the Zhejiang province, where disaster insurance is subsidised by the provincial and local governments.[194]

We also note that an alternative and perhaps more ambitious approach to subsidising premiums for low-income earners has also been proposed by SACOSS, which recommended the establishment of a concessions scheme for home, contents and car insurance for all low-income Australians through the addition of a 'general insurance concession' to the existing state concessions schemes for essential services such as energy, water and sewerage.[195] Such a concession could be provided on the basis of recognition that insurance, as argued in Part V(A)(3), is an 'essential' service in Australia. The establishment of a general insurance concessions scheme could provide an alternative to paying subsidies to insurers, to be passed on to consumers through a reduced premium — an approach that would carry the risk of insurers capturing the benefits of the subsidy by inflating premiums for eligible consumers.[196] Access to the concessions could be facilitated by community organisations with funding from the government.[197]

B *Measures Targeting Non-Insurance Drivers Other Than Affordability*

Affordability is not the only factor driving some Australians to forego building, home contents and comprehensive car insurance. As shown by Banks and Bowman, people on low incomes in particular face a range of risks in their lives without the safety net of savings, including insecure housing, precarious employment and fluctuating Centrelink payments.[198] As a result, they may have a built-up 'tolerance to losing assets',[199] or assume that their low-value belongings are not 'worth' insuring, even if they would be beyond their means to repair or replace.[200]

Distrust in the insurance industry may also drive some people to forego coverage, particularly if influenced by media stories of extended delays, inadequate payouts and other problems with claims handling in the wake of recent disasters.[201] According to Booth and Tranter, distrust in insurers' readiness to perform their side of the bargain renders insurance 'a risk in and of itself, providing a stronger rationale for choosing not being insured'.[202] There is evidence to suggest these reputational issues are not going away. In 2022, several years after the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

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194 Hennie Bester, Herman Smit, Lisa Morgan, Richard Lord, Zheng Wei, Luo Qingju, Hu Quiming and Lin Shanjun, 'China Access to Insurance Diagnostic: A Market and Regulatory Analysis' (Report, Access to Insurance Initiative, 2018) 83.

195 Freeman (n 22) 8.

196 Ibid 22. See also ACCC Report (n 23) 181.

197 Freeman (n 22) 8.

198 Banks and Bowman (n 9) 2, 23, 24, 31.

199 Sheehan and Renouf (n 30) 12.

200 Ibid 1, 23–4; Whyley, McCormick and Kempson (n 105) 8; Corrie (n 34) iv, 48–9; Collins (n 30) 33; Sheehan and Renouf (n 30) 23; Maury, Lasater and Mildenhall (n 30).

201 See, eg, Mark Moore, 'Thousands of Hail Damage Insurance Claims Are Still Outstanding', *ABC News* (online, 2 May 2020) <https://www.abc.net.au/news/2020-05-02/hail-damage-insurance-claims-outstanding-during-coronavirus/12204758>; Sofie Wainwright, 'Hundreds Still Displaced Six Months after Townsville Flood', *ABC News* (online, 9 August 2019) <https://www.abc.net.au/news/2019-08-01/townsville-floods-hundreds-displaced-six-months-later/11370062>.

202 Booth and Tranter (n 19) 3138.

highlighted the incidence of poor claims handling practices including 'excessive use of private surveillance', 'bullying tactics' and poor communication following floods, bushfires and storms,[203] breaches of the General Insurance Code of Practice reached record levels, with the top source of breaches being claims handling.[204] Insurers attributed such breaches to the very high volume of complex claims received in the wake of recent disasters. As the General Insurance Code Governance Committee noted, however, such catastrophes 'can no longer be regarded as seasonal events', meaning 'the operational stresses that accompany these events must now be incorporated into business-as-usual scenarios'.[205] There is an urgent need for insurers to reduce the burden of making claims for policyholders navigating trauma and other stressors in the wake of disasters.[206]

ASIC's new claims handling oversight powers could enable more active enforcement of insurers' obligations in this area.[207] Other measures that could promote transparency and, by extension, facilitate consumer trust include legislating standard definitions for policy terms such as 'maintenance' and 'wear and tear',[208] for example, by incorporating them into the Code. Definitions could also be incorporated into the standard cover provisions contained in the *ICA*, which require insurers selling building, home contents and car insurance to offer a baseline level of coverage set out in pt 3 div 1 of the *Insurance Contracts Regulations 2017* (Cth).[209] The standard cover regime has, however, been described as 'effectively redundant in its current form'[210] as it enables insurers to deviate from the standard cover as long as they '"clearly informed" the insured in writing', or 'the insured knew, or a reasonable person in the circumstances could be expected to have known, that the contract provided less than the standard cover or no cover'.[211] In practice, insurers are able to do this simply by providing consumers with a Product Disclosure Statement[212] — typically a complex, lengthy summary of the entire insurance contract that, according to the evidence, most consumers do not read.[213] Another disclosure-based protection is the requirement for insurers to provide a Cash Settlement Fact Sheet if offering to resolve a claim via a cash settlement.[214] Yet these

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[203] Robin Bowley, 'Recent Directions in the Regulation of Insurance Claims Handling in the United Kingdom and Australia: A Model for Other Jurisdictions to Consider?' in Pierpaolo Marano and Kyriaki Noussia (eds), *The Governance of Insurance Undertakings: Corporate Law and Insurance Regulation* (Springer, 2022) 263, 284. See *Banking Royal Commission Final Report* (n 13) vol 1, 309, vol 2, 415–55.

[204] General Insurance Code Governance Committee, *General Insurance Industry Data Report 2021–22* (Report, 2022).

[205] Ibid 5.

[206] Bourova, Ramsay and Ali, 'The Arduous Work of Making Claims in the Wake of Disaster' (n 14).

[207] FRLC, *Exposed: Insurance Problems after Extreme Weather Events* (n 14) 4.

[208] CHOICE (n 95) 8.

[209] *ICA* (n 44) s 35.

[210] Treasury (Cth), 'Standardising Natural Hazard Definitions and Reviewing Standard Cover for Insurance' (Consultation Paper, March 2024) 15.

[211] Ibid 14, citing *ICA* (n 44) s 35(2).

[212] Julie-Anne Tarr, 'Disclosure under the Prescribed Insurance Contracts Regime: Section 35 of the Insurance Contracts Act 1984 and Consumer Protection Revisited' (2001) 29(3) *Australian Business Law Review* 198, 204–5.

[213] ASIC and Susan Bell Research, *Insuring Your Home: Consumers' Experiences Buying Home Insurance* (Report No 416, October 2014) 45–6; Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures* (Report, February 2017) 18; CHOICE (n 95) 12.

[214] *Corporations Act* (n 42) ss 948B, 948C.

documents — intended to assist policyholders to 'make an informed decision'[215] about the implications of agreeing to a cash settlement instead of having their property repaired or rebuilt through the insurer's authorised repairers — are unlikely to meaningfully improve the bargaining position of policyholders exhausted by a lengthy negotiation process, or in urgent need of funds.[216] Rather, requirements incorporated into the Code — for example, for insurers to base cash settlement offers on 'genuine repair quotes'[217] from a local tradesperson — could go further to improve consumer trust in insurers' preparedness to settle claims fairly, especially if designated as 'enforceable' by ASIC in accordance with s 1101A(2) of the *Corporations Act*.

Finally, non-insurance can be driven by a lack of understanding of the importance of having appropriate insurance cover.[218] Multiple commentators have proposed measures to improve insurance awareness, such as advertising and promotional literature highlighting the dangers of foregoing coverage.[219] Yet the inherent complexity of insurance products and documents presents consumers with much to overwhelm,[220] and as Driver, Brimble, Freudenberg and Hunt note, improving insurance literacy 'is not as simple as producing websites and flyers'; it 'requires a sustained program of information and advice'.[221] Access to free, independent advice about insurance could assist consumer decision-making in this regard.[222] As shown in Part IV(B)(4), this is also something our respondents were receptive to, with 48.9% saying that a '[f]ree, independent online or telephone insurance advice service' would make them more likely to take out building, home contents or comprehensive car insurance. Yet such a service may remain little utilised by the most vulnerable consumers who typically prefer face-to-face communication with trusted sources and may lack motivation or resources to pursue information from a separate provider.[223] Furthermore, as suggested by our findings in Part IV(B)(4), most uninsured Australians do want more insurance cover,[224] and only a small minority do not recognise it as valuable.[225] We would therefore caution against relying excessively upon admittedly less costly — but ultimately less effective — measures such as information campaigns, when the evidence suggests that affordability, rather than a lack of understanding of insurance, is the major driver of non-insurance rates in Australia.

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215 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) 140 [7.41], 142 [7.55].

216 Bourova, Ramsay and Ali, 'The Arduous Work of Making Claims in the Wake of Disaster' (n 14) 544.

217 FRLC, *Exposed: Insurance Problems after Extreme Weather Events* (n 14) 5.

218 Tania Driver, Mark Brimble, Brett Freudenberg and Katherine Helen Mary Hunt, 'Insurance Literacy in Australia: Not Knowing the Value of Personal Insurance' (2018) 4(1) *Financial Planning Research Journal* 53, 69.

219 Collins (n 30) 42; Good Shepherd Microfinance (n 34) 22; Sheehan and Renouf (n 30) 24, 27.

220 FRLC, 'Overwhelmed: An Overview of Factors That Impact upon Insurance Disclosure Comprehension, Comparability and Decision Making' (Working Paper, September 2018) 3.

221 Driver et al (n 218) 70.

222 Ibid.

223 Collins (n 30) 14.

224 Ibid 25.

225 Maury, Lasater and Mildenhall (n 30) 23, 30.

VI Conclusion

While acknowledging the necessity of supporting the immediate needs of communities affected by increasingly frequent and severe disasters, Australian governments regard individual households as having primary responsibility to manage such risks by taking out building, home contents and comprehensive car insurance. Significant proportions of Australians — particularly social security recipients and other low-income earners — currently lack these types of coverage. Yet insurers have not been proactive in developing appropriate, low-cost insurance products for these groups, assuming low-income earners to be uninterested in insurance and unaware of its benefits, while governments have also been reluctant to intervene in private insurance markets except in case of 'clear failure … to offer appropriate cover at affordable premiums'.[226]

In this article, we draw upon survey findings to highlight significant unmet need for insurance in a sample of Australians without building, home contents or comprehensive car insurance policies. Unmet need for insurance has objective and subjective dimensions, including (1) limited financial resources that could be used to cover repair, replacement or rebuilding costs; (2) self-perceived exposure to financial loss in case of an emergency causing severe property damage; and (3) interest in purchasing insurance if it was accessible. Our findings in Part V(B) indicate that uninsured Australians have limited financial resources, little by way of a financial buffer in case of emergencies, and considerable exposure to financial loss despite the availability of social security and other safety nets. By contrast to industry assumptions of limited interest in insurance among those without coverage, most in this group would prefer to have some cover if it was affordable.

In Part V(A), we examine a range of measures that could address such unmet need by improving the affordability of insurance premiums. In our view, direct subsidies or concessions for Australians on low incomes — perhaps supported by statutory recognition of insurance as an 'essential' service — would be the most effective means of reducing premium costs for those most in need of such assistance. The not-for-profit mutual microinsurance scheme proposed by SACOSS[227] — with its emphasis on face-to-face contact and the incorporation of information about insurance within broader disaster preparedness and mitigation efforts[228] — could also facilitate insurance access while offsetting some of the solidarity-eroding community impacts of reliance upon private insurers to manage disaster risk.[229] Insurance-with-rent schemes are another potential option for delivering low-cost insurance to public and community housing tenants. As for other measures — such as abolishing state taxes on insurance, and extending the cyclone reinsurance pool to cover other risks and geographic areas — their potential impacts on premiums are more uncertain, and, if undertaken in isolation, they would be of little benefit to those most likely to forego insurance due to affordability concerns.

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226 *Natural Disaster Insurance Review* (n 26) ii.
227 Freeman (n 22) 34.
228 Ibid 33.
229 Chloe H Lucas and Kate I Booth, 'Privatizing Climate Adaptation: How Insurance Weakens Solidaristic and Collective Disaster Recovery' (2020) 11(6) *WIREs Climate Change*.

Finally, we acknowledge that for many Australians living on low, often fluctuating incomes from Centrelink, or in precarious employment, any additional financial commitment may prove impossible, preventing them from accessing insurance coverage. In order to meaningfully improve the accessibility of 'essential' insurance products and reduce non-insurance rates, all of the measures discussed in this article would need to be accompanied by other policy interventions — for example, 'less conditional, higher welfare payments', and 'legislation to enhance job security and wage certainty'[230] — to ensure an adequate income for those who are most vulnerable to devastating financial losses when disaster strikes.

[230] Banks and Bowman (n 9) 7.

An Empirical Study of the Distribution of Superannuation Death Benefits

Tobias Barkley* and Xia Li†

Abstract

In Australia, if a superannuation member dies before retirement, they will leave superannuation death benefits that must be distributed. Death benefits are usually distributed at the discretion of the trustee or, on appeal, by the Australian Financial Complaints Authority ('AFCA'). Analysis of the distribution of death benefits is exceedingly scarce in the literature. There is some practitioner commentary and case law, but it is not consistent on how this discretion is, or should be, exercised. General trust law holds that trustees exercise broad discretions and have duties to consider all relevant matters, including any non-binding nomination of beneficiaries by the deceased. Other evidence suggests that AFCA does not follow this approach. This article undertakes the first empirical examination of the distribution of death benefits by AFCA. Key findings are (1) there is no evidence that the deceased's wishes expressed in non-binding nominations have any association with distribution outcomes; and (2) there is a very strong association between receiving a distribution and AFCA's view that someone was financially dependent on the deceased.

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I Introduction

Australia's system of compulsory superannuation means that most people in Australia have a superannuation account. It also means that most people,[1] many unwittingly, are subject to the obscure system that governs the distribution of their accumulated superannuation benefits in the event they die before retirement. If a superannuation fund member dies before they reach retirement, their superannuation benefits do not pass under their will or to their estate.[2] This is because superannuation benefits are not the absolute property of superannuation fund members. Members only have contingent interests in their benefits,[3] which means they are only entitled to demand them in certain conditions. The primary condition for release of benefits is surviving until retirement or 65 years of age.[4] Approximately 27,000 people die each year between the ages of 20 and 65, which is approximately 20% of total deaths.[5] Most of these people are likely to have an accumulation superannuation account, and often a life insurance policy bundled with that account, which will be distributed as 'death benefits'. Therefore, the way these death benefits are distributed is important to all Australians.

The distribution of death benefits can be controlled by superannuation fund members directly through the creation of a binding nomination of beneficiaries.[6] However, what usually happens is that the benefits are distributed through an exercise of discretion by the trustee of the superannuation fund, due to the absence of a binding nomination.[7] The discretions written into most superannuation trust deeds enable the trustees to choose who receives the death benefits, although legislation requires that the deceased member's dependants and legal personal representative benefit before anyone else. In addition to allowing binding nominations, superannuation trustees often allow members to complete non-binding nominations that express their wishes about how they would like their death benefits to be distributed. Except where the trustee's discretion is removed by a binding nomination,[8] the terms of trust deeds and the legislation grant superannuation trustees very broad discretions. The important question for those of us with superannuation accounts is how trustees exercise their broad discretions.

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1 Over 92% of superannuation accounts are in regulated funds that are governed by the rules discussed in this article: Australian Prudential Regulation Authority, *Annual Superannuation Bulletin: June 2015 to June 2023* (Bulletin, 31 January 2024) <https://www.apra.gov.au/annual-superannuation-bulletin>.

2 *Stock v NM Superannuation Pty Ltd* [2015] FCA 612, [16] (Tracey J).

3 See *Latorre v Maddock* (2012) 47 Fam LR 206, 210 [12] (Jarrett FM).

4 *Superannuation Industry (Supervision) Act 1993* (Cth) s 62 ('*SIS Act*'); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01, sch 1 ('*SIS Regulations*'). Other conditions for release of funds include terminal medical conditions, permanent incapacity, severe financial hardship, emigration of temporary residents and compassionate grounds.

5 See Australian Bureau of Statistics, *Deaths, Australia, 2021* (Catalogue No 3302.0, 29 September 2022); Australian Bureau of Statistics, *Deaths, Australia, 2020* (Catalogue No 3302.0, 29 September 2021); Australian Bureau of Statistics, *Deaths, Australia, 2019* (Catalogue No 3302.0, 24 September 2020).

6 The legislation does not require every superannuation fund to offer binding nominations, but most funds do.

7 See below Part III.

8 The trustee's discretion is also de facto removed where there is only one dependant or legal personal representative, which the trustee is obliged to prioritise before others.

There is a conflict in the commentary and case law about how trustees do, and should, exercise these discretions. The general trust law approach to these types of discretion is that the trustee should consider all relevant matters[9] and tailor the decision to the particular circumstances of the case.[10] However, there is another approach that suggests trustees apply rules, or presumptive preferences, to determine outcomes.[11] Particularly, there is a perception that trustees generally distribute death benefits to those who were financially dependent on the deceased immediately before their death.[12] This raises the question of the extent to which the deceased's wishes are taken into account.

This article undertakes an empirical investigation of the practice of death benefit distribution. It investigates the practice by focusing on the decision outcomes rather than what is being said about the process of decision-making. Broadly, this study asks whether the evidence is more consistent with a flexible discretion that takes into account a full range of relevant circumstances and complexities arising from a particular deceased member's death or more consistent with a narrow discretion that applies a rule or presumptive preference. The study focuses on associations between distribution outcomes and variables including financial dependence on the deceased and nomination as preferred beneficiary by the deceased. It also investigates whether the recent decision of *Wan v BT Funds Management* has changed the practice.[13]

The evidence examined by the study is the reported cases of the Australian Financial Complaints Authority Ltd ('AFCA'). AFCA operates an external dispute resolution scheme for trustee decisions on death benefit distribution and is the successor to the Superannuation Complaints Tribunal ('SCT'). AFCA cases have been chosen as the object of study because they are published publicly, whereas trustees' decisions are not. AFCA's cases are highly relevant to understanding how superannuation trustees are likely to exercise their discretions because AFCA is the primary arbiter of disputes about death benefits. While AFCA cases on what constitutes fair and reasonable distributions are not technically binding on trustees,[14] trustees that want to avoid having decisions reversed will pay attention to them.

As will be seen, the main conclusion of the study is that AFCA cases are more consistent with a narrow discretion than a broad discretion. Over 90% of distribution decisions are consistent with a presumptive preference in favour of financial dependants. In contrast, the study finds no statistically significant evidence that AFCA places weight on the deceased's non-binding wishes. In addition, there is no evidence that AFCA's practice has changed since *Wan.* This suggests that AFCA continues to apply a narrow discretion dominated by presumptive preferences and

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9 *Pitt v Holt* [2013] 2 AC 108 ('*Pitt*').

10 *Wan v BT Funds Management Ltd* (2022) 160 ACSR 81, 107 [112] (Anastassiou J) ('*Wan*').

11 Stanley Drummond and Christopher Allen, 'Superannuation Death Benefit: No Presumptive Preference in Favour of Dependants — "Wan v BT Funds Management"' (2022) 33(7–8) *Australian Superannuation Law Bulletin* 101, 104.

12 Pam McAlister and Lynda Purcell, 'Claiming Discretionary Superannuation Death Benefits: A Warning about Conflicts of Interest!' (2014) 30(8) *Australian Banking & Finance Law Bulletin* 168, 169.

13 *Wan* (n 10).

14 See below text accompanying nn 38–41.

inconsistent with the broad discretion found in general trust law. A key implication is that it is misleading to offer non-binding nominations without explaining to members that they are likely to be given very little weight.

The next Part sets out the legal framework that governs the distribution of death benefits in regulated superannuation funds. This framework delineates the scope of the trustees' discretions over that distribution and AFCA's discretion when resolving complaints. Part III summarises the conflicting doctrinal approaches that have been suggested about how superannuation trustees and AFCA exercise, or should exercise, their discretions. Part IV describes the empirical methodology adopted in this study and Part V sets out the results. Part VI examines the results to assess what they tell us about how AFCA distributes death benefits.

II Legal Framework

The distribution of death benefits is regulated within a complex legal framework.[15] The framework is found in statutes, regulations, superannuation trust deeds, court cases and AFCA operating rules. The framework performs two functions: (1) it orders potential beneficiaries within a hierarchy of priorities; and (2) it grants a discretion to trustees to choose how to distribute death benefits between potential beneficiaries at the same level in the hierarchy.

A *Hierarchy of Beneficiary Priority*

The *Superannuation Industry (Supervision) Act 1993* (Cth) and its regulations create a hierarchy of different types of beneficiary. The hierarchy involves the key categories 'dependant' and 'legal personal representative'. The regulations provide that if anyone fitting these categories can be reasonably found then no death benefits can be paid to anyone else.[16] The statutory definition of 'dependant' includes the spouse and any child.[17] 'Spouse' includes member of a same-sex married[18] or de facto[19] couple. 'Child' includes an adopted, exnuptial or stepchild, and any child of the deceased's spouse.[20] This is surprisingly expansive as it includes any stepchild of the deceased's spouse.[21] The statutory definition is inclusive so does not limit the ordinary meaning of dependant, which includes financial dependants who are neither children nor spouses.[22] There is conflicting case law on whether the ordinary meaning extends beyond financial dependence to emotional or other forms of

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15 This is limited to regulated funds, which are regulated by the Australian Prudential Regulation Authority. Self-managed superannuation funds are not subject to the same governance mechanisms.

16 *SIS Regulations* (n 4) reg 6.22.

17 *SIS Act* (n 4) s 10(1) (definition of 'dependant').

18 Ibid s 10(1) (definition of 'spouse' para (a)).

19 De facto means living together 'on a genuine domestic basis in a relationship as a couple': ibid s 10(1) (definition of 'spouse' para (b)).

20 Ibid s 10(1) (definition of 'child').

21 The Superannuation Complaints Tribunal held that stepchild means a child of the deceased's spouse and that the stepchild relationship may continue after the death of the spouse: *D19-20\023* [2019] SCTA 149. See also *Scott-Mackenzie v Bail* (2017) 16 ASTLR 449.

