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Scrutinising the Scrutiny Process in the Courts

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Abstract

In every Australian jurisdiction, a dedicated parliamentary committee scrutinises delegated legislation. When interpreting delegated legislation, courts may make assumptions about the nature and quality of the scrutiny performed by these committees. We argue courts should be cautious about reaching these conclusions. The article uses the High Court of Australia's decision in *Disorganized Developments Pty Ltd v South Australia* as a case study. We show that, while a scrutiny committee might hold the promise of providing effective parliamentary oversight of delegated lawmaking, the reality may fall short of the ideal. With limited time and resources to scrutinise a large volume of instruments as well as to perform other functions, and with no guarantee of engagement from the Parliament or executive, scrutiny committees may not be able to scrutinise delegated legislation in a thorough or timely manner. Building on these insights, we consider the circumstances, and manner, in which a court might be justified in making findings about the process of scrutiny of delegated legislation.

I Introduction

Over the last few decades there has been a dramatic rise in delegated lawmaking across Australia.[1] Cheryl Saunders has dubbed this 'executive law-making creep'[2] but it may be that 'torrent' is a more apt description. Increasingly, the bulk of new

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1 The reasons for delegated lawmaking are canvassed in Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 6th ed, 2023) ch 1.

2 Cheryl Saunders, 'Australian Democracy and Executive Law-Making: Practice and Principle' (Pt 2) (2016) 66 (October) *Papers on Parliament* 71, 81.

laws are made by the executive pursuant to delegated legislative powers.[3] In New South Wales and South Australia, for instance, it has been reported that 70–90% of new laws are made by delegation.[4] The volume of delegated laws is compounded by the fact that such law is often very complex and, at least in some jurisdictions, accompanied by inadequate explanatory material provided by the executive.[5]

Delegated legislation raises concerns about the democratic legitimacy[6] of the lawmaking process and concentration of power in the executive branch.[7] Delegated legislation is often made 'behind closed doors' and is not subjected to 'the safeguards of the ordinary parliamentary processes': unlike Bills, it is never read out or debated on the floor of Parliament except on the rare occasion when there is a motion to disallow.[8]

Parliamentary scrutiny in the form of a dedicated legislative review committee is widely understood as one of the safeguards to mitigate these concerns regarding executive lawmaking.[9] Such committees have the role of examining the compatibility of delegated legislation with the enabling legislation and with standards such as 'personal rights and liberties' (and other common law principles) and to bring these potential incompatibilities to the attention of Parliament.

But the reality of legislative review committees does not always match the promise. This is not always well understood by the three arms of government, including the courts, as highlighted in the 2023 High Court case of *Disorganized Developments v South Australia* in which members of the Court expressed different

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3 By volume, about half of the law of the Commonwealth consists of delegated legislation, and since the mid-1980s tabled disallowable instruments have risen from approximately 850 to around 1,700 each year: Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 6 [1.15] ('*Parliamentary Scrutiny Report*').

4 According to an analysis submitted by Professor Lorne Neudorf, by volume, 87% of legislation enacted by the New South Wales Parliament in 2019 was delegated legislation: Regulation Committee, Parliament of New South Wales, *Making of Delegated Legislation in New South Wales* (Report No 7 of 2020, October 2020) 3 [1.11]. In regard to South Australia, see Lorne Neudorf, 'Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia' (2021) 43(8) *Bulletin: Law Society of South Australia* 10 ('The Problem of Delegated Legislation in South Australia'). For example, 88% of all new laws in South Australia in 2020 were delegated laws.

5 Legislative Review Committee, Parliament of South Australia, *The Workload of the Legislative Review Committee* (Report, 3 February 2021) 2 ('*LRC Workload Report*').

6 See Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11(1) *Australian Journal of Administrative Law* 45, 53; Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 4.

7 Meyerson (n 6) 52–3.

8 Lorne Neudorf, Submission No 11 to Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight* (25 June 2020) 3; Lorne Neudorf, 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia' (2019) 42(4) *Canadian Parliamentary Review* 25. Thilagaratnam points out that at the federal level the lack of robust scrutiny of delegated legislation is 'a troubling development, particularly as the government not infrequently seeks to give effect to controversial policies via delegated legislation': Renuka Thilagaratnam, 'Legislative Instruments: 2012–2014', *Human Rights Scrutiny Blog* (Blog Post, 23 December 2014) <https://hrscrutiny.wordpress.com/2014/12/23/legislative-instruments-2012-2014>.

9 Other safeguards include the requirement that the executive table delegated legislation in Parliament and various requirements as to when it can come into operation or continue in operation: see Pearce and Argument (n 1) chs 3–11.

views about the significance of legislative scrutiny of a pair of impugned regulations.[10]

In this article, we argue that *Disorganized Developments* highlights the gap between the promise and reality of legislative review committees. The article demonstrates that the courts should be cautious about making any assumptions or findings about the legislative scrutiny process.

Part II of this article analyses and explains the different views of parliamentary scrutiny articulated by the High Court in *Disorganized Developments*. Part III examines how legislative scrutiny works in practice, focusing on the work of the South Australian Parliament's Legislative Review Committee ('LRC'). It shows that the LRC lacks the resources and legislative framework to perform rigorous scrutiny of most regulations. It excavates the question raised by *Disorganized Developments* of whether the courts can understand legislative scrutiny and parliamentary oversight committees as safeguards that require or obviate the need for procedural fairness. Building on these insights, Part IV reflects on what weight courts might place on legislative scrutiny mechanisms when drawing conclusions about the process by which delegated legislation is made.

II *Disorganized Developments*, the High Court and Legislative Scrutiny

Disorganized Developments raises broad questions regarding the accountability, transparency and quality of delegated legislation. The case was a challenge to the validity of two regulations, known as the Cowirra Regulations, which purported to declare two portions of land as 'prescribed places' for the purposes of the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'). The first appellant, Disorganized Developments, was the registered proprietor of the two parcels of land while the second and third appellants were the directors and only shareholders of Disorganized Developments and were the occupiers of the land. They were also members of the Hells Angels motorcycle club and so were 'participant[s] in a criminal organisation' within the meaning of the *CLCA*.[11] As the High Court noted, the appellants wished to access the land in order to exercise their property rights and, at times, to reside on the land.[12] It was common ground that if the regulations were valid, the appellants would commit an offence if they entered or attempted to enter the Cowirra land. This offence carried a maximum penalty of three years' imprisonment. It was also common ground that the appellants had not been notified or consulted prior to the making of the Cowirra Regulations.

In the High Court the appellants challenged the validity of the regulations on two grounds. The first, which all five Justices agreed was made out, was that the

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10 *Disorganized Developments Pty Ltd v South Australia* (2023) 410 ALR 508 ('*Disorganized Developments*').

11 *Criminal Law Consolidation Act 1935* (SA) s 83GD ('*CLCA*').

12 *Disorganized Developments* (n 10) 515–16 [27] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

Cowirra Regulations were not effective in declaring the parcels of land to be 'prescribed places' within the meaning of ss 83GA(1) and 83GD(1) of the *CLCA*.[13]

The second ground (and the more relevant for the purposes of this article) was that the Cowirra Regulations were invalid as they were made in breach of a duty to afford procedural fairness to the appellants. On this second ground, four members of the Court (Kiefel CJ, Gageler, Gleeson and Jagot JJ, writing together) held there was an obligation to afford procedural fairness: an obligation that had not been fulfilled in relation to the Cowirra Regulations. Steward J, dissenting, held that the statute impliedly excluded the obligations of procedural fairness.

Kiefel CJ, Gageler, Gleeson and Jagot JJ observed that there was an established and strong presumption that the exercise of a statutory power implied the affording of procedural fairness and that this common law presumption applies in the making of regulations where the exercise of the power adversely affects the interests of particular individuals.[14] Such a presumption operates 'unless clearly displaced by the particular statutory scheme'.[15]

This holding is significant for delegated legislation more generally. Challenges to delegated legislation on the ground of failure to comply with the rules of procedural fairness are rare.[16] *Disorganized Developments* appears to be the first time an Australian court 'has held that a regulation made by the Governor, upon the advice of Cabinet, is invalid by virtue of a failure to afford procedural fairness'.[17]

The rules of procedural fairness are presumed to attach to any statutory power 'the exercise of which is apt to affect an interest of an individual' in a 'direct and immediate' way, and not merely 'as a member of the public or of a class of the public'.[18] For this reason, the making of delegated legislation has often not been seen as conditioned on observance of the rules of procedural fairness.[19] Traditionally, delegated legislation creates rules of general application rather than affecting individuals in a direct way. As Brennan J explained in the seminal case of *Kioa v West*:

> The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power.[20]

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13 On this first ground the High Court allowed the appeal, agreeing that the Cowirra Regulations were ineffective as they did not declare any place to be a prescribed place. The Cowirra Regulations were, therefore, not supported by the Governor's regulation-making power under *CLCA* (n 11) s 370 and were invalid by reason of their inefficacy.

14 *Disorganized Developments* (n 10) 584 [33]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [75] ('*SZSSJ*').

15 *SZSSJ* (n 14) 205 [75] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ), cited in *Disorganized Developments* (n 10) 584 [33].

16 See Pearce and Argument (n 1) 299–301.

17 South Australia, 'Respondent's Submissions', Submission in *Disorganized Developments Pty Ltd v South Australia*, Case No A22/2022, 25 November 2022, 20 [51] ('Respondent's Submissions').

18 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J) ('*Kioa*').

19 See *Re Gosling* (1934) 43 SR (NSW) 312, 318 (Jordan CJ); Pearce and Argument (n 1) 299–300.

20 *Kioa* (n 18) 620 (citations omitted).

But, as *Disorganized Developments* shows, this is not true of all regulations. The Cowirra Regulations clearly affected the appellants (as owners and occupiers of the affected land) in a direct and immediate way, quite distinct from the effect on other members of the public. The High Court had no difficulty in holding that the making of the Cowirra Regulations was a decision that attracted the presumption that the rules of procedural fairness applied.[21]

The presumption that the rules of procedural fairness attach to such a power can be displaced by 'express words or necessary implication'.[22] At issue in *Disorganized Developments* was whether the presumption had been displaced by necessary implication. The State of South Australia argued that four textual and contextual features of the *CLCA* supported the displacement of the presumption. First, the regulation-making power was vested in the Governor-in-Council.[23] Secondly, the unfettered nature of the regulation-making power under the *CLCA* indicated that the power could be exercised by reference to general policy considerations rather than any specific statutory criteria or procedure.[24] Thirdly, the unusual history of the procedure for declaring places to be 'prescribed places' indicated that the making of the regulations was not intended to attract a duty of procedural fairness.[25] Finally, the bespoke scheme of parliamentary scrutiny was consistent with the absence of any implied duty to afford procedural fairness. For the majority of the High Court, these features were 'insufficient, individually and cumulatively, to establish an intention to displace the common law presumption' that the rules of procedural fairness applied.[26] Steward J dissented on this point.

The final factor identified by South Australia is most relevant to this article. South Australia argued that the regulation-making power was not impliedly conditioned by a requirement to afford procedural fairness because 'delegated legislation is commonly subject to parliamentary oversight'.[27] This argument asks the Court to reach conclusions about the quality and nature of parliamentary oversight of delegated legislation: the issue at the heart of this article. Steward J embraced South Australia's argument on this point but the majority did not.

The majority in *Disorganized Developments* offered only brief consideration of South Australia's argument regarding parliamentary oversight, referring to the 'general and limited' oversight of the Governor's regulation-making power that was provided for by a parliamentary committee and the ability to disallow regulations.[28] According to the majority, these mechanisms were 'not the source of an implication to exclude procedural fairness'.[29] In reaching this conclusion, the majority rejected

[21] *Disorganized Developments* (n 10) 518 [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[22] Ibid 516 [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[23] Ibid 519 [38]–[40] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[24] Respondent's Submissions (n 17) 12–13 [32].
[25] Ibid 13 [33]. When the regime relating to prescribed places was introduced, an initial list of 16 prescribed places was included in regulations that formed a schedule to the *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA).
[26] *Disorganized Developments* (n 10) 518 [37] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[27] See Respondent's Submissions (n 17) [32]–[34]; *Disorganized Developments* (n 10) 518 [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[28] *Disorganized Developments* (n 10) 519–20 [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Note the majority did not refer to the LRC specifically, but only to 'a Parliamentary Committee' in general.
[29] Ibid.

South Australia's submission that the 'bespoke scheme of parliamentary supervision' that accompanied the regulation-making power in s 83GA(1) excluded an implied duty to afford procedural fairness.[30]

The majority did not delve into any of the detail of the legislative scrutiny process, either in terms of what was available or what actually occurred in this case. As discussed below, there is evidence that the LRC had little opportunity to scrutinise the Cowirra Regulations within the period of disallowance. For the majority, the mere existence of such oversight was insufficient to exclude procedural fairness. Thus, for the majority, the efficacy of the parliamentary scrutiny scheme for delegated legislation was not a consideration. It is unclear whether Kiefel CJ, Gageler, Gleeson and Jagot JJ drew any inference about the quality of that scheme. Their reasoning may, instead, have rested on the fundamental difference between procedural fairness and parliamentary scrutiny. As Andrew Edgar has pointed out, '[p]rocedural fairness applies to administrative decisions that affect a person directly and individually, and not to political or policy decisions that affect the public generally'.[31] Parliamentary scrutiny is suited to the latter type of decision: policy decisions with broad consequences, not decisions applying directly to specific individuals (even if such a decision comes in the form of delegated legislation). In short, the textual and contextual features identified by South Australia were not sufficient to exclude the obligations of procedural fairness.

For Steward J, in contrast, the existence of 'effective parliamentary supervision and oversight' was one of four considerations leading to the opposite conclusion.[32] Unlike the majority justices, his Honour ruled that there was a 'sufficient indication' of Parliament's intention to exclude any obligations of procedural fairness.[33] In reaching this conclusion, Steward J noted that the *Legislative Instruments Act 1978* (SA)

> obliges the Legislative Review Committee of Parliament to inquire into and consider the regulation. The Committee can, if it so wishes, form an opinion that the regulation ought to be disallowed and, if so, it must report that opinion to both Houses of Parliament.[34]

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30 Note that in making this submission South Australia pointed to the 'Statutory Review Committee' established under the *Subordinate Legislation Act 1978* (SA), as well as the 'further layer of parliamentary oversight' provided by the Crime and Public Integrity Policy Committee established by the *Parliamentary Committees Act 1991* (SA) ('*PCA*'). On this point the majority acknowledged that South Australia's submissions did not suggest that review by parliamentary committees was likely to afford procedural fairness to owners or occupiers or that such parliamentary scrutiny would involve consideration of matters that might be raised by an owner or occupier if procedural fairness was afforded: *Disorganized Developments* (n 10) at 519–20 [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Furthermore, they acknowledged that the scheme of parliamentary scrutiny was not presented by South Australia as a means that 'might avoid the arbitrary exercise of the regulation-making power': at 520 [42].

31 Andrew Edgar, 'Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy' (2017) 40(3) *Melbourne University Law Review* 738, 743.

32 *Disorganized Developments* (n 10) 529 [82].

33 Ibid 527 [73].

34 Ibid (citations omitted).

Steward J also referred to a 'further layer of Parliamentary oversight' in the form of review by the Crime and Public Integrity Policy Committee.[35] The existence of both of these mechanisms, in Steward J's view, 'strongly suggests that Parliament intended for this to be the principal way of ensuring that regulations made [under the Act] are both effective and appropriate'.[36] In coming to this view, Steward J relied on the mere existence of these two mechanisms, with no regard to how they actually work in practice or the extent of the scrutiny that had in fact occurred in the making of the Cowirra Regulations. This is something we explore later in the article.

In addition, Steward J contrasted the procedure in place in the Cowirra Regulations for declaring property to be a prescribed place with the complex regime set out in the *Serious and Organised Crime (Control) Act 2008* (SA). Under that legislation, there is a complex procedure for declaring an organisation to be a 'declared organisation'. That procedure involves detailed requirements to inform the affected organisation of the grounds and material being relied upon. In other words, the legislation itself provides a 'clear statutory mechanism for the giving of procedural fairness'.[37] As Steward J noted, the absence of this kind of complex procedure from the Cowirra Regulations was a 'further indication of Parliament's intention of what was required' when declaring property to be a prescribed place.[38]

Disorganized Developments thus provides a useful case study of how courts draw inferences about parliamentary scrutiny mechanisms when determining the validity of delegated legislation. While for both the majority and minority justices the existence of scrutiny processes was only one factor that bore upon their consideration of whether Parliament intended to exclude procedural fairness, there were some differences in their approaches. Both the majority and minority referred to the existence of these oversight mechanisms but took different views as to their significance. While the majority justices noted the 'limited' oversight of delegated legislation, Steward J appeared to place more weight on the existence of parliamentary oversight mechanisms.

As explained above, Steward J appeared to assume that these mechanisms offered effective scrutiny, with no examination of how they operate in practice or whether they offer any meaningful check on the regulation-making power.[39] There was no consideration, by any of the justices, of the extent to which the Cowirra Regulations had in fact been subject to parliamentary scrutiny before being enacted. This was also not addressed in the written submissions.

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[35] Ibid 593 [82], citing *PCA* (n 30) s 15O. The Crime and Public Integrity Policy Committee ('CPIPC') is a committee that undertakes public inquiry into the merits of the relevant state legislative scheme for serious and organised crime and how this scheme balances community safety with individuals' common law rights such as natural justice: see Crime and Public Integrity Policy Committee, Parliament of South Australia, *Legislation Pertaining to Serious and Organised Crime* (Report No 6, November 2021) 55 [6.7]. The CPIPC is an oversight committee but it is not a legislative scrutiny committee. As it does not scrutinise individual regulations, its role is tangential in this article's consideration of how the courts understand the legislative scrutiny process.

[36] *Disorganized Developments* (n 10) 529 [82].

[37] Ibid 529–30 [83] (Steward J).

[38] Ibid.

[39] Though, as we explain above, this was only one factor relied upon by Steward J and so was not, on its own, decisive.

The next Part questions whether the legislative scrutiny process actually performed by the LRC fits Steward J's description of 'effective parliamentary supervision and oversight'.[40]

III 'Effective Parliamentary Supervision and Oversight'?

In every Australian jurisdiction, a dedicated legislative review committee is responsible for scrutinising delegated legislation.[41] McNamara and Quilter explain that the rationale for such scrutiny committees is that they 'might curb (intended and unintended) infringements of rights and liberties arising from Parliamentary law-making'.[42] Pearce observes that such committees are 'more effective in regard to delegated legislation than primary legislation as government control of the parliament can secure the passage of what might be regarded as oppressive provisions in bills'.[43] The scrutiny process provides an opportunity upstream to correct any problems. Hence there is the potential for this scrutiny process to lift the quality of executive lawmaking as well as transparency and accountability.

It is worth noting that across Australia's scrutiny committees for delegated legislation, there is diversity in their composition, processes, powers and resources. This is made clear by Pearce and Argument's tome *Delegated Legislation in Australia* which also offers an understanding of the strengths and weaknesses of these committees. Producing this diversity is the varying size of parliaments in Australia, with South Australia, Tasmania, the Australian Capital Territory and the Northern Territory having the smaller parliaments. Where the scrutiny committee operates in a bicameral parliament, much depends on whether it is a joint committee drawn from both the houses of parliament. Bastoni and Macintyre explain:

> Most of the committees that exist at a State level are joint committees … This cripples the committees in terms of time, as lower house members have to devote a significant amount of time to electorate duties, and thus reduces the time in which the committees can sit. The use of joint committees can also

[40] *Disorganized Developments* (n 10) 529–30 [83].

[41] In the Commonwealth, the Senate Standing Committee for the Scrutiny of Delegated Legislation was established by the Senate, *Standing Orders* (October 2022) ch 5; in the Australian Capital Territory, the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) was established by resolution of the Legislative Assembly on 2 December 2020; in New South Wales, the Legislative Review Committee was established by the *Legislation Review Act 1987* (NSW) pt 2; in the Northern Territory, the Subordinate Legislation and Publications Committee was established by the Legislative Assembly, *Standing Orders* (21 April 2016) ord 176; in Queensland, the Scrutiny of Legislation Committee ceased on 30 June 2011 and was devolved to seven 'portfolio committees' under the *Parliament of Queensland Act 2001* (Qld) ch 5; in South Australia, the LRC was established by the *PCA* (n 30) pt 4; in Tasmania, the Subordinate Legislation Committee was established by the *Subordinate Legislation Committee Act 1969* (Tas) s 3; in Victoria, the Scrutiny of Acts and Regulations Committee was established by the *Parliamentary Committees Act 2003* (Vic) ss 5, 6, 17; in Western Australia, the Joint Standing Committee on Delegated Legislation was jointly established by the Legislative Assembly, *Standing Orders* (29 November 2017) ord 296 and Legislative Council, *Standing Orders* (August 2023) sch 1 item 10.

[42] Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21, 23.

[43] Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 10th ed, 2023) 244 [5.1]. It is possible that Pearce's observations are primarily based on the performance of the Australian Senate and its Standing Committee for the Scrutiny of Delegated Legislation.

> often result in governing party dominance of the committee system. … Committees at a State level are not always resourced appropriately.[44]

They flag that '[s]mall parliaments present problems in carrying out these key democratic functions', by which they mean the function of keeping the government of the day accountable.[45] For these reasons, it is not possible to evaluate the effectiveness of legislative scrutiny committees across the board by basing this evaluation on an understanding of Australia's pre-eminent committee for scrutinising delegated legislation, the Senate Standing Committee on Regulations and Ordinances ('SSCRO') — established by federal Parliament in 1932 and later renamed the Senate Standing Committee for the Scrutiny of Delegated Legislation ('SSCSDL'). It is more fruitful to examine the scrutiny mechanisms that exist in particular jurisdictions: in this case, South Australia. At the same time, it is worth noting that the operation and innovations of the federal scrutiny system can have a flow-on effect for legislative scrutiny across Australia, particularly in smaller parliaments.

The South Australian Parliament was the first of the state and territory parliaments to establish such a scrutiny committee, the Joint Committee on Subordinate Legislation, in 1938. The current LRC took on the functions of the Joint Committee via the *Parliamentary Committees Act 1991* (SA) ('*PCA*'). The LRC is a joint committee of six members, three from each house, with Ministers being ineligible.[46] The Presiding Member comes from the Upper House and has a casting vote.[47]

To evaluate the effectiveness of the LRC, Part III(A) of this article considers the LRC's workload, functions, powers and processes and seeks to gauge the strength of the legislative framework that supports its work. Part III(A) questions whether it is possible to understand a parliamentary committee for scrutinising delegated legislation to be 'effective' in terms of its capacity to offer a substitute to affording procedural fairness to adversely affected individuals, such as the owners and occupiers who were affected by the Cowirra Regulations.

A The LRC's Workload and Functions

A lack of time and resources is commonly identified by parliamentarians as one of the main constraints on the capacity of committees to perform legislative scrutiny.[48] This is compounded where a parliamentary committee has multiple functions. This is the case for the LRC which under the *PCA* has multiple functions which include conducting inquiries into a broad range of matters including law reform and

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44 Jordan Bastoni and Clement Macintyre, 'What's in It for Us? Why Governments Need Well Resourced Parliaments' (2010) 25(1) *Australasian Parliamentary Review* 177, 181 (citations omitted).

45 Ibid 177.

46 *PCA* (n 30) s 11.

47 Ibid ss 11, 24(4).

48 Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

petitions.[49] Relevantly, s 12(b) of the *PCA* provides that one of the LRC's functions is 'to inquire into, consider and report on subordinate legislation'. The process of performing this scrutiny function is set out in ss 10 and 10A of the *Legislative Instruments Act 1978* (SA) which provide that all regulations are to be laid before each House of Parliament within six sitting days of being made and that all regulations are referred to the LRC for scrutiny.[50]

The process of scrutinising delegated legislation involves a formidable workload. In August 2021, the Inquiry into the Effectiveness of the Current System of Parliamentary Committees reported that in the South Australian Parliament secondary legislation constituted 70% of all law made[51] which translates into 86% of total enactments in South Australia between 2018 and 2020. Each year the LRC scrutinises approximately 400 instruments based on its scrutiny principles. While the making of regulations for prescribing a place under the *CLCA* requires that each place be a separate regulation,[52] this is not the case with all instruments, some of which can be very complex.[53] In 2020, the year the Cowirra Regulations were laid before Parliament, the LRC considered 469 instruments which made up 91% of all legislation made that year by the South Australian Parliament.[54]

In terms of time, in practice the LRC generally meets for 1 to 1.5 hours each sitting week.[55] In 2020, it met on 21 occasions.[56] This equates to 21 to 30 hours in which to scrutinise 469 instruments and any petitions. In 2020, the LRC subsequently tabled 20 scrutiny reports in the Parliament in regard to these instruments.[57] The frequency of meetings and reporting is largely due to the time limit of 14 sitting days for the disallowance of regulations, which places pressure on the Committee.

The timeline for scrutinising the Cowirra Regulations illustrates this pressure starkly. The regulations were made (and commenced) on 17 December 2020: after the final sitting day of the year. The first sitting day of 2021 was Tuesday 2 February.

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49 These include 'any matter concerned with legal, constitutional or parliamentary reform or with the administration of justice … any matter concerned with inter-governmental relations' and any Act or subordinate legislation (or part of such legislation) having sunset clauses: *PCA* (n 46) ss 12(a)(i)–(iii), (matters referred), (ba) (petitions).

50 '"Regulation" means any regulation, rule or by-law made under an Act': *Legislative Instruments Act 1978* (SA) s 4 ('*LIA*').

51 Select Committee on the Effectiveness of the Current System of Parliamentary Committees, Parliament of South Australia, *Inquiry into the Effectiveness of the Current System of Parliamentary Committees* (Report, 25 August 2021) 66–7 ('*Effectiveness Inquiry Report*').

52 *CLCA* (n 11) s 83GA(2).

53 For example, the 2020 Uniform Civil Rules consisted of more than 1,000 pages. These were reviewed and scrutinised by the LRC which provided extensive comments: see Legislative Review Committee, Parliament of South Australia, *Annual Report of the Legislative Review Committee 2020* (Report, 18 May 2022) 18 ('*LRC Annual Report*').

54 Ibid 6. Commentators note that delegated lawmaking was at its height during the first year of the COVID-19 pandemic.

55 *LRC Workload Report* (n 5) app B, 2.

56 *LRC Annual Report* (n 53) 2.

57 Ibid 7. In addition, in 2020 the LRC conducted inquiries in regard to three petitions. Note that these reports are not publicly available on the LRC website <https://www.parliament.sa.gov.au/committees/lrc>.

Since the LRC meets on the Wednesday of a sitting week,[58] its first opportunity to consider the Cowirra Regulations was Wednesday 3 February, over six weeks after they commenced. While the LRC's agenda and minutes are not made public, the LRC tabled a report on 31 March 2021 advising that the Committee

> considers it necessary for a Notice of Motion for Disallowance to be given in relation to each of the Regulations in both Houses, before the expiration of 14 sitting days, to allow the Committee time to complete its deliberations.[59]

This suggests the LRC had not had time to scrutinise the Cowirra Regulations in the more-than-three months since they had been made. Seeking extra time in this way is an established practice of the LRC, albeit 'not preferred'.[60] On 5 May 2021 the LRC provided a further report advising it had resolved to take no action and to not proceed with the notice of motion to disallow the Cowirra Regulations.[61]

While it is difficult to draw conclusions in the absence of evidence of the LRC's substantive deliberations, the experience with the Cowirra Regulations does demonstrate the length of time the LRC can take to scrutinise even relatively straightforward delegated legislation. This, we surmise, is likely the result of the Committee's heavy workload and light resourcing. Delay is troubling in this context because regulations often commence before the LRC completes its scrutiny.[62] The Cowirra Regulations, for example, had been in force for more than five months before the LRC completed its scrutiny process. Once delegated legislation has commenced, that very fact may affect parliamentary scrutiny; potential confusion and uncertainty may weigh against disallowing a regulation that has already come into force.

The LRC performs its work with minimal personnel. As noted above, the LRC consists of six members of Parliament. Their work is supported by less than two full-time staff members, only one of whom is legally trained.[63] By way of comparison, the SSCSDL has five staff including an independent legal advisor, the New South Wales Parliament has four staff to assist its Legislative Review Committee and the Western Australian Parliament has three.[64] There is a real question whether the LRC is adequately resourced to deal with its onerous workload,[65] especially when we examine the breadth of the scrutiny principles against which regulations are assessed. In a bid to manage and reduce its workload, in mid-2020 the LRC tabled a detailed Information Guide on its 11 scrutiny principles and distributed this document to all parts of the executive, thus giving

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58 Legislative Review Committee, Parliament of South Australia, *Information Guide* (January 2022) 5 [1.7] ('*LRC Information Guide*').

59 Legislative Review Committee, Parliament of South Australia, *Report No 33* (31 March 2021) 1.

60 *LRC Workload Report* (n 5) 6.

61 Legislative Review Committee, Parliament of South Australia, *Report No 35* (5 May 2021).

62 See *LRC Annual Report* (n 53) 14–16.

63 Lorne Neudorf, 'The Problem of Delegated Legislation in South Australia' (n 4) 11.

64 See *LRC Workload Report* (n 5) 11. The 2021 Inquiry report noted Neudorf's recommendation of 'five staff members to do the technical scrutiny work in addition to administrative support for reporting': *Effectiveness Inquiry Report* (n 51) 72.

65 See *LRC Workload Report* (n 5) 8.

them notice of the explanatory material required by the Committee for each instrument.[66]

B *The LRC's Scrutiny Principles*

The LRC's 11 scrutiny principles are not set out in legislation or Standing Orders but they are set out informally in other documents such as the LRC's 2022 Information Guide ('*LRC Information Guide*').[67] The informal articulation of these principles has allowed for their expansion and contraction and also their close alignment with those principles used by other similar scrutiny committees in Australia, in particular the SSCSDL.[68]

Since mid-2020 the LRC's scrutiny principles cover 38 considerations. In common with other scrutiny bodies, this remit is 'extremely wide'.[69] The *LRC Information Guide* draws heavily[70] on the SSCSDL's first set of Guidelines.[71] The SSCSDL explains that these scrutiny grounds are underpinned by the protection and promotion of fundamental rule of law principles including procedural fairness, separation of powers and transparency and accountability.[72]

To evaluate Steward J's view in *Disorganized Developments* that the existence of the LRC suggests the declaration of a prescribed place is not subject to the rules of procedural fairness, it is relevant to examine those scrutiny principles that invoke procedural fairness. Until mid-2020, the scrutiny principles required direct consideration of whether instruments were 'inconsistent with the principles of natural justice' but amendments made in June 2020 removed this direct reference.[73] The *LRC Information Guide* explains that, in relation to each instrument referred to the committee, the LRC scrutinises whether, inter alia:

> (d) those likely to be affected by the instrument were adequately consulted in relation to it; and
>
> …
>
> (h) it trespasses unduly on personal rights and liberties; and
>
> …
>
> (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.[74]

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66 Legislative Review Committee, Parliament of South Australia, *Legislative Review Committee Information Guide* (June 2020). The explanatory material required by the Committee for each instrument is set out in the updated *LRC Information Guide* (n 58) 12–15 [4.1]–[4.6].

67 See also Department of Premier and Cabinet, Parliament of South Australia, *Referral of Subordinate Legislation to the Legislative Review Committee* (Premier and Cabinet Circular 34, October 2012).

68 See *LRC Annual Report* (n 53) 25.

69 Pearce and Argument (n 1) 194.

70 The *LRC Information Guide* (n 58) (dated January 2022) was presumably modelled on the first edition of the SSCSDL's Guidelines which were amended in February 2022.

71 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (February 2020).

72 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Annual Report 2021* (Report, 28 September 2022) 15–16 [2.19] ('*SSCSDL Annual Report*').

73 See *LRC Annual Report* (n 53) 5.

74 *LRC Information Guide* (n 58) 7 [3.2].

The *LRC Information Guide* explains that in regard to scrutiny principle (k), one consideration is 'whether an instrument referred to the Committee … is inconsistent with principles of natural justice'.[75] The affording of procedural fairness is thus within this consideration.[76] Further assessment of procedural fairness may also be caught by scrutiny principles (d) and (h).

1 *Adequate Consultation*

In relation to scrutiny principle (d), on adequate consultation, the *LRC Information Guide* explains that

> the Committee may consider, for example:
>
> (a) if adequate opportunity was given to persons likely to be affected by an instrument referred to the Committee in accordance with the spirit or intent of the Parliament, including by inviting submissions or encouraging participation in public hearings ...[77]

While this consideration can be useful in ensuring that the Parliament offers avenues of consultation to those persons or classes of persons directly and adversely affected by an instrument, it is clear that context is important. In the context of both the Cowirra Regulations and the *CLCA*, consultation via participation in public hearings would not be 'in accordance with the spirit or intent of the Parliament' which is to disrupt the sphere of organised crime.

South Australian legislation is silent as to whether consultation should take place. Given that the LRC draws on the processes of the SSCSDL, it is useful to consider how consultation is understood at the federal level where there is a stronger legislative framework that supports the scrutiny process. The overarching purpose of the *Legislation Act 2003* (Cth) ('*Legislation Act*') as articulated by s 3 'is to provide a comprehensive regime for the management' of legislation. The Act seeks to achieve this overarching purpose by, inter alia, 'encouraging rule-makers to undertake appropriate consultation before making legislative instruments' and 'establishing improved mechanisms for Parliamentary scrutiny of legislative instruments'.[78] Section 17(1) of the Act provides:

> Before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is:
>
> (a) considered by the rule-maker to be appropriate; and
>
> (b) reasonably practicable to undertake.[79]

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75 Ibid 9 [3.3(12)]. In 1998 the LRC made public its scrutiny principles in the report *Committee's Policy for Its Examination of Regulations* tabled in the South Australian Parliament on 3 June 1998. The second principle relevantly provided that the Committee would examine: '(b) whether the regulations unduly trespassed on rights previously established by law or are inconsistent with the principles of natural justice …': at 3. This indicates that the LRC has long considered natural justice as part of its scrutiny process.

76 Note that the terms 'natural justice' and 'procedural fairness' are commonly considered to be interchangeable: *Kioa* (n 18) 583 (Mason J).

77 *LRC Information Guide* (n 58) 8 [3.3(5)].

78 *Legislation Act 2003* (Cth) ss 3(b), (e) ('*Legislation Act*').

79 In its 2019 Inquiry Report, the SSCRO (later the SSCSDL) noted that it had limited ability to assess whether those likely to be affected by the instrument were adequately consulted (scrutiny principle

Section 17(3) explains that 'such consultation *could* involve notification' of persons or bodies likely to be affected by the proposed instrument and furthermore that '[s]uch notification *could* invite submissions'.[80] Public consultation is not mandatory: a failure to consult does not affect the validity of the legislation,[81] but an explanation must be given.[82] These provisions in the *Legislation Act* set up a formal system. Section 17 is a 'substantive consultation obligation'.[83] While it gives the federal executive discretion as to the level of consultation conducted, s 17 produces a presumption, flagged in s 3(b), that consultation will take place in regard to federal delegated legislation.[84]

2 *Rights and Liberties*

Scrutiny principle (h) requires consideration of whether a regulation 'trespasses unduly on personal rights and liberties'. Since 1932 this broad scrutiny principle has been used widely across Australian scrutiny committees[85] as well as in Canada[86] and New Zealand.[87] At times this principle has been dismissed as being overly vague to the point of being 'meaningless'.[88] This criticism has presumably been one of the prompts for scrutiny bodies to produce an information guide or a set of guidelines in order to make public their detailed interpretation of these principles.

In regard to principle (h), the *LRC Information Guide* relevantly explains that 'the Committee may consider, for example, whether an instrument referred to the Committee contains: ... (g) provisions that interfere with property rights ...'.[89] In regard to this principle, there is some divergence between the *LRC Information*

(d)) because of the discretion given by *Legislation Act* s 17 to the rule maker regarding consultation and because s 15J can be satisfied with limited information: see *Parliamentary Scrutiny Report* (n 3) 42–8 [3.34]–[3.54]. The Legislation Act Review Committee has recommended that this subjective standard for rule makers be replaced with an objective standard: see Legislation Act Review Committee, *2021–2022 Review of the Legislation Act 2003* (June 2022) 62 (Recommendation 5.3) ('*LARC 2021–22 Review*').

80 *Legislation Act* (n 78) s 17(3) (emphasis added).

81 Ibid s 19.

82 Ibid s 15J(2)(e).

83 *LARC 2021–22 Review* (n 79) 60.

84 Other Australian jurisdictions with non-mandatory public consultation provisions are New South Wales (*Subordinate Legislation Act 1989* (NSW) s 5(2)), Tasmania (*Subordinate Legislation Act 1992* (Tas) s 5(2)) and Victoria (*Subordinate Legislation Act 1994* (Vic) ss 6, 12C). Besides South Australia, other jurisdictions without public consultation provisions are the Australian Capital Territory (*Legislation Act 2001* (ACT)), the Northern Territory (*Interpretation Act 1978* (NT)), Queensland (*Statutory Instruments Act 1992* (Qld)) and Western Australia (*Interpretation Act 1984* (WA)).

85 *Legislation Review Act 1987* (NSW) s 9(1)(b)(i); Legislative Council (NT), Standing Orders, April 2016, SO 176.3(b); *Legislative Standards Act 1992* (Qld) s 4(2); *Subordinate Legislation Committee Act 1969* (Tas) s 8(1)(a)(iii); Legislative Council (WA), Standing Orders, January 2019, sch 1, SO 10.6(b).

86 Standing Joint Committee for the Scrutiny of Regulations (Canada), Mandate, sub-s (9).

87 House of Representatives (NZ), Standing Orders of the House of Representatives, August 2017, SO 319(2)(b).

88 Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights* (Report No 17, October 2001) 127–8 [8.44].

89 *LRC Information Guide* (n 58) 9 [3.3(9)]. This aligns with the position of the SSCSDL at the time the *LRC Information Guide* was updated in January 2022. In February 2022 the SSCSDL amended its interpretation *Guidelines*.

Guide and the SSCSDL's *Guidelines* as the latter's interpretation of this scrutiny principle omits any reference to property rights but includes an explicit reference to 'procedural fairness'.[90]

The LRC's set of 11 scrutiny principles, with its 38 considerations, is laudable but it raises questions as to whether this extremely wide remit is feasible given South Australia's weak legislative framework for scrutiny and the LRC's resources and workload.

C *Provision of Explanatory Material to the LRC*

For the LRC to perform its scrutiny process, the *LRC Information Guide* indicates that the Committee is to receive explanatory material from the executive to accompany and explain the effect or purpose of each instrument. This requirement is set out as scrutiny principle (g).[91] In theory, the material should provide information about the consultations with those affected by the instrument and, if this is not provided, the Committee can request this information.[92] To do the latter, it may defer the instrument so as to complete its deliberations.[93]

Unlike the Commonwealth, South Australia does not have a legislative framework whereby explanatory memoranda or explanatory statements are provided either for Bills or for regulations.[94] At the federal level, explanatory statements are tabled in each House of Parliament. Section 15J(2) of the *Legislation Act* sets out the requirements for explanatory statements, including that they 'must … explain the purpose and operation of the instrument'.[95] For example, if consultation has taken place, a description of that consultation must be included.[96] Explanatory statements are also used by the Legislative Assembly for the Australian Capital Territory;[97] its scrutiny body, the Standing Committee on Justice and Community Safety ('JACS'), must consider whether an explanatory statement 'meets the technical or stylistic

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[90] Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (3rd ed, July 2024) 25. In mid-2021, the SSCSDL expanded its scrutiny principles from 11 to 13 via Standing Order 23 and this was reflected in the 2nd edition of the SSCSDL's *Guidelines* (February 2022) as well as the 3rd edition of the *Guidelines*.

[91] 'The Committee scrutinises each instrument referred to it as to whether: … (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument …': *LRC Information Guide* (n 58) 7 [3.2].

[92] See ibid 10 [3.4(3)].

[93] Ibid 10 [3.5(4)(b)], 11 [3.7].

[94] In federal Parliament, an Explanatory Statement is required for legislative instruments pursuant to *Legislation Act* (n 78) s 15J. House of Representatives Standing Order 141 provides that when a Bill (except an Appropriation or Supply Bill) is presented, the Minister must present a signed Explanatory Memorandum including an explanation of the reasons for the Bill. The Office of Parliamentary Counsel does not have any role in the drafting of Explanatory Statements: see *LARC 2021–22 Review* (n 79) 55.

[95] See *Legislation Act* (n 78) s 15J(2)(b). For an analysis of this Act (before amendments were made in 2015) see Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) 27(1) *Public Law Review* 18.

[96] See *Legislation Act* (n 78) ss 15J(1), (2)(d).

[97] 'All bills and subordinate legislation (including regulations and disallowable instruments) require an explanatory statement': *ACT Government Legislation Handbook* (March 2017) 27.

standards expected by the Assembly'.[98] In New South Wales, a regulatory impact statement must be forwarded to its parliamentary scrutiny committee as must 'all written comments and submissions received' as part of the required consultation process.[99] While the quality of these documents may vary[100] and there is no consequence for executive non-compliance, these formal systems may reduce the time spent by a scrutiny committee in seeking this information from the executive.

Despite the detailed *LRC Information Guide*, inadequate explanatory material from the executive continues to pose a major problem for the Committee.[101] The LRC has expressed concern that '[t]oo often the Committee receives supporting reports that insufficiently detailed the effect of provisions of legislative instruments or included extraneous information that is of little assistance'.[102] The varying 'quality of explanatory material that accompany those instruments'[103] can also compound the complexity of some of the instruments scrutinised. According to two (non-government) LRC members, '[o]ne of the greatest abuses in [the explanatory material] reports is the absence of information relating to any consultation the department and agencies have undertaken in drafting those regulations'.[104] They argue that the 'difficulty in obtaining information … can often prevent proper scrutiny by the Committee'.[105]

Inadequate information also hampers the scrutiny of federal delegated legislation.[106] Given the federal system of explanatory statements set out in the *Legislation Act*, the problem for the SSCSDL is predominantly one of the 'quality' of these statements, in particular whether they 'are drafted with sufficient care and precision'.[107] The level of care and precision is also relevant to information about consultation. In its guideline on consultation, the SSCRO explains that it

> does not interpret [s 15 of the *Legislation Act*] as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement … may be considered insufficient to meet the requirements of the [*Legislation Act*].[108]

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98 Legislative Assembly (ACT), Standing Committees — Establishment: Resolution of Appointment, 2 December 2020 [(10)(a)(vi)]. See also Legislative Assembly (ACT), Standing Committee on JACS, *Guide to Writing an Explanatory Statement* (March 2011).

99 *Subordinate Legislation Act 1989* (NSW) s 5(4). Note that s 6 provides the executive discretion in complying with s 5. On whether regulatory impact statements add value to the scrutiny process, see Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665, 680–5.

100 See Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29(1) *Australasian Parliamentary Review* 116.

101 Legislative Review Committee, Parliament of South Australia, *SA Productivity Commission's Inquiry into Reform of South Australia's Regulatory Framework* (Report, 12 May 2021) 3 (Presiding Member Nicola Centofanti) ('*SA Productivity Commission Inquiry*').

102 *LRC Annual Report* (n 53) 25. See also *LRC Workload Report* (n 5) 5.

103 *LRC Workload Report* (n 5) 2.

104 Ibid app B, 3.

105 Ibid.

106 *Parliamentary Scrutiny Report* (n 3) 54 [3.76]–[3.78].

107 Ibid.

108 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in the 41st Parliament* (Report No 114) app 3, 2 ('Guideline for Preparation of Explanatory Statements: Consultation').

From reading the *LRC Workload Report*, it appears that the provision of 'bare or very generalised statements' may be the norm for the South Australian executive and that the *non*-provision of information may also be a problem. Via the *Legislation Act*, the federal framework for the scrutiny of delegated legislation offers a formal system of requiring the executive to provide information to Parliament, including on whether consultation has been undertaken.

In South Australia, the ongoing problem of the executive failing consistently to provide adequate explanatory material underlines two things: first, the executive is not taking sufficiently seriously the role of the LRC in performing this scrutiny role on behalf of Parliament; and second, the LRC has a legislative framework that is weaker than that under which the federal SSCSDL, the Australian Capital Territory's JACS and New South Wales's Legislative Review Committee perform. These dynamics impact on whether the LRC can effectively perform its scrutiny function. They also illustrate the diversity of practice across legislative scrutiny committees in different jurisdictions.