22 See *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83.

dependence.[23] 'Legal personal representative' ('LPR') means the executor of the will or administrator of the deceased's estate.[24]

While dependants and LPRs always have priority over others, there can be additional hierarchies within those priority categories. Legislation provides a pathway by which members can create a binding nomination that, if valid, removes any discretion from the trustee.[25] Only dependants and LPRs can be validly nominated, considerable formalities must be complied with, and the binding nomination lapses after three years.[26] In addition, many trust deeds provide a second pathway for 'non-lapsing' binding nominations,[27] which is permitted by the statute provided the trustee consents to the nomination.[28] This study refers to nominations as binding if they effectively remove the trustee's discretion and oblige the trustee to give effect to the member's wishes expressed in that nomination. It is also possible for trust deeds to create different levels of hierarchy within the categories of dependant and LPR. For example, where there is no nomination (binding or non-binding), the BT Lifetime Super deed obliges the trustee to pay death benefits to the LPR ahead of dependants.[29]

The effect of the hierarchy on the trustee is to define the scope of the superannuation trustee's discretion. Thus, the first questions a trustee must decide are who, if anyone, is a dependant or LPR, and whether any binding nomination is valid. These questions of scope can be very difficult due to complex and uncertain factual evidence. However, answering them is not an exercise of discretion because there are objectively correct answers.[30] In summary, the hierarchy of priority is (1) dependants and LPRs nominated in a valid binding nomination; (2) dependants and LPRs not so nominated; and (3) others. Where someone from a higher priority group can be found, no one in a lower priority group will receive anything.

B *Trustee Discretions*

Within the scope of the hierarchy of priority, discretions are granted to trustees to decide how the death benefit should be distributed among the eligible recipients. These discretions are found in the trust deeds rather than legislation. For example, a typical clause is that in the Hostplus Deed:

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23 Ibid [18]–[19]. Cf *Wan* (n 10) 110–15 [127]–[152] (Anastassiou J).

24 *SIS Act* (n 4) s 10(1) (definition of 'legal personal representative').

25 Ibid s 59(1A). Superannuation trusts must include this pathway in the trust deed for it to be available.

26 *SIS Regulations* (n 4) reg 6.17A.

27 See Luke Hooper, 'When Consent to a Non-Lapsing Nomination Is Revoked' (2017) 29(4) *Australian Superannuation Law Bulletin* 69.

28 *Retail Employees Superannuation Pty Ltd v Pain* (2016) 139 SASR 401, 492–3 [493] (Blue J). Trust deeds may provide that the trustee's consent is withdrawn on the occurrence of certain events such as divorce of the member, rendering the non-lapsing nomination non-binding: *Re BT Funds Management Ltd* [2017] NSWSC 45.

29 BT Lifetime Super, 'Trust Deed' (5 January 2015) cl 6.9B(c) <https://www.bt.com.au/about-bt/bt-financial-group/additional-disclosure/bt-funds-management-limited.html>.

30 See *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [29]–[30] (French CJ, Gummow, Heydon, Crennan and Bell JJ) ('*Finch*').

> Subject to the Relevant Law, upon the death of a Member or Beneficiary, the Trustee will:
>
> (i) … [follow any binding nomination]
>
> and otherwise:
>
> (ii) where the Member or Beneficiary had Dependants: pay or apply the Benefit to one or more of the Member's or Beneficiary's Dependants (including any Nominated Beneficiaries) and Legal Personal Representative in such proportions, form, manner and at such times as the Trustee in its discretion determines, provided that the payment of the Benefit complies with the Relevant Law; or
>
> (iii) where the Member or Beneficiary had no Dependants: pay the Benefit to the Legal Personal Representative of the Member or Beneficiary, or if there is no Legal Personal Representative may pay or apply the Benefit in such a manner as permitted by the Relevant Law.[31]

This grants trustees two distinct discretions. One is to choose between dependants or LPRs, where they are present without a binding nomination. The other is, where there are no dependants or LPRs, to choose between all others.

This trust deed is typical in providing no guidance to the trustee on how it is to exercise the discretion.[32] The legislative framework does not supply any guidance either.[33] However, it does set out the AFCA complaints framework.

C *AFCA's Jurisdiction*

AFCA's jurisdiction over trustee decisions is to review whether they are 'fair and reasonable in all the circumstances'.[34] If AFCA is satisfied that the trustee's decision was unfair or unreasonable, AFCA will exercise the discretion to remedy the fault.[35] This allows review of the merits of the trustee's decision rather than the process of decision-making.[36] That is, AFCA may find a decision outcome was fair and reasonable even if the trustee's process was irrational. Unlike the binary structure of many legal disputes, the review always involves multiple parties: legislation obliges the trustee to notify all other people who may have an interest in the death benefit so they can be joined if they choose.[37]

The peculiarities of AFCA's jurisdiction must be understood in light of the *Australian Constitution*. The courts have interpreted the *Constitution* to reserve all 'judicial power' to courts and prevent it being exercised by tribunals.[38] However, the courts also recognise the practicality and convenience of tribunals. This leads the

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31 Hostplus Superannuation Fund, 'Trust Deed' (1 September 2023) cl 13.13(c) <https://hostplus.com.au/about-us/company-overview/governance-and-disclosures>.

32 The distribution allocation between those nominated in a binding nomination will be determined by that nomination.

33 *Brine v Carter* [2015] SASC 205, [72] (Blue J).

34 *Corporations Act 2001* (Cth) s 1055(3) ('*Corporations Act*').

35 Ibid s 1055(5).

36 *Lykogiannis v Retail Employees Superannuation Pty Ltd* (2000) 97 FCR 361, 372 [48] (Mansfield J).

37 *Corporations Act* (n 34) s 1056A.

38 *Constitution* ss 71–2; Michelle Foster, 'The Separation of Judicial Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 672, 678, 682.

courts to interpret tribunals' jurisdictions in a way that does not offend the *Constitution*. Thus, the courts have held that AFCA's determinations do not determine existing rights, which would be similar to a judicial power, but rather create new rights.[39] Therefore, to be consistent with this constitutional theory, 'fair and reasonable' is understood as separate from the duties on trustees.[40] This generates the peculiar outcome where the superannuation trustee has no duty to make fair and reasonable decisions, but failing to make a fair and reasonable decision can result in the decision being overturned.[41] This theoretical separation between the trustees' discretion and AFCA's role could support an argument that AFCA cases tell us nothing about trustees' discretions. While this point is valid, it is sufficient for the present study if AFCA cases *could* influence trustees' discretions.

Indeed, AFCA cases are very likely to influence trustees because the vast majority of complaints about trustees' death benefit decisions are resolved by AFCA. This study identifies 188 AFCA cases on the distribution of death benefits. A search of case law databases revealed only four cases in which judicial review of an AFCA death benefit decision was sought; none was successful.[42] No cases were found that circumvented AFCA and directly claimed that a trustee's exercise of discretion was a breach of duty under general equitable principles.[43] This absence is notable as many potential cases are likely to be excluded from AFCA's jurisdiction by tight 28-day limits for lodging complaints,[44] leaving recourse to the general law as the only option.

III Literature and Case Law

Literature on how death benefit discretions are exercised, or should be exercised, is scarce. There are no academic legal analyses dedicated to this issue and practitioner commentaries are brief. However, there are relevant Federal Court cases and AFCA's own commentary on its decision-making. The commentary reveals two distinct perspectives on the exercise of discretion. One is that the purpose of the discretion is to ensure that distributions are flexible and tailored to the unique circumstances and complexities of the case. The other perspective is that the purpose of the discretion is to ensure that distributions are made to those who would have benefited from the deceased member's benefits if the member had not died.

The first perspective is associated with general trust law, which inclines towards giving trustees considerable discretionary latitude while expecting them to take the context and circumstances into consideration. For example, there is a general

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39 *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97, 133–4 [153] (Moshinsky, Bromwich and Derrington JJ).

40 *Wan* (n 10) 106 [109] (Anastassiou J).

41 *Corporations Act* (n 34) s 1055(6).

42 *Tratter v Aware Super* [2023] FCA 491 ('*Tratter*'); *Wan* (n 10); *Reeves v Nulis Nominees (Australia) Ltd* (2022) 22 ASTLR 253; *Cummins v Petterd* [2021] FCA 646.

43 General equitable principles impose duties to exercise discretions for a proper purpose, to act in good faith, to take into account relevant considerations, to not put weight on irrelevant considerations, and to not make a decision that is beyond the line of *Wednesbury* unreasonableness: *Karger v Paul* [1984] VR 161; *Pitt* (n 9); *Finch* (n 30); *Tonkin v Western Mining Corporation* (1998) 10 ANZ Insurance Cases 61–397.

44 *Corporations Act* (n 34) s 1056(2).

duty on trustees to take into account all relevant considerations when making a decision.[45] General trust law also holds that trustees must consider any wishes expressed by the settlor, although they are not binding.[46] Professor Scott Donald reflects this perspective in a brief comment on death benefit discretions within a recent article:

> It is a decision that requires the weighing of potentially multiple competing claims and, typically, consideration of an indeterminate set of factors such as the age and health of the dependants, their financial position and degree of dependency, and the presence of other potential sources of assistance. Some of the criteria are objectively quantifiable (age, financial position) and some require more judgment. The resolution of the full set is, however, indeterminate in the sense that the trustee must decide how to balance the factors, a determination for which there are no guidelines nor formulae.[47]

This perspective is reflected in several articles by practitioners.[48] It suggests that when assessing whether an outcome is 'fair and reasonable' AFCA should adopt a broad approach that takes into account and gives weight to multiple competing considerations, and gives serious weight to any non-binding nomination or other expression of wishes.

The second perspective is associated with the statutory purpose of regulated superannuation trusts according to the interpretation of the SCT, the predecessor to AFCA. Practitioners McAlister and Purcell put it this way:

> [I]t is generally considered that the death benefit should be paid to dependants who were financially reliant on the deceased or who might have been expected to receive financial support from the deceased in retirement. Certainly, this has been the approach of the Superannuation Complaints Tribunal.[49]

This perspective suggests that when assessing whether an outcome is 'fair and reasonable' AFCA should adopt a narrow approach that applies a presumptive preference in favour of those who would have received financial support from the deceased, in the event they had not died.

These two perspectives are found in *Webb v Teeling*, a Federal Court of Australia appeal from an SCT case on distribution.[50] The SCT had determined that each of the deceased's dependants should receive a benefit directly proportional to the amount of financial support they received from the deceased.[51] This granted 26% to the deceased's daughter, which differed from the deceased's non-binding

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45 *Esso Australia Ltd v Australian Petroleum Agents' and Distributors' Association* [1999] 3 VR 642, 651–2 [39]–[41] (Hayne J); *Pitt* (n 9) 131 [40]–[41] (Lord Walker).

46 *Re Baden's Deed Trusts; McPhail v Doulton* [1971] AC 424, 457 (Lord Wilberforce); *Pitt* (n 9) 137 [66] (Lord Walker); *Australian Incentive Plan Pty Ltd v A-G (Vic)* (2012) 44 VR 661, [36] (Nettle JA).

47 M Scott Donald, 'Delegation by Superannuation Fund Trustees' (2020) 37(5) *Company and Securities Law Journal* 319, 338 (citations omitted).

48 Stephen Graham, 'Death Benefits Contain a Sting' (2010) 24(5) *Super Review* 12; Selwyn Black, 'Who Gets the Superannuation Death Benefit? The Distribution of Superannuation Death Benefits' (2020) 12(1) *FS Super: Journal of Superannuation Management* 40; Scott Hay-Bartlem, 'Estate Planning and Superannuation: Current Issues' (2021) 55(10) *Taxation in Australia* 543.

49 McAlister and Purcell (n 12) 169.

50 *Webb v Teeling* (2009) 3 ASTLR 186.

51 Ibid 193–4 [24]–[29] (Jagot J).

nomination that his daughter receive 50%. The complainant alleged that the SCT had applied a policy 'resulting in an inflexible and mathematically exact apportionment', gave 'excessive weight to the beneficiaries' financial dependence' on the deceased, and thereby ignored the deceased's nomination.[52] These complaints reflect the perspective that the SCT and AFCA give overwhelming weight to financial dependence over all other considerations. However, the Court rejected these complaints and found sufficient evidence that the SCT had exercised a broad discretion. Jagot J found that the SCT had taken into account factors other than financial dependence, including the deceased's nomination, because the SCT had stated that it had done so.[53] Very similar arguments were presented by counsel in *Tratter v Aware Super* in relation to AFCA. Counsel submitted that AFCA should have inquired into the financial needs of the eligible parties, should not have focused on financial dependency alone, and did not treat the deceased's non-binding nomination appropriately.[54] Wheelahan J did not directly address the first two arguments but held that AFCA had treated the nomination appropriately by considering it.[55]

In early 2022, AFCA published its own document explaining how it approached death benefit complaints,[56] which also included elements of both perspectives. On one hand, AFCA stated that, because it has the same powers and obligations as trustees, it is obliged to consider the same matters that trustees must consider.[57] It stated that non-binding nominations would generally be taken into account.[58] On the other hand, AFCA presented a narrow conception of the purpose of death benefit payments: to provide for those financially reliant on the deceased at the time of their death. AFCA also suggested that spouses, minor children and financial dependants will always be preferred over adult children and the deceased's LPRs or estate.[59] This presents an inherent conflict as AFCA cannot be exercising a broad discretion that gives serious consideration to every relevant matter, including the settlor's wishes, while also adopting a rule that some eligible individuals are presumptively preferred to others.

In 2023, the conflict between presumptive preferences and broad discretion surfaced in the case of *Wan*. A deceased member's girlfriend claimed to the deceased's superannuation trustee that they had been in a de facto relationship and, therefore, she was eligible to receive a distribution of the death benefit as her boyfriend's dependant. The other eligible recipient was the deceased's estate. In addition, the girlfriend relied on statements from the SCT to argue for a presumption that she as dependant should receive everything in preference to the estate; for example: 'A trustee will generally only pay a benefit to the legal personal representative of a deceased member if there are no dependants or if there was such

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52 Ibid 188 [5] (Jagot J).
53 Ibid 199 [65].
54 *Tratter* (n 42) [33]–[34] (Wheelahan J).
55 Ibid [49].
56 Australian Financial Complaints Authority ('AFCA'), 'The AFCA Approach to Superannuation Death Benefit Complaints' (AFCA Approaches, May 2022).
57 Ibid 6.
58 Ibid 7.
59 Ibid 6–8.

a direction in a binding death benefit nomination.'[60] The girlfriend lost her case as the Court decided she was not in a de facto relationship. However, the Court added, in obiter, that there should be no rule, presumption or preference in favour of dependants over the estate as a broad discretion was given to the trustee.[61] This case has been understood to have changed the law that applies to trustees who must choose between the deceased's dependants and estate.[62] It could also be argued that it is authority that AFCA should not use any presumptive preferences. However, its impact on AFCA's practice is yet to be determined.

IV Research Questions

The legal framework, literature and case law surveyed above present a conflicted picture of how AFCA resolves death benefit complaints where trustees have a discretion to exercise. General trust law principles and *Webb v Teeling* both suggest that AFCA exercises a broad discretion that considers a wide range of factors. Practitioners in the field and AFCA's explanatory document suggest that AFCA exercises a much narrower discretion focused on financial dependence. This suggests a hypothesis:

> If AFCA exercises a broad discretion over the distribution of death benefits, then distribution outcomes will be less strongly associated with individual factors.

General trust law principles also suggest a subsidiary question about the influence of the deceased member's wishes on distribution outcomes. The first subsidiary hypothesis is:

> If AFCA gives real and genuine consideration to deceased members' non-binding nominations, then there will be a positive association between being nominated and receiving a distribution.

The decision in *Wan* raises the possibility that AFCA's use of presumptive preferences may have changed in response to the Federal Court decision. A second subsidiary hypothesis is:

> If *Wan* changed AFCA's practice, then there will be a change in the association between distribution outcomes and individual factors in cases after the *Wan* decision.

Finally, in some cases either a binding nomination or a singular potential beneficiary purport to remove the trustees' discretion. In such cases, AFCA's decisions would be expected to comply with the regulations and also show no evidence of discretion.

V Methodology

This study adopts an empirical methodology to answer the research questions. An empirical analysis will enable insight into the patterns of AFCA's decisions that would be more difficult to obtain reliably with standard doctrinal legal methods.

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60 *Wan* (n 10) 102 [90] (Anastassiou J) (citations omitted).
61 Ibid 106–7 [110] (Anastassiou J).
62 Drummond and Allen (n 11) 104.

Essentially, it examines what AFCA does, rather than AFCA's somewhat inconsistent statements about what it does.

A *Data*

This study includes all AFCA cases that involve a complaint about the distribution of a death benefit by a superannuation trustee. It uses the entire population rather than a sample. The temporal range of study is all AFCA cases published up to 1 August 2023. This range was chosen in order to limit the study to one decision-maker. In 2018, AFCA replaced the SCT. AFCA has jurisdiction to hear complaints made after 1 November 2018, while complaints initiated before then were resolved by the SCT.[63] The end of the range was originally 31 May 2022, but was later extended to include cases after the decision in *Wan* was released.

The cases were obtained and selected through the AFCA website's 'search published decisions' page.[64] AFCA has the power to publish its decisions or to not publish if doing so would risk identifying the parties or for another compelling reason.[65] AFCA withheld 6.25% of death benefit distribution decisions between 1 November 2018 and 30 June 2022.[66] The AFCA website 'advanced search' function was used to select 'Death benefit distribution' from the 'Issue' dropdown menu. The search on 1 August 2023 produced a total of 201 results. Two were duplicate decisions, which left 199 unique decisions. An alternative search of 'death benefit' from the 'product name' dropdown menu reported additional decisions that concerned issues with death benefits other than their distribution (for example, decisions to not pay out insurance or to not pay out components of a defined benefit). These additional results were not included. Of the 199 included decisions, 6 involved issues other than the discretionary distribution of a death benefit, such as compensation for improperly withholding a death benefit; in 2, the trust deed removed all discretion from the trustee; and in 3 cases, AFCA remitted the distribution decision back to the trustee. These 11 cases were removed from the analysis, leaving 188 cases.

B *Case Coding*

The AFCA decisions were coded in REDCap,[67] a web-based software platform designed for collecting research data.[68] Each AFCA decision was entered into its own form. A coding schema with 77 fields was developed that was filled by entering

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63 AFCA, *Transitional Superannuation Guide* (2018).

64 'Search Published Decisions', *Australian Financial Complaints Authority* (Web Page) <https://www.afca.org.au/what-to-expect/search-published-decisions>.

65 AFCA, *Complaint Resolution Scheme Rules* (Rules, 13 January 2021) [A.14.5]; AFCA, *Operational Guidelines to the Rules* (Guidelines, 1 April 2022) 75–6.

66 Email from Heather Gray, Lead Ombudsman, Superannuation, AFCA to Tobias Barkley, 6 December 2022.

67 Version 12.8.4, Vanderbilt University, Nashville, Tennessee, USA.

68 Paul A Harris, Robert Taylor, Brenda L Minor, Veida Elliott, Michelle Fernandez, Lindsay O'Neal, Laura McLeod, Giovanni Delacqua, Francesco Delacqua, Jacqueline Kirby, Stephany N Duda and REDCap Consortium, 'The REDCap Consortium: Building an International Community of Software Platform Partners' (2019) 95 *Journal of Biomedical Informatics* 103208.

data into an online form. Only 46 of the variables were used in the analysis, including those in the following categories:

- Case variables: AFCA case number, date of the AFCA decision, date of the deceased's death, gender of the deceased member, quantum of death benefit to be distributed, and whether the case determines the distribution of a death benefit.
- Nomination variables: whether a nomination existed, date of the nomination, whether it was intended to be binding or non-binding, whether a binding nomination was invalid, and reason(s) why a binding nomination was invalid.
- Individual party variables: relationship with deceased, legal status of relationship with deceased, percentage of death benefit nominated by deceased, percentage of death benefit that would have been distributed by trustee, and percentage of death benefit distributed by AFCA.

The REDCap form included fields that allowed for up to seven individuals per case. Six cases involved more than seven individuals, which was recorded in an open text field and manually entered during analysis.

A research assistant was trained to enter data from the decisions into REDCap using the coding schema. Tobias Barkley also coded a representative group of 30 decisions and used that data to crosscheck the accuracy and consistency of the data entered by the research assistant.

C *Analysis*

After the AFCA decisions were coded into REDCap, the data was exported to SPSS,[69] a statistical software program for analysing data. Statistical analysis was carried out by the authors. The data was analysed in two ways: first, with the AFCA case as the item of study; and second, with each individual eligible to receive a death benefit as the item of study. The following additional variables were computed in SPSS:

- Case variables: number of individuals associated with case, category of case in relation to the legal framework, the value of death benefits simplified into quartiles, whether the case involved a distribution to an LPR rather than a dependant, and time between date of death and date of decision.
- Nomination variables: age of nomination at death.
- Individual party variables: whether the individual was distributed any death benefit by AFCA, whether nominated under a valid binding nomination, whether nominated under a non-binding nomination, whether nominated under a nomination less than four years old, whether nominated under a nomination more than three years old, whether financially dependent on the deceased, and whether a sole dependant or LPR in a case.

[69] Version 29.0.2.0 (20), IBM SPSS Statistics, IBM Corporation, Armonk, New York, USA.

Descriptive statistics were generated from the data on the AFCA cases. Analytical statistics were difficult to generate when cases were the unit of study. This was because within each AFCA case there could be multiple individuals eligible to receive a death benefit through the exercise of the trustee discretion. Therefore, in each case AFCA was required to make multiple decisions to determine how much each eligible individual should receive. This meant that at the case level it was difficult to identify a single target variable. In contrast, at the individual level the readily available target variable was the percentage of death benefit received by that individual from AFCA.

A categorical target variable was computed from the continuous percentage of death benefit variable: whether an individual received any distribution of the death benefit or no distribution. This was initially done for an exploratory analysis using Chi-square tests. It was continued because information on modelling categorical data was more accessible to the first author than tools for non-normally distributed continuous data, such as Tobit models.[70]

To analyse the data, this study used decision trees and generalised linear mixed models. Decision trees, specifically classification trees, use algorithms to build models that resemble human reasoning and thus are relatively easy to interpret.[71] They have been used to analyse judicial decision-making.[72] However, classification trees include Chi-square tests that assume observations are independent, which is not satisfied in this study because the individuals are associated through the AFCA cases. To remedy this limitation, generalised linear mixed models were built. These models allow the incorporation of explanatory variables at the individual level (for example, whether an individual has been nominated) and the group level (for example, the number of individuals in a case).[73] Generalised linear mixed models do not assume that observations are independent.

D *Limitations*

Three limitations on this study are noted. The first is what data is recorded in AFCA cases. This limits the explanatory variables that can be tested. AFCA consistently records whether a potential claimant is financially dependent on the deceased and whether the deceased made a nomination. The age of the nomination and the amount of the death benefit are usually reported, but not always. Other potential explanatory variables appear in some cases but are not mentioned in most. For example, in some cases evidence of a deceased's wishes recorded in a will (rather than a nomination) were considered,[74] while in most cases they were not mentioned. In one case, financial need due to disability was considered relevant,[75] while in another case it

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70 See, eg, Theodore Eisenberg, Thomas Eisenberg, Martin T Wells and Min Zhang, 'Addressing the Zeros Problem: Regression Models for Outcomes with a Large Proportion of Zeros, with an Application to Trial Outcomes' (2015) 12(1) *Journal of Empirical Legal Studies* 161.

71 SB Kotsiantis, 'Decision Trees: A Recent Overview' (2013) 39(4) *Artificial Intelligence Review* 261.

72 Jonathan P Kastellec, 'The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees' (2010) 7(2) *Journal of Empirical Legal Studies* 202.

73 Ronald H Heck, Scott L Thomas and Lynn N Tabata, *Multilevel Modeling of Categorical Outcomes Using IBM SPSS* (Routledge, 2012).

74 *AFCA Case 637143* (29 May 2020); *AFCA Case 735102* (30 June 2021).

75 *AFCA Case 761682* (29 March 2022).

was considered irrelevant,[76] and in most cases financial need was not considered at all. The gender of the deceased's dependants could be inferred in some cases, but in most cases reliable inferences were not possible.

The second limitation is that this study analysed the whole population of published AFCA cases. This population is not a valid sample of any larger population of actual decisions. This means that the findings cannot be generalised to disputes that are not published, disputes that are resolved in AFCA dispute resolution, disputes that are resolved by trustees, or disputes that are resolved privately. For example, in the published AFCA cases most attempts to create binding nominations fail, but this says nothing about the frequency with which binding nominations fail generally. However, the findings can be generalised to hypothetical complaints that could have been resolved by AFCA. Knowing how AFCA has decided the cases that have come before it allows us, and superannuation trustees, to make predictions about how AFCA would have decided the cases that did not come before it.

The third limitation is that the data extracted from these cases is made up of contested and indeterminate facts. An individual may be recorded in this study as being financially dependent on the deceased through being in a de facto relationship with the deceased. However, the conclusion that there was a de facto relationship may be reasonably contested or even rejected by the trustee. However, as this study concerns AFCA's decisions, this issue can be ignored. Thus, the facts extracted from the AFCA cases are the facts as determined by AFCA.

VI Results

The results of the statistical analysis of the data in SPSS are set out in this Part.

A *AFCA Cases*

There were 188 cases in which AFCA made a decision about the distribution of death benefits. In 174 of these cases, the amount of the death benefit left by the deceased member was stated by AFCA and in 14 cases the amount was not stated. The stated death benefits ranged from $2,974 to $1,474,721, as illustrated in Figure 1. The mean was $246,743 and the median was $188,500. In 182 of these cases, the date of death was reported as well as the date of the AFCA decisions, as illustrated in Figure 2. The time between these dates ranged from 0.6 to 6.4 years and the mean was 2.82 years. No generalisations can be made from this data as it is not a random sample from a larger population, but it illustrates the context of AFCA decisions.

[76] *AFCA Case 699515* (12 January 2020).

Figure 1: Amount of death benefit distributed, by frequency

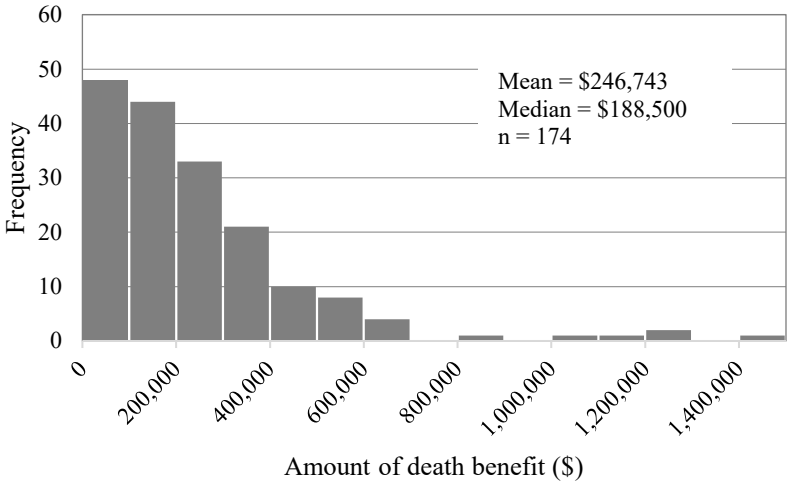
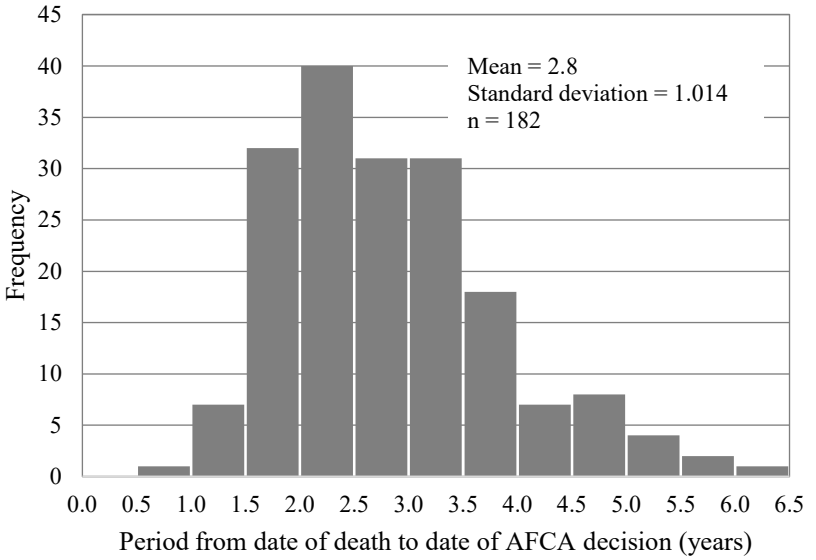


Figure 2: Period between date of death and date of decision, by frequency



Similarly, no generalisations can be drawn from data on the frequency of nominations. Nevertheless, as helpful context, these frequencies are set out in Table 1. Most cases (120, or 63.8%) involved a nomination. However, of the 37 attempts at binding nominations, only 9 were completely successful. The remainder were invalid for a variety of reasons, some overlapping, including nominating ineligible nominees (13); errors in execution or form (7); and lapse of time (9). Where attempts at binding nominations were unsuccessful, they were still evidence of the deceased's wishes so had the same status as non-binding nominations.

Table 1: Frequency and type of nomination

Existence	Type	Validity	Frequency	Per cent
Nomination	Binding	Valid	9	4.8
		Invalid	26	13.8
		Unclear[77]	2	1.1
	Non-binding		83	44.1
No nomination			68	36.2
Total			188	100.0

The 188 AFCA cases divide into four categories aligning with the legal framework, as set out in Table 2. In 9 cases, the distribution was entirely governed by a valid binding nomination. In 33 cases, there was only one dependant or only LPRs, which meant the trustee had no discretion to exercise as they only had one choice that complied with the regulations. Where there are multiple LPRs but no dependants, the trustee does not have a discretion as the LPRs jointly represent the estate. In 134 cases, there were multiple dependants or a dependant and an LPR, which meant the trustee had a discretion to choose between them. In the remaining 12 cases, there were no dependants or LPRs and the trustees had discretion to distribute to other people.

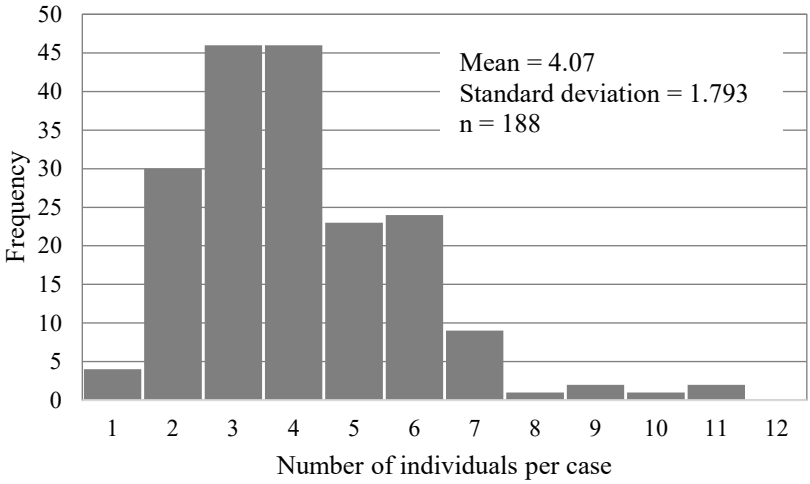
Table 2: AFCA cases according to legal framework categories

Case categories	Frequency	Per cent
Valid binding nomination	9	4.8
One dependant or LPR	33	17.6
Multiple dependants or LPRs	134	71.3
No dependants or LPRs	12	6.4
Total	188	100.0

[77] In one case, AFCA decided that it might have been possible to find that the nomination was binding due to changes in the legal understanding of 'stepchildren' but it was unnecessary as distribution to the LPRs benefited the same individuals: *AFCA Case 649502* (6 February 2020). In the other case, the trust deed required that the binding nomination be treated as partly valid where some nominees were eligible and some were not: *AFCA Case 825390* (30 September 2022). In contrast, the legislation only makes nominations binding where all nominees are eligible: *SIS Regulations* (n 4) reg 6.17A(4)(a).

The 188 AFCA cases contained multiple individuals as shown in Figure 3. As AFCA had to decide whether each individual should receive a distribution, this meant that, where AFCA had a discretion, each AFCA case involved multiple distribution decisions. This made analysis difficult as a single target variable that captured the distribution was not readily present for the case.

Figure 3: Number of individuals per case, by frequency



The significance of *Wan* was able to be tested at the case level. As noted above, the ratio of *Wan* was that AFCA should not have a default preference for dependants over the deceased estate. Table 3 is a contingency table that compares the number of cases where an LPR received a distribution with whether the case decision was made before or after *Wan*. The cases were limited to those where there were both an LPR and a dependant for the trustee to choose between. Table 3 shows that there has been no increase in the odds of AFCA distributing to an LPR since the decision in *Wan*. There is no statistically significant association between these two variables.[78]

Table 3: Cross-tabulation of LPR receiving benefit with timing of case

		Before or after *Wan*		
		Before *Wan*	After *Wan*	Total
Both LPR and dependant present	LPR received distribution	6	2	8
	LPR did not receive distribution	24	21	45
Total		30	23	53

[78] Fisher's Exact Test, two-sided: $p = 0.441$.

B *Individuals*

In response to the difficulty of analysis at the case level, the data on each of the 188 AFCA cases was restructured so that the individual, rather than the case, was the unit of study. A target variable was readily available for each individual, which was whether AFCA decided that the individual would receive a distribution of some of the death benefit. The explanatory variables for each individual included the following: number of other individuals in the relevant case, whether the individual was financially dependent on the deceased, and whether the individual was nominated by the deceased.

The restructure resulted in 779 individuals. Twenty-five of these individuals were the second role of a person already counted. For example, where an adult child was also an LPR they would be eligible to receive the death benefit either as a dependant or as LPR on behalf of the deceased's estate. Therefore, people with two roles were included as two discrete individuals.

The 779 individuals' relationships with the respective deceased members are shown in Table 4. Some important relationships were current or former spouses (18.6%), adult children (30.2%), minor children (9.4%), and stepchildren (4.6%). While parents (11.9%) and siblings (10.4%) were also frequently involved, they usually did not have the priority status of dependants under the legislation. The AFCA cases include information that allows the categorisation of dependants as financially dependent under the ordinary meaning of dependence, dependent according to the statutory inclusion of spouses and children, or both. Most spouses and minor children were dependants both through statutory inclusion and the ordinary meaning of dependence. Most adult children were only dependants through statutory inclusion.

Table 4: Cross-tabulation of dependants and LPRs according to relationship with deceased member and legal status of relationship

		Legal status of relationship					
		Financial and statutory dependant	Financial dependant not statutory dependant	Statutory dependant not financial dependant	LPR	Neither LPR nor dependant	Total
Relationship	Spouse at death	77	1	3	0	0	81
	Separated, former or divorced spouse	10	5	22	0	27	64
	Minor child	66	0	7	0	0	73
	Adult child	19	0	215	0	1	235
	Stepchild	4	0	32	0	0	36
	Parent	3	8	10	9	63	93
	Sibling	3	2	0	19	57	81
	Secondary role	0	0	0	25	0	25
	Other	3	1	6	25	56	91
Total		185	17	295	78	204	779

Figures 4 and 5 present the mean and median percentage distribution of the death benefit according to individuals' relationship with the deceased. These charts reflect all individuals including those who received nothing. The median chart (Figure 5), in which the median value is zero for all individuals apart from spouses and minor children, demonstrates that the frequency of receiving a benefit was significantly lower for all other types of relationships.

Figure 4: Mean percentage of death benefit received, by relationship

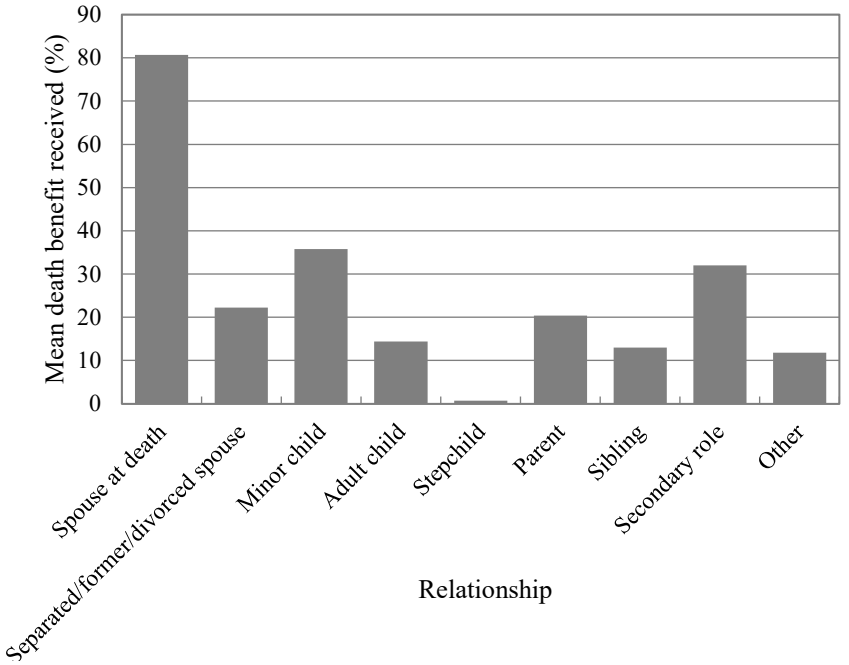
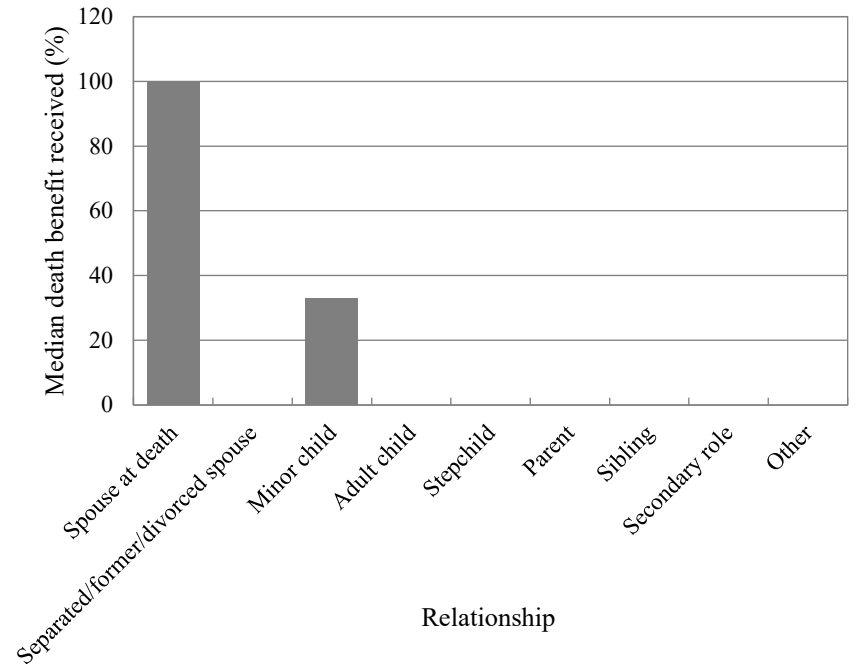


Figure 5: Median percentage of death benefit received, by relationship



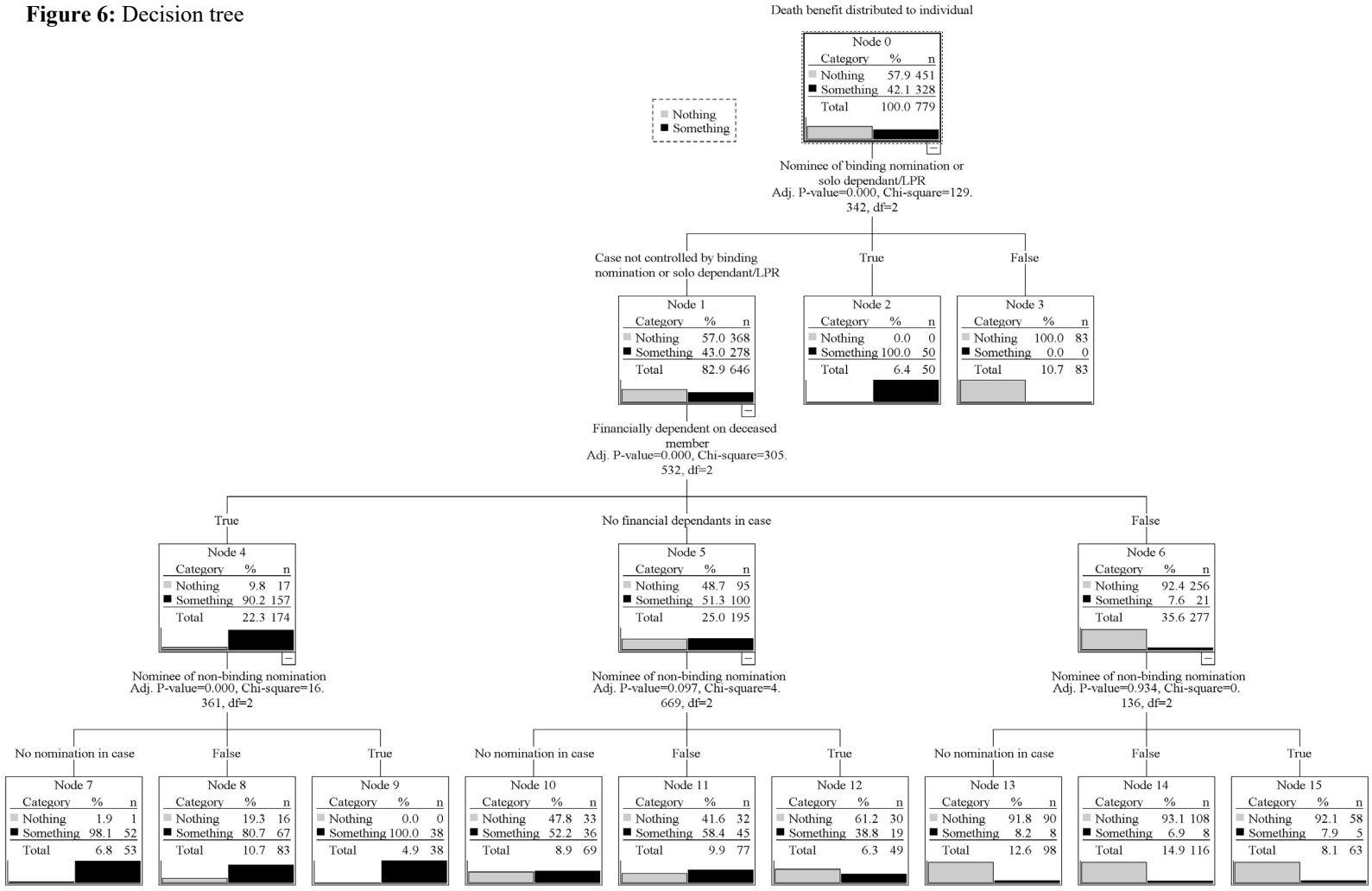
The first analysis of the 779 individuals is presented in the decision tree in Figure 6. This method uses machine learning to classify individuals into nodes according to the influence of distinct variables and visualises the structure of the data. The target variable is whether an individual received some of the death benefit from AFCA or received nothing. The outcome of this variable is presented in the tables and bar charts in Figure 6. Node 0 includes all 779 individuals, which shows that 328 individuals received a distribution and 451 did not.

The first explanatory variable (nodes 1, 2 and 3) classifies individuals according to the case categories. This variable is answered 'True' if the individual was nominated under a binding nomination or was the sole dependant or LPR in a case. As expected, AFCA followed the legislation and distributed 100% to these individuals (node 2) and 0% to other individuals in those same cases who were either not nominated or not the sole dependant/LPR (node 3). The third category (node 1) carries the individuals who were in other types of cases forward to the next variable.