D *The LRC and the Power to Disallow*

Like other legislative scrutiny committees, the LRC does not have the power to disallow regulations. Where the Committee decides that an instrument should be disallowed, its representative in each House gives notice of a motion to disallow an instrument and provides the Committee's grounds for that opinion.[109] There is a period of 14 sitting days to introduce a notice of motion once a regulation has been laid before Parliament.[110] It is up to each House to determine by vote any motion to disallow the instrument in accordance with its standing orders. As the Lower House is controlled by government and there is strong party discipline in Australia, it is the Upper House which exercises this veto power over regulations. According to *Odgers*, in the Commonwealth Parliament, the Senate has never rejected a committee recommendation that an offending instrument be disallowed.[111]

In practice, such scrutiny committees generally take a less confrontational approach, by first seeking to engage in dialogue with the part of the executive responsible for the instrument and to request further information and thus encourage compliance and correction. This is demonstrated by the LRC's *2020 Annual Report* which details 13 regulations which raised concerns for the Committee, with only one set of regulations being disallowed by the Upper House.[112] This is similar to dynamics in the federal Senate where the potential for a disallowance motion notice means the executive understands that it must either seek to accommodate the

[109] *LRC Information Guide* (n 58) 11 [3.8].

[110] *LIA* (n 50) s 10(5b)(a). This is the same in Queensland (*Statutory Instruments Act 1992* (Qld) s 50) and Western Australia (*Interpretation Act 1984* (WA) s 42). It is 6 sitting days in the Australian Capital Territory (*Legislation Act 2001* (ACT) s 65), 15 in New South Wales (*Interpretation Act 1987* (NSW) s 41) and Tasmania (*Acts Interpretation Act 1931* (Tas) s 47(4)), 12 in the Northern Territory (*Interpretation Act 2011* (NT) s 63) and 12–18 in Victoria (*Subordinate Legislation Act 1994* (Vic) s 23). On approaches in other jurisdictions, see *Parliamentary Scrutiny Report* (n 3) 118–20 [8.20]–[8.25].

[111] *Odgers' Australian Senate Practice*, rev Harry Evans, ed Rosemary Laing (Department of the Senate, 14th ed, 2016) ch 15.

[112] *LRC Annual Report* (n 53) 9–13.

concerns of the scrutiny committee or risk losing its legislation.[113] This 'behind the scenes' work by a scrutiny committee is not always apparent to the public or other Members of Parliament and can impact on the LRC's workload.

E *Evaluations of the LRC's Effectiveness*

There are three sources by which we can evaluate the LRC's effectiveness. The first is an evaluation offered by Professor Lorne Neudorf, a comparative law scholar who studies the scrutiny of delegated legislation across Westminster parliaments in the Anglosphere. In Neudorf's view, the process for making delegated legislation in South Australia is 'paper thin' because the process 'fails to impose adequate and meaningful controls on executive lawmaking'.[114] Neudorf pins a large part of the problem on the fact that the legislative framework does not impose 'robust accountability and transparency measures found in the ordinary parliamentary process'.[115] For example, the South Australia legislation does not impose any requirements on the executive to provide explanatory materials or to conduct consultation of any kind before new delegated laws are made.[116] Neudorf also points to the LRC's limited resources to handle its significant workload, and argues that it 'is in desperate need of additional staffing resources'.[117] Given its resourcing, he asks: 'How can you possibly be applying effectively 38 different considerations for 1,300 pages of new text every year, and then reading all that enabling legislation?'[118]

A second source for evaluating the Committee is an inquiry, conducted in 2020–21 by the South Australian Select Committee on the Effectiveness of the Current System of Parliamentary Committees, which reported that the functions of the LRC 'have become clouded with other unrelated functions' such as the function to report and inquire into petitions which was added in 2019.[119] The report of the inquiry, quoted by legislation experts Pearce and Argument, agrees that the workload of the LRC has 'increased to an untenable level … and takes away the important scrutiny focus of that Committee'.[120]

A third source for evaluating the Committee is the internal evaluations conducted in early 2021 by the Committee itself. In this evaluation, two LRC members (one opposition member and one crossbench member) publicly flagged the Committee's 'dysfunction'.[121] The two non-government members warn that '[t]he inherent risk in the Committee's current practice and time restraints is that despite its best intentions, issues of significance could easily be overlooked'.[122] They urge: 'There must be a change in approach to the Committee structure *to one of technical review* rather than perceiving this Committee as a *rubber stamp for the policy of the*

113 See *Parliamentary Scrutiny Report* (n 3) 122 [8.33]–[8.34].
114 Lorne Neudorf, 'The Problem of Delegated Legislation in South Australia' (n 4) 11.
115 Ibid.
116 Ibid.
117 Ibid.
118 Evidence to Legislative Council Legislative Review Committee, Parliament of South Australia, Adelaide, 17 February 2021, 5 (Associate Professor Lorne Neudorf).
119 *Effectiveness Inquiry Report* (n 51) 7.
120 Ibid; Pearce and Argument (n 1) [3.73].
121 *LRC Workload Report* (n 5) app B, 2.
122 Ibid.

government of the day.'[123] This points to a divergence between the aspiration and reality of scrutiny committees taking a technical approach to scrutinising delegated legislation. The aspiration is set out in the *LRC Information Guide*: 'The Committee takes a non-partisan technical approach to its inquiry into and consideration of instruments referred to it.'[124] This is aligned with the statements of most scrutiny committees in bicameral Australian parliaments who style themselves as technical scrutiny committees that avoid scrutinising policy and adhere as strictly as possible to applying scrutiny principles.[125] The reality is indicated by a comment made by the two members that

> it has become common practice for successive chairs of the Committee to exercise their casting vote to wave through legislative instruments that clearly don't meet the scrutiny expectations of at least half of the Committee members.[126]

They express concern that Parliament may be unaware of these 'contentious votes' and that there is no system by which they can alert Parliament when this problem arises.[127]

As Presiding Members and Chairs of the LRC have always been government members,[128] we can gain a glimpse of the partisan dynamics that can dominate parliamentary committees. For government members, there may be a temptation to take a 'tick and flick' approach to the Committee's scrutiny function, while the Chair, who holds the casting vote, might be tempted to wave through regulations or to declare issues to be matters of policy and hence off limits.[129] At the same time, opposition and crossbench members might have more motivation to take a rigorous approach. These partisan dynamics might be motivating members to lose sight of the LRC's safeguard function of performing technical scrutiny on the behalf of Parliament as whole.

To sum up, the LRC's under-resourcing and multiple functions, combined with its weak legislative scheme and the half-hearted approach of the executive to supporting the scrutiny process, mean that the Committee is not positioned to offer

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123 Ibid 3 (emphasis added). This is consistent with the evidence given by LRC members Hon Nicola Centofanti and Hon Irene Pnevmatikos who emphasise that the focus of the LRC is not on the substantive content or merits of the policy or regulation but on 'its technicalities': *SA Productivity Commission Inquiry* (n 101) 2.

124 *LRC Information Guide* (n 58) 10 [3.5(1)].

125 For example, the *SSCSDL Annual Report* (n 72) explains that it performs 'technical legislative scrutiny … The committee does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny': at vii. In most circumstances, the NSW Legislative Review Committee is precluded from considering the underlying policy of delegated legislation: *Legislation Review Act 1987* (NSW) s 9(3). The NSW Legislative Council has established a separate parliamentary committee with an express policy scrutiny role in relation to delegated legislation: see Pearce and Argument (n 1) [11.15], [3.47].

126 *LRC Workload Report* (n 5) app B, 3.

127 Ibid.

128 At the federal level, the Chair of the SSCSDL is a government member while the deputy chair is an opposition party member. The converse is the case for the Chair and Deputy Chair of the Senate Standing Committee for the Scrutiny of Bills. The NSW Legislation Review Committee has a government Chair and Deputy Chair.

129 In an empirical study involving interviews with 55 Australian parliamentarians, party discipline and 'the necessity to compromise for political reasons' were raised by many interviewees as an obstacle to the effectiveness of scrutiny committees: Evans and Evans (n 48) 340.

'*effective* parliamentary scrutiny and oversight' to the extent that it could form the context for displacing the common law duty to afford procedural fairness. The effectiveness of the 'safeguard' provided by the LRC is dependent on many dynamics within both Parliament and the system of government.

Thus, the High Court majority's assessment of the parliamentary oversight offered by South Australian parliamentary committees being 'general and limited' is an apt characterisation, certainly more accurate than Steward J's sanguine reference to 'effective parliamentary supervision and oversight'.[130] Neither the majority nor Steward J, however, offer any explanation of how they reached their view about the efficacy of the scrutiny process. Both positions — that scrutiny of the Cowirra Regulations was 'general and limited' that it was 'effective' — reflect unexamined assumptions about the nature of the legislative scrutiny mechanisms.

IV Courts and Facts: Assumptions about Legislative Scrutiny

The disconnect discussed in Part III between judicial assumptions about legislative scrutiny and the realities of the limited oversight by Parliament that occurs in practice raises the question of how courts are, or ought to be, informed of the relevant factual matrix when considering the validity of delegated legislation. Of course, this question — about the facts that underpin judicial determinations — is by no means limited to delegated legislation. Similar difficulties arise in other contexts.[131] However, in this article we are focusing our enquiry on the process of making delegated legislation for two reasons. First, this is the context that arose in *Disorganized Developments* and the Court's approach in that case shows how different assumptions about these processes can have divergent results in terms of validity. Secondly, the particular factual matrix that underpins the making of delegated legislation will be quite different to other contexts, where more general legislative or social facts — including, where necessary, specialist expertise — may be required. We are not, in this article, concerned with investigating the factual bases of courts' decisions generally. Rather, we are concerned with the effectiveness of the existing legislative scrutiny processes, and the reliance that courts can and should place on these processes. The sheer volume of delegated legislation, as well as the impact it has on the lives of citizens,[132] suggests these questions deserve attention.

There are a number of circumstances in which a court might consider the effectiveness of a legislative scrutiny process in relation to delegated legislation. As *Disorganized Developments* illustrated, the existence and efficacy of legislative scrutiny mechanisms may be one consideration relevant to determining whether the making of delegated legislation attracts a duty of procedural fairness. Another example relates to the interpretation of delegated legislation. In *Environment Protection Authority v Condon*, Leeming JA explained that, when construing

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130 See text accompanying nn 28, 32.

131 For example, in determining constitutional disputes courts will sometimes have to make findings of 'constitutional fact': see Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) ch 3.

132 Ruth Fox and Joel Blackwell, 'The Devil Is in the Detail: Parliament and Delegated Legislation' (Report, Hansard Society, 2014) 23.

regulations, '[i]t is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation'.[133] Therefore, 'minor divergences in wording'[134] or 'errors in language'[135] might not hold the same significance as they would in primary legislation. Applying this reasoning, in *Day v Harness Racing New South Wales*, an obvious error in the name of a prohibited substance listed in local rules made by a statutory authority was explained on the basis that the rules were

> not drafted by Parliamentary Counsel, nor scrutinised in the way that tends to occur of a Bill as it passes through Parliament and receives assent. It is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation. It is equally legitimate to have regard to the fact that [the relevant local rule] was drafted by Mr Sanders [Harness Racing NSW's Manager Integrity and Chairman of Stewards], and adopted by the five members of HRNSW. I mean no disrespect, but none of those men would profess to expertise in legal drafting. Their rules should be construed bearing as much in mind.[136]

Accordingly, the Court held that the reference in the local rules to 'cobalt chloride' was clearly intended to be a reference to 'cobalt'.

A variation on this theme appears in *Croc's Franchising v Alamdo Holdings*.[137] In construing regulations designed to give commercial tenants relief during the COVID-19 pandemic, the New South Wales Court of Appeal took 'judicial notice of the fact that many steps were taken in haste at the outbreak of the COVID-19 pandemic'.[138] Accordingly, the Court had 'greater than usual leeway in construing the language' of the regulations.[139]

The existence of parliamentary scrutiny may also be relevant to the interpretation of so-called 'Henry VIII' clauses: that is, clauses that allow delegated legislation to amend primary legislation. In *ADCO Constructions v Goudappel*, Gageler J considered the provision for committee scrutiny and disallowance when interpreting such a clause.[140] His Honour observed:

> That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as 'Henry VIII clauses'. The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.[141]

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[133] *Environment Protection Authority v Condon* (2014) 86 NSWLR 499, 508 [44] ('*Condon*').
[134] Ibid 510 [52].
[135] *Liversidge v Anderson* [1942] AC 206, 223 (Viscount Maugham).
[136] *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, 610 [79] (Leeming JA) (citations omitted). For another application of *Condon* (n 133) see *Lake v Municipal Association of Victoria* [2018] VSC 561.
[137] *Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd* [2023] NSWCA 256.
[138] Ibid [203] (Basten AJA).
[139] Ibid.
[140] *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1.
[141] Ibid 25 [61] (citations omitted).

On this reasoning, the requirement of parliamentary scrutiny justifies a more generous interpretation of the executive's regulation-making power.

Each of these approaches reflects underlying factual assumptions about the process of making delegated legislation. It is well accepted that the fact-finding role of courts is constrained. Judges are, on the whole, not permitted to simply conduct free-range inquiries in order to establish relevant facts or to acquire background information or context. With limited exceptions, the scheme of fact-finding before courts is party driven. As Mason CJ observed in *Cunliffe v Commonwealth* in the context of establishing a burden on the implied freedom of political communication, the 'relevant facts must either be agreed or proved or be such that the Court is prepared to take account of them by judicial notice or otherwise'.[142]

Judicial notice operates as a shortcut to formal proof. It enables judges to have regard to well-known facts without regard to evidence or making any further inquiries, as well as to those facts that can be ascertained by reference to authoritative works.[143] Although the boundaries of judicial notice are somewhat indistinct and have been subject to criticism,[144] it is not in dispute that judicial notice is an essential component of judicial decision-making. It would simply not be feasible for courts to require evidence on every factual matter.

When assessing the validity of delegated legislation, as occurred in *Disorganized Developments*, the relevant context concerns the processes of lawmaking. Courts are routinely called upon to assess the validity of legislation,[145] including delegated legislation, and it can be assumed that judges have knowledge of the processes by which laws are made. It is assumed that judges, in courts of all levels, have general knowledge of the passage of laws through Parliament as well as the general processes that attend the making of delegated legislation. Indeed, this might be seen as squarely within the expertise of courts, and something that courts routinely take into account when assessing legislation. It is common, for example, for courts to have regard to parliamentary materials such as second reading speeches when considering questions of interpretation or validity.[146] Whether or not the label of judicial notice is used, it seems unquestionable that courts can and do take notice of these basic facts about lawmaking processes.[147]

Less clear is the extent to which courts can and should scrutinise the *adequacy* of these lawmaking processes. In the context of primary legislation, there has been a longstanding British tradition which prevents the questioning of proceedings in

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142 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 304.

143 Note these two categories were developed by Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196. They are often referred to as 'judicial notice without inquiry' and 'judicial notice after inquiry': see further JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th Australian edition, 2020) ch 2.

144 See, eg, IR Freckelton, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Thomson Reuters, 6th ed, 2019) 155 [2.30.40].

145 It is now routinely remarked that we live in an 'age of statutes': see Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Lisa Burton Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159.

146 At the federal level, see, eg, *Acts Interpretation Act 1901* (Cth) s 15AB. See also Jacinta Dharmananda, 'Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process' (2018) 41(1) *UNSW Law Journal* 1.

147 See also *Legislation Act* (n 78) s 15ZB.

Parliament. This prohibition, which emerges from art 9 of the *Bill of Rights 1689*, was designed to protect parliamentary privilege. While for many years it operated to prevent courts referring to parliamentary debates, this has been relaxed — both in the United Kingdom and Australia — and it is now commonplace for courts to rely on extrinsic material.[148] In addition, as Kavanagh has argued in the context of the United Kingdom, there is a distinction between courts analysing the quality of the decision-making *process* of a parliament, and a court analysing the substantive decision or outcome of the parliamentary process.[149] As Kavanagh explains, it is 'possible to assess the *quality of the decision-making process* without evaluating the merits of the individual arguments', meaning that this would 'fall outside the forbidden territory'.[150] In the context of secondary legislation, courts in the United Kingdom have assessed the adequacy of scrutiny processes,[151] both where incompatibility was pointed out but Parliament chose to proceed anyway, and also where there was simply insufficient scrutiny and debate.[152] In both types of cases the United Kingdom Supreme Court has concluded that the secondary legislation was incompatible with rights set out in the *European Convention on Human Rights*.[153]

Of course, here we are concerned with the adequacy of parliamentary scrutiny of delegated legislation rather than primary legislation. In this context, the relevant question is whether the mere existence of such measures is sufficient, or whether courts should assess the adequacy of these measures. In the context of the United Kingdom's *Human Rights Act 1998*, Richard Edwards has suggested that the level of deference to be accorded to Parliament should vary depending on the relevant lawmaking body:

> Moreover, the origin of the legal measure in question can to some extent colour the level of deference to be applied. The stronger the democratic pedigree of the measure the more appropriate deference may be. Clearly, rules promulgated by un-elected decision-makers and rules based on the common law should receive less deference than those made by Parliament.[154]

According to this reasoning, delegated and other subordinate forms of legislation should be subject to less weight — or deference[155] — because they have not been

[148] For instance, in Australia the *Acts Interpretation Act 1901* (Cth) was amended in 1984 to permit reliance on *Parliamentary Debates* (or 'Hansard') in certain circumstances.

[149] Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) *Oxford Journal of Legal Studies* 443, 465.

[150] Ibid 465 (emphasis in original).

[151] Note that in the United Kingdom the amount of scrutiny depends on whether the affirmative procedure or negative procedure is followed, with the bulk of secondary legislation following the negative procedure. This means that the instrument becomes law immediately once it is signed, unless it is actively annulled within a 40-day period.

[152] Merris Amos, 'Law-Making in the Rights Hostile Environment of the United Kingdom' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Thomson Reuters, 2020) 385, 395–6.

[153] Ibid. Note that the context for reviewing delegated legislation is quite different in the United Kingdom compared to Australia due to the *Human Rights Act 1998* (UK).

[154] Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65(6) *Modern Law Review* 858, 876 (citations omitted).

[155] Although Australian courts have been uncomfortable with explicit references to the concept of 'deference', in the constitutional context it has been argued that when conducting proportionality analysis courts should assess the investigations and deliberations made by parliaments: see Appleby

subject to rigorous Parliamentary debate. As we have shown in Part III above, the regulations in question in *Disorganized Developments* were, in practice, subject to a 'paper thin' level of scrutiny. It must be noted that in this context the High Court was not concerned with assessing whether the regulations infringed a protected right or freedom, and so the Court was not conducting a proportionality inquiry, which is often the context in which deference is applied. Instead, the Court considered parliamentary scrutiny processes as one factor in determining whether Parliament intended to exclude the obligation to afford procedural fairness. As we have explained in Part II above, both the majority and minority justices considered the *existence* of such processes might be relevant. For the majority, the 'general and limited' oversight did not support any implication to exclude procedural fairness. In contrast, Steward J appeared to place more weight on the existence of scrutiny mechanisms, suggesting that 'effective parliamentary supervision and oversight' supported an intention to exclude procedural fairness.

We suggest that courts ought to be cautious about drawing inferences regarding the quality of the scrutiny of delegated legislation from the mere existence of legislative scrutiny mechanisms. Just because mechanisms exist, such as the LRC in South Australia and analogous bodies in other jurisdictions, this does not mean there is 'effective' parliamentary scrutiny. In *Disorganized Developments* the majority's recognition of the 'limited' parliamentary scrutiny more accurately reflects the situation in practice. The consequence of the majority's view was, as we have explained, that they placed little weight on the existence of scrutiny in terms of assessing whether procedural fairness applied. We suggest that if courts *do* want to place reliance on the existence of parliamentary scrutiny, they would need to be satisfied that such scrutiny occurred.

We suggest two different vehicles by which courts could become informed of the relevant level of scrutiny. First, courts may take judicial notice of general facts about the effectiveness of parliamentary scrutiny. For example, a body of literature deals with the deficiencies of such scrutiny mechanisms,[156] and the work of these committees themselves is often documented in publicly available reports.[157] If courts were to take judicial notice in this way, it would be incumbent on them to afford procedural fairness to the parties by informing them that the court proposed to take judicial notice of certain matters and giving the parties the opportunity to respond to that proposal.[158]

Secondly, material about the adequacy of scrutiny that in fact occurred in relation to a particular legislative instrument could be the subject of submissions and/or evidence by counsel. Counsel could, for example, submit evidence about the actual scrutiny that occurred. This evidence may be included in submissions or

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and Carter, who propose a 'spectrum of inter-institutional relations': Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259, 271. See also Gabrielle Appleby and Anne Carter, 'Parliaments and Facts: Deepening Deliberation' in Joe Tomlinson and Anne Carter (eds), *Facts in Public Law Adjudication* (Hart Publishing, 2023) 29.

156 See, eg, Evans and Evans (n 48).

157 See above Part III for examples.

158 Note that under *Evidence Act 1995* (Cth) s 144(4), a judge taking judicial notice is required to give a party an opportunity to make submissions or refer to relevant information.

appended to submissions, as commonly occurs in constitutional cases.[159] Although in proceedings for the judicial review of administrative action extrinsic evidence[160] is not routinely adduced,[161] at times such evidence will be relevant. For instance, evidence may be relevant to questions such as whether a regulation is unreasonable or disproportionate.[162] Evidence of questions asked in committees about, for example, the consultation that has taken place with affected parties might be relevant to whether the rules of procedural fairness have been complied with.[163] In practice, evidence about the adequacy of the scrutiny process is likely to be presented by those seeking to defend the validity of delegated legislation (often the state, as was the case in *Disorganized Developments*).

V Conclusion

In the 20th century, parliaments across Australia established legislative scrutiny committees as safeguards to counter the danger of Parliament having no direct control over regulations and to minimise the risk of regulations 'slipping through without any member being aware of its contents'.[164] It is hard to argue with the following assessment of this scrutiny work:

> Considering the number of regulations made each year, and the enormous variety of subjects, on which members generally have little information, the committee's work will be arduous.[165]

Both of these statements were made in 1938, when South Australia's Joint Committee on Subordinate Legislation was first officially established, and they remain pertinent. In the 21st century, scrutiny committees for delegated legislation continue to have an 'arduous' and onerous role in scrutinising the ever-increasing number of regulations, and, without adequate resources and support from the executive, there is much chance of more instruments like the Cowirra Regulations 'slipping through' without adequate scrutiny. This could be alleviated if Parliament were to enact a legal framework by which the executive was compelled to make public its explanation of the purpose of each regulation as well as its consultation process. Scrutinising the stream of 'executive law-making creep'[166] requires a more

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159 See, eg, Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 470; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges — Commentary on Dixon' (2015) 43(3) *Federal Law Review* 493, 496.

160 In this context we use 'extrinsic evidence' to refer to material that was not before the primary decision-maker.

161 See, eg, *Changshu Longte Grinding Ball Co Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science [No 1]* [2017] FCA 1114, [6] (Griffiths J).

162 See, eg, *Australian Energy Regulator v Snowy Hydro Ltd* (2014) 8 ARLR 332, where Beach J refused to hear an interim application as the evidentiary foundation had not been established. See also *Comcare v Lilley* (2013) 216 FCR 214, 238 [103].

163 Noting, however, that public consultation through parliamentary processes can play a quite distinct role from the rules of procedural fairness: see text accompanying n 31 referencing Edgar.

164 South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1938, 473 (Hon WG Duncan). The first report of the 'Honorary Committee on Subordinate Legislation', chaired by Baden Pattinson, in 1935 used the expressions 'danger' and 'safeguards': see South Australia, *Parliamentary Papers*, 1935 vol II no 52.

165 South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1938, 474 (Hon H Homburg).

166 Saunders (n 2) 71, 81.

robust system in order for Parliament to retain control over its delegated legislative power. Given the executive's dominance of Parliament in our system of government, a shifting away from a largely informal and discretionary system is unlikely unless there is some incentive to follow the lead of federal Parliament via its *Legislation Act*.[167]

In this article, our examination of the work of the LRC shows the High Court majority were correct not to use the Committee's existence as a justification for procedural fairness being excluded, albeit without providing any clear reasons for this position. We suggest the Committee suffers from significant constraints, both in terms of resources and process, which mean it is ultimately hamstrung in terms of its ability to provide adequate scrutiny. Furthermore, the existence of parliamentary committees cannot be used to obviate the executive's obligation to consider individual common law rights when making delegated legislation.

In this article we question whether it is prudent for judges to make assumptions about legislative oversight committees in relation to delegated legislation. Using *Disorganized Developments* and South Australia as a case study, we argue that an idealised view of the delegated lawmaking process bears little resemblance to practice where there are serious concerns regarding the transparency, accountability and quality of delegated lawmaking. While some aspects of this case study are distinctly South Australian, our examination of delegated lawmaking elsewhere reveals both common challenges and jurisdictional variations. This underscores our point that courts should be cautious about drawing inferences from the mere existence of a parliamentary scrutiny mechanism.

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167 For federal Parliament, one of the 'incentives' in setting out a formal system in the *Legislation Act* (n 78) was the comprehensive review of the practice of executive lawmaking at the federal level by the Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992). See also Legislative Instruments Act Review Committee, Parliament of Australia, *2008 Review of the Legislative Instruments Act 2003* (Parliamentary Paper No 98, March 2009).

Unearthing Language Rights Protections in the Racial Discrimination Act 1975 *(Cth)*

Catherine Zhou* and William Ruan†

Abstract

The *Racial Discrimination Act 1975* (Cth) (‘*RDA*’) has been ineffective at preventing discrimination based on language. Australian courts have adopted narrow approaches to deny language-based claims by misconstruing the relationship between language and racial discrimination. These approaches portray language as an individual characteristic, subject language rights to proportionality analysis, require the positive existence of a language right, or narrow the scope of rights protected by the *RDA* to exclude language claims. This article argues that these denials have no basis. Historically, the use of language as a proxy for race has been a means of effecting exclusionary policies which fail to defend against racial and linguistic discrimination. Recognition of these dimensions of language supports the deconstruction of the doctrinal arguments which have been deployed to deny protection from racial discrimination in the context of language.

I Introduction

Language is fundamental to the construction of identities — personal, communal, social, cultural, religious and national. Yet the languages of dominant and minority groups are enjoyed to different extents. Increasingly, more dominant languages have encroached upon the right of minority groups to sustain their languages. Assimilationist pressures prevent the use of minority languages in private and public spaces.

In this context, the *Racial Discrimination Act 1975* (Cth) (‘*RDA*’) provides a possible avenue for redress where acts or laws discriminate against linguistic minorities. The *RDA* gives effect to Australia’s obligations assumed under the

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International Convention on the Elimination of All Forms of Racial Discrimination (‘*ICERD*’) which, in its preamble, recites the purposes to secure the ‘understanding of and respect for the dignity of the human person’ and to eliminate racial discrimination.[1] However, although several litigants have argued claims based on differential enjoyment of language rights, Australian courts have generally refused to recognise that linguistic discrimination is a form of racial discrimination that falls within the *RDA*. The justifications for this refusal reflect misconceptions surrounding language which devalue its sociocultural importance and ignore the ongoing effects of injustice on racial and linguistic minorities. This article argues that judicial failures to recognise language protection in the *RDA* are founded on weak premises. By analysing these cases in turn, we contend that the *RDA* can defend against racial and linguistic discrimination, contributing to a conception of language which is more firmly situated in its sociological context.

The article is organised into three main parts. Part II outlines the present threat against minority languages, considering the connections between language, culture and race that have been forged by communities and imposed by colonial structures and the state. Part III considers the context of the *RDA*. It argues that current jurisprudence on language claims under the *RDA* fails to adequately theorise the role of language in racial discrimination. Instead, courts have adopted an approach which fails to recognise the use of language as a proxy for race, relegating language to an individual characteristic which has no collective effects. Claims are also barred by other justifications such as proportionality analysis, the lack of a positive right, the absence of racial reference or ‘targeting’, and the ineffectiveness of deriving language rights from other rights and freedoms. We argue that each of these justifications is untenable such that the *RDA* has a greater capacity to uphold language rights than is evidenced by its record. Part IV considers arguments against the overbroad operation of the *RDA* where conferral of rights might result in the enjoyment of rights to a greater extent. It concludes that it is nonetheless appropriate to import a beneficial and remedial construction into the *RDA* to address historical injustices, especially when language and race are conceived in collective, contingent capacities.

II The Threat to Language

A *Minority Languages in a Linguistic Market*

The value of language is typically theorised through two lenses which justify its protection under language rights, being rights which protect language-related acts and values.[2] The first lens claims that language preserves cultural identities. Those

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1 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) Preamble paras 5, 10 (‘*ICERD*’). For a more detailed explication of the legal interrelationship between the *RDA* and international law, see *Wotton v Queensland [No 5]* (2016) 325 ALR 146, 279–81 [516]–[525] (Mortimer J).

2 Susanna Mancini and Bruno de Witte, ‘Language Rights as Cultural Rights: A European Perspective’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff, 2008) 247, 247. Skutnabb-Kangas and Phillipson have also written on a category of ‘linguistic human

identities are both personal and communal.[3] Having full language rights is part of securing the long-term viability of a national minority.[4] The second lens suggests that linguistic pluralism is desirable for enhancing the diversity of society. These justifications are echoed in international legal protections for minority languages. Article 27 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') provides that linguistic minorities 'shall not be denied the right, in community with the other members of their group … to use their own language'.[5] The United Nations Human Rights Committee ('UNHRC') states that art 27 'is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole'.[6] As such, language preserves individual and communal identities,[7] but is also a constitutive force which shapes identities and societal pluralism.[8] Under both conceptions, language is fundamentally connected to the cultural, national and racial identities with which it intersects.

The UNHRC's statement of value captures part of the importance of language. But minority languages must also be understood as existing within a system in which they are continuously under threat. That threat originates in the historical weaponisation of language and race against minority populations. The historical entanglement of language and race recurringly involves the co-extensive construction of both through colonial projects which created racial and linguistic 'others' by privileging the European subject and European languages.[9] These ideologies ascribed colonised subjects with a state of 'languagelessness' in which representations of non-European languages were characterised as simplistic or

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rights' within language rights, being inviolable and inalienable rights 'which are necessary for individuals and groups to live a dignified life': Tove Skutnabb-Kangas and Robert Phillipson, 'Introduction: Establishing Linguistic Human Rights' in Tove Skutnabb-Kangas and Robert Phillipson (eds), *The Handbook of Linguistic Human Rights* (John Wiley & Sons, 2023) 1, 16.

3 Moria Paz, 'The Tower of Babel: Human Rights and the Paradox of Language' (2014) 25(2) *European Journal of International Law* 473, 480, citing *Hernandez v New York*, 500 US 352 (1991). For similar arguments, including poststructuralist perspectives, see Bonny Norton, *Identity and Language Learning: Extending the Conversation* (Multilingual Matters, 2nd ed, 2013); Bonny Norton, 'Language and Identity' in Nancy H Hornberger and Sandra Lee McKay, *Sociolinguistics and Language Education* (Multilingual Matters, 2010) 349; David Block, 'The Rise of Identity in SLA Research, Post Firth and Wagner (1997)' (2007) 91(S1) *Modern Language Journal* 863; Grace Cho, 'The Role of Heritage Language in Social Interactions and Relationships: Reflections from a Minority Language Group' (2000) 24(4) *Bilingual Research Journal* 369.

4 Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, 2001) 252.

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27.

6 Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) [9] ('*General Comment No 23*').

7 Alice Taylor, 'Anti-Discrimination Law As the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*' (2021) 42(2) *Adelaide Law Review* 405, 416, citing Laura Beacroft, 'Indigenous Language and Language Rights in Australia after the *Mabo (No 2)* Decision: A Poor Report Card' (2017) 23 *James Cook University Law Review* 113, David Smillie, 'Human Nature and Evolution: Language, Culture, and Race' (1996) 19(2) *Journal of Social and Evolutionary Systems* 145 and Philip Riley, *Language, Culture and Identity: An Ethnolinguistic Perspective* (Continuum, 2007).

8 Paz (n 3) 474.

9 Jonathan Rosa and Nelson Flores, 'Unsettling Race and Language: Toward a Raciolinguistic Perspective' (2017) 46(5) *Language in Society* 621, 623.

animalistic modes of illegitimate communication.[10] Further, the privileging of the English language served as a proxy for racial exclusion. In Australia, for example, the White Australia policy was facilitated by tests of linguistic fluency which operated as forms of indirect racial discrimination.[11] Under the policy, the Queensland Parliament mandated a 'dictation test' which 'operate[d] specifically, in fact if not in form, against Asiatic labourers'.[12] The *Immigration Restriction Act 1901* (Cth) enshrined a similar dictation test, which 'except in one or two instances [was] never … applied to Europeans'.[13] The languages of Aboriginal and Torres Strait Islander peoples have also been systematically targeted by decades of bans on Indigenous language use by governments and churches.[14] These policies illustrate how language has been used as a mechanism to facilitate racial discrimination and cultural destruction. Colonial concepts of language and race are interlinked in that both are complicit in effecting exclusion and linguicide.

Language is also an instrument of nationhood. It has been described as 'the crucial criterion of nationality'.[15] In Australia, that nexus is demonstrated by a focus on English language competency in citizenship tests.[16] In this context, the value of minority languages cannot be understood absent their standing in a 'linguistic market'[17] mediated by the means through which states choose to value or devalue them. State formation creates the conditions for 'the constitution of a unified linguistic market, dominated by the official language'.[18] The nature of a linguistic market is such that minority languages are always in tension with dominant languages associated with linguistic capital, power and authority.[19] They are under threat when they do not facilitate the stability of a unified political structure. As such, linguistic exchanges are 'relations of symbolic power in which the power relations between speakers of their respective groups are actualized'.[20] This tension extends to the absence of positive measures: 'the absence of explicit policy … is in itself an

10 Ibid 624.

11 Phillip Tahmindjis, 'The Law and Indirect Racial Discrimination: Of Square Pegs, Round Holes Babies and Bath Water?' in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (Australian Human Rights Commission, December 1995) 101, 102.

12 KH Bailey, 'The Legal Position of Foreigners in Australia' in Norman MacKenzie (ed), *The Legal Status of Aliens in Pacific Countries* (Oxford University Press, 1937) 32, 46.

13 Myra Willard, *History of the White Australia Policy to 1920* (Melbourne University Press, 2nd ed, 1967) 122.

14 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Report, Australian Human Rights Commission, 2009) 58.

15 EJ Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge University Press, 2012) 95. For further discussion of language as ideology, including the centralisation of monolingualism in the 'one nation, one language' ideology, see Ingrid Piller, 'Language Ideologies' in Karen Tracy, Cornelia Ilie and Todd Sandel (eds), *The International Encyclopedia of Language and Social Interaction* (John Wiley & Sons, 2015) vol 2, 917.

16 Mostafa Rachwani, 'The New Australian Citizenship Test: What Is It and What Has Changed?', *The Guardian* (online, 18 September 2020) <https://www.theguardian.com/australia-news/2020/sep/18/the-new-australian-citizenship-test-what-is-it-and-what-has-changed>.

17 Pierre Bourdieu, *Language and Symbolic Power* (Polity Press, 1991) 39.

18 Ibid 45.

19 Pierre Bourdieu, 'The Economics of Linguistic Exchanges' (1977) 16(6) *Social Science Information* 645, 648–53.

20 Bourdieu, *Language and Symbolic Power* (n 17) 37.

act of language policy'.[21] Further, the absence of explicit policy is situated against a baseline of assimilationist pressure. As such, it is a myth that the state can be ethnoculturally 'neutral' without privileging a particular identity or culture.[22] The value of language is not constitutive in a vacuum; it is also preservation against assimilation.

Legal protections internationally have largely failed to intervene where minority languages are under threat, with one exception — courts are more willing to give credence to language rights in the context of preserving political compromises between majority and minority groups. This is illustrated by leading cases in overseas jurisdictions founded on compromises that involve bargains of language. In Canada, the *Canadian Charter of Rights and Freedoms* provides that English and French are the two official languages of Canada 'and have equality of status'.[23] It also grants minority language educational rights, including the right for children of an English or French linguistic minority population to be educated in the first language of their parents.[24] In *Mahe v Alberta*, for example, the Canadian Supreme Court upheld a claim by French-speaking parents that a new school be established with an autonomous French school board due to dissatisfaction with the quality of French-language schools provided by their government.[25] Dickson CJ stated that the purpose of s 23 of the *Canadian Charter* (which enshrines minority language educational rights) is 'to preserve and promote the two official languages of Canada, and their respective cultures'.[26] The section 'places positive obligations on government to alter or develop major institutional structures'.[27] This category of protection does not rely on an identity-constitutive justification for language rights.[28] It also does not afford linguistic protection to other linguistic minorities, and concedes that the English and French are privileged over other linguistic groups by virtue of their special status in Canada.[29] Simultaneously, political compromises can compel linguistic minorities to conform to the terms of a national bargain. In *Mathieu-Mohin v Belgium*, the European Court of Human Rights held that two French-speaking citizens who resided in the Flemish region of Belgium were required to take a parliamentary oath in Dutch to assume their positions in office.[30] That gave effect to a principle by which the institutional system of the Belgian State was designed, being 'to achieve an equilibrium between the Kingdom's various regions and cultural communities by means of a complex system of checks and balances'.[31] These examples evidence how certain national circumstances can extend strong legal protection for minority languages, but only where such protection facilitates the political compromises and negotiations enabling the

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[21] Christina Bratt Paulston, 'Language Policies and Language Rights' (1997) 26(1) *Annual Review of Anthropology* 73, 77 (citations omitted).
[22] Kymlicka (n 4) 253.
[23] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 16(1).
[24] Ibid s 23. Legislation was also passed in 2019 relating to respect for Indigenous languages in Canada: see *Indigenous Languages Act*, SC 2019, c 23.
[25] *Mahe v Alberta* [1990] 1 SCR 342.
[26] Ibid 362.
[27] Ibid 365 (Dickson CJ).
[28] Paz (n 3) 487.
[29] Ibid 489.
[30] *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1.
[31] Ibid 19 [57].

existence of a unitary nation. The respect afforded to these languages is not in their capacity to be culturally constitutive at an individual or communal level, but in their capacity to facilitate a political structure. There is accordingly a vacuum of language protection in the absence of a political structure that relies on bargains of language, as is evident in Australia.

B *Government Policy*

Within this context, there are varying degrees to which governments can intervene along an axis of pluralism, integration and assimilation.[32] A policy of pluralism may grant linguistic minorities significant latitude in the administration of their own affairs.[33] Integration 'aims at the unity of the various groups of a given society while allowing them to maintain their own characteristics through the adoption of specific measures'.[34] Some governments may also attempt active efforts at improving intergroup relations, including increasing representation of members of various minority groups in civic institutions and emphasising cultural exchange in education.[35] Conversely, other policy positions tend to de-emphasise intergroup differences.[36] If pursued through mechanisms of assimilation, these policies effect enforced homogeneity in which minority groups are forced to abandon their traditions, culture and language in favour of majoritarian norms.[37] A desire for unity through assimilation can perversely undermine intergroup relationships. When groups feel alienated or are victims of discrimination, they may feel that they do not identify with the nation and that they cannot participate in public life.[38] This desire also reveals an ideological assumption that the language practices of racialised subjects are unfit for legitimate social participation.[39] Simultaneously, the law tends to favour and reinforce policies that subordinate language protection — for example, through emphasising the importance of learning the English language rather than protecting the longevity of minority languages.[40] Those practices are evident in Australia's historical White Australia policy and the present English language requirements of the Australian citizenship test.[41]

Another axis through which these policy orientations are theorised spans tolerance and promotion. Kloss distinguishes between 'tolerance-oriented' and 'promotion-oriented' minority rights. Tolerance-oriented minority rights are laws and measures which 'provide for the minorities and which, if need be, protect for the minorities the right to cultivate their language in a private sphere, namely, in the

32 Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979) 50 [293].

33 Ibid.

34 Ibid.

35 Ibid 49–50 [292].

36 Ibid 45 [267].

37 Ibid 50 [293].

38 Ibid 46 [272].

39 Rosa and Flores (n 9) 627.

40 In the European context, see Paz (n 3) 483. Paz notes that the European Court of Human Rights only requires language protection insofar as it is needed for understanding.

41 See above nn 15–20 and accompanying text.

family and in private organizations'.[42] It may also involve privileging a majority language in the public sphere — through, for example, subsidising public schools that use the majority language.[43] Conversely, promotion-oriented rights 'regulate how public institutions may use and cultivate the languages and cultures of the minorities'.[44] While tolerance-oriented rights derive from formal equality, promotion-oriented rights can only be derived from material equality.[45]

Increasingly, however, these axes have begun to represent a divide between the use of minority languages in private and public life. Approaches which emphasise unity and tolerance may accept minority languages in private spaces but actively impede the use of minority languages in public life. International materials discuss language rights as operating within linguistic communities but not beyond them. In *General Comment No 23*, the UNHRC states that the relevant right is '[t]he right of individuals belonging to a linguistic minority to use their language among themselves'.[46] Over time, that qualification has manifested in human rights jurisprudence as a mode of exclusion from the public sphere. The distinction between the right to use a language internally and the absence of a right to use it externally has been mapped onto the distinction between private and public life. For example, in *Ballantyne v Canada*, a leading case on language rights under the *ICCPR*, the UNHRC considered whether a Quebec law mandating the use of French in advertising was a violation of the rights of individuals seeking to advertise in English, including the right to freedom of expression.[47] The UNHRC determined that '[a] State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice'.[48] In *Hamzy v Commissioner of Corrective Services* at first instance, Bellew J stated that the corollary of this is that a state 'may exclude the freedom to express oneself in a language of one's choice within spheres of what might be regarded as "public life"'.[49] The enforcement of a monolingual public life is capable of marginalising linguistic minorities such that their use of language is relegated to the private domain. This marginalisation has downstream effects on the capacity of linguistic minorities to partake in domains such as schooling, work and religion — all of which are facilitated through the medium of language.[50] In Australia, courts have reinforced this divide and refused to recognise both the independent importance of minority languages, and the discriminatory effects of a monolingual public life. That position is discussed in the next Part in relation to the *RDA*.

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[42] Heinz Kloss, *The American Bilingual Tradition* (Center for Applied Linguistics, 1998) 20.
[43] Paz (n 3) 494.
[44] Kloss (n 42) 21.
[45] Ibid.
[46] *General Comment No 23* (n 6) 3 [5.3].
[47] Human Rights Committee, *Views: Communications Nos 359/1989 and 385/1989*, 47th sess, UN Doc CCPR/C/47/D/359/1989 ('*Ballantyne v Canada*').
[48] Ibid [11.4].
[49] *Hamzy v Commissioner of Corrective Services* [2020] NSWSC 414, [149] (Bellew J) ('*Hamzy Trial*'). See below Part III for a more detailed analysis of this case and its appeal.
[50] Alastair Pennycook, *Language as a Local Practice* (Routledge, 2010) 26.

III The Relationship between Language and the *Racial Discrimination Act 1975* (Cth)

Claims to language rights have primarily been litigated through s 10 of the *RDA*. Section 10 provides a right to equality before the law. If, due to the operation of a Commonwealth or state or territory law,

> persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, [then those persons] shall, by force of this section, enjoy that right to the same extent …

As such, s 10 is a provision that is uniquely directed toward the operation and effect of *legislation*, rather than individual acts.[51] Section 10 also does not require the complainant to show that a law expressly makes a distinction based on race. Rather, it is 'directed to the discriminatory operation and effect of the legislation'.[52] As Hayne J drew attention to in *Maloney v The Queen*, 's 10(1) does not use the word "discriminatory" or any cognate expression'.[53] The focus is 'on the *enjoyment* of rights by some but not by others'.[54] What flows from this focus is that s 10 applies to laws that are facially neutral but have disparate impacts on different racial groups. Section 10 is therefore well suited to target not only laws that explicitly privilege the English language — such as the laws considered in the *Hamzy* appeal[55] — but also laws that cause a disparate impact on linguistic minorities as a result of unofficial preferences for English in public life — such as the impugned laws in *Nguyen v Refugee Review Tribunal*,[56] in *Sahak v Minister for Immigration and Multicultural Affairs*[57] and in *Munkara v Bencsevich*.[58]

An incompatibility with s 10 may have substantial consequences. For instance, where the incompatible legislation is a state law that expresses a limitation, that law would be rendered inoperative by s 109 of the *Australian Constitution*.[59] For this reason, the *RDA* has been described as 'almost constitutional'.[60] On the other

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51 Cf *Racial Discrimination Act 1975* (Cth) ss 9, 11–17 ('*RDA*'); *Age Discrimination Act 2004* (Cth) ss 18–32; *Disability Discrimination Act 1992* (Cth) ss 15–21, 22–30; *Sex Discrimination Act 1984* (Cth) ss 15–27.