The next variable encountered is whether the individual was financially dependent on the deceased. This has a strong effect: 90.2% of financial dependants received something (node 4). The difference between nodes 5 and 6 shows how not being a financial dependant is associated with a significantly lower chance of receiving something when competing for the distribution with a financial dependant (7.6%, node 6) than when there are no financial dependants (51.3%, node 5).

The final variable encountered is whether the individual is nominated by the deceased in a non-binding nomination (nodes 7 to 15). The shapes of the bar charts show that each group of three nodes is quite similar to that group's preceding node in the tree. For example, nodes 13, 14 and 15 have a similar distribution to node 6, which they stem from. Indeed, only in the left group does nomination have a statistically significant relationship with the outcome (nodes 7 to 9). Being nominated while also a financial dependant is associated with an increased chance of distribution (node 9), whereas being nominated while not financially dependent does not increase the chance to a level that registers as statistically significant with the Chi-square test (node 12). Indeed, node 12 shows a smaller proportion of individuals nominated by the deceased member receiving a benefit than others in that branch of the decision tree.

Figure 6: Decision tree



These results can be further detailed by comparing the average amount of benefit received. The average percentage distribution for the 157 financial dependants at node 4 who received a distribution was 61%. In contrast, the average benefit for the 21 who were not financially dependent but received something at node 6 was 24%. These 21 included 11 adult children and one spouse, none of whom received more than 25%; five parents of the deceased members who were in interdependency relationships with them, but without being financially dependent on their child; and LPRs in three cases.[79] The average for those in node 5 who were not financially dependent but who received something was 45%, which occurred in cases where there were no financial dependants to compete with.

A critical limitation on the decision tree is that it uses Chi-square tests, which assume that observations are independent. However, the individuals are not independent but associated with each other in the cases. To allow for the lack of independence in the observations, the individuals were analysed with a generalised linear mixed model ('GLMM').

Another limitation on the decision tree in Figure 6 is that it takes in all individuals, including those who are ineligible to receive a benefit under the legal framework. That is, some of those in nodes 12 and 15 who were nominated but did not receive anything would have been in that position because of the legal framework rather than AFCA's decision to exclude them. For example, a parent who is nominated in a case where there is an eligible de facto partner will not receive anything because they are not a dependant and the de facto partner is. To refine the GLMM analysis, the data was filtered to exclude individuals who were ineligible due to the legal framework. Individuals in cases that were decided by a binding nomination or a sole dependant/LPR were excluded, as were those who were neither dependants nor LPRs in cases where there were dependants or LPRs. This resulted in 549 individuals in 146 cases. For the first GLMM, individuals were also excluded where data on the size of the death benefit was missing. This resulted in 522 individuals in 139 AFCA cases being included in the GLMM.

The GLMM allows the influence of variables that apply at the case level (such as the number of individuals in the case and the size of the death benefit) to be compared to the influence of variables that apply at the individual level (such as financial dependence and nomination). The data structure for the model grouped individuals within their associated case. The target categorical variable was the same as for the decision tree: whether the individual received some or none of the death benefit. Four explanatory variables were included as fixed effects: case level variables included the number of individuals in the case and the size of the death benefit; individual level variables included the individual's financial dependence and the individual's nomination. Interaction effects were tested for all variables and

[79] Regarding the LPRs, in one case, an individual nominated under a binding nomination had died prior to the decision and AFCA determined that in that circumstance their share must go to the estate: *AFCA Case 616775* (6 August 2019). In another case, the only dependants were also beneficiaries under the estate and did not object to the trustee's decision to distribute to the LPR: *AFCA Case 662176* (17 December 2021). In the final case, a former de facto spouse had limited financial dependence on the deceased member related to a shared mortgage so received a limited distribution, which left the remainder to go to the estate: *AFCA Case 856722* (31 January 2023).

excluded as none were statistically significant. A binominal distribution and logit link function were used, as appropriate for a categorical target variable.

The results of the first GLMM are presented in Table 5. At the case level, it demonstrates that the number of individuals in a case has a statistically significant relationship with whether the individual receives a distribution. The negative direction of the estimation shows that as the number of individuals in a case increases, the odds of any one of them receiving something reduces. In contrast, the size of the death benefit has no statistically significant relationship with the target variable. At the individual level, the financial dependence of an individual has a very strong and statistically significant relationship with whether the individual receives a distribution. There is 95% confidence that an individual who is financially dependent on the deceased is between 24 and 100 times more likely to receive a benefit than someone who is not financially dependent. In contrast, there is no statistically significant relationship between being nominated in a non-binding nomination and receiving a benefit from AFCA. We cannot reject the null hypothesis that there is no association between nomination and outcomes. The intercept is the remaining variance between the 139 cases after the case level variables are accounted for.

Table 5: Generalised linear mixed model for AFCA distribution[a]

Parameter	Estimate	Standard error	*p*-value	Odds ratio	95% confidence interval for odds ratio	
					Lower	Upper
Intercept	0.005	0.6404	0.994	1.005	0.285	3.535
Individuals per case	–0.307	0.0898	<0.001	0.735	0.617	0.877
Size of death benefit	0.170	0.1503	0.260	1.185	0.882	1.592
Financial dependence	3.902	0.3600	<0.001	49.480	24.396	100.355
Non-binding nomination	0.302	0.3341	0.367	1.352	0.702	2.607

N(individuals) = 522
N(cases) = 139
Probability distribution: Binomial
Link function: Logit
Overall per cent correct: 87.0%
[a] Target: Received part or all of the death benefit from AFCA

A second GLMM was created with the nomination variable split into two variables according to the age of the nomination at the time of the deceased's death. The split was made between nominations that were less than or equal to three years old and those older than three years. This split fits the assumption behind the regulations that it may not be appropriate to follow nominations older than three years. The variable regarding the size of the death benefit was removed as it was

statistically insignificant, which meant a few more cases were included. The results are presented in Table 6. The GLMM demonstrates that, while recent nominations are somewhat closer to a statistically significant association with the target variable than older nominations, they still do not surmount the standard measure of significance: a *p*-value less than 0.05.

Table 6: Generalised linear mixed model for AFCA distribution[a]

Parameter	Estimate	Standard error	*p*-value	Odds ratio	95% confidence interval for odds ratio	
					Lower	Upper
Intercept	0.600	0.4405	0.174	1.823	0.767	4.330
Individuals per case	–0.347	0.0880	<0.001	0.707	0.594	0.840
Financial dependence	3.998	0.3615	<0.001	54.478	26.781	110.820
Recent nomination	0.665	0.4764	0.163	1.944	0.763	4.957
Older nomination	0.370	0.4719	0.433	1.448	0.573	3.659

N(individuals) = 549
N(cases) = 146
Probability distribution: Binomial
Link function: Logit
Overall per cent correct: 87.4%
[a] Target: Received part or all of the death benefit from AFCA

Table 7 presents an analysis of the influence of *Wan* on AFCA decision-making. A dummy variable is included for whether cases are post-*Wan*. Interactions with the other variables are also included. There is a statistically significant difference to the target variable between cases before and after *Wan*, which appears in the interaction between the number of individuals per case and whether the case is after *Wan*. In cases before *Wan*, an individual's log odds of receiving something reduces by 0.577 every time another individual is included in the case. In cases after *Wan*, the individual's log odds of receiving something reduce by 0.181 (–0.577 + 0.396) which is a statistically significant reduction in the effect. However, importantly, there is no significant interaction with the other variables. That means there is no evidence that cases after *Wan* are associated with a *change* in association between financial dependence and receipt of a benefit. Neither is there evidence that cases after *Wan* are associated with a change in the lack of association between non-binding nominations and receipt of a benefit.

Table 7: Generalised linear mixed model for AFCA distribution[a]

Parameter	Estimate	Standard error	*p*-value	Odds ratio	95% confidence interval for odds ratio	
					Lower	Upper
Intercept	1.231	0.6123	0.045	3.426	1.029	11.405
Individuals per case	–0.577	0.1313	<0.001	0.562	0.434	0.727
Financial dependence	4.268	0.4728	<0.001	71.362	28.191	180.644
Non-binding nomination	0.679	0.4498	0.132	1.971	0.815	4.770
Post-*Wan*	–0.935	0.8557	0.275	0.392	0.073	2.107
Post-*Wan*: Individuals per case	0.396	0.1735	0.023	1.486	1.057	2.090
Post-*Wan*: Financial dependence	–0.455	0.7827	0.561	0.634	0.136	2.951
Post-*Wan*: Non-binding nomination	–0.555	0.6505	0.394	0.574	0.160	2.061

N(individuals) = 549
N(cases) = 146
Probability distribution: Binomial
Link function: Logit
Overall per cent correct: 85.6%
[a] Target: Received part or all of the death benefit from AFCA

Finally, there was no evidence that AFCA fails to give effect to valid binding nominations. In the nine cases where AFCA found a valid binding nomination AFCA distributed according to the nomination.

VII Discussion and Implications

The results of this study present clear answers to the research questions. First, it is apparent that AFCA exercises a relatively narrow discretion where outcomes are strongly associated with a single explanatory variable: financial dependence on the deceased. In cases where a discretion is exercised and AFCA has the option to choose a financial dependant, 90.2% of financial dependants receive something and only 7.6% of those not financially dependent receive something. The odds of receiving something as a financial dependant are between 24 and 100 times that of someone not financially dependent. While factors related to adult children (other than financial dependence) are occasionally taken into account, the results demonstrate a strong association between outcomes and this single factor. Where those not financially dependent do receive something, the quantity of benefits

received are also considerably smaller than those received by financial dependants. This suggests that AFCA's approach is a narrow discretion where the presumptive preference for financial dependants is only rarely displaced.

Second, the results fail to establish that AFCA gives any real or genuine consideration to the deceased's wishes expressed in non-binding nominations. This contradicts AFCA's claim that these wishes are taken into account. To demonstrate that some factor was being given real and genuine consideration in decisions, it would not need to have influence on every decision, but it would need to demonstrate some influence on outcomes in the aggregate. The fact that even recent nominations, less than three years old, do not have a statistically significant association with outcomes contradicts any claim that only outdated preferences are discounted.

Third, the *Wan* case has had no discernible impact on AFCA's practice of decision-making. The lack of evidence for an association between nominations and distribution outcomes persists in the cases after *Wan*. Likewise, the evidence for a strong relationship between financial dependence and distribution outcomes persists in the cases after *Wan*. The proportion of cases in which an estate rather than a dependant received a distribution did not increase after *Wan*. This suggests that AFCA's practice has not changed following *Wan*, at least to the date of this study.

Fourth, there is evidence that AFCA makes decisions that are consistent with the regulations. In the nine cases where AFCA found a valid binding nomination, the percentage distribution was consistent with the percentage nomination. In addition, when these cases are combined with the 33 cases where AFCA had no discretion (because there was only one eligible beneficiary) to identify 133 individuals, all 50 of those who were eligible to receive something did so and none of the 83 who were not eligible received anything. A significant caveat regarding the binding nominations is that only nine were completely valid, while 26 were invalid. This demonstrates that binding nominations have been an unreliable solution in *some* cases. However, further conclusions about the frequency of problems with binding nominations cannot be drawn from this data because there may be bias in which binding nominations are subjects of complaint to AFCA.

The broader question raised by these results is whether they reveal a normative failing in the superannuation death benefits system. That is, is it right that AFCA and trustees place no discernible weight on nominations and considerable weight on financial dependence? Empirical evidence cannot answer these normative questions. However, the insights from the evidence ground a strong argument that reform is required.

Binding nominations should be reformed. Regardless of our inability to generalise from the data, the 26 invalid attempts at binding nominations suggest that the regulations are thwarting rather than facilitating superannuation members' choices. Solutions could include allowing binding nominations to be saved in a similar way to informal wills or by upholding partially valid nominations.

Non-binding nominations must also be reformed because there is no evidence they affect outcomes. Indeed, the fact that non-binding nominations are offered to members, but do not have any statistically significant association with distribution outcomes, is misleading. Offering members the opportunity to express their

preferences generates a reasonable expectation that their preferences will be given weight. It creates a false sense of security for members, which is poor policy. One option for reform is to simply remove non-binding nominations. Trustees could do this without any central regulation, although a consistent approach would be better for members. A more difficult option would be to reform how AFCA and trustees exercise discretions so that more weight is given to non-binding nominations.

This leads to the broader consideration of whether granting trustees, and AFCA, discretion is good policy. The advantage of discretion over the distribution of death benefits is that it allows outcomes to be tailored to circumstances as they arise. The disadvantage is additional cost and delay. The current system appears to create the problems of discretion but without the advantages. First, an average of 2.82 years before a decision is made represents a considerable delay following a death and is likely to cause harm to relatives of the deceased, for example, through eligible beneficiaries dying during the process. Second, AFCA's current approach largely nullifies the advantages of discretion by deciding outcomes very consistently with the single consideration of financial dependence. Other important considerations, such as family violence, appear to be excluded from the discretion. This is morally insupportable, particularly because there is no compelling reason to exclude these considerations. An illustrative case, from the SCT, is *Ievers v Superannuation Complaints Tribunal*, which involved the tragic suicide of a 20 year old.[80] The SCT had to decide whether to distribute to the deceased's de facto partner, or to her estate (which would be distributed to the deceased's mother). The SCT found that the de facto partner was arguably abusive.[81] The police submitted evidence that the partner was controlling, including prohibiting the deceased from accepting lifts home from work in the rain, and the relationship involved elements of escalating abuse.[82] The Coroner's report concluded that it was likely that domestic violence contributed to the deceased's suicide.[83] Nevertheless the SCT distributed the entire benefit to the partner on the ground he alone had a right to look to the deceased for financial support.[84] The value of discretion is to take into account considerations such as these, but the current system does not allow it. While it may be possible to reform the system so that discretion is exercised more responsively to the circumstances, this will likely add further delay and cost.

An immediate solution was proposed in January 2024 by the Law Council of Australia.[85] The proposal is that all death benefits automatically form part of the deceased's estate except where the deceased has made a valid binding nomination. This proposal removes discretion from trustees and AFCA, and should reduce delays for relatives and costs for trustees. The proposal would be an effective solution for the problems identified in this article.

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80 *Ievers v Superannuation Complaints Tribunal* (2018) 160 ALD 96 ('*Ievers*').

81 *D14-15\227* [2015] SCT 82, [30] (Presiding Member Anderson and Member Duffield) ('*D14-15\227*').

82 Ibid [39] (Presiding Member Anderson and Member Duffield).

83 Ibid [41] (Presiding Member Anderson and Member Duffield).

84 *Ievers* (n 80) [71]; *D14-15\227* (n 81) [49] (Presiding Member Anderson and Member Duffield).

85 Letter from Greg McIntyre, Law Council of Australia President to Jim Chalmers and Stephen Jones, 12 January 2024 <https://lawcouncil.au/resources/submissions/proposed-reform-to-superannuation-death-benefits>.

Before the High Court

Finality and Certainty in the Integrated National System of Chapter III Courts: *Judge Vasta v Stradford*

Emily Hammond*

Abstract

Australian authority holds that there is a critical distinction between superior and inferior courts when it comes to the legal force of judicial orders affected by jurisdictional error. It is said that such orders, when made by a superior court, have legal force unless and until set aside but that, when made by an inferior court, they lack legal force from the outset. This distinction — recently consigned to pre-1846 history by the United Kingdom Supreme Court — does not align with the contemporary reality of the integrated system of courts established under Ch III of the *Australian Constitution*. The appeals in *Commonwealth v Stradford*, *Judge Vasta v Stradford* and *Queensland v Stradford* present an opportunity for the High Court of Australia to set a new approach that reflects the constitutional context for Ch III court operation. Specifically, the appeals may be upheld on the basis that any purported order made by a Ch III court acting as a repository of judicial power has legal force unless and until set aside.

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I Introduction

All courts in Australia are courts of limited jurisdiction, and all below the High Court of Australia ('the Court') are amenable to judicial review to enforce the limits on their jurisdiction. However, some are 'superior courts' and others are not. This distinction is thought important when it comes to certain matters. One is the legal force of a court order that has not been set aside. If a superior court makes an order that is affected by jurisdictional error, the order has legal force unless and until set aside. For instance, detention under a superior court order for imprisonment that has

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not been set aside is not actionable as false imprisonment. The appeals before the Court in *Commonwealth v Stradford*, *Judge Vasta v Stradford* and *Queensland v Stradford*[1] raise the question whether the position is otherwise if the order is made by an inferior court.

On the written submissions, the parties invite the Court to maintain a general rule that an inferior court order affected by jurisdictional error lacks legal force from the time it is made. The parties refer to this as an uncontroversial starting point. It is certainly consistent with numerous judicial statements, including in recent judgments of the Court.[2] However, no mention is made in the written submissions (nor in the judgment below) of recent United Kingdom Supreme Court ('UKSC') authority that there is a duty to obey *all* court orders unless and until set aside, and that this has been the position in the United Kingdom since at least 1846.[3] This is a significant gap in the materials before the Court. It is significant because, as this column will explain, there is a compelling case that Australia should likewise adopt a single principle governing the legal force of judicial orders of any institution that is a 'court' within the meaning of Ch III of the *Australian Constitution* ('Ch III court').

This column goes so far as to propose a principle, suitable for the Australian constitutional context, that could be applied to uphold these appeals.[4] The principle might be put this way: any judicial order made by a Ch III court of competent jurisdiction has legal force until set aside. Competent jurisdiction conveys a threshold notion of general authority (that is, to make an order of the kind that has been made, on the subject matter of the application). The threshold ensures that a court is acting as a repository of judicial power when it makes a purported judicial order. That is critical because it is the underlying exercise of judicial power that sustains the legal force of a purported order affected by jurisdictional error.

It is convenient to emphasise at the outset what is at stake in discussion of an order's legal force unless and until set aside. The legal force of an order refers to whether rights or liabilities are as specified in the order by force of law.[5] This does *not* pose a global inquiry into all legal consequences the existence of the purported order may or may not have.[6] Recognising that a court order has legal force unless

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1 High Court of Australia, Case Nos C3/2024, C4/2024, S24/2024 respectively.

2 See, since 1996: *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 275 [329] ('*Re Macks*'); *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, 370 [11] ('*Berowra*'); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [69]–[70] ('*Kirk*'); *New South Wales v Kable* (2013) 252 CLR 118, 140–1 [56] ('*Kable No 2*'); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33, 48 [48] ('*Oakey*'); *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, 231 [27] ('*Citta*'); *Stanley v DPP (NSW)* (2023) 407 ALR 222, 225–6 [15]–[16] ('*Stanley*'). See further below nn 67–74 and accompanying text.

3 *R (Majera) v Secretary of State for the Home Department* [2022] AC 461 ('*Majera*'). See below Part IV(C); Justice Kristen Walker, 'When Can a Court's Decision be Ignored?' (2022) 46(2) *Melbourne University Law Review* 572, 583–6.

4 Recognising that this is a matter on which the respondent has not yet been heard.

5 See, eg, *Stanley* (n 2) 225–6 [15].

6 See, eg, Leighton McDonald, Kristen Rundle and Emily Hammond, *Principles of Administrative Law* (Oxford University Press, 4th ed, 2023) 170–82.

and until set aside therefore does not prevent judicial review of the order,[7] or reopening the proceedings.[8] Nor does it preclude a respondent to proceedings for enforcement applying for the order to be set aside.[9] That said, if an order *does* have legal force until set aside, there is necessarily a legal duty to obey the order if it has not been set aside.

II Facts and Proceedings

In December 2018, Mr Stradford (a pseudonym) was held in custody for seven days following an order by Vasta J that Mr Stradford be sentenced to 12 months' imprisonment for contempt of disclosure orders made by the Federal Circuit Court of Australia ('FCC') in proceedings under the *Family Law Act 1975* (Cth). The purported order was stayed upon the filing of an appeal, which was unanimously upheld.[10] The appellate Bench described the making of the declaration that Mr Stradford was in contempt and the imprisonment order as 'a gross miscarriage of justice'.[11]

Subsequently, Mr Stradford commenced proceedings in the Federal Court alleging that Vasta J had committed the torts of false imprisonment and collateral abuse of process, and that the Commonwealth and Queensland were vicariously liable for the actions of their officers and agents. Wigney J held that Vasta J, the Commonwealth, and Queensland were liable for false imprisonment and awarded damages.[12]

Wigney J found that there were five jurisdictional errors in Vasta J's conduct of the contempt proceedings, including a grave denial of procedural fairness and pre-judgment.[13] Wigney J expressly recognised that Vasta J 'had the jurisdiction to entertain the matter between Mr and Mrs Stradford, and had the power to deal with any alleged contempt by Mr Stradford in the context of that litigation'.[14] Nonetheless, Wigney J held that Vasta J's imprisonment order, being an order of an inferior court[15] affected by jurisdictional error, did not authorise the detention.[16]

In reaching this view, Wigney J rejected two lines of argument advanced in favour of the imprisonment order being effective until set aside.[17] First, that the general principle is that legal force is denied to those inferior court orders made without 'subject matter jurisdiction' (that is, orders that are not of the kind the court

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7 See, eg, *Kirk* (n 2) 583 [106]–[107]; *Kable No 2* (n 2) 132–3 [30]. See Enid Campbell, 'Inferior and Superior Courts and Courts of Record' (1997) 6(4) *Journal of Judicial Administration* 249, 250, 258.

8 See, eg, *Cameron v Cole* (1944) 68 CLR 571, 589–90, 600, 607 ('*Cameron*'); Campbell (n 7) 259.

9 Compare David Rolph, *Contempt* (Federation Press, 2023) 559. Noting that transfer may be required if enforcement is before a court that does not have authority to undertake judicial review.

10 *Stradford v Stradford* (2019) 59 Fam LR 194.

11 Ibid 212 [73] (Strickland, Murphy and Kent JJ).

12 *Stradford v Judge Vasta* [2023] FCA 1020 ('*Stradford FCA*').

13 Ibid [76]–[136].

14 Ibid [174].

15 Ibid [190], [204].

16 Ibid [173]–[197].

17 Ibid [177]–[195].

is authorised to make).[18] A second and more complex line of argument, also rejected by Wigney J, was that the general rule did not apply to the order made in exercise of the FCC's contempt powers, either by operation of statute (s 17(1) of the *Federal Circuit Court of Australia Act 1999* (Cth)) or due to the nature of the power to punish contempt as an attribute of judicial power.[19]

Wigney J went on to hold that Vasta J, as a judge of an inferior court, was not protected by the judicial immunity afforded to a superior court judge who acts bona fide in the exercise of office and under the belief that they have jurisdiction;[20] and that, because the invalid imprisonment order was made by an inferior court, no common law defence was available to the various Commonwealth and Queensland officers and agents who executed the warrant, apparently valid on its face.[21]

In the present appeals, no party contests Wigney J's findings as to the imprisonment order being affected by jurisdictional error, or the calculation of damages. The issues in the appeals fall into two categories:

(1) whether Mr Stradford's detention was lawful because Vasta J's orders had legal force until set aside, despite being affected by jurisdictional error;[22] and

(2) whether, if the order lacked legal force from the time it was made:

   (a) Vasta J was protected by judicial immunity — because inferior court judges are immune for acts done with subject matter jurisdiction,[23] or because there is only one principle of judicial immunity,[24] or because he had superior court immunity in the contempt proceeding;[25] and

   (b) the officers and agents who executed Vasta J's orders were protected — because they acted in execution of a warrant that appeared valid on its face,[26] and/or they had statutory authority to execute apparently valid warrants,[27] and/or the warrant was valid because it appeared valid on its

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18 Ibid [182]–[184].

19 Ibid [189]–[193] (contempt as attribute of judicial power), [88]–[99], [193]–[194] (effect and availability of *Federal Circuit Court of Australia Act 1999* (Cth) s 17).

20 Ibid [206] (superior court judicial immunity), [342]–[347] (judicial immunity of inferior court judges).

21 Ibid [524], [552]. Wigney J also rejected Queensland's claim of a statutory immunity under s 249 of the schedule to the *Criminal Code Act 1899* (Qld) on the basis that this statutory immunity did not apply to warrants issued by federal courts: at [544].

22 Commonwealth, 'Submissions of the Appellant', Submissions in *Commonwealth v Stradford*, Case No C3/2024, 28 March 2024, [14]–[32] ('Commonwealth Submissions'); Hon Justice Vasta, 'Submissions of the Appellant', Submissions in *Judge Vasta v Stradford*, Case No C4/2024, 28 March 2024, [2], [47]–[56] ('Judge Vasta Submissions'). Cf Queensland, 'Submissions of the Appellant', Submissions in *Queensland v Stradford*, Case No S24/2024, 28 March 2024, [43] ('Queensland Submissions'); Attorney-General (SA), 'Submissions of the Intervenor', Submissions in *Commonwealth v Stradford*, Case No C3/2024, 28 March 2024, [10], [15] ('South Australia Submissions').

23 Commonwealth Submissions (n 22) [51]–[65]; Judge Vasta Submissions (n 22) [46].

24 Commonwealth Submissions (n 22) [66]–[74]; Judge Vasta Submissions (n 22) [10]–[45].

25 Judge Vasta Submissions (n 22) [47]–[56].

26 Commonwealth Submissions (n 22) [33]–[47]; Queensland Submissions (n 22) [41]–[70].

27 Queensland Submissions (n 22) [12]–[40].

> face and the underlying imprisonment order was made within subject matter jurisdiction.[28]

If it is found that the imprisonment order had legal force until set aside, there is no actionable false imprisonment and the complex secondary questions going to liability do not require resolution.[29]

III Submissions on Legal Force of the Imprisonment Order

For present purposes, there are three salient features of the parties' submissions on legal force of the imprisonment order.

First, no party challenges Wigney J's conclusion that, as a general rule, inferior court orders infected by jurisdictional error lack legal force whether or not they are set aside.[30] The Judge and Commonwealth do not press their argument below that inferior court orders have legal force until set aside if made within subject matter jurisdiction.

Second, the Judge and Commonwealth rely on established authority that a statute may provide that an inferior court order is to have legal force unless set aside, including by general words.[31] While not explored directly, this would presumably invite some threshold inquiry into whether there is sufficient connection between the order made and such statutory provision. As such, the arguments on legal force implicitly assume it is possible to demarcate between a court that is or is not acting in a way that attracts the statutory provision. Some such demarcation is in any event explicitly drawn in the Commonwealth's submission that judicial immunity operates for any judge acting with subject matter jurisdiction.[32]

Third, there is a striking contrast within the Judge's and Commonwealth's submissions on legal force and liability. Within their submissions on judicial immunity, they argue that the distinction between inferior and superior courts is anachronistic: out of step with the contemporary realities of a professionalised judiciary and the constitutional context of an integrated national system of courts established under Ch III of the *Constitution*.[33] These are points well made.[34] It is therefore notable that the Judge and Commonwealth do not press for a congruent approach to the underlying legal force of judicial orders by Ch III courts. Such an approach is available, as will now be explained.

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28 South Australia Submissions (n 22) [17]–[21].

29 Noting that these may be resolved as additional bases for upholding the appeals.

30 See Commonwealth Submissions (n 22) [12], [14]; Judge Vasta Submissions (n 22) [51]; Queensland Submissions (n 22) [43]; South Australia Submissions (n 22) [10], [15].

31 Commonwealth Submissions (n 22) [14]–[19]; Judge Vasta Submissions (n 22) [50]–[56].

32 Commonwealth Submissions (n 22) [50], [51]–[65]; Judge Vasta Submissions (n 22) [46]. Compare South Australia Submissions (n 22) [19] (validity of the warrant).

33 Commonwealth Submissions (n 22) [67]–[74]; Judge Vasta Submissions (n 22) [30]–[35]. See also Commonwealth, 'Commonwealth Reply', Submissions in *Commonwealth v Stradford*, Case No C3/2024, 24 May 2024, [15], [25] ('Commonwealth Reply').

34 See also *Stradford FCA* (n 12) [331]–[332].

IV A Principled Approach to Legal Force of Chapter III Court Orders

The argument of this Part seeks to demonstrate that there would be merit in exploring, within the context of these appeals, a new approach to the legal force of Ch III court orders. Specifically, the appeals might be upheld on the basis that any judicial order made by a Ch III court of competent jurisdiction will have legal force until set aside. It would be appropriate to take this step having regard to: (A) constitutional principle; (B) constitutional context; (C) UK authority; (D) no reliance militating against the change.

A *Constitutional Principle Supports Taking the Step*

Kable No 2[35] provides a principled account of the source of the legal force of a superior court order that is not authorised by the statute under which it is purportedly made. In this scenario, the order does not draw legal force from the statute under which it was purportedly made — it does not attract the operation of the statute. Similarly, when jurisdictional error is made in purported exercise of decision-making authority legislatively conferred, the purported decision 'exceeds the limits of decision-making authority legislatively conferred' and 'is properly regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all"'.[36] But as *Kable No 2* recognises, it is constitutionally permissible that even in these circumstances, a court order might, until set aside, have legal force from a different source.[37] That source, as explained in *Kable No 2*, is the underlying exercise of judicial power: the 'roots of the doctrine, that the orders of a superior court of record are valid until set aside even if made in excess of jurisdiction, lie in the nature of judicial power'.[38] This characteristic of superior court orders 'reflects the distinction between the exercise of judicial power (by the *final* quelling of controversies according to law) and the exercise of executive power (*subject* to law)'.[39]

Kable No 2 concerned the exercise of judicial power by a superior court.[40] But the Court's reasons make clear that the fundamental justification for the legal force accorded to superior court orders lies in the nature of judicial power.[41] In the tri-partite classification of state powers, it is judicial power that provides a peaceful resolution of disputes about rights or liabilities, including in disputes about whether rights or liabilities are as specified in purported laws or determinations of the political branches of government. Within this constitutional conception, it is imperative that judicial power has the potential to produce orders in resolution of disputes that have legal force unless and until set aside, even if affected by serious error.

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35 *Kable No 2* (n 2).
36 *Stanley* (n 2) 225–6 [15] (Gageler J) (citations omitted).
37 *Kable No 2* (n 2) 135 [36], 141–2 [57].
38 Ibid 134 [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
39 Ibid 134 [34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).
40 Ibid 140 [56].
41 Ibid 135–6 [38]–[40], 141–2 [58]–[60].

This understanding points to a necessary threshold consideration in any extended application of the principle to inferior courts. The order must be made by a court acting as a repository of judicial power. The inquiry here is *not* whether the court satisfied all preconditions and conditions for the effective exercise of power in the instant case. It is a more basic inquiry into whether the court was acting as a repository of judicial power when it made the order. For present purposes, the concept of subject matter jurisdiction is a serviceable reference point.[42] However, a more precise statement might be that the court has judicial power to make the kind of order it has made, on the subject matter of the proceeding.[43] This accommodates the principle that conferral of jurisdiction on an inferior court will prima facie carry only those powers necessary to its exercise (as distinct from the well of undefined powers implied in the status of 'superior court').[44]

B *Constitutional Context Supports Taking the Step for Chapter III Courts*

The Ch III scheme supports extending 'superior court effect' (that is, having legal force unless and until set aside even if affected by jurisdictional error) to Ch III court judicial orders. There are robust constitutional safeguards for independence and impartiality in the exercise of judicial power, and correction of error, which operate across the integrated national system of courts established under Ch III of the *Constitution*. Chapter III provides accountability for the exercise of judicial power by Ch III courts through the system of appeals established by and under s 73, and the entrenched minimum provision for judicial review for jurisdictional error.[45] This is supplemented by the protections derived from Ch III for the institutional integrity of courts as impartial and independent institutions for the administration of justice. As *Kable No 1*[46] established, all Ch III courts are required to maintain, at an institutional level, those characteristics that make them suitable repositories for separated judicial power.

Conversely, the constitutional context might support drawing a distinction between the judicial orders of Ch III courts and others. The exercise of judicial power by repositories that are *not* Ch III courts occurs in a distinct context, removed from the safeguards provided in Ch III. In the pre-*Kable No 1* era, Australian law drew a distinction between 'courts' and 'non-courts' in the related matter of identifying jurisdictional errors.[47] The logic articulated in that era might well be adjusted, in light of *Kable No 1*, to sharpen the relevant contrast between those institutions that are courts within the meaning of Ch III and those that are not. That distinction has additional resonance following the Court's recognition of an implied limit on state legislative capacity to confer state judicial power on bodies that are not Ch III

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42 Compare reliance on this concept in the parties' submissions on liability: see above n 32.

43 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 446 [29], 449–50 [44]–[46], 451–2 [50]–[54] ('*Pelechowski*'). See also at 459–60 [77].

44 Ibid noting, as to the 'necessity' touchstone for implied powers, 451–2 [50]–[51].

45 That is, the entrenched minimum provisions for review identified, for Commonwealth powers, in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157*') and, for state powers, in *Kirk* (n 2).

46 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable No 1*').

47 *Craig v South Australia* (1995) 184 CLR 163, 176–80 ('*Craig*'); *Kirk* (n 2) 572–3 [67]–[68].

courts.[48] In light of the evolved Ch III jurisprudence, it would seem defensible to draw a line between Ch III courts and other repositories of judicial power.

C *United Kingdom Authority*

In a 2021 judgment,[49] the UKSC unanimously held that the Secretary of State was bound to comply with a bail order issued by the First-Tier Tribunal until it was set aside, even if the order was invalid. Lord Reed P (writing for the Court) explained:

> It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer*, in terms which have been repeated time and again in later authorities.[50]
>
> ...
>
> In the light of this consistent body of authority stretching back to 1846, it is apparent that the alleged invalidity of the order made by the First-tier Tribunal had no bearing … Even assuming that the order was invalid, the Secretary of State was nevertheless obliged to comply with it, unless and until it was varied or set aside.[51]

As explained by Lord Reed, this principle applies in the UK to courts of limited jurisdiction[52] such as the First-Tier Tribunal, a county court[53] and a mental health tribunal.[54] It applies provided the court is one of 'competent jurisdiction', a concept that appears analogous to acting with subject matter jurisdiction or broad authority to make the kind of order sought.[55]

This application is seen as

> consistent with the rationale of the rule. … [I]t is based on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as those made by courts possessing unlimited jurisdiction.[56]

The UKSC was, of course, addressing issues as they arise in a different constitutional and doctrinal setting. Notably, the UKSC suggested that a duty to obey may be extended to *executive* orders that have not been set aside.[57] That would not be open in Australia, where an entrenched separation of judicial power casts into relief the inherent incapacity of executive power to affect rights or liabilities, which means that any such legal force can be derived only from statute (or common law

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48 *Burns v Corbett* (2018) 265 CLR 304. Note that this development casts substantially different light on the reservation expressed in *Kirk* (n 2) 573 [69].

49 *Majera* (n 3).

50 Ibid 480 [44], citing *Chuck v Cremer* (1846) 47 ER 884.

51 Ibid 484 [56].

52 Ibid 482 [48].

53 Ibid 482 [50].

54 Ibid 482–3 [51]–[52].

55 Ibid 482 [49] (Lord Reed P).

56 Ibid.

57 Ibid [27]–[42]. On this aspect and the legislative response, see Mark Aronson, 'Reforming Certiorari and Messing with Nullity' (2022) 29(2) *Australian Journal of Administrative Law* 110.

prerogative) operating on the fact of an executive decision.[58] Accordingly, a decision affected by jurisdictional error, when made by a repository of *executive* power, can have no legal force.[59]

That said, in the case of judicial orders of Ch III courts, it is hard to see any differences in constitutional context that would pull against Australia taking the step taken by the UKSC. On the contrary, the differences would seem to *favour* the step being taken for Australia. Principally (as already discussed) the Ch III scheme is conducive to taking this step for orders made by Ch III courts, provided they are acting as repositories of judicial power (that is, authorised to make an order of the kind sought on the subject matter).

Might it be said that there is a distinct pressure for the UKSC to take this step that does not exist in Australia? The argument might run something like this: Because the UK has largely abandoned the distinction between jurisdictional and non-jurisdictional legal error, extending superior court effect to court orders was the only viable doctrinal move available in the UK to promote certainty and compliance with court orders.

It is correct that Australia, to a greater extent than the UK, uses the application of jurisdictional error to promote the rule of law value of certainty and obedience to inferior court orders.[60] But this is not the ideal doctrinal vehicle to promote those rule of law values. This is because, within the application of jurisdictional error to inferior courts, certainty competes with other rule of law values.[61] If superior court effect were extended to all Ch III courts, this would alleviate some of the pressure of competing demands on the application of jurisdictional error to inferior courts. Thus, despite the difference in context, the step taken in the UK would benefit Australian doctrine too.

D *No Reliance Militating against the Change*

It remains to note that there has been no reliance on present doctrine that militates against extending superior court effect to the judicial orders of Ch III courts.

First, it bears mentioning that all post-*Kable No 1* statements from the Court supporting the present approach have been obiter in cases concerned with superior court judicial orders,[62] non-court tribunal judicial orders,[63] administrative orders of inferior courts,[64] questions whose resolution did not turn critically on the status of the court in which proceedings were brought[65] or proceedings for judicial review of an inferior court order affected by jurisdictional error.[66] The pre-*Kable No 1* Court authorities are, likewise, generally in obiter, being in cases concerning superior court

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58 See, eg, McDonald, Rundle and Hammond (n 6) 53–6.
59 Contrast, on this point, Campbell (n 7) 258.
60 See *Craig* (n 47) 179; *Kirk* (n 2) 572–3 [68]–[69]. See also South Australia Submissions (n 22) [7]–[9].
61 See, eg, *Plaintiff S157* (n 45) 482–4 [5]–[9], 513 [103]–[104].
62 *Re Macks* (n 2); *Kirk* (n 2); *Kable No 2* (n 2).
63 *Citta* (n 2).
64 *Oakey* (n 2).
65 *Berowra* (n 2).
66 *Stanley* (n 2).

judicial orders[67] or superior court administrative orders,[68] or upholding an inferior court's authority to make an impugned judicial order.[69]

Second, the proposal is to extend superior court effect only where a Ch III court is acting as a repository of judicial power. As mentioned above, this would not be the case if the court lacked authority to make the kind of order it has made on the subject matter before it. The proviso would reconcile the proposed approach with the result in the one Court judgment that rests critically on the distinction to deny legal force to an inferior court order: *Pelechowski v Registrar, Court of Appeal (NSW)*.[70] There, the majority held that breach of a District Court order preserving the asset of a judgment debtor did not constitute a contempt because statute did not authorise the court to make an asset preservation order of that nature and effect.[71] McHugh J, although in dissent on the statutory construction, articulated the issue in terms consistent with the majority: did statute authorise the District Court to make 'such an order',[72] or give it authority 'to take cognisance of matters presented in a formal way for its decision'?[73] *Pelechowski* can therefore be reconciled with the proposed approach on the basis that there was no underlying exercise of judicial power to sustain the legal force of the District Court order.[74]

Third, the proposed change would *not* expand any court's powers or jurisdiction. Even if the change were made, legislators could rely on inferior court designation to establish certain parameters for a court's operation. For instance, the designation could continue to be used so that conferral of jurisdiction will prima facie carry only those powers necessary to its exercise,[75] or to indicate limited contempt jurisdiction.[76]

Fourth, it is quite unreal to suppose that the current limited application of superior court effect would be the driving reason for an Australian parliament to establish an inferior Ch III court.[77] One theme that comes through very clearly in the written submissions in these appeals and related commentary is that the public interest in finality and certainty in litigation applies equally to all courts. There is no overriding public interest in maintaining the current scope for collateral challenge and contempt in relation to court orders at the expense of finality and certainty; certainly not for courts operating under Ch III's entrenched safeguards for institutional integrity and correction of error.

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67 *Ex parte Williams* (1934) 51 CLR 545; *Cameron* (n 8); *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351; *W v W* (1982) 151 CLR 491.

68 *Ousley v The Queen* (1997) 192 CLR 69.

69 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461.

70 *Pelechowski* (n 43). In *Cameron* (n 8) only Latham CJ relied on inferior court orders lacking legal effect.

71 *Pelechowski* (n 43) 446 [29], 449–50 [44]–[46], 452 [53]–[54] (Gaudron, Gummow and Callinan JJ).

72 Ibid 459 [76].

73 Ibid 459–60 [77] (citations omitted).

74 The proviso also reconciles *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 335 (no authority to order prior restraint of a threatened contempt by the media) and *A-G (NSW) v Mayas Pty Ltd* (1998) 14 NSWLR 342, 357 (non-publication order can only be made in context of a closed hearing).

75 But see, as to the 'necessity' touchstone for implied powers, *Pelechowski* (n 43) 451–2 [50]–[51].

76 Campbell (n 7) 251–2; Rolph (n 9) 35. Noting an argument that some power to deal with contempt may be an essential characteristic of a Ch III court: Rolph (n 9) 49–54.

77 Compare (on judicial immunity) Commonwealth Reply (n 33) [22].

V Conclusion

There are numerous judicial statements, including from present members of the Court in recent cases, that there is a critical distinction between superior and inferior courts when it comes to the legal force of judicial orders affected by jurisdictional error. In stark contrast, the UKSC has recently held that there is a duty to obey all court orders unless and until set aside, and that this has been the position in UK common law since 1846. In any event, and for the reasons given, the distinction does not align with fundamental principles operating on the integrated system of Ch III courts. These appeals present an opportunity for the Court to set a new approach that aligns with the framework that the *Constitution* provides for adjudication by Ch III courts. Within that framework, it would be justifiable to recognise that any purported order made by a Ch III court acting as a repository of judicial power (that is, with authority to make an order of the kind made on the subject matter of the proceeding) has legal force unless and until set aside.

Case Note

Sims v Commonwealth: The Ultimate Foundation of Australian Law and the Recovery of Ultra Vires Payments by the Commonwealth Executive

Matthew Graeme John Wilcox*

Abstract

The application of a statutory limitation period to the recovery of mistaken payments by the Commonwealth to a former naval serviceman is not a place one would expect to locate the practical influence of jurisprudence. Yet it emerges in *Sims v Commonwealth*. The issue concerns the accurate identification of the ultimate foundation of Australian law. It is contended that the foundation is materialised by the interaction between the *Australian Constitution* and the common law: the *Constitution* is incomplete without common law doctrines. Therefore, there must be limits to the extent to which legislatures can abolish or amend the operation of common law rules in order to safeguard the constitutional allocation of powers. This necessarily includes limitation of action provisions. The contention is derived from recent High Court authority which was apparently not cited on appeal in *Sims*. A limitation period must be sourced elsewhere in the interaction between the *Constitution* and the unified common law of Australia.

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I Introduction

Jurisprudence and legal history manifest themselves in the strangest of ways and places. So much is exemplified by the New South Wales Court of Appeal decision in *Sims v Commonwealth* ('*Sims*').[1] The facts of *Sims* are shortly stated: the Commonwealth sought restitution after continuing to pay Mr Sims for six years after his service in the Royal Australian Navy had concluded. The issue was whether the Commonwealth's action ceased to be maintainable, due to a delay in bringing proceedings, based on the New South Wales statutory limitation period.[2] Arguably, *Sims* disguises the complex legal issues that arise when particular acts of the Commonwealth executive are undertaken ultra vires. However, the case also highlights the importance of jurisprudence in understanding why the law applies as it does in matters arising under the *Australian Constitution*.

These arguments are advanced in three Parts. The procedural history and judgments in *Sims* are summarised in Part II. Part III outlines the historical basis of the principle relied upon by the Commonwealth in *Sims*, and the law of restitution. It argues that the action forms part of the law of restitution. However, it outlines several propositions, arising from High Court authority, which were not relied upon by the Court of Appeal, and their possible application to *Sims*. Part IV identifies Australian law's ultimate foundation as the interaction between the *Constitution* and the common law. It opines that there must be limits on the extent to which the federal and state legislatures can amend or abolish common law and equitable rules that provide the doctrinal and remedial substance to actions arising under the *Constitution*, lest constitutional restraints on legislative power be rendered otiose. Alternative sources of limitation periods are identified in the concluding remarks for actions arising under the *Constitution*, or involving its interpretation.