52 *Maloney v The Queen* (2013) 252 CLR 168, 179–80 [11] (French CJ) (citations omitted) ('*Maloney*'). Ms Maloney was charged and convicted under s 168B of the *Liquor Act 1992* (Qld) for possession of more than the prescribed quantity of liquor in a restricted area. She appealed her conviction on the basis that the impugned provisions — which restricted the possession of liquor in Palm Island, an area whose population was 97% constituted by Aboriginal people — were inconsistent with s 10 of the *RDA*, could not be rescued as special measures pursuant to s 8 of the *RDA* and were therefore invalid. The High Court found that the impugned provisions were special measures and dismissed her appeal.

53 Ibid 200 [65].

54 Ibid (emphasis in original).

55 *Hamzy v Commissioner of Corrective Services (NSW)* (2022) 107 NSWLR 544 ('*Hamzy Appeal*').

56 *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 ('*Nguyen*').

57 *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514 ('*Sahak*').

58 *Munkara v Bencsevich* [2018] NTCA 4 ('*Munkara*').

59 See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, 98–9 (Mason J) ('*Gerhardy*'). See generally Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 42–3.

60 Alice Taylor, 'The "Constitutional" Value of the *Racial Discrimination Act 1975* (Cth)' (2021) 43(4) *Sydney Law Review* 519, 519.

hand, where the incompatible legislation is a law that confers a relevant positive right but does not do so universally, s 10 will extend the conferral of that right so that it is not unequally enjoyed by people of different races.[61]

Section 9 of the *RDA* has also been used to litigate language rights claims, though its operation is more limited. Section 9(1) makes unlawful any acts of 'direct' racial discrimination that have the purpose or effect of 'nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom …' Section 9(1A) extends these protections to 'indirect' racial discrimination in circumstances where a person 'requires another person to comply with a term, condition or requirement which is not reasonable' and the other person 'does not or cannot comply'.

While the link between racial discrimination and language has been recognised,[62] claims to protection against racialised linguistic discrimination made pursuant to s 10 (and s 9) have been entirely unsuccessful.[63] In contradistinction to the existing case law, this Part argues that the *RDA* has the potential to be a bulwark against policies of language assimilation and a rare mechanism that supports the advancement of promotion-oriented language rights. This potential exists despite the evidence that courts have so far resisted recognising the force and breadth of the *RDA*. This resistance has manifested itself in several approaches evident in the case law that have been or could be used to deny language rights claims: first, that language is a personal characteristic that is not linked to race; second, that even if language is linked to race, a law (or act) cannot be impugned if it is proportionate to a legitimate end; third, that a right must positively be protected for members of other races before s 10 is engaged in relation to that right; fourth, that a law must target or single out a race before it engages s 10; and finally, that relevant rights must be characterised or identified in an exceedingly narrow way.

In our view, these approaches are unsupportable, even within the current framework of the *RDA*. They cut against 'the large objects which the *RDA* evidently pursues and the generality of the words which it uses'.[64] In the following sections, we evaluate each of these approaches in detail. Our analysis centres on s 10, but we also refer to s 9 where appropriate given the similarities between the two sections and how reasoning about one overlaps with the other. We find that the approaches are inconsistent with the text and purpose of the *RDA*. Only once they fall away can the *RDA* begin to provide adequate protection to language rights.

A *Language Ability as Personal Characteristic*

Courts have recurringly refused to recognise a link between language and race so as to enliven ss 9 and 10 of the *RDA*. In *Sahak*, Mr Sahak challenged s 478 of the

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[61] See, eg, *Gerhardy* (n 59) 98 (Mason J).

[62] *Hamzy Appeal* (n 55) 571–2 [79] (Basten JA).

[63] It is worth acknowledging that very few *RDA* claims reach the courts, and decisions involving linguistic discrimination under the *RDA* are a small subset of these claims: we refer here to the cases of *Nguyen* (n 56), *Hamzy Appeal* (n 55), *Sahak* (n 57), *Munkara* (n 58) and *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86 ('*Iliafi*'). None of these cases were binding on any other of these cases, as they were either at the same level, or in a different jurisdiction.

[64] *Maloney* (n 52) 201 [68] (Hayne J).

Migration Act 1958 (Cth) which prescribed a 28-day period in which an application for review of a decision of the Refugee Review Tribunal could be lodged.[65] Mr Sahak argued that the effect of s 478 is that persons of Syrian and Afghani origin enjoy only a limited right to equality before the law, including access to the courts and their judicial review procedures, because an attribute or characteristic of persons of those national origins is that English is not spoken or written, or is a secondary language. Goldberg and Hely JJ held that linguistic discrimination 'is not based on race, colour, descent or national or ethnic origin, but rather on the individual personal circumstances of each applicant'.[66] These circumstances may include 'if their comprehension of the English language is sufficient, or if they have access to friends or professional interpreters so as to overcome the language barrier'.[67] North J disagreed, contending that Goldberg and Hely JJ's view 'appears … to adopt a verbal formula which avoids the real and practical discrimination which flows as a result of the operation of s 478'.[68] North J analogised[69] the facts to the decision of the United States Supreme Court in *Griggs v Duke Power Co*, in which an employer's requirement that applicants for employment pass an intelligence test or hold a school diploma was unlawful because it operated to disqualify African American applicants at a substantially higher rate than white applicants.[70] That case articulated the importance of defending against the disparate impacts of facially neutral policies.

Subsequent claims have been denied through the reasoning of Goldberg and Hely JJ in *Sahak*, despite appellants invoking the reasoning of North J.[71] In *Munkara*, the appellant challenged the validity of parts of the *Alcohol Protection Orders Act 2013* (NT) ('*APO Act*') on the basis that they contravened the *RDA*. Sections 9 and 11 of the *APO Act* provide that a person who has been issued with an alcohol protection order may apply for reconsideration by a senior officer or to a Local Court for a review of the senior officer's decision. The appellant contended that the 'poorer English language literacy of indigenous Territorians compared with non-indigenous Territorians' meant that the law impermissibly imposed a disproportionate burden on Indigenous Territorians.[72] Blokland J held that there was no such basis for invalidating the law, citing the finding in *Sahak* that any difficulty in completing and filing applications was due to personal characteristics and not racial characteristics.[73] Blokland J went on to state that '[t]he reasoning of the majority in *Sahak* is not contrary to the established authority concerning the application of s 10(1) of the *Racial Discrimination Act*'.[74]

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65 *Sahak* (n 57) 517 [10] (Goldberg and Hely JJ).

66 Ibid 525 [45].

67 Ibid.

68 Ibid 516 [6]. However, North J ultimately agreed with Goldberg and Hely JJ's conclusion that the appeals should be dismissed, because 'the only limitation is that the appellants may be confined to instituting proceedings in the High Court rather than having available the opportunity to commence proceedings in both the High Court and the Federal Court': at 516 [3].

69 Ibid 516 [8].

70 *Griggs v Duke Power Co*, 401 US 424 (1971).

71 See, eg, *Munkara* (n 58) [118] (Blokland J).

72 Ibid [14] (Kelly J).

73 Ibid [117].

74 Ibid [118].

Similarly, in *Hamzy* at first instance the plaintiff, who was serving a sentence of full-time imprisonment,[75] submitted that he had 'the right to speak to members of his family in the Arabic language when they visit[ed] him in custody' pursuant to ss 9 and 10 of the *RDA*.[76] Clause 101(1) of the *Crimes (Administration of Sentences) Regulation 2004* (NSW) impaired this right by providing that, during a visit to an extreme high risk restricted inmate, 'all communications must be conducted in English or another language approved by the Commissioner'. At first instance, Bellew J rejected this argument[77] stating that 'there will be no breach of s 10(1) if a person does not enjoy a human right, or does so to a lesser extent, because of [their] individual personal circumstances'.[78] In his Honour's view, the fact that the plaintiff was required to speak English arose 'from the personal circumstances of his being in custody'.[79] These cases indicate that courts are willing to individualise language at multiple stages of analysis. First, as in *Sahak* and *Munkara*, language itself may be treated as an individual characteristic which has no connection to race or national origin. Second, in *Hamzy* at first instance the scope of 'personal circumstances' was extended to a context in which a language was mandated.

After *Hamzy* was appealed to the New South Wales Supreme Court of Appeal, Basten JA preferred to hold that a constraint on some languages 'will adversely impact on some groups in a multicultural society' and therefore will engage the operation of s 9 or s 10 of the *RDA*.[80] In reaching this conclusion, Basten JA expressly endorsed the reasoning of North J in *Sahak*.[81] This approach should be preferred. It should also be taken as a refutation of both senses in which language was individualised in previous jurisprudence, such that language claims under the *RDA* should not be defeated on this basis. First, it recognises an undeniable collective dimension to the nature of language. As discussed in Part II above, language constraints necessarily have disproportionate impacts on persons of certain racial and national origins. Accepting an association between language and race does not essentialise that association. Rather, it recognises that this association has historically been constructed — by communities, who preserve their languages to preserve their own identities and cultures, and by discriminatory policies, which have used language as a proxy for race. Second, it refutes Bellew J's concept of 'personal circumstances' as context. Basten JA observed that Bellew J's description of the 'personal circumstances of [Mr Hamzy] being in custody' does no more than describe 'the area of operation of the restriction on communication'.[82] The relevant comparison in racial discrimination must be whether persons within the same context enjoy rights to different degrees. The context in which a law operates does not justify its unequal application within that context.

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75 *Hamzy Trial* (n 49) [1] (Bellew J). The case was appealed unsuccessfully in *Hamzy Appeal* (n 55).

76 Ibid [125] (Bellew J).

77 Ibid [159]–[166].

78 Ibid [165], citing *Sahak* (n 57) 525 [45] (Goldberg and Hely JJ).

79 *Hamzy Trial* (n 49) [165].

80 *Hamzy Appeal* (n 55) 574 [89]. His Honour nonetheless rejected the appeal because he considered the relevant issue to be whether s 9(1A) was engaged, a question which was not raised in the trial or on appeal: at 566 [63].

81 Ibid 554 [27]–[28].

82 Ibid 568 [68]. See also Alexandra Grey, 'Lawful Limits on Freedom of Expression for Private Communications "in Public Life"' (2023) 12(2) *Cambridge International Law Journal* 328, 330.

B *Language and Proportionality*

Courts have imported proportionality in assessing ss 9 and 10 claims in two ways: by reading proportionality into the operation of s 10, and by constraining the ambit of rights which engage ss 9 and 10 by reference to proportionality.[83] While the High Court did not explicitly identify these plausibly separate approaches, it decisively rejected both approaches to proportionality analysis across separate judgments in *Maloney*. Though these approaches continue to be used to deny language rights claims, they are unsustainable.

The former approach of reading proportionality into the operation of s 10 is arguably evident in the reasoning of Basten JA in the *Hamzy* appeal. His Honour concluded that whether an act constitutes unlawful discrimination 'will depend on whether it has a legitimate purpose which is pursued by means which are not unreasonable, in the sense that the mechanism … is proportionate to the legitimate purpose'.[84] A similar approach was adopted in *Nguyen*. In that case, the appellant contended that he was 'less able to enjoy the right to be notified of the Department [of Immigration and Ethnic Affairs]'s decision than a person of another race who could understand English'.[85] Tamberlin J held that the use of English as a de facto national language could not be said to be discriminatory.[86] In his view, the use of English in official correspondence is 'reasonable and appropriate', and any other approach would be 'impractical and inefficient'.[87]

Several of the judgments in *Maloney* explicitly rejected the idea of importing notions of proportionality to assess claims of inconsistency with s 10 otherwise than through s 8. Hayne J (with whom Crennan J agreed) found that '[s]ection 10 does not say that persons of a particular race may enjoy a right to a more limited extent … if that difference is justifiable or proportionate to a legitimate end'.[88] Kiefel J stated that there is no foundation for proportionality analysis in the terms of s 10. In her view, '[n]othing in s 10 requires or permits a justification for a legal restriction on a human right or fundamental freedom'.[89] Rather, '[i]t is left to s 8 to test whether a law is a special measure to which s 10 does not apply'.[90] Bell J formed a similar view, stating that she '[did] not consider the application of s 10(1) to be subject to a test of proportionality'.[91] While Gageler J indicated that proportionality may be relevant to analysis in s 10,[92] his Honour ultimately concluded that proportionality

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83 Grey (n 82) refers to another way in which proportionality may be relevant: as a requirement for 'Australian federal laws that incorporate international conventions … because such laws rely on the "purposive" legislative power in s 51(xxix) of the *Australian Constitution*': at 334. However, this constitutional test of proportionality is a question of whether the *RDA* is proportional in giving effect to the *ICERD* (n 1). We do not consider this to be a live legal question and to the authors' best knowledge it has never been tested by any court.

84 *Hamzy Appeal* (n 55) 574 [90]. Leeming JA, with whom Bathurst CJ agreed, took a different approach: see below Part III(C).

85 *Nguyen* (n 56) 316 (Tamberlin J).

86 Ibid 319.

87 Ibid.

88 *Maloney* (n 52) 202 [68] (Hayne J, Crennan J agreeing at 213 [112]) (citations omitted).

89 Ibid 232 [167].

90 Ibid.

91 Ibid 241 [197].

92 Ibid 296 [342].

was effected through s 8 of the *RDA*. The application of s 10 to a law that 'does not meet the requirements of a special measure, cannot be avoided by showing that the criteria the law adopts are nevertheless proportionate or reasonably necessary to the pursuit of a legitimate aim'.[93] It is difficult to see how proportionality may be relevant to a s 10 analysis. Section 8 of the *RDA* provides that special measures are excepted from s 10 of the *RDA*. Section 8 imports art 1(4) of the *ICERD* which states that special measures 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary … shall not be deemed racial discrimination'. This forms a textual basis for proportionality that is absent from the terms of s 10. Because s 10 encompasses laws which are necessarily detrimental and deny or restrict a human right or fundamental freedom, there is no capacity for it to be excepted.

The latter approach of constraining the ambit of rights by reference to proportionality can be found in the judgment of Chesterman JA in the Queensland Court of Appeal decision in *R v Maloney*.[94] His Honour quoted the observation in *Bropho v Western Australia* that 'it has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other competing rights and values',[95] and concluded that

> reasonable and legitimate [impositions on the right to property] do not have the effect that the human right and fundamental freedom recognised by Art 5(d)(v) [of the *ICERD*] have been infringed. [Therefore, s] 10 of the *RD Act* is not engaged.[96]

The approach holds that if the relevant right is not infringed in the first place because the limit placed on the right by the law is proportional, s 10 is never engaged. French CJ directly addressed this point in the High Court decision in *Maloney*, finding that it 'diminishes, if it does not render otiose, the particular and limited exemption for operational discrimination provided by the special measures provisions of the *ICERD*'.[97] Subsequently, in *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia*, the applicant relied on freedom of expression as the right which engaged s 9.[98] In obiter, Kenny J appeared to suggest this approach in noting that 'the right to freedom of expression engages a sophisticated jurisprudential analysis' and, by reference to provisions of the *ICCPR* and the jurisprudence of the European Court of Human Rights, stating that the 'right to freedom of expression is in and of itself limited … by measures … proportionately designed'.[99] Her Honour criticised the applicant's submission on the basis that it 'did not invoke, involve or depend on any aspect of th[is] jurisprudential analysis'.[100]

This latter approach may reflect a confusion in how the *RDA* is understood. The human rights jurisprudence relied upon in the foregoing cases and formalised in

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93 Ibid 298 [348].
94 *R v Maloney* [2013] 1 Qd R 32.
95 Ibid 38 [20], quoting *Bropho v Western Australia* (2008) 169 FCR 59, 83 [81] (Ryan, Moore and Tamberlin JJ).
96 *R v Maloney* (n 94) 62 [99].
97 *Maloney* (n 52) 191 [39].
98 *Iliafi* (n 63) 111 [87] (Kenny J).
99 Ibid 112 [92].
100 Ibid 112 [93].

international instruments takes those rights as freestanding rights. The relevant question there is whether the limitations imposed on those rights can be justified. Such a limitation on the rights themselves can be justified so long as the limitation is reasonably necessary to achieve a legitimate end. On the other hand, the *RDA* is concerned with the *differential* enjoyment of those human rights. The *RDA* only permits the causing of that differential enjoyment in very limited circumstances. For acts, the circumstances are given by 9(1A) — when a term, condition or requirement that is imposed via an act of indirect discrimination is reasonable. For laws, as noted above, s 8 carves out the only exception. To limit the breadth of the human rights to which the *RDA* is directed by reference to human rights jurisprudence rather than the limited circumstances prescribed by ss 8 and 9(1A) is to mix the two different contexts in which those rights are protected. The statements of Southwood J in *Blackwell v Bara* are apposite.[101] His Honour noted that although international law

> does not recognise an unqualified right to liberty [this] does not mean that an interference with personal liberty, which is otherwise a valid interference, will be valid if it directly limits the right to personal liberty of the persons of one race to a greater extent than the rest of the population.[102]

C *Positive Existence of a Right*

Leeming JA, with whom Bathurst CJ agreed, did not rely on proportionality to dismiss the s 10 claim in the *Hamzy* appeal. Instead, he did so on the basis that there 'was no other law which conferred a right enjoyed by persons of another race, colour or national or ethnic origin which, by dint of s 10, could be relied upon by the appellant'.[103]

To require the affirmative existence of a right that applies to members of another race before s 10 is engaged would risk rendering the right which it protects — equality under the law — theoretical and illusory. At the very least, it would significantly narrow the scope of its operation. The fundamental human rights under s 10(2) are often not protected under Australian law; nor are the particular manifestations of those rights that are the subject of a s 10 analysis. In New South Wales (the jurisdiction in *Hamzy*), there is no law that protects the right to speak in the language of one's origin, which was the right raised by the appellant. Nor is there a law that protects the broader right to freedom of expression other than where that right overlaps with the implied freedom of political communication. The conclusion reached by Leeming JA was that a law which suppressed those rights for some races but not others will still be consistent with s 10 as long as those rights are not explicitly protected. The application of this principle to the denial of a prisoner's ability to speak to their family in their mother tongue is sufficiently unsound as to raise doubts as to the correctness of this approach. Under this approach, a hypothetical New South Wales law that criminalised the use of a language in circumstances that were not otherwise protected by the implied freedom of political communication, while undeniably racially discriminatory, would not be inconsistent with s 10.

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101 *Blackwell v Bara* (2022) 364 FLR 381.
102 Ibid 408 [82].
103 *Hamzy Appeal* (n 55) 615–16 [274].

There are language rights cases where the criterion imposed by Leeming JA in *Hamzy* of the existence of a positive right may seem more straightforward to fulfil. In *Sahak*, the relevant human right was the right to access the courts.[104] That human right was manifested in a right to judicial review which was granted in a statute.[105] *Nguyen* also concerned a right that was referable to statute.[106] But these form only a part of the universe of language rights cases. Many will concern circumstances where the right to use a language in a particular context is denied and where there is no explicit conferral of the relevant right. But even where the relevant right is explicitly granted, a narrow construal of that right might still see it fall outside this *Hamzy* criterion.

Given this criterion would severely curtail the operation of s 10, it is unsurprising that doubts were raised about it in *Fisher v Commonwealth*.[107] *Fisher* concerned a challenge to the *Social Security Act 1991* (Cth) ('*SSA*') by an Aboriginal man.[108] He alleged that the provision of the age pension under the *SSA*, which begins at age 67, was inconsistent with s 10 of the *RDA* because the shorter life expectancy of Aboriginal men compared with other Australian men meant that they received the age pension for fewer years and their right to social security was therefore differentially impaired.[109] Though the Full Federal Court dismissed the appeal, it questioned whether 'a particular law giving effect to the right needs to exist, in order for a law curtailing its enjoyment by members of a particular race to engage s 10(1)'.[110] Instead, the Court considered that if the rights burdened in *Hamzy* were a kind of right protected by art 5 of the *ICERD*, they would be rights enjoyed by persons in Australia generally because 'the common law permits that which is not prohibited'.[111] This is the better view. As French CJ[112] and Gageler J[113] reiterated in *Maloney*, the rights which engage s 10 are not limited to the legal rights enforceable under domestic law. It would be contrary to the purpose of the *RDA* and s 10 which is directed to the differential enjoyment of 'human rights' to require an applicant to point to a domestic law conferring that legal right on members of other races when the practical effect of a law is to cause the differential enjoyment of human rights. Nothing in the text of s 10 suggests that such a limitation should exist, and it would be contrary to the rule that beneficial and remedial legislation is to be given a liberal construction.[114]

D *Referring to or Targeting Race*

Other judges have expressed concerns that an overbroad interpretation of the *RDA* would capture general laws with no intention to refer to or target a particular race. In *Maloney*, Bell J posed a hypothetical planning law that required coastal buildings

104 *Sahak* (n 57) 517 [10] (Goldberg and Hely JJ).
105 Ibid 524 [39]–[41] (Goldberg and Hely JJ).
106 *Nguyen* (n 56) 319 (Tamberlin J).
107 *Fisher v Commonwealth* (2023) 298 FCR 543 ('*Fisher*').
108 Ibid 546 [4] (the Court).
109 Ibid.
110 Ibid 568 [84] (the Court).
111 Ibid (citations omitted).
112 *Maloney* (n 52) 178 [9].
113 Ibid 280 [300].
114 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

to meet extreme-weather specifications. Her Honour asked whether s 10(1) would invalidate the law if the 'overwhelming majority of building owners affected by the law [were] members of a particular race'.[115] Without definitively answering the question, her Honour distinguished the laws in *Maloney* from this scenario on the basis that they 'unarguably target Aboriginal persons'.[116] The judgment of Mitchell AJA in *Athwal v Queensland* followed a similar line of reasoning but raised the idea that the impugned law should target race to a threshold requirement.[117] In *Athwal*, the impugned law prohibited the carrying of knives in schools. For many Sikhs, the carrying of a knife is a matter of religious obligation. The appellant argued that the law therefore limited the right of Sikhs to freedom of movement. Mitchell AJA considered that s 10 would not apply to a 'general law [which] prohibits certain conduct by all members of the community, even where that conduct may be the subject of religious belief only by persons of a particular ethnic origin'.[118] His Honour only allowed the appeal because the law was subject to several reasonable excuses, and the reasonable excuse of possessing a knife for a genuine religious purpose was specifically excluded, which 'effectively single[d] out Sikhs for differential treatment'.[119]

Often, no race is being expressly targeted by the laws that deny people their language rights. Both laws that impose an English requirement and laws that entrench racial inequality through a background assumption of English use and understanding, such as laws which provide for a limited time for an appeal, are general laws that do not single out a particular group for differential treatment.

There is an argument that it would be unworkable for s 10 to be engaged by *any* general law that in its practical operation causes differential impacts on the rights of different races. Many laws may, as in the planning law scenario given by Bell J, cause a disparate impact in an accidental and limited way unconnected to race, and to construe s 10 to be engaged by such laws may go beyond the purpose of ensuring equality before the law. The literal meaning of s 10 might therefore have to be tempered by some further limit to carve from its ambit cases where any differential impact is accidental, small and has no relationship with race. One way to put the question would be when a differential impact caused by a law becomes 'adverse impact discrimination'[120] or, more precisely, a 'section 10 adverse impact' given the 'difficulties with casting s 10(1) of the Act as an anti-discrimination provision'.[121]

However, in the context of language, we make two points. First, differential treatment through the medium of language generally does not arise in an accidental way unconnected to race. This may be hard to identify when the differential treatment is part of the construction of Australian nationhood. Some of the laws which effect this differential treatment may be described as making 'no reference,

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115 *Maloney* (n 52) 244 [203].
116 Ibid 244 [204].
117 *Athwal v Queensland* (2023) 379 FLR 92, 117 [113] ('*Athwal Appeal*').
118 Ibid 117 [109].
119 Ibid 117–8 [113].
120 See *Maloney* (n 52) 285 [308] (Gageler J); *Fraser v A-G (Canada)* [2020] 3 SCR 113, 115 (Abella J for Wagner CJ, Moldaver, Karakatsanis, Martin and Kasirer JJ).
121 *Athwal Appeal* (n 117) 102 [33] (Dalton JA).

direct or indirect, to race, ethnicity, colour or nationality'.[122] But, as we have shown, the racialisation of language in Australia has been no accident. As described in Part II(A) above, the privileging of the English language through both explicit and implicit requirements historically served policies of racial exclusion; today, they marginalise minority groups from public life. The impugned law in *Munkara*, which provided for an exceptionally short period of three days to apply for a reconsideration of a decision, will limit the ability of non-English speaking minorities to make such an application. It does so because the decisions are made in English and the application must be made in English, and that is the case notwithstanding the lack of any explicit legal requirements saying so, because racially exclusionary and assimilationist policies have constructed English as the de facto language of Australia.

Second, while these laws may not 'single out' particular racial groups, that is not the touchstone to be used under s 10. There is no requirement of discriminatory intent.[123] As a matter of authority, Bell J hypothesised in *Maloney* that the planning law scenario would not engage s 10 because any limitation would have 'no connection to race',[124] an idea that was also taken up in *Fisher*.[125] Gageler J preferred the touchstone to be whether the differential enjoyment was 'inconsistent with persons of those two races being accorded equal dignity and respect'.[126] In any case, while the law on this question may still be developing, s 10 can undoubtedly apply to laws that do not 'inarguably target' a racial group but that simply '[treat] equally things that are unequal'.[127] Many laws that impinge on language rights might fall on the right side of a discriminatory intent test but should and would fall on the wrong side of s 10.

E *Rights Categorisation and Characterisation*

Once a relevant human right has been identified, the question turns to how the particular incident of that right should be characterised in the assessment of whether its enjoyment is limited. This is a complex issue upon which *RDA* cases have often turned.[128] The complexity arises from the fact that there are many ways to characterise a right. In practice, the process of characterisation is often unprincipled and can be engineered to deny a claim. In the first-instance decision of *Athwal*, Brown J characterised the rights to be the 'rights to religious freedom and freedom of movement, while wearing a knife as an article of faith in a school'.[129] Notwithstanding the fact that Sikhs are the only ethno-religious group whose adherents must wear knives as an article of faith, the rights so characterised are enjoyed in principle equally by members of all races. A similar characterisation could have been an alternative means to deny the claim in the *Hamzy* appeal: the

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122 *Nguyen* (n 56) 319 (Tamberlin J).
123 See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 280. See generally Gaze and Smith (n 59) 54.
124 *Maloney* (n 52) 244 [204].
125 *Fisher* (n 107) 582–3 [132] (the Court).
126 *Maloney* (n 52) 294 [335].
127 *Athwal Appeal* (n 117) 101 [30] (Dalton JA), quoting *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 478 (Gaudron and McHugh JJ).
128 See, eg, *Maloney* (n 52) 228–9 [154]–[157] (Kiefel J).
129 *Athwal v Queensland* (2022) 372 FLR 291, 306 [67] (citations omitted).

right to freedom of expression while speaking English in prison communications is equally enjoyed by all. Unsurprisingly, this approach to characterisation was criticised in the *Athwal* appeal.[130] Dalton JA re-iterated the idea that s 10 is concerned with broad rights and observed that the approach taken by Brown J meant that 's 10 could not operate as it was intended' because the characterisation incorporated 'into the definition of the relevant right the attribute fastened onto by the impugned legislative provision'.[131] It would therefore be 'impossible to compare Sikhs' enjoyment of the defined right and the enjoyment of others'.[132] His Honour preferred characterising the rights at a high level of generality as the 'right to religious freedom and the right to freedom of movement'.[133]

The approach of Dalton JA has much to recommend it. As his Honour observed, it is consistent with general discrimination law[134] and forecloses a self-defeating characterisation of the right. But while it applies easily to laws that impose a limitation, there remain difficulties with laws that grant a right because of a tendency to consider *what* right is really being granted. In *Fisher*, the Court bypassed a high level of generality in rights characterisation in favour of characterising the right by reference to the statute that purported to grant the right in practice.[135] The question before the Court was whether the pension age was inconsistent with s 10 because Indigenous male Australians enjoyed on average significantly fewer years on the age pension compared to males of other races due to a shorter lifespan.[136] The relevant s 10(2) right was identified as the right to social security.[137] The Court observed that '[c]onsideration for the purpose of s 10(1) of the extent to which people of different races in Australia enjoy the right to social security involves, primarily, analysis of how the *SSA* applies to them'[138] and concluded that the relevant right was the 'right to a level of income support, covering the period from when a person reaches "retirement age" until death, however long that period might be'.[139] There was no differential enjoyment of the right framed in these terms.[140] If contestation had centred on this issue in the time limit cases of *Sahak* or *Munkara*, those claims could have been dismissed in a similar way. The rights could be characterised as 'the right to appeal a decision within the timeframe specified in the law, however long it takes for a person to understand the original decision and consider an appeal'.

Due in part to these difficulties, Taylor has argued for '[placing] less emphasis on interrogating the nature of the rights involved'[141] and for an approach to the *RDA* that instead considers whether the 'discrimination complained of

130 *Athwal Appeal* (n 117) 95–6 [10]–[11] (Dalton JA), 118–9 [118] (Mitchell AJA).
131 Ibid 95–6 [11].
132 Ibid.
133 Ibid 95 [5].
134 See *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613, 631 [30] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).
135 *Fisher* (n 107) 575–6 [107] (the Court).
136 Ibid 546–7 [6] (Mortimer CJ, Katzmann, Charlesworth, Abraham and Kennett JJ).
137 Ibid 575 [105].
138 Ibid 577 [111].
139 Ibid 582 [130].
140 Ibid 582 [131].
141 Taylor (n 7) 427.

"touch[ed] the enjoyment" of another protected right or freedom', also called the 'ambit' principle.[142] In our view, while a focus on interrogating the nature of the rights may be misplaced, using the ambit principle does not avoid the characterisation exercise. As Taylor describes, '[t]he concept of ambit requires that if the state offers a benefit, it cannot discriminate in the provision of that benefit'.[143] On these terms, the concept of 'benefit' may simply be a substitute for the concept of 'right' in the characterisation exercise, with the result that the same answer is reached. For instance, it might equally be said in *Fisher* that the benefit conferred by the *SSA* is a level of income support, covering the period from when a person reaches 'retirement age' until death. With such a characterisation, no discriminatory benefit is conferred.

The issue with *Fisher* is instead the characterisation exercise itself. In a similar way to Brown J at first instance in *Athwal*, the Court fastened the attribute that is the subject of substantive differentiation onto the definition of the right. The attribute complained of in *Fisher* is precisely that the period of retirement age until death is substantively less on average for Indigenous men. To characterise the right as income support during that period, especially with the caveat of 'however long that period might be', neuters the possibility of identifying any differentiation in the enjoyment of the right as between different races in relation to the complained-of attribute. The basis for the characterisation in *Fisher* was drawn from what was 'embodied in the legislation' and 'inherent in its design'.[144] Rather than reflecting a principled approach, it begs the question because the relevant issue, at a high level of generality, is whether the design of the legislation is discriminatory. We consider the criticisms of Dalton JA canvassed earlier to apply equally in these cases where a right is granted rather than limited. In line with his approach, a broader, less technical characterisation of the right is to be preferred.

The problem that a narrow approach to rights characterisation poses to language claims may alternatively be theorised as a function of the rigidity of rights categorisations. The assertion of a linguistic right typically relies on other rights given the lack of a freestanding constitutional or legal right to linguistic freedom. In *Iliafi*, the appellants contended that their right to worship publicly as a group in the Samoan language was contravened by a prohibition of the Samoan language in church services.[145] The appellants argued that this right emerged from one or other or all of the right to nationality; the right to freedom of thought, conscience and religion; and the right to freedom of opinion and expression.[146] The Court canvassed an extensive body of international law, but ultimately considered that the claim could not be supported by any of these rights.[147] The Court considered that an individual's freedom of religion is sufficiently protected by their right to leave their church.[148] Further, the Court stated that the right to freedom of expression 'does not guarantee "linguistic freedom as such" or "guarantee a right to use the language of one's

142 Ibid 428–9 (citations omitted).
143 Ibid 429.
144 *Fisher* (n 107) 581–2 [127] (Mortimer CJ, Katzmann, Charlesworth, Abraham and Kennett JJ).
145 *Iliafi* (n 63) 95 [20] (Kenny J).
146 Ibid 103–4 [53]–[54] (Kenny J).
147 Ibid 117 [110] (Kenny J).
148 Ibid 109 [78], 110 [81] (Kenny J).

choice" in all circumstances'.[149] The freedom of expression upon which the appellants relied was an aspect of the right contained in art 27 of the *ICCPR* in relation to minority languages. In that context, the Court held that the right to speak Samoan extended only to a right 'in community with other members of their group' — but not in the company of non-Samoan speaking persons, and Samoan youth who were unable to speak the Samoan language.[150] The Court's approach in *Iliafi* reflects the subsidiarisation of language rights, in which each potential source of a language right is interrogated and dismissed in turn. This approach fails to conceptualise that the intersection of these rights may give rise to a broader conceptualisation of the enjoyment of language which is more coherent with the purposes of the *RDA*. Through that failure, 'the crux of the claim, namely racial discrimination, is lost'.[151]

IV Laws That Confer Rights

One of the idiosyncrasies of s 10 is that where the effect of a law is to confer a right in an unequal way, s 10 would *extend* or *augment* that conferral to ensure that its enjoyment is not unequal.[152] This is especially pertinent in the context of language rights because assimilationist pressures on minority languages largely arise from indirect rather than direct discrimination (such as the laws in *Nguyen*, *Sahak* and *Munkara*). In *Fisher*, however, the Court expressed several reservations about the exercise of its powers in extending or augmenting rights in circumstances of indirect discrimination. If those reservations held, the effectiveness of s 10 as a defender against assimilationist pressures on minority languages would be severely curtailed. This Part therefore briefly attempts to address those reservations raised in *Fisher* relevant to language rights claims.

In *Fisher*, the Court stated that an adjustment for a facially neutral law that treats all members of a race in the same way (for instance, by extending the time limit for appeals for people of a racial group that typically does not use English as a first language) may not be 'adequate or principled'.[153] Individuals in that cohort may be fluent in English and therefore have not suffered any limitation on their enjoyment of the relevant right. They would end up enjoying their right to a *greater* extent than members of other races. The Court in *Fisher* considered that this sort of amelioration might 'test the limits of what a court exercising the judicial power of the Commonwealth may properly do'.[154] It pointed to the existence of s 8 of the *RDA* as indicating that Parliament intended to maintain its power to decide what measures would be appropriate.[155] It noted that statistically evident disadvantage that is not intrinsic to a race 'may change over time'.[156]

However, it would also be inadequate and unprincipled for s 10 to be operative on facially neutral laws that limit a right but not on those that confer a right. The fact that the relevant disadvantage — as evinced in statistical evidence

[149] Ibid 117 [92] (Kenny J).
[150] Ibid 113 [96] (Kenny J) (emphasis omitted).
[151] Taylor (n 7) 422.
[152] *Fisher* (n 107) 550–1 [15] (Mortimer CJ, Katzmann, Charlesworth, Abraham and Kennett JJ).
[153] Ibid 584 [140].
[154] Ibid 585 [143].
[155] Ibid 584–5 [142].
[156] Ibid 582–3 [132].

and arising from a host of social and historical factors — may change over time and is not an intrinsic racial characteristic should not operate as a limit on any s 10 claim. To conclude so reflects a failure to acknowledge that racial categories are themselves contingent and constructed, and that their construction is bound up in the social and historical factors that give rise to disproportionate disadvantage. To rely on characteristics that are intrinsic to a concept that is itself contingent is an absurdity. The existence of s 8 also does not mean that Parliament intended to *exclude* the operation of s 10 to augment rights in the context of a facially neutral law; s 8 simply ensures that s 10 does not operate on special measures that *are* passed by Parliament. Finally, the difficulty of framing appropriate relief in a principled way can be answered by observing that just as a law may adopt facially neutral criteria in effecting a disparate impact, so too can the remedy provided by the court. Where the use of language is a proxy for discrimination, language can also be the proxy to negate it. In the time limit cases, the court could augment the rights of those suffering a disparate impact by ordering that an appropriate amount of additional time be given to those who are not fluent with the English language. This would avoid the difficulties of treating members of the same race with differing characteristics in the same way, and severely limit the scope of any 'complex and contestable judgments, based on potentially shifting facts'.[157]

V Conclusion

The conclusion of our analysis is that there are reasons to doubt the correctness of all the past language rights cases under the *RDA*. As we have seen, the reasoning used to dismiss those claims is problematic, and alternative lines of reasoning drawn from other *RDA* cases also betray weaknesses. To take an example, and based on our analysis above, the appeal in *Hamzy* should not have been dismissed on the basis of proportionality, nor on the lack of an explicit right. Reasoning based on either characterising the right in a way that renders comparison with other racial groups impossible or highlighting the lack of racial targeting in the relevant provision would also be unhelpful. The contest for these such cases should centre on whether the impact of the impugned law meets the s 10 adverse impact threshold. In *Hamzy*, as Basten JA identified, the limitation imposed by the law did reveal a connection to race.[158] And restricting the ability of prisoners to speak to family members in languages other than English is (to use the test preferred by Gageler J in *Maloney*)[159] inconsistent with those of minority language backgrounds being accorded equal respect and dignity. The law should have been invalidated.

Language is a means for people to express themselves and communicate with others. It is intimately bound up with a person's sense of identity and community. Respect for a person's language is therefore respect for their human dignity. However, historically, language has been instrumentalised as a discriminator through which Australian governments have marginalised minorities. Today, minority languages continue to be undermined by assimilatory laws that demand the use of English in public life and provide for no appropriate affordances. We have

157 Ibid 585 [143].
158 *Hamzy Appeal* (n 55) 568 [68].
159 *Maloney* (n 52) 294 [335].

argued that the *RDA* possesses the capacity to be a tool to defend against both linguistic discrimination and legal regimes that effect assimilatory pressure. We have sought to progress toward this powerful potential of the *RDA* by deconstructing all the justifications which have thus far barred the success of language rights in *RDA* litigation. Our analysis has revealed these justifications to be limited and that there are cogent reasons for the *RDA* to be interpreted in a way that helps secure the dignity of linguistic minorities. Nothing less ought to be expected of a piece of legislation that was claimed to represent our 'best [efforts] to redress past injustice and build a more just and tolerant future'.[160]

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160 Gough Whitlam, 'Proclamation of the Racial Discrimination Act' (Speech, Canberra, 31 October 1975).

Dispossession Cycles and Resistance: Historical Continuums in the Deportation of First Nations Peoples

Alison Gerard[*] and Annette Gainsford[†]

Abstract

This article surveys the historical and contemporary context of Indigenous peoples' entanglement in systems of criminal justice and migration control. Government attempts to remove First Nations peoples from Australia under visa cancellation provisions present a striking contemporary development in border control. Despite the High Court of Australia's ruling that 'Aboriginal Australians' cannot be 'aliens' and therefore subject to visa cancellation provisions, Indigenous peoples continue to be targeted for exclusion and subject to the gaze of border control authorities. We use documentary research and draw on two case studies to explore the historical use of deportation to target First Nations peoples. We identify previous attempts to achieve law reform to rectify past injustices and prevent Indigenous peoples from being caught up in migration laws aimed at excluding non-citizens. We review the extensive literature on *Love v Commonwealth* and analyse the expanded visa cancellation provisions that have resulted in increased numbers of people being targeted for removal, and removed, from Australia. When analysed against the long shadow of colonisation, we argue that these applications of criminal and migration law represent a continuation of attempted exclusion and dispossession that has been, and continues to be, actively resisted by Indigenous peoples. In analysing the cyclical nature of dispossession and its resistance, the complex interaction of criminal and migration law can be seen to have created novel impacts for First Nations peoples in Australia.

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I Introduction

Aboriginal and Torres Strait Islander peoples have occupied this land since time immemorial.[1] Indigenous peoples' connection to this Country now known as Australia is unique and embodies complex notions such as law, identity, place, language, spirituality, culture, family and sustenance.[2] This connection, recognised in international law,[3] is widely understood as the foundation for health and wellbeing[4] and core to Indigenous resistance and survival.[5] Despite this, Indigenous peoples, families and communities continue to endure the prospect of removal from Australia, and containment within immigration detention, under the Australian government's newly expanded visa cancellation powers. Over the past two decades, the government has significantly shifted its focus from external border controls to the removal of non-citizens lawfully present in Australia through administrative processes based on the 'character test' in s 501(6) of the *Migration Act 1958* (Cth) ('*Migration Act*').[6] Before, and even after, the High Court's decision in *Love v Commonwealth* that 'Aboriginal Australians' could not be considered 'aliens',[7] Indigenous peoples were and are being entangled in protracted legal disputes with

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1 Michael Mansell, 'Australians and Aborigines and the *Mabo* Decision: Just Who Needs Whom the Most?' (1993) 15(2) *Sydney Law Review* 168, 168.

2 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Welcome to Country* (Web Page) <https://aiatsis.gov.au/explore/welcome-country>.

3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 26 ('*UNDRIP*').

4 Marcelle Burns, 'Closing the Gap between Policy and Law: Indigenous Homelands and a "Working Future"' (2009) 27(2) *Law in Context* 114, 119; Jacynta Krakouer, Sana Nakata, James Beaufils, Sue-Ann Hunter, Tatiana Corrales, Heather Morris and Helen Skouteris, 'Resistance to Assimilation: Expanding Understandings of First Nations Cultural Connection in Child Protection and Out-of-Home Care' (2023) 76(3) *Australian Social Work* 343, 343; Patricia Dudgeon and Abigail Bray, 'Indigenous Relationality: Women, Kinship and the Law' (2019) 3(2) *Genealogy* 23, 24.

5 Dudgeon and Bray (n 4) 24.

6 Leanne Weber and Alison Gerard, 'Robodeport or Surveillance Fantasy? How Automated is Automatic Visa Cancellation in Australia? (2024) 9 *Frontiers in Sociology* 1336160:1–16, 1. See also Mary Crock and Kate Bones, 'The Creeping Cruelty of Australian Crimmigration Law' (2022) 44(2) *Sydney Law Review* 169, 173; Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime, Law and Social Change* 1, 7 ('Regulating Crimmigrants').

7 *Love v Commonwealth* (2020) 270 CLR 152, 192 [81] (Bell J) ('*Love*').

immigration authorities regarding permanent exclusion from Australia.[8] The *Love* case involved Daniel Love and Brendon Thoms, both of whom identified — and were accepted by their communities — as Aboriginal,[9] but who were not born in Australia and did not have Australian citizenship. Although visa cancellation is the focus of this article, we note that, historically, Aboriginal and Torres Strait Islander peoples 'were denied citizenship' and basic citizenship rights.[10]

This article surveys the historical context and contemporary social reality of Indigenous peoples' entanglement in systems of criminal justice and migration control. Migration control and colonisation are tightly linked through their contested relationships with, and access to, sovereign territory. Contemporary and historical writings on immigration and racism in settler colonies have been criticised for failing to 'take Indigenous decolonization seriously'[11] as the 'question of land as contested space is seldom taken up'.[12] Migration controls impact First Nations peoples against a backdrop of rising rates of incarceration and victimisation globally as colonisation and its ongoing effects continue to resonate.[13] The legal fiction of the declaration of terra nullius led to the swift possession of Australia. As Indigenous legal scholar Aileen Moreton-Robinson writes, whereas international customary law required that colonies be established under conquest or cession, 'Australia was taken on a different basis', denying the customary proprietary rights and the rights of Indigenous peoples as 'subjects of the crown'.[14] The application of this legal fiction led to the Frontier Wars and to the systematic dispossession (attempted and actual), including the forced relocation of Indigenous peoples, which continues today. The laws, policies and practices of colonisation are, and have been, resisted by Indigenous peoples with

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8 Paul Karp, 'Albanese Government Urged to End Legal Fight over Power to Deport Aboriginal People', *The Guardian* (online, 18 June 2022) <https://www.theguardian.com/australia-news/2022/jun/18/albanese-government-urged-to-end-legal-fight-over-power-to-deport-aboriginal-people> ('Government Urged to End Legal Fight').

9 *Love* (n 7) 191–2 [79] (Bell J), 215 [157]–[158] (Keane J).

10 Michael Dodson, 'Citizenship in Australia: An Indigenous Perspective' (1997) 22(2) *Alternative Law Journal* 57, 57. See also Dodson at 57–8; Peter Prince, 'Was Namatjira an Alien? The High Court's Flawed History of Belonging in Australia' in Kate Bagnall and Peter Prince (eds), *Subjects and Aliens: Histories of Nationality, Law and Belonging in Australia and New Zealand* (ANU Press, 2023) 151, 166.