II The Case

A *Facts*

Sims separated from the Navy in September 2009, having joined in September 2000.[3] Notwithstanding this separation, the Commonwealth erroneously continued making payments to Mr Sims as salary payments. The error was discovered in 2015. The combined value of these payments exceeded $300,000. However, it was only in 2021 that the Commonwealth commenced the action for money had and received to recover the funds.

B *Judgment at First Instance*

The Commonwealth commenced proceedings to recover the funds from Sims in the New South Wales District Court. The parties agreed that the payments were made without parliamentary authority and were thus ultra vires.[4] The claim for recovery

1 *Sims v Commonwealth* (2022) 109 NSWLR 546 ('*Sims*').
2 *Commonwealth v Sims* (2021) 37 DCLR(NSW) 318–22 [1]–[22] (RJ Webber DCJ) ('*Sims Trial*').
3 Ibid 319–21 [1]–[11] (RJ Weber DCJ).
4 Ibid 322 [17] (RJ Weber DCJ).

was based on *Auckland Harbour Board*, in which the Judicial Committee of the Privy Council advised that governmental payments made by the Crown without parliamentary appropriation are recoverable ('the *Auckland Harbour Board* principle').[5] The issue was whether this was a restitutionary claim and potentially subject to the statutory limitation period,[6] such that the action was only *maintainable* if brought within the relevant period, or a standalone common law cause of action.[7]

At first instance the claim was held to be a standalone cause of action and not a 'mainstream restitutionary claim' for two reasons.[8] First, the liability 'does not arise from any … unjust enrichment'.[9] Second, the ordinary defences to the restitutionary actions are not available for actions of this kind, because the cause of action is based in public policy concerns, and not in restitution.[10] Supposing it were a restitutionary action, Weber DCJ held that it was not an action to which the statutory limitation applied.[11] His Honour ordered Sims' repayment of all monies claimed by the Commonwealth.[12]

C *Decision on Appeal*

Sims brought an appeal before the New South Wales Court of Appeal against the decision of the primary judge. At this stage, the Commonwealth issued notice of a matter 'arising under the *Constitution* or involving its interpretation'.[13] The primary issues on appeal were whether:[14]

(1) *Auckland Harbour Board* claims fell within the law of 'quasi-contract' such that the State statutory limitation period applied to the Commonwealth's claim; and

(2) the claim is entrenched by the *Constitution* such that the limitation period was inapplicable.

The Court, unanimously, answered the first question affirmatively, but rejected the second proposition.[15] The leading judgment was written by Bell CJ;[16] Meagher JA wrote separately;[17] White JA agreed with both the Chief Justice and Meagher JA.[18]

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5 Ibid 322 [16], citing *Auckland Harbour Board v The King* [1924] AC 318, 327 (Viscount Haldane for the Judicial Committee) ('*Auckland Harbour Board*').

6 *Sims Trial* (n 2) 323–4 [28], [32]–[34] (RJ Weber DCJ), citing *Limitation Act 1969* (NSW) s 14(1)(a) ('*Limitation Act*'), which provides: 'An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims — (a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed'.

7 *Sims Trial* (n 2) 324 [30]–[31] (RJ Weber DCJ).

8 Ibid 322 [19], [22] (RJ Weber DCJ).

9 Ibid.

10 Ibid 322 [20] (RJ Weber DCJ).

11 Ibid 324 [30]–[31].

12 Ibid 326 [47]–[49].

13 *Sims* (n 1) 555–6 [30]–[32] (Bell CJ); *Judiciary Act 1901* (Cth) s 79B ('*Judiciary Act*').

14 *Sims* (n 1) 549 [1] (Bell CJ), 573 [112] (Meagher JA), 582 [153] (White JA).

15 Ibid.

16 Ibid 549–73 [1]–[111].

17 Ibid 574 [115], 582 [152].

18 Ibid 582 [153].

1 *Chief Justice Bell*

(a) *Auckland Harbour Board Claims Belong to the Law of Restitution*

While briefly recapitulating both the facts and procedural history of the case,[19] Bell CJ commenced by noting that the Commonwealth's pleadings alleged Sims' 'unjust enrichment at the plaintiff's expense'.[20] His Honour noted that previous invocations of *Auckland Harbour Board* were framed in an action for money had and received,[21] notwithstanding that the 'principle's juristic basis' — the gist of the action — 'is … founded on quasi-constitutional notions of ultra vires'.[22] His Honour accepted that the principle is well established in Australian law.[23]

The Chief Justice outlined the legal concept of quasi-contract, and its juridical metamorphosis into the law of restitution, before explaining that restitutionary claims are subject to the limitation period.[24] Referring to Meagher JA's reasons,[25] he outlined the adoption by the *Judiciary Act 1901* (Cth) ('*Judiciary Act*') of the State limitation period and its application to the exercise of federal jurisdiction.[26] His Honour rejected the Commonwealth's plea to postpone the limitation period.[27]

(b) *Action not Entrenched by the Constitution*

The Chief Justice rejected[28] the constitutional argument[29] raised by the s 79B notice.[30] That is, ss 81–83 of the *Constitution* do not exempt *Auckland Harbour Board* restitutionary claims from the application of the statutory limitation period.[31] He observed that the *Constitution* is concerned with the content of, and restraints upon, government powers and functions.[32] It is not generally a source of rights, let alone individual rights.[33]

His Honour remarked upon the novelty of the argument that the *Auckland Harbour Board* claim was entrenched by the *Constitution*.[34] However, he noted that it would be curious if, in these circumstances, the text, nature or structure of the *Constitution* itself provided direct rights of action for restitution.[35] Additionally, as the *Constitution* did not provide for the action — either expressly or by necessary

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19 Ibid 549–56 [1]–[32].
20 Ibid 550 [11].
21 Ibid 559 [48].
22 Ibid.
23 Ibid 549–56 [1]–[32].
24 Ibid 560–8 [52]–[81]; *Limitation Act* (n 6) s 14(1)(a).
25 *Sims* (n 1) 574 [117]–[118] (Meagher JA), citing *Rizeq v Western Australia* (2017) 262 CLR 1 ('*Rizeq*'); *Judiciary Act* (n 13) s 79(1).
26 *Sims* (n 1) 551 [14].
27 Ibid 568 [82], citing *Limitation Act* (n 6) s 56(1).
28 *Sims* (n 1) 571 [98].
29 Ibid 555–6 [30]–[32].
30 Ibid, citing *Judiciary Act* (n 13) s 79B.
31 *Sims* (n 1) 569–70 [88]–[91].
32 Ibid 571 [95], citing *James v Commonwealth* (1939) 62 CLR 339, 362 (Dixon J).
33 *Sims* (n 1) 570–1 [91], [95].
34 Ibid 570 [92], citing *Commonwealth v Burns* [1971] VR 825, 827–8 (Newton J) ('*Burns*'); *Constitution* ss 81–83.
35 *Sims* (n 1) 571 [95].

implication — the limitation period was not enacted in excess of state legislative competence, and to that extent invalid.[36]

2 *Justice Meagher*

Before accepting that the *Auckland Harbour Board* principle is well established in Australian law,[37] Meagher JA observed that the limitation period is picked up by the *Judiciary Act* and applied to state courts' exercise of federal jurisdiction.[38] Accordingly, his Honour rejected the entrenchment of the action by the *Constitution*.[39] His Honour went on to observe:

(1) the history of restitutionary claims;[40] and

(2) the transformation of the taxonomical nomenclature from 'quasi-contract' into the law of restitution, of which the *Auckland Harbour Board* principle forms part.[41]

Accordingly, he held that the limitation period applies to the Commonwealth's claim.[42]

3 *Justice White*

White JA agreed with the reasons of both Bell CJ and Meagher JA.[43] However, his Honour's judgment contains some interesting observations on the history of restitutionary claims.[44] The claims were originally brought by an information without reference to a cause of action.[45] His Honour invoked s 64 of the *Judiciary Act* which requires the rights of parties in actions involving the Commonwealth to be reconciled as closely as possible with the rights that would exist in matters between citizens. This led White JA to observe that the 'principle falls squarely within a claim for money had and received. It is therefore a claim in quasi-contract to which [the limitation period] applies.'[46]

III The Historical Development of Restitutionary Actions by the Crown in Australia

A *The Fundamental Constitutional Principle*

The effects of the Revolution Settlement, in which the divine right of kings yielded to parliamentary supremacy over the executive, remain widely discussed in

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36 Ibid 571 [97].
37 Ibid 574–5 [119]–[121].
38 Ibid 574 [118], citing *Rizeq* (n 25); *Judiciary Act* (n 13) s 79(1).
39 *Sims* (n 1) 574 [118].
40 Ibid 576–80 [128]–[146].
41 Ibid 580–2 [147]–[151].
42 Ibid 581–2 [151]–[152].
43 Ibid 582 [153].
44 Ibid 582 [157]–[158].
45 Ibid.
46 Ibid 582 [160].

contemporary jurisprudence and legal scholarship.[47] Unsurprisingly, many of the principles arising from the *Bill of Rights* extended to the colonies[48] and are reflected in the Australian *Constitution*.[49] For present purposes, one concept is relevant: parliamentary control of government expenditure.[50]

That constitutional principle is protected by authority enabling the recovery of payments made without statutory authorisation,[51] notwithstanding that the monarch's entitlement to recover the proceeds of ultra vires dealings in the Crown's treasure can be traced to 16th century authority.[52] The advice tendered by the Privy Council in *Auckland Harbour Board* is the archetypal authority on the point.[53] There, Viscount Haldane remarked upon the effect of the ancient constitutional principle regarding parliamentary control of government expenditure — namely, the inevitable transfer of that doctrine to the Crown's colonial possessions.[54] As he discussed, in order to protect that principle, '[a]ny payment out of the consolidated fund without Parliamentary authority is simply illegal and ultra vires, and *may be recovered by the Government* if it can, as here, be traced'.[55] As Bell CJ noted in *Sims*, notwithstanding the establishment of the principle without authority,[56] it is 'well recognised and established in Australian law'.[57]

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47 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 242 [128] (Edelman J) ('*Davis*'), citing David Kershaw, 'Revolutionary Amnesia and the Nature of Prerogative Power' (2022) 20(3) *International Journal of Constitutional Law* 1071; Justice William MC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79(3) *Australian Law Journal* 167, 170, citing *Bill of Rights 1689* 1 Wm & M sess 1, c 2. See also Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4th ed, 2011) 20.

48 See generally *Campbell v Hall* (1774) 98 ER 1045.

49 George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 1–11.

50 *Constitution* ss 81–3; *Combet v Commonwealth* (2005) 224 CLR 494, 535–7 [44]–[46] (McHugh J).

51 *Auckland Harbour Board* (n 5) 327 (Viscount Haldane for the Judicial Committee). See also Hogg, Monahan and Wright (n 47) 349.

52 *Dodington's Case* (1596) 78 ER 791; *Earl of Devonshire's Case* (1606) 77 ER 1266, 1269–70.

53 See, eg, *Burns* (n 34) 827–8 (Newton J); *Commonwealth v Crothall Hospital Services* (1981) 54 FLR 439, 453 (Ellicott J); *Director-General of Social Services v Hales* (1983) 78 FLR 373, 409–11 (Sheppard J); *Sandvik Australia Pty Ltd v Commonwealth* (1989) 89 ALR 213, 229–30 (French J) ('*Sandvik*'); *Brown v West* (1990) 169 CLR 195, 205 (the Court), citing *Auckland Harbour Board* (n 5). See also *R v Toronto Terminals Railway Co* [1948] Ex CR 563, [41]–[42] (O'Connor J); *Breckenridge Speedway v The Queen* [1970] SCR 175, 182–4 (Cartwright CJ, Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ); *School Facility Management Ltd v Governing Body of Christ the King College* [2020] PTSR 1913, 2029 [454] (Foxton J); *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2021] QB 896, 929 [104]–[105] (Thornton J).

54 *Auckland Harbour Board* (n 5) 327 (Viscount Haldane for the Judicial Committee).

55 Ibid (emphasis added).

56 *Sims* (n 1) 556 [34], citing *Auckland Harbour Board* (n 5) 319 (Clauson KC, Farwell KC and Mousley) (during argument).

57 *Sims* (n 1) 559 [47].

B *The Vehicle for Recovery*

1 *Historical Crown Proceedings to Recover Unappropriated Funds*

That *Auckland Harbour Board* immediately translates into a qualifying ground within the *private* law of restitution is not obvious.[58] Historically, the Crown would have proceeded by the ancient procedure of information.[59] Blackstone discussed the information as being

> grounded … merely on the intimation of … the attorney-general, who 'gives the court to understand and be informed of' the matter in question; *upon which the party is put to answer … as in suits between subject and subject*. [One of the] most usual informations [is that] of … debt: [to recover] upon any contract for monies due to the king ...[60]

The nature of the claim, upon which the principle relied, was perhaps irrelevant to *Auckland Harbour Board* because that case concerned an appeal from New Zealand about the amount recoverable by a plaintiff on a petition of right.[61] That procedure was the means by which a subject could recover the proceeds of a wrong which had found their way into the Crown's hands.[62] The law as it applied to disputes between subjects was to be applied as closely as possible to relief sought upon the supply of a petition of right for recovery from the Crown.[63] A legal doctrine applicable to a dispute between subjects was necessary before recovery against the Crown was possible.[64] The availability of one type of restitutionary claim, based on the forms of action discussed below, had succeeded.[65] So far as debts were concerned, it appears that both the petitions of right and the information in debt procedures served the same purpose, and resolved matters using the same means.

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58 See, eg, *The Bankers' Case* (1700) 14 How St Tr 1; *Auckland Harbour Board* (n 5) 320 (Viscount Haldane for the Judicial Committee). See also *Earl of Devonshire's Case* (n 52) 1269–70.

59 George S Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of Government* (Stevens & Sons, 1908) 170. But note the contradistinction between Latin informations in debt (proceedings at law on the revenue side of the King's Bench: see at 170–85) and English informations for account (proceedings in equity on the revenue side of the King's Bench: see at 235–40). Note also that proceedings in money claims in equity could be brought before the Court of Chancery: see at 463–85.

60 William Blackstone, 'Chapter the Seventeenth: Of Injuries Proceeding from, or Affecting, the Crown' in *The Oxford Edition of Blackstone's Commentaries on the Laws of England: Book III — Of Private Wrongs*, ed Thomas P Gallanis (Oxford University Press, 2016) 169, 174 (emphasis added). See also ibid 170–85, 235–40, 463–85. Note also *R v Ward* (1846) 2 Ex 301, 301 (Parke B) ('any one is in privity with the Crown who knows that the money which he receives is the money of the Crown'). Cf *Judiciary Act* (n 13) s 64.

61 *Auckland Harbour Board* (n 5) 319–21 (Viscount Haldane for the Judicial Committee).

62 *Monckton v A-G* (1850) 42 ER 156, 160 (Lord Cottenham LC).

63 Blackstone (n 60) 169.

64 Walter B Clode, *The Law and Practice of Petition of Right under the Petitions of Right Act, 1860* (Clowes & Sons, 1887). See also *Bradley v Commonwealth* (1973) 128 CLR 557, 585 (Menzies J); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 249 [48] (Gageler and Gleeson JJ) ('*Hobart International Airport*'), quoting *Abebe v Commonwealth* (1999) 197 CLR 510, 527–8 [31]–[32] (Gleeson CJ and McHugh J).

65 See, eg, *R v Doutre* (1884) 9 App Cas 745 (quantum meruit); *Baron de Bode's Case* (1849) 116 ER 1302 (money had and received (*obiter*)).

The remedy was *amoveas manus*, or orders in that nature.[66] It seems the Crown could obtain remedies in that nature through the information procedures.[67] However, given the petition of right was held in *Mewett* to have been rendered redundant by s 75(iii) of the *Constitution*,[68] it is unclear how the information procedures could have survived. Nevertheless, the declaration of right remains available.[69] It is a discretionary remedy.[70] The jurisdiction to grant declaratory relief cannot be fettered by Parliament.[71] The Commonwealth has successfully obtained declarations of right in respect of Commonwealth debts.[72] But legal history demonstrates the *necessity* of framing claims for recovery — by or against public authorities — according to established doctrine, of which the law of restitution is an integral part.

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66 See generally Hogg, Monahan and Wright (n 47) ch 1.

67 Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (Butterworth & Son, 1890) 332–6.

68 *Commonwealth v Mewett* (1997) 191 CLR 471, 496–7 (Dawson J), 513 (Toohey J), 549 (Gummow and Kirby JJ, Brennan CJ agreeing).

69 *The Eastern Trust Co v McKenzie, Mann & Co Ltd* [1915] AC 750 (Privy Council), 759–60 (Sir George Farwell for the Judicial Committee); *McLean v Rowe* (1925) 25 SR (NSW) 330, 342 (Long Innes J); *New South Wales v Commonwealth* (1926) 38 CLR 74, 87 (Isaacs J) ('*The Garden Island Case*'); *New South Wales v Commonwealth* (1932) 46 CLR 155, 182 (Rich and Dixon JJ) ('*Garnishee Case No 1*'); *Faithorn v Territory of Papua* (1938) 60 CLR 772, 788 (Rich J), 792 (Dixon J), 795–7 (McTiernan J); *Stenhouse v Coleman* (1944) 69 CLR 457, 472 (Starke J); *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 69 (Latham CJ), 84 (Dixon J); *Pye v Renshaw* (1951) 84 CLR 58, 77 (the Court); *National Trustees Executors & Agency Co of Australasia Ltd v Commissioner of Taxation* (1954) 91 CLR 540, 585–6 (Kitto J); *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, 454 (Dixon CJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 (the Court); *Mann v O'Neill* (1997) 191 CLR 204, 266 (Kirby J), quoting *Harrison v Bush* (1855) 119 ER 509, 512 (Lord Campbell CJ); *Ha v New South Wales* (1997) 189 CLR 465, 503–4 (Brennan CJ, McHugh, Gummow and Kirby JJ) ('*Ha*'); *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96, 123 [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 586–7 [56]–[57] (Gleeson CJ, Gaudron and Gummow JJ) ('*Edensor Nominees*'); *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 584–5 [123]–[124] (Crennan and Kiefel JJ); *Hearne v Street* (2008) 235 CLR 125, 139–41 [41]–[42] (Kirby J); *Hobart International Airport* (n 64) 250, 252–4 [52]–[53], [61]–[62] (Kiefel CJ, Keane and Gordon JJ), 256–62 [84]–[99] (Edelman and Steward JJ); *Davis* (n 47) 230 [59]–[62] (Kiefel CJ, Gageler and Gleeson JJ); *A-G (Cth) v Huynh* (2023) 97 ALJR 298, 344 [224] (Edelman J).

70 *The Garden Island Case* (n 69) 87 (Isaacs J); *Garnishee Case No 1* (n 69) 182 (Rich and Dixon JJ); *Australian Boot Trade Employees' Federation v Commonwealth* (1954) 90 CLR 24, 45 (Dixon CJ); *Mutual Life & Citizens' Assurance Co Ltd v A-G (Qld)* (1961) 106 CLR 48, 54 (Dixon CJ); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 376 (Dixon CJ) ('*Cigamatic*'); *Bolton v Madsen* (1963) 110 CLR 264, 269 (the Court); *Australian Conservation Foundation v Commonwealth* (1979) 146 CLR 493, 504 (Aickin J); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 292 (Aickin J); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [101] (the Court), quoted in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 392 [237] (Kiefel and Keane JJ).

71 *Momcilovic v The Queen* (2011) 254 CLR 1, 94–5 [179] (Gummow J), quoting *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ). See generally *New South Wales v Kable* (2013) 252 CLR 118 ('*Kable*'). Cf *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, 515 (Kiefel and Keane JJ), 525 [36] (Bell and Gordon JJ), 540 [95] (Gageler J).

72 *Cigamatic* (n 70) 376–80 (Dixon CJ), 390 (Menzies J).

2 *The (Private) Law of Restitution*

Restitution refers to the reversal of some payment or transfer to reinstate some antecedent state of affairs. The concern of the underlying legal doctrine is the grounds upon which a legal obligation to make restitution is based. Some general observations may be made of the Australian position. Restitution describes the result of the operation of a range of ancient forms of action, and doctrines arising from the common law and equity.[73] Relevantly, these include the action for money had and received.[74]

These forms of action belong to the common law.[75] Liability under those actions arises at common law and exists alongside contract and tort in the law of obligations.[76] The defendant's legal liability to make restitution is determined by applying equitable principle — both in terms of attribution and defences — because the aim is to explain '*who* should [properly] bear [liability for] the loss and *why*'.[77] In these circumstances, the application of equitable principle demonstrates whether the defendant's retention of benefits received is unconscionable.[78] Thus, the legal liability to make restitution of benefits — including a payment — arises to avoid unconscionable retention of those benefits.[79] In some cases, this is the meaning of unjust enrichment in Australia.[80] Nevertheless, not every obligation to make restitution of money had and received arises from the defendant's unjust enrichment.[81]

The gist of the action for money had and received is satisfied in payments actuated by:

(1) mistake;[82]

(2) undue influence;[83]

(3) unconscionable conduct;[84]

(4) duress to the person,[85] or their property;[86]

(5) failure of consideration;[87] or

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73 See, eg, Peter J Millett, 'Law of Restitution' (1995) 111(2) *Law Quarterly Review* 517, 517–8.

74 *Moses v Macferlan* (1760) 97 ER 676.

75 David Ibbetson, 'Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count' (1982) 41(1) *Cambridge Law Journal* 142, 142 n 1.

76 *Roxborough v Rothmans of Pall Mall Pty Ltd* (2001) 208 CLR 516, 539–40 [62]–[64] (Gummow J) ('*Roxborough*').

77 *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 597 (Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).

78 *Roxborough* (n 76) 552–5 [92]–[100] (Gummow J).

79 See, eg, ibid 542 [69].

80 *Pavey & Matthews Pty Ltd v Paul* (1987) 12 CLR 221, 255–6 (Deane J).

81 See, eg, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ('*David Securities*'); *Roxborough* (n 76).

82 See *David Securities* (n 81).

83 See, eg, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

84 Ibid.

85 See, eg, *Barton v Armstrong* [1976] AC 104.

86 See, eg, *Sargood Brothers v Commonwealth* (1910) 11 CLR 258; *Mason v New South Wales* (1959) 102 CLR 108 ('*Mason*').

87 *Redland City Council v Kozik* (2024) 98 ALJR 544 ('*Kozik*').

(6) demands from public authorities under the colour of their office and ultra vires.[88]

In Australia, the action for money had and received has been invoked to recover monies paid to satisfy a debt to the Crown as taxes levied pursuant to an ultra vires state law.[89] It has been recognised as the appropriate means for the recovery of monies paid without valid parliamentary appropriation.[90] The primary concern is to address the ultra vires nature of the payment by reversing it.

3 *The (Public) Law of Restitution?*

To say that the principle belongs to the law of restitution seems uncontroversial.[91] Nevertheless, some authors suggest it is desirable for these types of actions to arise at public law.[92] Indeed, the uncritical application of the private law of obligations to public authorities may obstruct, rather than enhance, the rule of law by accentuating the importance of the unjust enrichment at the plaintiff's expense formulae where the components of that doctrine are irrelevant.[93]

Those shortcomings are apparently addressed by the mandate that the law apply in these circumstances *as closely as possible* to its putative application to disputes between private parties.[94] *This does not mean that precisely the same law should apply*.[95] There is clearly capacity for adaptation to ensure coherence in the law. One obvious manifestation of this is the removal of several defences applicable to private law restitutionary obligations from matters involving public authorities where government according to law is at issue.[96] Another example is the refusal to grant a decree of specific performance against the Crown.[97]

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88 *Mason* (n 86) 139–42 (Windeyer J).

89 See, eg, *Roxborough* (n 76).

90 *Williams v Commonwealth* (2012) 248 CLR 156, 225 [156] (Gummow and Bell JJ) ('*Williams*'), cited in *Sims* (n 1) 559 [45] (Bell CJ).

91 As noted above (n 55 and accompanying text), the ultra vires (absence of capacity) and illegal nature of the payments was identified as the juristic basis of the recovery in *Auckland Harbour Board* (n 5) 327 (Viscount Haldane for the Judicial Committee). However, in relation to a claim by citizens against a public authority in *Kozik* (n 87), the Chief Justice together with Jagot J observed, 'the mere fact of illegality … proves the undermining or stultification of the law. The fact of the illegality, however, is the reason the question of possible stultification of the law arises. It does not determine the question [of liability]': at 569 [127]. Any attempt to challenge the status of *Auckland Harbour Board* in Australian law might usefully explore this issue. For further analysis, see *Equuscorp v Haxton* (2012) 246 CLR 498.

92 See, eg, John Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22(2) *Legal Studies* 165.

93 *Kingstreet Investments Ltd v New Brunswick* [2007] 1 SCR 3, 22–7 [32]–[41] (Bastarache J for the Court).

94 Blackstone (n 60) 173. See also *Judiciary Act* (n 13) s 64.

95 *Commonwealth v Miller* (1910) 10 CLR 742, 751 (O'Connor J), 754 (Isaacs J), 758 (Higgins J); *New South Wales v Bardolph* (1934) 52 CLR 455, 459–60 (Evatt J).

96 *Burns* (n 34) 830 (Newton J); *A-G (NSW) v Gray* [1977] 1 NSWLR 406, 409–10 (Hutley JA); *Sandvik* (n 53) 580 (French J).

97 *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521, 532 (Dixon, Williams, Fullagar and Kitto JJ), citing *Short v Poole Corporation* [1926] Ch 66 and *Fennell v East Ham Corporation* [1926] Ch 641. See also Nicholas C Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 7th ed, 2023) 11–15.

Accordingly, the obligation need not arise from a standalone public law action *dehors* the law of restitution. As Professor Stevens discusses in relation to the *Woolwich* principle[98] — the *Auckland Harbour Board* principle's affiliate for recovery of unlawfully demanded taxes, etc[99] — 'no doubt the claims are part of "public law" [because one party] is part of the State' but also because whether the constitutional validity of a public authority's action 'is within the *vires* of the public body is a public law issue. … However, once the public law issue of validity has been answered, there is nothing particularly "public" involved in [determining] whether [a relevant transaction] … should be reversed.'[100]

C *Federal Jurisdiction and State Legislation*

1 *The Problem*

As discussed, the *Auckland Harbour Board* principle honours one of the fundamental constitutional objectives sought to be achieved by the Revolution Settlement. Constitutional considerations form the gist of the action. The action in question arises under the *Constitution*,[101] and ventilating it involves the plaintiff enlivening federal jurisdiction.[102] Yet the focus in *Sims* appears to have been on the common law recovery mechanism, rather than the constitutional issues that arise when the Commonwealth undertakes expenditure that is not authorised by statute. This renders the Court of Appeal judgments in *Sims* somewhat difficult.

2 *Pape and Williams: A Legacy*

The facts of these cases have been widely discussed. *Pape* concerned the constitutional validity of the federal government stimulus package of 2008 in response to the global financial crisis.[103] *Williams* was a challenge to a school chaplaincy program in state schools funded by the federal government without express statutory authority.[104] They clarify and establish the following propositions. First, the exercise of power by the executive of the Commonwealth relies on s 61 of the *Constitution*. This provides that the executive power of the Commonwealth — vested in the King and exercisable by the Governor-General as the King's representative — extends to the execution and maintenance of the laws of the Commonwealth, and of the *Constitution* itself. Expenditure is an activity which must be authorised by either the execution limb or maintenance limb of that section.[105]

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98 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

99 Ibid 176F–77C (Lord Goff).

100 Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 99.

101 See *Constitution* s 75(iii).

102 *Sims* (n 1) 551 [14] (Bell CJ), 574 [118] (Meagher JA). See also *Judiciary Act* (n 13) ss 39(2), 61, 78B.

103 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 26–30 [18]–[33] (French CJ), 65–9 [139]–[149] (Gummow, Crennan and Bell JJ), 95–8 [258]–[270] (Hayne and Kiefel JJ) ('*Pape*').

104 *Williams* (n 90) 179–84 [2]–[19] (French CJ), 217–22 [85]–[106] (Gummow and Bell JJ), 239 [167] (Hayne J), 336 [450]–[451] (Crennan J), 359–61 [550]–[555] (Kiefel J).

105 *Pape* (n 103) 52–53 [101]–[103] (French CJ), 79–88 [201]–[228] (Gummow, Crennan and Bell JJ), 101–105 [284]–[296] (Hayne and Kiefel JJ).

Second, *Williams* establishes that the Commonwealth cannot rely on a construction of the 'common law' powers of the Crown which ostensibly provides an independent basis for spending activities on the assumption that the Commonwealth enjoys the same 'capacity' to spend money as ordinary people.[106] Mere appropriation of funds, therefore, does not suffice to authorise expenditure by the Commonwealth executive.[107] The power must be located either in a statute, under the implied nationhood power, or otherwise under the *Constitution*.[108]

Thus, the constitutional validity of the mistaken payment in *Sims* rested on a statutory appropriation of the funds, together with constitutional or statutory authorisation within the meaning of s 61.[109] The funds in question were appropriated by Parliament to the use of the Commonwealth to discharge the salary liabilities of defence personnel. Mr Sims was not, at the relevant times the payments were made, a member of the Royal Australian Navy, and so was not a member of defence personnel to which a power to make payments applied.

Moreover, this payment cannot have been a gift. The power to make gratuitous payments cannot have survived *Williams* lest the rule created by that case be circumvented, and thus rendered redundant, by making conditional grants enforceable in equity rather than the Commonwealth entering into contracts.[110] Supposing the power had survived, the Commonwealth's vitiated intent in making the payments would negative the formation of a donor–donee relationship.

The payments were therefore unsupported by s 61, and thus by the *Constitution* itself. Accordingly, in making the payments, the Commonwealth executive transgressed the constitutional limitations upon executive power. In other words, the payments in *Sims* were not *merely* ultra vires: they lacked constitutional validity.

3 *State Tobacco Excise Taxes and British American Tobacco*

The invalidity of state fees on tobacco was declared by the High Court in *Ha*,[111] followed by British American Tobacco's action to recover the funds in question as money had and received from the Western Australian government.[112] The relevant Crown proceedings legislation provided that an action was not *maintainable* without the State Treasurer's approval.[113] *British American Tobacco* was not a challenge to a *federal* limitation period, but to the application of a State statute purporting to debar

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106 *Williams* (n 90) 192–4 [37]–[39] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 243–4 [177]–[181] (Hayne J), 341–55 [477]–[534] (Crennan J), 373–4 [595] (Kiefel J).

107 Ibid; *Pape* (n 103) 71–88 [172]–[228] (Gummow, Crennan and Bell JJ), 100–24 [278]–[357] (Hayne and Kiefel JJ).

108 *Williams* (n 90) 192–4 [37]–[39] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 243–4 [177]–[181] (Hayne J), 341–55 [477]–[534] (Crennan J), 373–4 [595] (Kiefel J); *Pape* (n 103) 71–88 [172]–[228] (Gummow, Crennan and Bell JJ), 100–24 [278]–[357] (Hayne and Kiefel JJ).

109 *Victoria v Commonwealth* (1975) 134 CLR 338, 396–7 (Mason J) ('*AAP (Australian Assistance Plan) Case*').

110 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 25–9.

111 See generally *Ha* (n 69).

112 *British American Tobacco v Western Australia* (2003) 217 CLR 30 ('*British American Tobacco*').

113 Ibid 49–50 [28]–[34] (McHugh, Gummow and Hayne JJ).

the maintenance of an action.[114] Nevertheless, the High Court held that as the action was in response to the constitutional invalidity, the matter invoked federal jurisdiction because it arose under the *Constitution*.[115] The State legislation was not cognisable by the courts without being given a supererogatory application, which was impermissible.[116]

4 *Federal Jurisdiction and Rizeq*

British American Tobacco must be reconciled with the result in *Rizeq*, which involved a challenge to the constitutional requirement of unanimous jury verdicts in matters arising under federal law.[117] *Rizeq* explains that the *Judiciary Act* picks up some state laws where state courts exercise federal jurisdiction,[118] because that jurisdiction cannot be regulated by state legislation alone.[119] *Rizeq* differs from *Sims* because federal jurisdiction was only enlivened in *Rizeq* because the defendant was a New South Wales resident being tried for an offence in Western Australia.[120] However, the offence itself arose under a Western Australian statute;[121] the relevant offence was not picked up by the *Judiciary Act*, hence a unanimous jury verdict was not required.[122] Therefore, unless another Commonwealth law or the *Constitution* itself prescribes otherwise, state statutes will be 'picked up' in matters:

(1) before state courts invoking federal jurisdiction; and

(2) arising under either a Commonwealth enactment or the *Constitution*.[123]

In *Sims*, the relevant source of law was the unified Australian common law. However, the common law action has a peculiar nexus with the *Constitution* because it lies to vindicate a transgression of a constitutional restraint on government power by reversing its consequences. The action for money had and received is not, therefore, in the nature of a *Bivens* action — which lies in the United States specifically to vindicate transgressions of, inter alia, individual constitutional rights.[124] The point was emphasised by McHugh, Gummow and Hayne JJ in *British American Tobacco*, where their Honours explained the nexus between the action for money had and received and the *Constitution*.[125] In that case, the action arose because where money is paid pursuant to a statute passed contrary to a constitutionally imposed restraint on legislative power, retaining the value of the payments is 'against conscience'.[126]

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114 Ibid 54 [45] (McHugh, Gummow and Hayne JJ).
115 Ibid 48 [25]–[26] (Gleeson CJ), 58–9 [62]–[63] (McHugh, Gummow and Hayne JJ), 90 [171] (Callinan J).
116 Ibid 60 [67] (McHugh, Gummow and Hayne JJ), 90 [171] (Callinan J).
117 *Rizeq* (n 25) 18–20 [34]–[43] (Bell, Gageler, Keane, Nettle and Gordon JJ).
118 Ibid 27–31 [65]–[76] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Judiciary Act* (n 13) s 79(1).
119 *Rizeq* (n 25) 24–6 [57]–[63] (Bell, Gageler, Keane, Nettle and Gordon JJ).
120 Ibid 19 [36]–[37] (Bell, Gageler, Keane, Nettle and Gordon JJ).
121 Ibid.
122 Ibid.
123 Ibid 32–6 [80]–[89] (Bell, Gageler, Keane, Nettle and Gordon JJ).
124 *Bivens v Six Unknown Agents*, 403 US 388 (1971).
125 *British American Tobacco* (n 112) 52–54 [40]–[45] (McHugh, Gummow and Hayne JJ).
126 Ibid 52 [40]–[41] (McHugh, Gummow and Hayne JJ).

Accordingly, if this were a mere common law action, applying the relevant state enactment — that is, the limitation period — would be unproblematic.[127] However, the action in *Sims* arose under (because the payments were unsupported by) the *Constitution*.[128] That is, while the *Auckland Harbour Board* principle supplies a juristic reason for recovery — that is, the gist of the action for money had and received — it also arises under, or involves the interpretation of, the *Constitution* given its interaction with s 61. Although the original jurisdiction in such matters is nevertheless conferred upon the High Court,[129] it is conferred upon other courts reposed of federal jurisdiction.[130] The jurisdiction of the High Court is extended to state Supreme Courts by the *Judiciary Act*.[131] By applying s 79(1) of the *Judiciary Act*, the *Constitution* 'otherwise provides' for the creation and maintenance of the action. It is therefore inconsistent with a state limitation period that purports to regulate the action. Hence, the State limitation was never 'picked up'. It was inapplicable. Following *British American Tobacco*, applying the limitation period gave the State enactment an impermissible supererogatory operation.[132] Therefore, insofar as this renders *Sims* at variance with binding High Court authority, it was uttered *per incuriam*.

IV The Ultimate Foundation of Australian Law: The Common Law and the *Constitution*

A *Authority to Decide versus Choice of Law for Decision*

Rizeq is but one example of case law that highlights the Byzantine complexity which inheres in the relationship between the unified common law of Australia, and both federal and state statutes.[133] Justice Leeming — writing extrajudicially — notes the importance and consequences in the age of statutes of understanding the interaction between those statutes, the common law and equity.[134] That importance is amplified when dealing with constitutional issues, as in *Sims*. The development of case law must therefore cohere with those issues. The process may be facilitated by recourse

127 *Rizeq* (n 25) 35–6 [89] (Bell, Gageler, Keane, Nettle and Gordon JJ).
128 *Constitution* s 75(iii). See also *Judiciary Act* (n 13) ss 61, 64.
129 *Constitution* s 75(iii). See also *British American Tobacco* (n 112) 52–4 [40]–[45] (McHugh, Gummow and Hayne JJ).
130 *Judiciary Act* (n 13) s 39(2).
131 *Rizeq* (n 25) 33 [82] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Edensor Nominees* (n 69) 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) and, crucially, *British American Tobacco* (n 112) 60 [68] (McHugh, Gummow and Hayne JJ).
132 *British American Tobacco* (n 112) 59–60 [64]–[67] (McHugh, Gummow and Hayne JJ), 87–88 [157]–[161] (Kirby J); 90 [171] (Callinan J).
133 *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J); Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 229–40.
134 Leeming (n 133) 268–96.

to legal theory. This analysis deploys Kelsen's deeply influential paper 'The Pure Theory of Law'[135] and subsequent works.[136]

B *The Ultimate Foundation of Australian Law: Common Law or the Constitution?*

1 *The Grundnorm*

In 1957, Sir Owen Dixon identified the common law as the ultimate constitutional foundation of Australian law.[137] In these remarks, he recalled having been rebuked in *Hancock's Survey of the British Commonwealth* for his fascination with the Grundnorm.[138] This term, first deployed by Professor Kelsen, refers to the hypothetical norm which forms the basis for a legal system, and from which all other legal rules develop.[139] The arbitrary nature of the Grundnorm's selection — upon which reasonable differences of opinion are permitted — is one of the salient criticisms of Kelsen's theory.[140] This limitation becomes obvious when one observes that various norms may reasonably be selected as the fundamental norm in the normative hierarchy which underpins Australian law.

2 *The Common Law or the Constitution?*

Dixon had previously discussed the legal development of constitutional principles in Australia in 1935, in remarking upon the reconciliation of ongoing competition between three juristic and political conceptions.[141] These were the supremacy of the law, of the Crown and of Parliament.[142] At any point, the reconciliation achieved between those conceptions represents the fundamental constitutional principles of the legal system.[143] Dixon propounded the view that the prevailing reconciliation of that time was manifested in the Revolution Settlement.[144] However, the process of receiving legal doctrines arising from that reconciliation into British constitutional theory was not completed until the era of Queen Victoria's reign.[145] These doctrines, deriving from the Revolution Settlement, are 'common law' principles par excellence: they include, as discussed previously, parliamentary control of government spending and parliamentary supremacy over the executive.[146]

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135 Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts' (1934) 50(4) *Law Quarterly Review*, 474, 477 and Hans Kelsen 'The Pure Theory of Law: Part II' (1935) 51(3) *Law Quarterly Review* 517, extracted in Michael Freeman, *Lloyds' Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014) 269–75.

136 See, eg, Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1965) 17(6) *Stanford Law Review* 1128, 1130; Freeman (n 135) 269–300.

137 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31(3) *Australian Law Journal* 240, 242.

138 Ibid 242, 245, 254.

139 See above nn 135–136.

140 Freeman (n 135) 257–63.

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

142 Ibid 590–1.

143 Ibid.

144 Ibid 591.

145 Ibid.

146 Ibid 593–4.

Dixon reasoned that Australia's federal system is crucial to defining the reconciliation between the three competing conceptions of juristic or political supremacy discussed above.[147] Federalism assumes that powers are divisible into particular areas of activity and competence.[148] The allocation of powers in a federal system is achieved by law. This is now referred to as a 'supreme law'.[149] The validity of the exercise of those powers depends upon that supreme law.[150] Thus, the efficacy of a federal system is contingent upon the supremacy of the law itself.

It is unclear whether the common law can be selected as the fundamental norm from which all other norms in Australian law develop. Dixon opined that the paramount force of the *Constitution* itself, being derived from its status as an Imperial enactment, is an incident of parliamentary sovereignty as a common law rule.[151] With respect, Dixon's view probably cannot withstand recent High Court jurisprudence,[152] nor the passage of the *Australia Acts*.[153] Additionally, Professor Winterton was disinclined to concede that parliamentary sovereignty was a common law rule, because that would entail the proposition that the Parliament at Westminster was capable of abrogating parliamentary sovereignty itself.[154]

Moreover, as a majority in *Williams* shows, some common law rules are not suitable in the Australian Commonwealth.[155] The Court rejected the application of the common law conceptions of extra statutory power to the Commonwealth executive, in the manner discussed above, with respect to contracting and spending.[156] It was held that that conception of executive power is ill suited to a federal structure in which enumerated heads of legislative power are allocated between governmental units.[157] The spectre of using executive powers to cut across the federal balance — achieved by the *Constitution* — led to a rejection of an unbridled executive contracting and spending power.[158]

The fundamental premise of Australian law cannot be parliamentary sovereignty, because the parliaments of the Commonwealth and the various states are not now, nor have they ever been, sovereign in the sense of the Parliament at Westminster.[159] Those parliaments are law-making institutions in the sense that, within the relevant limits on legislative power, they are capable of abolishing or

147 Ibid 595–600.
148 Ibid 604–7.
149 *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gummow J). Cf ibid 597.
150 Dixon, 'The Law and the Constitution' (n 141) 607–8.
151 Ibid 597.
152 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 137–9 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 275 (Gummow J); *Sue v Hill* (1999) 199 CLR 462, 490–2 [59]–[65] (Gleeson CJ, Gummow and Hayne JJ).
153 See, eg, *Australia Act 1986* (Cth). See also *Pape* (n 103) 84 [217] (Gummow, Crennan and Bell JJ).
154 George Winterton, 'The British *Grundnorm*: Parliamentary Supremacy Re-Examined' (1976) 92(3) *Law Quarterly Review* 591, 592.
155 *Williams* (n 90) 193–216 [38]–[82] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 240–61 [172]–[224] (Hayne J), 341–58 [477]–[544] (Crennan J), 371–4 [585]–[595] (Kiefel J).
156 Ibid.
157 Ibid.
158 Ibid.
159 Dixon, 'The Law and the Constitution' (n 141) 595.

amending the operation of common law rules.[160] The emanation of these laws from those parliaments occurs pursuant to the 'supreme' law itself.[161]

For example, the powers vested in the Commonwealth Parliament, pursuant to s 51, are relevantly 'subject to [the] *Constitution*'.[162] Indeed, the transfiguration of the various Australian colonies from mere colonial possessions of the Crown into states within the Commonwealth of Australia occurred by force of the *Constitution*.[163] Clearly, the law must be supreme over parliament(s), because the Commonwealth, and the states as such, derive their existence as polities from the *Constitution* as the supreme law, and not from the Crown per se.[164] However, the *Constitution*, at s 61, requires the supremacy of the Commonwealth Parliament over the Commonwealth executive.[165] This perhaps represents the reconciliation reached in relation to the three competing 'supremacies' discussed by Dixon,[166] and originally propounded by Professor Hearn.[167] The *Constitution* itself may therefore provide the fundamental underpinning of Australian law.

The problem with identifying the *Constitution* in vacuo as the ultimate foundation of Australian law is that its terms, nature and structure do not necessarily disclose all features of the law; nor does it exhaust the permissible trajectories for its development. That is because the *Constitution* imposes restrictions on the exercise of governmental power within Australia.[168] The *Constitution* has, as its primary focus, the allocation of powers to the various governmental units — that is, the Commonwealth, states and territories.