11 Bonita Lawrence and Enakshi Dua, 'Decolonizing Antiracism' (2005) 32(4) *Social Justice* 120, 120.

12 Ibid 126.

13 Amanda Porter, 'Aboriginal Sovereignty, "Crime" and Criminology' (2019) 31(1) *Current Issues in Criminal Justice* 122.

14 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 4–5.

the Uluru Statement from the Heart[15] calling for Voice,[16] Treaty and Truth-Telling[17] as central to efforts to reconcile this past and ongoing contemporary legacies.

Deportation, in particular, has unique impacts on Indigenous peoples globally.[18] Government attempts to remove First Nations peoples from Australia under visa cancellation provisions present a striking contemporary development in border control. This article contributes to existing analysis of the High Court ruling in *Love* that 'Aboriginal Australians' cannot be 'aliens',[19] by focusing on two central arguments. First, the targeting of Indigenous peoples for exclusion represents a continuation of colonisation practices and a rejection of recommendations to the contrary. Second, Indigenous peoples remain entangled in migration controls and actively resist containment and exclusion. In concluding our analysis, we highlight the important role of legal education in providing a vehicle for truth-telling, and recognising the role played by our discipline and profession in addressing ongoing harms.[20]

In Part II of this article, we review the literature on deportation and analyse the expanded visa cancellation provisions that have resulted in increased numbers of people being targeted and removed from Australia. The intensifying interplay between criminal and immigration law, termed 'crimmigration',[21] is said to be uniquely shaping the differential and more-punitive experience of non-citizens. We use this framing to understand the impact of crimmigration on First Nations peoples and sovereignty. In Part III we outline our methodological approach. Documentary research and two case studies are relied upon to explore the historical continuities in deportation and to platform the experiences, strength and resistance of First Nations peoples caught up in this push to remove and exclude non-citizens permanently from Australia.

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15 *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017). The Uluru Statement from the Heart was issued to the Australian people in 2017 by Aboriginal and Torres Strait Islander peoples in attendance at the First Nations National Constitutional Convention ('Uluru Convention'). It called for a First Nations Voice to Parliament, a process to follow that for agreement-making, and truth-telling. These proposals are known as Voice, Treaty, Truth: see Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (UNSW Press, 2021) 6.

16 'Voice' signifies a First Nations Voice to the Commonwealth Parliament that is enshrined in the *Australian Constitution*: see Dani Larkin and Kate Galloway, 'Constitutionally Entrenched Voice to Parliament: Representation and Good Governance' (2021) 46(3) *Alternative Law Journal* 193. The referendum to establish a permanent Aboriginal and Torres Strait Islander Voice to Parliament was defeated in October 2023 and it remains unclear how this proposal will be realised.

17 In the Regional Dialogues that led to the Uluru Convention and the creation of the Uluru Statement from the Heart, First Nations participants emphasised that 'truth was not about them as victims, survivors or as resistance fighters but about all Australians — now and, through ongoing educational programs, in the future': Megan Davis, 'Speaking Up: The Truth about Truth-Telling' (2022) 76 *Griffith Review* 25, 34.

18 Karl Gardner, 'Indigenous Anti/Deportation: Contesting Sovereignty, Citizenship, and Belonging in Canada and Australia' (2024) 33(2) *Social & Legal Studies* 168, 168.

19 *Love* (n 7) 192 [81].

20 Annette Gainsford, Alison Gerard and Emma Colvin, 'Challenges and Strategies for Incorporating Indigenous Laws and Histories across Legal Education Curriculum' in Nicole Watson and Heather Douglas (eds), *Legal Education Through an Indigenous Lens: Decolonising the Law School* (Routledge, 2025).

21 Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) *American University Law Review* 367, 376 ('The Crimmigration Crisis').

In Part IV of this article, we discuss the history and present practices of deportation of First Nations peoples which form the context of the two case studies. The first of our case studies, pre-dating *Love*, is *WSML and Minister for Home Affairs*,[22] a successful appeal on merit to the Administrative Appeals Tribunal ('AAT') concerning a citizen from Aotearoa New Zealand who claimed both Aboriginal and Māori identity. In this case study we investigate the routine entanglement of Indigenous peoples with visa cancellation powers. We explore how historical legacies of colonisation reverberate in the present through contemporary practices of visa cancellation and removal. Our second case study is *Montgomery v Minister for Immigration*, a case which also concerned a New Zealand citizen who identifies as an Aboriginal Australian.[23] In this case study we analyse the continuous need for Indigenous peoples to argue against exclusion, and how the advocacy and resistance of Indigenous peoples and lawyers, including native title organisations, continue in the aftermath of the High Court's pronouncement in *Love*. We argue that Indigenous peoples continue to be subject to the gaze of border control authorities for removal. We argue that more needs to be done to counter the contemporary reality whereby only a 'wafer thin' majority prevented the government from deporting a traditional custodian from Australia.[24]

II Indigenous Sovereignty, Crimmigration and Deportation

The move to deport, or attempt to deport, First Nations peoples from Australia reveals the 'foundational and continuing role of "race" and "whiteness" in the formation of Australian sovereignty and citizenship'.[25] In the Australian setting, Moreton-Robinson writes that racism is 'inextricably tied to the theft and appropriation of Indigenous lands in the first world' despite the 'omnipresence of Indigenous sovereignties'.[26] The prevalence of what Moreton-Robinson terms 'patriarchal white sovereignty'[27] has meant that Indigenous sovereignty is perceived as threatening and enhances the fear of dispossession from a 'foreign other', as represented by asylum seekers and refugees. Louise Boon-Kuo draws on Moreton-Robinson's work in her analysis of punitive approaches in border control, understood as 'part of the expressive performance of patriarchal white sovereignty responding to the crisis of legitimacy of its illegal foundation'.[28] Border security policy is thus intrinsically connected to the denial of Indigenous sovereignty,[29] and stands to have a differential impact on First Nations peoples.

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22 *WSML and Minister for Home Affairs (Migration)* [2019] AATA 41 ('*WSML*').

23 *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 ('*Montgomery*').

24 Asmi Wood, 'Australia and Pandemics v BLM: No, *Love* Lost (at the High Court)' (Pt 1) (2021) 46(3) *Alternative Law Journal* 178 ('No, *Love* Lost Pt 1').

25 Louise Boon-Kuo, '"Race", Crimmigration and the Deportation of Aboriginal Non-Citizens' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 39, 40.

26 Moreton-Robinson (n 14) xiii.

27 See, eg, ibid 138.

28 Boon-Kuo (n 25) 39.

29 Moreton-Robinson (n 14) 5.

A Legal Framework of Visa Cancellation and Removal

Australia's visa cancellation and removal framework is so robust there is now a 'suite of tools' available to exclude non-citizens.[30] Historically, the main mechanism for removal was the criminal deportation power, contained within ss 200 and 201 of the *Migration Act*.[31] Section 201 provides that a non-citizen can be 'deported' if convicted of a criminal offence and sentenced to imprisonment for at least one year. Long-term residents (initially, people who had been in Australia for 5 years, a period increased to 10 years in 1983)[32] were recognised as occupying a different position and exempted from deportation.[33] Section 200 was the main deportation power used until the early 1990s when a series of migration law reforms was introduced that expanded the use of visa cancellation and removal, in effect unseating deportation powers.[34]

The dominant provision now relied upon to effect the visa cancellation of non-citizens is 'character grounds' found in s 501 of the *Migration Act*. A visa can be refused or cancelled if the non-citizen does not pass the 'character test' as defined in s 501(6). The original 'character test', introduced in 1992, enabled the Minister to refuse or cancel a visa if satisfied the person was not of good character.[35] Notably, when s 501 was originally introduced the provisions were aimed at visa refusal and not removal.[36] Section 501 contained no exemption for long-term residents, in contrast to the criminal deportation power in ss 200 and 201.[37] Section 501 was bolstered with the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth), which shifted the onus onto the applicant as a 'character test' that applicants must satisfy.[38] It introduced the 'substantial criminal record' provision, which meant that someone did not pass the 'character test' if they were sentenced to imprisonment for more than 12 months.[39] Finally, the amendments allowed the Minister to cancel a visa without applying

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30 Evidence to Joint Standing Committee on Migration, Parliament of Australia, Canberra, 27 June 2018, 4 (Justine Jones). The *Migration Act 1958* (Cth) ('*Migration Act*') provides a range of powers to cancel visas under 'character grounds' in s 501 and 'specified grounds' such as in ss 116–18.

31 The criminal deportation power, formerly in s 12 of the *Migration Act* (n 30), was amended by the *Migration Amendment Act 1983* (Cth) to become s 200 and apply to all non-citizens convicted and sentenced to at least one year of imprisonment: see Khanh Hoang and Sudrishti Reich, 'Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis' (2017) 5(1) *Comparative Migration Studies* 1, 8; Rebecca Powell, 'A Return to the 10-Year Rule? The Deportation of Convicted New Zealander Long-Term Residents from Australia under Section 501 of the *Migration Act*' (2024) 36(3) *Current Issues in Criminal Justice* 347, 349–50; Peter Billings and Khanh Hoang, 'Characters of Concern or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 119, 121.

32 Powell (n 31) 349.

33 *Migration Act* (n 30) s 201.

34 Hoang and Reich (n 31) 8.

35 The original version of the 'character test' was s 180A and was inserted in 1992: Michelle Foster, '"An 'Alien' by the Barest of Threads": The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483, 510.

36 Ibid 510. See also Powell (n 31).

37 Hoang and Reich (n 31) 8.

38 Foster (n 35) 510.

39 *Migration Act* (n 30) s 501(7).

natural justice[40] and gave the Minister the power to overturn a decision of a merits review tribunal.[41] This already represented a dramatic enhancement of the Minister's powers, but even more powers to exclude were to follow.

Section 501 was significantly bolstered by amendments in 2014 to introduce mandatory visa cancellation and expand existing discretionary grounds for visa cancellation.[42] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) stipulated that a visa must be cancelled if a non-citizen receives a prison term of 12 months or more or is convicted of sexually based offences involving a child, and is serving a term of imprisonment.[43] Where sentences are to be served concurrently, the whole length of each term is used to calculate whether or not a person has reached the 12-month threshold.[44] The reforms also introduced much broader discretionary provisions in s 501(2) that identify people for visa cancellation based on their risk of committing crime or other forms of conduct labelled suspicious. A strengthened 'character test' set out in s 501(6) stipulates that, in addition to having a criminal record, a person will fail the 'character test' if the Minister 'reasonably suspects' that they have been, or are, a member of a group or organisation or have had 'an association' with a group, organisation or person 'involved in criminal conduct'.[45] The provisions have been widened to include risk as a basis on which to cancel a visa under the discretionary provisions in s 501(2). To illustrate, under s 501(6)(d) a visa can be cancelled if there is a risk that the person would engage in criminal conduct.[46]

The introduction of mandatory visa cancellation to cancel a visa without natural justice or prior notice to the visa holder was accompanied by a process through which a visa holder could seek 'revocation' of the visa cancellation decision.[47] Section 501CA(4) of the *Migration Act* gives the Minister or a delegate the power to revoke a decision to cancel a visa under s 501(3A) if the person makes representations in accordance with the invitation and the Minister or delegate is satisfied that the person passes the 'character test' (as defined by s 501 and including all limbs), or there is another reason why the original decision should be revoked.[48] For those unsuccessful in their application for revocation, a merits review process is

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40 *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 item 23, inserting s 501A(4).

41 Ibid sch 1 item 23, inserting s 501A.

42 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1 item 8 inserted s 501(3A) which introduced mandatory visa cancellation for non-citizens who were deemed to have failed the 'character test'. Under s 501(3A), which applies retrospectively, the Minister must cancel the visa of a person if they have been sentenced to a term of imprisonment of 12 months or more or have been convicted of sexually based offences involving a child, and are serving the sentence full-time in a custodial institution. For a description of the key legislative provisions see Billings, 'Regulating Crimmigrants' (n 6) 7–10.

43 *Migration Act* (n 30) s 501(3A).

44 Ibid s 501(7A).

45 Ibid s 501(6)(b).

46 Ibid s 501(6)(d)(i).

47 Ibid s 501CA. See Weber and Gerard (n 6) 11.

48 Ibid s 501CA(4)(b). See Weber and Gerard (n 6) 11. Approximately three-quarters of those who have their visa cancelled do apply for revocation of the mandatory visa cancellation decision: see Department of Home Affairs (Cth), *Freedom of Information Request: FA21/02/00558* (January 2021) questions 3, 4, 5.

available in limited circumstances. Application can be made to the AAT for a merits review of a decision by a delegate of the Minister not to revoke a decision to cancel a visa.[49] A Minister can still set aside a decision of the AAT not to cancel a visa if satisfied that the cancellation is in the national interest.[50] Ministerial Directions, issued under s 499 of the *Migration Act*, provide guidance to delegates of the Minister, and AAT Members, in making decisions around the refusal and cancellation of visas and the revocation of mandatory visa cancellation. *Direction No 110* is the most recent at the time of writing,[51] and sets out five 'primary considerations':

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

(3) the strength, nature and duration of ties to Australia;

(4) the best interests of minor children in Australia;

(5) expectations of the Australian community.[52]

In taking these considerations into account, the Ministerial Direction makes clear that the protection of the Australian community from criminal or other serious conduct in para 8(1) is 'generally to be given greater weight' than the other primary considerations.[53] 'Other considerations' taken into account include the legal consequences of the decision, extent of impediments if removed, and impact on Australian business interests.[54]

The strengthening of the 'character test' in 2014 was presented as a necessary aspect of ensuring the integrity of Australia's migration program.[55] The Australian government asserted at the time that the community expected there to be 'a low tolerance for criminal, noncompliant or fraudulent behaviour by noncitizens'.[56] It is unclear what evidence was relied upon to support this assertion. The 2014 changes have resulted in a dramatic increase in the numbers of non-citizens, including First Nations peoples, having their visas cancelled. In total terms, the 2014 amendments increased the number of people having their visas cancelled under s 501 from 76 in 2013–14[57] to 588 in 2014–15[58] and 1,284 in 2015–16.[59] The figures continue to fluctuate and for 2022–23 the number was 626, almost all of which were mandatory

49 *Migration Act* (n 30) s 500(1)(b).
50 Ibid s 501BA(2).
51 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 110: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (7 June 2024) ('*Direction No 110*').
52 Ibid para 8(1)–(5).
53 Ibid para 7(2).
54 Ibid para 9(1)(a)–(c).
55 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 10325 (Scott Morrison, Minister for Immigration).
56 Ibid.
57 Department of Immigration and Border Protection (Cth), *Annual Report 2013–14* (Report, 2014) 169.
58 Department of Immigration and Border Protection (Cth), *Annual Report 2014–15* (Report, 2015) 159.
59 Department of Immigration and Border Protection (Cth), *Annual Report 2015–16* (Report, 2016) 8.

visa cancellations.[60] It is understood that just under half of those affected are New Zealanders, and Māori and Pasifika New Zealanders are proportionally over-represented in the statistics on visa cancellation.[61] We know from media sources, and some case law, that First Nations peoples are included in these figures,[62] but exact figures are unobtainable.

B *Crimmigration: Merging Immigration and Criminal Law*

New theoretical approaches have sought to capture the way in which criminal and immigration law have combined to enhance the precarity of non-citizens.[63] This intensification has been referred to by law scholar Juliet Stumpf as 'crimmigration', or the merging of immigration and criminal laws to exclude. Stumpf originally coined the term 'crimmigration' to characterize developments in three domains: the overlapping of substantive criminal and immigration law; the similarities between strategies and technologies used to detect and prosecute criminal and immigration law offenses; and the procedural way in which both immigration and criminal law are managed.[64] Stumpf's thesis, which is based on membership theory, asserts that the merger is draconian and aims to exclude those who are not part of a social contract with government, with criminal and immigration law providing the tools to exclude.[65] Deportation provides the method of expulsion.[66] But not all attributes have become part of the merger, with Stumpf noting that protections in criminal law available to defendants are not part of the union.[67] In later writing, Stumpf analyses the crimmigration process as a form of punishment of non-citizens, noting it is often harsher than that faced by citizens who commit similar offences.[68]

Scholars applying Stumpf's work have sought to use it to capture what they term 'transformations'. Analysing the Norwegian context, Katja Franko Aas writes about a 'transformation' in criminal justice — a more exclusionary penal culture directed at non-citizens.[69] Perhaps this characterisation as 'transformational' reflects the fact that Western Europe has some of the highest rates of imprisonment of non-

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60 Department of Home Affairs (Cth), *Character (Section 501) and General Cancellation Statistics* (30 June 2023) table 2. In 2022–23, of the 626 visa cancellations 9 were discretionary cancellations under s 501(2) of the *Migration Act* (n 30) and 617 were mandatory visa cancellations under s 501(3A).

61 Powell (n 31) 348, 354; Elizabeth Stanley, 'Expanding Crimmigration: The Detention and Deportation of New Zealanders from Australia' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 519, 524; Henrietta McNeill and Marinella Marmo, 'Past–Present Differential Inclusion: Australia's Targeted Deportation of Pacific Islanders, 1901 to 2021' (2023) 12(1) *International Journal of Crime, Justice and Social Democracy* 42, 49–50.

62 Non-citizens with Aboriginal ancestry have been deported: see, eg, *Wehi v Minister for Immigration and Border Protection* [2018] FCA 1176, [20] (Rangiah J).

63 Stumpf, 'The Crimmigration Crisis' (n 21) 376–9.

64 Alison Gerard, 'Crimmigration and the Australian Legal Lexicon: Reflecting on Border Control, Theory and the Lived Experience' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 89, 92.

65 Stumpf, 'The Crimmigration Crisis' (n 21) 377.

66 Ibid 378.

67 Ibid 392.

68 Juliet Stumpf, 'Crimmigration: Encountering the Leviathan' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2013) 237.

69 Katja Franko Aas, 'Bordered Penality: Precarious Membership and Abnormal Justice' (2014) 16(5) *Punishment & Society* 520, 520.

citizens in the globe.[70] For Western Europe, citizenship has become a technique of 'bordered penality'.[71] Applying this to the Australian context tests the claim that this is a new phenomenon, because an exclusionary penal culture, and restrictions on legal citizenship,[72] have existed since invasion.[73] It was also central to the law-making efforts of our first federal Parliament in 1901.[74] The over-representation of First Nations peoples in child protection statistics[75] and incarceration shows that criminalisation and other techniques of exclusion persist. This makes the impact of crimmigration on First Nations peoples, and its resistance, an important site of analysis.

C *Sovereignty, Crimmigration and First Nations Peoples*

The governing of mobility is a key demonstration of the state's sovereign power.[76] Although crimmigration scholars have begun to recognise the 'racialised dimensions of crimmigration', 'the role of settler colonialism as constitutive of racial formation remains marginal'.[77] The Australian context provides a rich basis for analysing the role of settler colonialism and the unique way in which criminal and migration systems are intertwined. The merging of immigration and criminal law is not new for Australia given our history of colonisation and the White Australia policy.[78] Australia is also the site for the routine criminalisation and differential status of Aboriginal and Torres Strait Islander peoples,[79] such that the assumption of protections in the criminal justice system, depicted as eroded by crimmigration, may not be as 'protective' in the first place.

Building on Stumpf's thesis that crimmigration privileges sovereign power over membership, Boon-Kuo argues that

> utilising the sanction of deportation for Aboriginal people who are not Australian citizens and have been convicted of criminal offences communicates not only condemnation of the non-citizen offender, but also denial of First Nation sovereignties, and works ideologically to naturalise a raced notion of citizenship that is embedded in 'patriarchal white sovereignty'.[80]

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70 Ibid 522.

71 Ibid 531–2.

72 This is not expanded upon in this article, but for a review see John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

73 In support of our use of the term 'invasion' see Moreton-Robinson (n 14) 34; Teela Reid, 'The Power of the First Nations Matriarchy: Warrior Women Reckoning with the Colony' (2022) 76 *Griffith Review* 43, 46.

74 Mark Finnane and Andy Kaladelfos, 'Australia's Long History of Immigration, Policing and the Criminal Law' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 22.

75 Productivity Commission (Cth), *Closing the Gap: Annual Data Compilation Report* (Report, July 2024) 33 (socio-economic areas 11, 12).

76 Mary Bosworth, 'Border Control and the Limits of the Sovereign State' (2008) 17(2) *Social & Legal Studies* 199, 199. See also Gardner (n 18) 169.

77 Boon-Kuo (n 25) 40.

78 See ibid; McNeill and Marmo (n 61) 42; Finnane and Kaladelfos (n 74) 19, 19.

79 Porter (n 13) 122.

80 Boon-Kuo (n 25) 41, referencing Moreton-Robinson's 'patriarchal white sovereignty'.

Crucially, Boon-Kuo argues that the visa cancellation decision-making process 'operates as a forum for the production of racialised evaluations of Aboriginality and community connection'.[81] Boon-Kuo alerts us to the risk 'that decision-making in this field has and will increasingly become another vehicle in which state practice effects the separation of First Nation families and communities'.[82]

Attempts to deport Aboriginal and Torres Strait Islander peoples from Australia represent the physical severing of connections to land. While Indigenous sovereignty persists regardless of removal, disconnection from land '"compromises cultural connections" and causes extreme distress and powerlessness commonly felt by many Indigenous groups worldwide'.[83] Removal under s 198 of the *Migration Act* means permanent exclusion from Australia; one can never return. Indigenous relationships to land are spiritual and political, and an important site of resistance and sustenance.[84] As Bonita Lawrence and Enakshi Dua write, they also have 'tremendous longevity'.[85] The connections between Indigenous cultures and Country are recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[86] Analysing deportation cases from Canada and Australia, Karl Gardner introduces the notion of Indigenous 'anti/deportation' to capture the contestation of deportation and its impact on Indigenous sovereignty and solidarity movements between migrants and Indigenous peoples.[87] Given the sacred nature of connection to Country, it might be expected that this reality, evidenced within several Royal Commissions and national inquiries,[88] would be given prominence in policy and laws and might temper the application of visa cancellation and deportation.

D *Love v Commonwealth*

The decision by the High Court in February 2020 in *Love* was a significant one for Australian legal scholarship and a litmus test of how Australian jurisprudence understands Aboriginal and Torres Strait Islander peoples, sovereignty, connection

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81 Ibid 42.