As the *Constitution* focuses on the allocation of governmental powers within a federal system, it often omits explicit expression of the core assumptions which provide much of its content.[169] Those assumptions were apparently treated as obvious.[170] Thus, the birth of the *Constitution* 'into a common law world' becomes significant.[171]

As Professor Winterton observed, one of the constitutional realities which present constitutional discourse should reflect is that 'the *Constitution* was not inscribed upon a *tabula rasa*'.[172] That is, the *Constitution* is premised on various

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160 Ibid 611.
161 Ibid 597–603.
162 *Constitution* s 51.
163 Ibid; James Stellios, *Zines and Stellios's the High Court and the Constitution* (Federation Press, 7th ed, 2022) 547–53.
164 *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1921) 31 CLR 421, 439 (Isaacs J) ('*Wool Tops Case*').
165 *Davis* (n 47) 226–7 [29]–[32] (Kiefel CJ, Gageler and Gleeson JJ), 269–70 [290]–[291] (Jagot J).
166 Dixon, 'The Law and the Constitution' (n 141) 590–1.
167 Ibid 594.
168 See above n 32 and accompanying text.
169 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 462 [214] (Gummow and Hayne JJ) ('*Re Patterson*'); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 90–8 [114]–[136] (Gageler J).
170 John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, rev ed, 2015) 837–42.
171 George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25(1) *Adelaide Law Review* 21, 34.
172 Ibid.

common law principles.[173] The most obvious example of these unexpressed assumptions arises in relation to s 61 of the *Constitution* which establishes the Commonwealth executive. Section 61 does not firmly state the content of executive power, despite outlining its limits.[174] In addition, interpreting the terms of Ch II of the *Constitution* in a strictly literal sense, and divorcing those terms from their common law meaning, would permit an autocratic form of government. That is because the *Constitution* makes no explicit reference to responsible government.[175] This demonstrates why the common law is critical to understanding the *Constitution*. Understanding the content of executive power merely *commences* with a historical understanding of the common law powers of the Crown. Thus, the common law clearly plays a crucial role in supplementing the *Constitution* itself.

3 *The Constitution and Common Law: An Interaction*

Interpreting the *Constitution* requires finely balancing the various and 'apparently dissonant strands' to achieve an apparently 'imperfect symmetry' which recognises the importance of each strand.[176] Relevantly, the supremacy of the law cannot be guaranteed in a federal system without courts possessing the competence to effectively adjudicate and quell disputes vis-à-vis the validity of purported exercise(s) of government power.[177] Such an observation gives rise to a second assumption, albeit one that is peculiarly adapted to Australian circumstances:[178] the separation of powers doctrine.[179] This is premised on the development of a certain federal jurisdiction, as an inevitable concomitant of enacting the *Constitution*.[180]

As *Rizeq* demonstrates, federal jurisdiction provides courts with the authority to render decision on legal controversies which, inter alia, arise under the *Constitution* or involve its interpretation.[181] The separation of powers necessitates the total denial of parliamentary capacity to enact legislation which operates to impair the institutional integrity of those courts.[182] The alternative would entail the effective impairment of constitutional restraints on governmental power; those restraints would be rendered nugatory if Parliament were capable of abolishing or

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173 *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ); *Cheatle v The Queen* (1993) 177 CLR 541, 552 (the Court). See also ibid; Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 279.

174 *Williams* (n 90) 342 [483] (Crennan J).

175 *New South Wales v Commonwealth* (1975) 135 CLR 337, 364–6 (Barwick CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Wool Tops Case* (n 164) 446 (Isaacs J); *Re Patterson* (n 169) 401–3 [11]–[15] (Gleeson CJ).

176 Winterton, *Parliament, the Executive and the Governor General* (n 49) ch 1; Peter A Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments in Interpretational Methodology and Constitutional Symmetry' (2018) 37(1) *University of Queensland Law Review* 2017.

177 Dixon, 'The Law and the Constitution' (n 141) 606.

178 Winterton, *Parliament, the Executive and the Governor General* (n 49) ch 1.

179 Ibid; Stellios, *Zines and Stellios's the High Court and the Constitution* (n 163) ch 9.

180 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J); Dixon, 'The Law and the Constitution' (n 141) 606–7.

181 *Rizeq* (n 25) 33 [82] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Edensor Nominees* (n 69) 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) and *British American Tobacco* (n 112) 60 [68] (McHugh, Gummow and Hayne JJ).

182 *Marbury v Madison*, 5 US (1 Cranch) 137, 176–80 (Marshall CJ) (1803).

curtailing the courts' authority to quell such controversies. Such a denial manifests itself in, for example, the *Kable* principle.[183]

Yet part of the creation of federal jurisdiction to quell those controversies apt to arise under the *Constitution*, or which involve its interpretation, necessarily means that the Commonwealth and the states become amenable to that jurisdiction, and the judicial process of its repositories. This extends to subjecting those authorities to legally enforceable liabilities even despite their express protestations to the contrary.[184] As Dixon discussed, this appears to mean that the *Constitution* operates to grant a party capable of satisfying the standing requirements the right to proceed against a state, even where that right may be superior to the right afforded by state law.[185] That right would then become enforceable in courts exercising federal jurisdiction.[186] This appeared to Dixon as one of the most conspicuous examples of the supremacy of the law.[187] These conspicuous examples extend to the Commonwealth by virtue of, for example, ss 75(iii) and (v) of the *Constitution*.

Nevertheless, the Australian *Constitution* does not offer direct remedies for various wrongs beyond those entrenched by s 75(v) and ancillary orders. Consider an example: where monies are levied as taxes, in a manner inconsistent with the *Constitution*, an action for the declaration of invalidity does not per se result in the automatic recovery of payments made pursuant to the invalid law because it is a constitutional action. Rather, the basis for payment in law has been retrospectively deprived of constitutional validity, such that, according to strict general law principle, the public authority's retention of those payments becomes unconscionable.[188] Thus, the action for money had and received to the plaintiff's use will usually lie to recover the funds.[189] An action arising from a breach of a constitutionally prescribed limitation on governmental power — legislative, executive or judicial — must, therefore, be located in the common law. The right to proceed, however, is guaranteed in the original jurisdiction of the High Court by s 75(iii).

This demonstrates that the ultimate foundation of Australian law cannot strictly be either the common law, or the *Constitution* itself, in isolation. At some level of abstraction, the fundamental norm in the hierarchy of Australian law must be located in the interaction between the unified common law of Australia and the *Constitution*.[190] There must, therefore, be some rules of that common law whose operation is unalterable by the parliaments where:

(1) that operation is assumed by the *Constitution* — for example, responsible government;[191] or

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183 *Kable* (n 71).

184 *Garnishee Case No 1* (n 69); *Forge v Australian Investments and Securities Commission* (2006) 228 CLR 45, 90–1 [112] (Gummow, Hayne and Crennan JJ), discussed in *Rizeq* (n 25) 35 [88] (Bell, Gageler, Keane, Nettle and Gordon JJ); Dixon, 'The Law and the Constitution' (n 141) 608–10.

185 Dixon, 'The Law and the Constitution' (n 141) 608.

186 Ibid.

187 Ibid 609.

188 See above Part III(B)(2)–(3); Gummow (n 47) 180.

189 See above Part III(B)(2)–(3); Gummow (n 47) 180.

190 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 141 (Brennan J), quoted in Gummow (n 47) 172; *British American Tobacco* (n 112) 63 [75] (McHugh, Gummow and Hayne JJ).

191 See above nn 179–182 and accompanying text.

(2) the amendment or abolition of those rules would render a constitutional limitation on the exercise of governmental power a 'dead letter'.[192]

And that is so whether the changes are directed to the amendment of the substantive law, or the achievement of a like effect through the conferral of certain procedural rights on the relevant parties. With respect to the latter category, the core issue becomes the location of the types of rules that protect the efficacy of those constitutional restraints. It is suggested that *Auckland Harbour Board* cases are a prime example of the latter category, given their role in safeguarding the parliamentary control of executive spending, as entrenched by the *Constitution*.[193]

The alternative view is unattractive. The Commonwealth could effectively eradicate the requirement to provide just terms compensation on compulsory acquisitions of property by imposing a 100% taxation rate on the recoverable amounts (or property) arising from invalid laws. Limitation periods could be used as circuitous devices to obstruct constraints on the executive contracting and spending power. Conversely, state legislatures could effectively constrain the availability of remedies for breaches of constitutionally prescribed restraints on legislative power. Section 92 of the *Constitution*, on the freedom of interstate trade, could be rendered otiose. This was the issue in *Antill Ranger*.[194] Legislation was passed to preclude restitution of funds paid pursuant to a state taxation law that infringed s 92.[195] That legislation was invalid because barring the right to recovery itself burdened the constitutional restraint.[196]

The alternative view would furthermore fail to explain the rationale for the *Judiciary Act* amendments passed after *British American Tobacco*.[197] These amendments concerned the validity of state legislative provisions that regulate the recovery of money paid to satisfy 'tax' debts, arising from invalid state tax legislation.[198] Accordingly, the amendments authorise, but do not require, the application of state legislation that limits the availability of such claims in the exercise of federal jurisdiction.[199]

V Conclusion

This case note concludes that *Sims* is apparently inconsistent with High Court authority and was therefore incorrectly decided. Moreover, it highlights the importance of legal theory in explaining the law's application or development in particular cases. This conclusion was developed in three Parts. After discussing the procedural history of *Sims*, previous case law was discussed to demonstrate the correctness of the New South Wales Court of Appeal's conclusion that *Auckland Harbour Board* formed part of the law of restitution. However, other cases were

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192 See, eg, *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 102–3 (Fullagar J) ('*Antill Ranger*').
193 *Constitution* ss 81–3.
194 *Antill Ranger* (n 192).
195 Ibid 96–98 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).
196 Ibid 99–101 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).
197 *Judiciary Act* (n 13) ss 79(2)–(4).
198 Ibid.
199 Ibid.

invoked to demonstrate how state enactments are not picked up in cases such as *Sims*, which either arise under the *Constitution* or involve its interpretation. The role of legal theory was mentioned before consideration was given to the selection of the ultimate foundation of Australian law. Perhaps crudely, the ultimate foundation was identified as the interaction between the *Constitution* and the common law. This case note opines that the absence of restraints on legislative power to curtail the availability of claims — such as those in *Sims* — risks rendering the constitutional restraints on the spending power of the executive a 'dead letter'.

Clearly, claims arising under the *Constitution* should not be perpetually maintainable. This case note offers three means of justifying the ultimate result reached in *Sims*. First, if protecting fundamental constitutional provisions and values is the source of a restraint on legislative power to limit actions arising under the *Constitution*, then those provisions and values must be drawn upon to locate or justify the application of a limitation period. For example, Ch III courts have an entrenched jurisdiction to restrain against the abuse of judicial process, which safeguards the institutional integrity of courts exercising federal judicial power.[200] Thus, an action could be restrained where the delay in bringing the action amounted to an abuse of process.

Second, as White JA shortly stated in *Sims*, the application of the limitation period may represent the operation of s 64 of the *Judiciary Act*: namely, the law applying to a claim between the Commonwealth and the citizen in as close a manner as possible to its application in disputes between citizens.

Third, recall that the remedies arising from actions of the kind pursued in *Sims* were historically regarded as discretionary.[201] As discussed above, these discretionary remedies, or at least orders in their nature, remain available.[202] The discretion to withhold such remedies may, bearing in mind well-recognised public law principles, be exercised based on unwarrantable delay.[203] The presence of a limitation period may be relevant to determining whether a delay in bringing an action is unwarrantable, such that the remedy sought should be withheld.

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200 See, eg, *Condon v Pompano* (2013) 252 CLR 38, 61–2 [42]–[43] (French CJ), 107–8, 115 [187], [212] (Gageler J), citing *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ). See also *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857.

201 See above n 70.

202 Ibid.

203 See, eg, *Bechara v Bates* (2021) 286 FCR 166, 202–4 [158]–[164] (the Court).

Book Review

Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia by Alice Taylor (2023) Hart Publishing, 264 pp ISBN 9781509952922

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I Introduction

It is not contentious to say that some Australian judicial decisions in discrimination law have been disappointing. While the text of statutory discrimination law appears broad and protective, the potential of equality law has been limited by its judicial interpretation and application. In *Purvis v New South Wales*, for example, a student who exhibited antisocial and aggressive behaviour due to his disability was suspended and ultimately expelled from school.[1] The High Court of Australia was asked to identify the relevant comparator under the *Disability Discrimination Act 1992* (Cth): should the student be compared to a non-disabled student who was well behaved, or a non-disabled student with the same behavioural problems? The High Court chose the comparator with the same behavioural problems,[2] which meant the student was treated no differently to any other student who acted out, even though the behavioural problems were caused by his disability. For Gleeson CJ, the required comparison is with a pupil without the disability, not a pupil without the violence.[3] Campbell has described this decision as 'positively wrong' and 'unconvincing' — a hard case making bad law.[4]

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1 *Purvis v New South Wales* (2003) 217 CLR 92.

2 Ibid 100–1 [11] (Gleeson CJ), 161 [225] (Gummow, Hayne and Heydon JJ). Cf 136 [134] (McHugh and Kirby JJ).

3 Ibid 100–1 [11] (Gleeson CJ).

4 Colin D Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111.

It is into this fraught field of judicial interpretation of discrimination law that Alice Taylor's book *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* steps. This deceptively slim work provides a wide-ranging consideration of discrimination law, statutory interpretation and the judicial role, drawing on comparative analysis of Australia, the United Kingdom and Canada. The work is engaging and clear, covering a broad and complex field using a light yet sophisticated approach.

II Grounding and Evaluating 'Creative' Interpretations

Building on Lester and Bindman,[5] Taylor argues that judges must be 'creative' interpreters of discrimination law for statutory discrimination laws to be effective.[6] Lester and Bindman posit that courts are best positioned as 'creative interpreters of the legislative intent, rather than as the instrument for radical reforms'[7] — this, in part, explains the limited development of equality rights in the common law prior to statutory reform.

For Taylor, a 'creative' interpretation is not just a purposive interpretation, consistent with general rules of statutory interpretation. Indeed, for Taylor, a purposive interpretation and existing statutory interpretation rules do not apply easily to discrimination law,[8] as the laws themselves — and the Parliaments who pass them — are often unclear as to what their purpose is. The purpose of discrimination law is rarely articulated by Parliament, meaning there is no discoverable intent behind the laws.[9] Further, there is no shared learning or understanding of discrimination law in the common law that can enable a purposive approach.[10] There is a need, then, to look to the normative and theoretical literature to ascertain the purpose of discrimination law.

For Taylor, drawing on Fredman[11] and Moreau,[12] the purpose of discrimination law is multidimensional and pluralist.[13] A creative interpretation applies this pluralist account to the interpretation and application of discrimination law. A creative interpretation is therefore a more expansive version of a purposive

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5 Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman, 1972).

6 Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing, 2023) 2, 9.

7 Lester and Bindman (n 5) 71.

8 Taylor (n 6) 29.

9 Ibid 7, 10.

10 Ibid 31.

11 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022). Fredman describes a multidimensional principle of substantive equality that encompasses redressing disadvantage (the redistributive dimension); addressing stigma, stereotyping, prejudice and violence (the recognition dimension); facilitating participation, inclusion and voice (the participative dimension); and accommodating difference and structural change (the transformative dimension): at 29–44.

12 Sophia Reibetanz Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020). Moreau sees the rationale of discrimination law as being pluralist: she argues that there are at least three ways in which a practice can disadvantage someone on the basis of a trait, and therefore fail to treat them as an equal. For Moreau, this includes subordinating people to others, denying people deliberative freedoms, and leaving people without access to basic goods required to participate as an equal in society: at 11.

13 Taylor (n 6) 43, 54.

interpretation,[14] and one which is informed by the normative literature.[15] This approach to statutory interpretation is more active than established approaches, and seeks to elaborate the underlying values of discrimination law.[16] It is also an approach to interpretation that is contextual, takes into account socio-economic inequalities,[17] and challenges systemic barriers to equality via a focus on redistribution.[18]

Having elaborated what a creative interpretation of discrimination law might entail, Taylor then considers whether courts interpret discrimination law creatively in practice. She concludes, ultimately, that while jurisprudence across the jurisdictions can be confused and contradictory,[19] courts are more likely to adopt a creative interpretation if they have an established role in human rights review:[20] a creative interpretation 'requires the judiciary to have an accepted role in the articulation of fundamental values and the protection of rights'.[21] This role is well established in Canada, somewhat established in the United Kingdom, and underdeveloped in Australia.[22] Understandably, then, in the jurisdictions Taylor studies, a creative interpretation is most often evident in Canada, sometimes present in the United Kingdom, and largely absent in Australia.[23] Taylor concludes that the Australian judiciary's approach to discrimination law is one focused on formal equality, which does not seek societal transformation.[24] Instead, the approach taken to proving discrimination, and justification, by Australian courts is one 'focused on fault and punishment'.[25] This is far more limited than what is envisaged by a pluralist and multidimensional view of equality.

Taylor therefore argues that the differences in approach to statutory interpretation arise from the 'different institutional contexts' for judicial decision-making in each country.[26] For Taylor, statutory discrimination law is quasi-constitutional in all three jurisdictions;[27] this categorisation has been used in Canada to justify a creative and expansive interpretation of discrimination law,[28] grounded in values and not technicalities,[29] but has not led to the same approach in Australia or the United Kingdom.[30] Again, Taylor sees this difference as reflecting the Canadian judiciary's well-established role in rights review;[31] Canadian courts have an established, accepted and legitimate function in articulating community norms

14 Ibid 9.
15 Ibid 10, 32.
16 Ibid 27.
17 Ibid 55.
18 Ibid 56.
19 Ibid 147.
20 Ibid 8, 153.
21 Ibid 167.
22 Ibid 153, 176, 181.
23 Ibid 148–50.
24 Ibid 135.
25 Ibid 143. See also at 147.
26 Ibid 171.
27 Ibid 153, 166.
28 Ibid 152, 157.
29 Ibid 158.
30 Ibid 153.
31 Ibid 181.

and values, and this is reflected in their approach to statutory interpretation.[32] Thus, while a 'creative' approach to interpretation, going beyond what was originally anticipated by Parliament, may be seen as posing challenges to the judiciary's institutional legitimacy,[33] a different understanding of the judicial role emphasises a different (and larger) role for the courts in the development of rights (and equality law).[34]

Further, Taylor argues that discrimination law's status as both public and private law justifies the judiciary's active intervention in matters of distribution and resource allocation by governments.[35] Indeed, this active involvement is critical to achieve both the recognitional and redistributional aspects of equality law.[36] At present, though, this potential is under-realised — reflecting not the limits of discrimination legislation[37] but 'embedded understandings' of the judicial role and enduring beliefs in the limited institutional capacity of judges to make 'political' decisions.[38]

III Implications

Taylor's work explicitly does not focus on making proposals for law reform.[39] It has clear implications, though, for the Australian Human Rights Commission's call to adopt a national human rights Act in Australia.[40] Not only could adopting such legislation better protect human rights in Australia, it might also prompt a shift in how courts approach their judicial role, particularly in the interpretation of discrimination law. If a 'creative' interpretation goes hand in hand with an established judicial role in rights review, it is arguably critical that human rights instruments be adopted to facilitate this judicial role and potential shift in interpretive approach. For Taylor, this would 'provide courts with the language and institutional legitimacy to bring to life a "creative" interpretation'.[41] Without 'constitutional transformation', though, Taylor sees statutory equality rights as likely to remain 'relatively ineffective in securing substantive change'.[42] The question, then, is whether the adoption of human rights statutes — as has occurred in the Australian Capital Territory, Victoria and Queensland — is sufficient to achieve this shift in the judicial role and interpretation, or whether broader constitutional change is required. It was presumably beyond the scope of this work to consider any differences in approach across the Australian states and territories; Taylor explicitly focuses her analysis at a high level, concentrating on 'creative' (and non-creative) appellate

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32 Ibid 183.
33 Ibid 151.
34 Ibid 172.
35 Ibid 152, 188.
36 Ibid 190.
37 Ibid 197.
38 Ibid 188, 195.
39 Ibid 6.
40 Australian Human Rights Commission, 'Free and Equal: An Australian Conversation on Human Rights' (Issues Paper, April 2019); Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report* (Report, 2023).
41 Taylor (n 6) 213.
42 Ibid.

judicial decisions.[43] But there is clearly more work to be done to consider the dynamic interplay between human rights law and equality law, particularly in the context of federalism.

Taylor also emphasises the clear disconnect between the courts and the normative literature on discrimination law.[44] This separation has implications for the courts and judges, and how they approach their role in interpreting and applying discrimination law. As scholars of equality law, we can only hope that the judiciary engages deeply with Taylor's work. Equally, though, there is a need for normative literature that more closely engages with judicial decisions. It is here, for example, that Moreau's normative work represents a departure from other theoretical scholarship, as it intentionally engages case law and real-world complaints of discrimination to develop and test theory.[45] It is perhaps unsurprising that there is such a disconnect between judicial decisions and theory, if neither is consciously engaging with the other. Taylor's careful scholarship offers a potential bridge to link the normative and the judicial, enriching both fields of work.

Taylor's work flags the ways in which statutory discrimination law might present a challenge to some established understandings of the judicial role; but it also offers an invitation to reframe and recast the institutional role of the judiciary. For Taylor, a more active judicial approach to interpreting and applying discrimination law is consistent with both the framing of discrimination law statutes, and a broader understanding of the judicial role. As Taylor concludes, the way the judiciary responds to discrimination law is critical for ensuring the law's effectiveness and success.[46] The courts and Parliament should work in partnership to better protect equality rights.[47] Achieving this shift is going to require significant institutional support for the judiciary, to help reframe and reshape existing approaches to interpretation. In addition to adopting human rights instruments, we might consider how we can better support judges to engage with discrimination law in a meaningful, creative way that best advances equality.

This book is critical reading for equality and discrimination law scholars. However, it also speaks to the rules of statutory interpretation, and the role of the courts. It will therefore have broad appeal to scholars of public law.

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43 Ibid 6, 7.
44 Ibid 10, 34, 210.
45 Moreau (n 12) 28–9, 30, 104.
46 Taylor (n 6) 213.
47 Ibid.