82 Ibid 56.

83 Jonathan Kingsley, Mardie Townsend, Claire Henderson-Wilson and Bruce Bolam, 'Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing' (2013) 10(2) *International Journal of Environmental Research and Public Health* 678, 682–3.

84 Irene Watson, 'Aboriginal Relationships to the Natural World: Colonial "Protection" of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment* 119, 124. See also Moreton-Robinson (n 14) 11.

85 Lawrence and Dua (n 11) 126.

86 *UNDRIP* (n 3) art 26.

87 Gardner (n 18) 170, citing Peter Nyers, *Irregular Citizenship, Immigration, and Deportation* (Routledge, 2019).

88 See *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 1, 295; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, April 1997) ('*Bringing Them Home*'); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC Report No 31, 1986) 95; Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) ('*Pathways to Justice*'); Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (2020).

to Country and the severance of that connection through removal or deportation. By a slim majority of four judges to three, the High Court ruled that 'Aboriginal Australians' cannot be aliens and cannot be deported.[89] According to Asmi Wood, 'in seeking to deport two Aboriginal men the current executive is attempting to do what not even the most racist of their forebears' dared to do.[90] Wood argued for constitutional recognition[91] and called 'on the non-Indigenous peoples, who now share this continent to shake off their apathy and force their recalcitrant leaders to "do the right thing by Blacks" something they claim to have done for the immigrants to this continent'.[92] Wood stated that *Love* bought Australia time to 'do the right thing'.[93]

A considerable amount has been written on *Love*,[94] much of it focusing on the implications for constitutional recognition of Indigenous sovereignty.[95] Some law academics have argued that *Love* represents 'aggressive judicial activism by the High Court'.[96] The case involved Daniel Love and Brendon Thoms who were not born in Australia and did not have Australian citizenship.[97] Love was born in Papua New Guinea and Thoms in Aotearoa New Zealand.[98] Both had been permanently living in Australia since they were six years old (Love since 1985 and Thoms since 1994).[99] Upon being convicted of a criminal offence, both were sentenced to periods of imprisonment that triggered mandatory visa cancellation under s 501(3A) of the *Migration Act*.[100] Thoms was taken into immigration detention upon commencing court-ordered parole.[101] Love was taken to immigration detention after serving almost two months of his sentence, then released almost two months later when the cancellation of his visa was revoked.[102] The appellants argued in the High Court that

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89 *Love* (n 7) 192 [81].

90 Wood, 'No, *Love* Lost Pt 1' (n 24) 178; Asmi Wood, 'Australia and Pandemics v BLM: No, *Love* Lost (at the High Court)' (Pt 2) (20012021) 46(4) *Alternative Law Journal* 314 ('No, *Love* Lost Pt 2').

91 Wood, 'No, *Love* Lost Pt 1' (n 24); Wood, 'No, *Love* Lost Pt 2' (n 90).

92 Wood, 'No, *Love* Lost Pt 1' (n 24) 178.

93 Wood, 'No, *Love* Lost Pt 2' (n 90) 317.

94 See, eg, Johnny M Sakr and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40(1) *University of Queensland Law Journal* 119; Mischa Davenport, '*Love v Commonwealth*: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership' (2021) 43(4) *Sydney Law Review* 589; James Aird and Allan Ardill, 'A "Kind of Sovereignty": Toward a Framework for the Recognition of First Nations Sovereignties at Common Law' (2023) 46(2) *Melbourne University Law Review* 330; Elisa Arcioni and Rayner Thwaites, 'Constitutional Law and Citizenship: Aboriginal Australians not Vulnerable to Deportation' [2020] (65) *Law Society of NSW Journal* 68; SA McDonald, 'The Detention of Non-Aliens Suspected of Being Unlawful Non-Citizens: Thoms v Commonwealth' (2023) 33(4) *Public Law Review* 287; Boon-Kuo (n 25).

95 See, eg, Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410; Daniel Lavery, 'Judicial Distancing in the High Court: *Love/Thoms v Commonwealth*' (2020) 26 *James Cook Law Review* 159; Flyn Wells, 'Heartbeat in the High Court: *Love v Commonwealth* (2020) 375 ALR 597' (2020) 41(2) *Adelaide Law Review* 657.

96 Sakr and Zimmermann (n 94) 137.

97 *Love* (n 7) 169 [2] (Kiefel CJ).

98 Ibid.

99 Ibid 214 [152], 215 [157], [159] (Keane J).

100 Ibid.

101 Ibid 215 [159] (Keane J).

102 Ibid 234 [225] (Keane J).

they have 'special status' as a 'non-citizen, non-alien'.[103] Thoms identifies as a member of the Gunggarri people, and is a native title holder as recognised by the Federal Court of Australia.[104] Love identifies as Kamilaroi 'and is recognised as such by one Elder of that group'.[105] The central contention of the plaintiffs was that 'the common law of Australia recognises the unique connection which Aboriginal people have with land and waters in Australia'.[106]

Each judge wrote their own judgment which gives a sense of the complexity and wrangling of unique approaches to get to the majority decision that Aboriginal people could not be deported. The majority ruled that 'Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2])* are not within the reach of the "aliens" power conferred by s 51(xix) of the *Constitution*'.[107] The tripartite test was set out by Brennan J in *Mabo [No 2]* as follows:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.[108]

This approach supported earlier expressions of the tripartite test by Deane J in *Commonwealth v Tasmania*,[109] and followed what had been adopted by federal government departments as the 'working definition' of Aboriginality since the early 1980s.[110] The Australian Law Reform Commission has urged use of a flexible definition,[111] and 'that these matters should be determined by Aboriginal and Torres Strait Islander people themselves, working through their own communities, institutions and consultation processes'.[112] In short, the tripartite test requires Aboriginal and Torres Strait Islander descent, self-identification and community recognition.[113]

The minority in *Love* argued that 'alien' was akin to 'citizen' and a legislative issue for Parliament, concluding that Indigeneity was irrelevant to determining citizenship.[114] This determination is reminiscent of what Irene Watson characterises as 'a violent space within which Aboriginality is measured for its degree of authenticity, and where those who do the measuring are ignorant or deniers of the history of colonialism'.[115] Issues in contention were whether or not Aboriginal Elders should have the power to determine the boundaries of membership of

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103 Ibid 170 [3] (Kiefel CJ).
104 *Kearns v Queensland* [2012] FCA 651; *Foster v Queensland* [2014] FCA 1318.
105 *Love* (n 7) 170 [3] (Kiefel CJ).
106 Ibid 175 [21] (Kiefel CJ).
107 Ibid 192 [81] (Bell J, for the majority).
108 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 ('*Mabo [No 2]*').
109 *Commonwealth v Tasmania* (1983) 158 CLR 1, 274.
110 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, 2003) 914–15 [36.14] ('*Essentially Yours*').
111 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, 1986) [95].
112 *Essentially Yours* (n 110) 913 [36.10].
113 *Mabo [No 2]* (n 108) 70 (Brennan J).
114 *Love* (n 7) 170 [4] (Kiefel CJ).
115 Irene Watson, 'In the Northern Territory Intervention: What Is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45, 49.

Aboriginal society,[116] and whether connection to Country means connection to a particular nation group or the whole of Australia.[117] Ultimately the Court found that Indigenous peoples' connection to Country was 'constitutionally significant'.[118] As Brendan Thoms' Indigeneity had been already 'proven' he was released from immigration detention, whereas Daniel Love's proof of Indigenous status was sent to the Federal Court for determination.[119] In the aftermath of the decision, nine Indigenous people who had demonstrated that they satisfied the tripartite test articulated in *Mabo [No 2]* were released from detention, and a further 20 were reported to be having their claims assessed.[120] Thoms lost a subsequent case seeking compensation for the 500 nights he spent in immigration detention and not in the community with his family.[121]

Because of *Love*, the Standard Operating Procedures of immigration authorities now stipulate that officers can only detain a person under the *Migration Act* if they reasonably suspect 'the person does not meet, or probably does not meet, all three limbs of the tripartite test'.[122] The three limbs of the test as set out in the Procedures are:

> 1. the person must be biologically descended from Aboriginal or Torres Strait Islander people, and
> 2. the person must self-identify as a member of those same Aboriginal or Torres Strait Islander people, and
> 3. the person must be recognised as a member of those same Aboriginal or Torres Strait Islander people by elders or other persons enjoying traditional authority among those people.[123]

As a result, First Nations peoples who are non-citizens and who might not meet the tripartite test continue to be the subject of migration controls, as we explore below.

III Method

In this article we use documentary research to analyse 'historical patterns of bordering'.[124] Marinella Marmo's method of analysing interconnections between past and present interdisciplinary approaches corresponds with Cindy Blackstock and colleagues' Indigenous ontological perspective that is critical of 'new

116 *Love* (n 7) 253 [271] (Nettle J).
117 Ibid 189 [71] (Bell J).
118 Harry Hobbs, 'Drawing an Implied Limitation to the Race Power' (2021) 32(3) *Public Law Review* 184, 189.
119 *Love* (n 7) 260 [288] (Nettle J).
120 Paul Karp, 'Government Accused of "Shirking Responsibility" in Bid to Overturn Ruling Against Aboriginal Deportation', *The Guardian* (online, 16 October 2021) <https://www.theguardian.com/australia-news/2021/oct/16/government-accused-of-shirking-responsibility-in-bid-to-overturn-ruling-against-aboriginal-deportation>.
121 *Thoms v Commonwealth* (2022) 276 CLR 466.
122 Department of Home Affairs (Cth), *Interviewing Located Persons* (Standard Operating Procedure, Document ID (PPN) BC-5436, 5 August 2021) 7 ('*Interviewing Located Persons*').
123 Ibid.
124 Marinella Marmo, 'Continuity and Durability of Violent Border Policies and Practices Directed at Undesirable Migrants in Britain and Australia: Some Reflections on the Past–Present Continuum' (2022) 40(1–2) *Immigrants & Minorities* 240, 243.

approaches' and discoveries in Western academia.[125] Blackstock recognises that an Indigenous ontological approach places connection to culture and lived experience as a central part of Indigenous ways of knowing, being and doing,[126] thereby reinforcing Indigenous peoples' distinctive sense of belonging to the physical and spiritual environment through cultural and kinship ties.

To explore 'historical patterns of bordering' and their resistance,[127] this article adopts a case study approach drawing on two cases decided either side of the High Court's decision in *Love*. Our selection of each case study did not occur through a systematic case law or media analysis, which would constitute a useful area for future research. Instead, as we detail below, our case studies were derived from our literature review and from media attention at the time of undertaking this research on the visa cancellation of Shayne Montgomery, who asserted Aboriginality through cultural adoption.[128] A case study approach was adopted as it enables a contextual and in-depth understanding of contemporary practices and their historical legacy using a variety of sources.[129] We used documentary research and information that was publicly available through judgments and media interviews instead of directly interviewing people subject to visa cancellation and removal. We took this approach as it offered a less intrusive way to platform the experiences of those subject to the tumult of visa cancellation.

This research is of particular significance to Aboriginal and Torres Strait Islander peoples and as such engages the Australian Institute of Aboriginal and Torres Strait Islander Studies Code on the ethical and responsible conduct of research ('*AIATSIS Code*').[130] The four principles underpinning the *AIATSIS Code* and reflected in this research are (1) Indigenous self-determination, (2) Indigenous leadership, (3) impact and value, and (4) sustainability and accountability.[131] Each principle involves a number of responsibilities for researchers, and we were alive to these at every stage of the research. Our responsibilities around respect and recognition were in some ways more onerous given we were relying on documentary research. As a non-Indigenous and Indigenous researcher with a long history of

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[125] Cindy Blackstock, Muriel Bamblett and Carlina Black, 'Indigenous Ontology, International Law and the Application of the Convention to the Over-Representation of Indigenous Children in Out of Home Care in Canada and Australia' (2020) 110(1) *Child Abuse & Neglect* 104587.

[126] Cindy Blackstock, 'Why Addressing the Over-Representation of First Nations Children in Care Requires New Theoretical Approaches Based on First Nations Ontology' (2009) 6(3) *Journal of Social Work Values and Ethics* 1, 29.

[127] Studying and understanding resistance is a counterweight to the deficit discourses that pervade education, health, law and justice framing of Aboriginal and Torres Strait Islander peoples: see Melitta Hogarth, 'Speaking Back to the Deficit Discourses: A Theoretical and Methodological Approach' (2017) 44(1) *Australian Education Research* 21, 32; William Fogarty, Melissa Lovell, Juleigh Langenberg and Mary-Jane Heron, 'Deficit Discourse and Strengths-Based Approaches: Changing the Narrative of Aboriginal and Torres Strait Islander Health and Wellbeing' (Report, Lowitja Institute, 2018); Marcelle Burns, Simon Young and Jennifer Nielsen, '"The Difficulties of Communication Encountered by Indigenous Peoples": Moving Beyond Indigenous Deficit in the Model Admission Rules for Legal Practitioners' (2018) 28(2) *Legal Education Review* 1, 9.

[128] Karp, 'Government Urged to End Legal Fight' (n 8).

[129] John W Creswell and J David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publications, 6th ed, 2023) 14.

[130] Australian Institute of Aboriginal and Torres Strait Islander Studies, *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020) ('*AIATSIS Code*').

[131] Ibid 3.

collaboration, we walked together in this inquiry privileging Indigenous leadership within the research team and outside it, responding to calls from Indigenous leaders for Indigenous sovereignty to be respected within visa cancellation processes.[132] Our ongoing commitment, advanced in this collaboration, is to participate in research that benefits Aboriginal and Torres Strait Islander people and contributes to a more socially just future in fulfilment of the *AIATSIS Code*.[133]

Selecting case studies from before and after *Love* was important to us in understanding how Aboriginal and Torres Strait Islander peoples continue to be entangled with border control. Our first case study was identified through a literature review on the topic of Indigenous peoples and visa cancellation and removal. Boon-Kuo[134] had recently written about the case of WSML, a New Zealand citizen who descended from peoples living in North-East Lutruwita/Tasmania. This ancestral link led us to focus on the historical operation of deportation of Aboriginal peoples, using the contemporary case study of *WSML*.[135] We came to our second case study through the media attention given to the case of Shayne Montgomery when Senator Lidia Thorpe called on the government to discontinue a High Court appeal challenging a decision not to deport Montgomery, who identified as an Aboriginal person through cultural adoption.[136] The High Court case was an appeal by the Commonwealth that sought to re-open or limit *Love*.[137] Elisa Arcioni and Kirsty Gover write that the case

> highlights the challenges entailed in efforts to determine the scope of the Australian Parliament's power to determine membership of the constitutional polity, and appropriately describe Aboriginal Australians in a way that respects the complexities of Aboriginal and Torres Strait Islander identity and membership.[138]

We consider the resistance to the deportation of Aboriginal people by analysing submissions by Indigenous stakeholders in the High Court. Both the Northern Land Council ('NLC') and the National Native Title Council ('NNTC') intervened and their submissions were the first contribution of Indigenous organisations to the High Court on questions of membership and deportation.[139] Analysing these acts of resistance amplifies the knowledges, leadership and sovereignty of Aboriginal and

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132 See, eg, Northern Land Council, 'Proposed Submissions of the Northern Land Council', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 9 March 2022, 3 [10] ('*NLC Submission*'); National Native Title Council, 'Submissions of the National Native Title Council Seeking Leave to Intervene', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 9 March 2022, 4 [7] ('*NNTC Submission*'); Indigenous Law and Justice Hub, 'Swift Successes Towards Indigenous Justice', *University of Melbourne* (Web Page) <https://www.unimelb.edu.au/alumni/impact/community/swift-successes-towards-indigenous-justice>.

133 See *AIATSIS Code* (n 130) 20–1 principle 3.

134 Boon-Kuo (n 25) 39.

135 *WSML* (n 22).

136 Karp, 'Government Urged to End Legal Fight' (n 8).

137 Transcript of Proceedings, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* [2022] HCATrans 51.

138 Elisa Arcioni and Kirsty Gover, 'Aboriginal Identity and Status under the *Australian Constitution*: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*' (2022) 44(1) *Sydney Law Review* 137, 137.

139 *NLC Submission* (n 132); *NNTC Submission* (n 132).

Torres Strait Islander peoples. It also counters the harmful deficit narratives that dominate representations of Aboriginal and Torres Strait Islander peoples in law and justice discourses.[140] We begin our analysis with a historical overview of the use of deportation on First Nations peoples.

IV Historical and Contemporary Context of Deporting First Nations Peoples

Deportation has been operationalised as a tool of colonisation since European invasion. *Bringing Them Home*, the final report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('Stolen Generations Inquiry'), revealed through powerful storytelling[141] two primary uses of the power to deport. The first use was the forced removal of Aboriginal and Torres Strait Islander peoples to remote islands *within* Australia. The terminology of deportation had been used to describe the removal of Indigenous peoples to island settlements, such as Palm Island in Queensland, and Flinders Island and Sara Island in Lutruwita/Tasmania.[142] In the case of Palm Island, deportation had many aims including enabling Aboriginal parents to be separated at a distance that made it impossible for them to visit their children.[143] On Flinders Island, deportation targeted (unsuccessfully) the removal of all Aboriginal people from Lutruwita/Tasmania to seize land and stop the 'Black War', an 1820s conflict between Aboriginal people and non-Aboriginal peoples.[144] We return to Flinders Island in our case study in Part IV(A).

The second use of deportation, and the primary focus for this article, was the forced removal of Aboriginal and Torres Strait Islander peoples from Australia, including children fostered or adopted into families as part of the policies informing the Stolen Generations.[145] This aligns with the definition of deportation in international law which requires the crossing of an international border.[146] The Stolen Generations Inquiry heard testimony from those impacted by the deportation of Aboriginal and Torres Strait Islander peoples who sought to return to Australia but remained non-citizens. As the report states, an 'unknown number' of Aboriginal and Torres Strait Islander children forcibly removed from their families and communities were subsequently taken overseas by foster families or adoptive parents.[147]

Deportation through forced removal resulted in the loss of citizenship by current and future generations of Aboriginal and Torres Strait Islander peoples. The Stolen Generations Inquiry heard about 'Jack', whose grandmother was forcibly

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140 See generally Burns, Young and Nielsen (n 127).
141 Narelle Bedford, 'Storytelling in Our Legal System: Healing for the Stolen Generations' (2019) 45(2) *Australian Feminist Law Journal* 321.
142 *Bringing Them Home* (n 88) 75.
143 Ibid.
144 Ibid 79–80.
145 Ibid 211–14, 320–1.
146 Vincent Chetail, 'Is There Any Blood on My Hands? Deportation As a Crime of International Law' (2016) 29(3) *Leiden Journal of International Law* 917.
147 *Bringing Them Home* (n 88) 211.

taken from the Torres Strait in the early 1900s.[148] It is understood that Jack's grandmother was taken by missionaries to Fiji to work in domestic service. Jack came to Australia on a tourist visa in 1988, overstayed his visa, and at the time of the Stolen Generations Inquiry was liable to deportation. Jack had re-established family and community ties, was working and was accepted by relatives and community, yet he was not eligible for citizenship or even permanent residence. According to his great-uncle who testified at the Inquiry:

> [T]he Australian Government owes a historical debt to Jack's grandmother (my sister) which it can only repay by granting Jack the right to remain in this country. Jack's birthright was stolen from him by Missionaries acting with the consent of the Queensland Government at the turn of the century and he is morally entitled to compensation. The least that can be done to compensate him would be to grant him a right to reside in his own country.[149]

Jack's grandmother was not a citizen when removed from Australia as citizenship was only extended to Aboriginal people with the passing of the *Nationality and Citizenship Act 1948* (Cth), well after his grandmother was removed.[150] We do not know what happened to Jack and whether he was deported. The generational impact of colonisation and its intersection with migration is enlivened by the courageous testimony provided by his family to the Inquiry.

The Stolen Generations Inquiry found that for people impacted by forced removal such as Jack, and those who could not afford to return to establish ties, 'the Commonwealth should assist those living overseas to return to this country permanently should they so choose'.[151] The Inquiry found this should occur in 'recognition of the fact that forcible removal was wrongful and of the need of many to re-establish their Indigenous identity, kinships and cultural links'.[152] The Inquiry produced a number of recommendations in *Bringing Them Home* that pertained to addressing the impact of deportation on those who told their stories to the Inquiry:

> Recommendation 31a: That the Commonwealth create a special visa class under the *Migration Act 1951* (Cth) to enable Indigenous people forcibly removed from their families and from Australia and their descendants to return to Australia and take up permanent residence.
>
> Recommendation 31b: That the Commonwealth amend the *Citizenship Act 1948* (Cth) to provide for the acquisition of citizenship by any person of Aboriginal or Torres Strait Islander descent.
>
> Recommendation 31c: That the Commonwealth take measures to ensure the prompt implementation of the *International Transfer of Prisoners Bill 1996*.[153]

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148 Ibid.

149 Ibid (Confidential evidence 138, Victoria).

150 Indigenous Australians automatically became Australian citizens with the passing of the *Nationality and Citizenship Act 1948* (Cth), but there was a difference between status and rights for Aboriginal and Torres Strait Islander peoples: see John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

151 *Bringing Them Home* (n 88) 320.

152 Ibid.

153 Ibid 321.

While the government asserts that these recommendations have been fulfilled, it is hard to see this claim realised when Aboriginal peoples without the security of citizenship continue to face the same challenges in returning and staying in Australia.

On the citizenship and visa recommendations (31a and 31b), the government has argued that provisions already exist in migration and citizenship legislation for granting entry to people removed from Australia, or the children of those removed.[154] A Senate Committee examining the implementation of the recommendations from the Stolen Generations Inquiry stated that, in receiving this submission from the government, 'the Committee received no evidence to suggest that this response was insufficient, or that members of the [Stolen Generations] had experienced difficulties in returning to Australia'.[155] (This particular submission from the government and the then Minister for Aboriginal and Torres Strait Islander Affairs, John Herron, also characterised *Bringing Them Home* as a 'misrepresentation of the historical record' and discussed at length the 'benign' intent of government policies that led to the Stolen Generations.[156]) Notwithstanding this assertion, it remains the case that if recommendation 31b had been implemented, Daniel Love and Brendan Thoms would not need to have taken their case to the High Court.

Despite the government stating that these recommendations have been implemented, Indigenous peoples forcibly removed from Australia still face challenges in returning. Recommendation 31c sought to enable the return of Aboriginal and Torres Strait Islander peoples deported and then jailed overseas. Russell Moore, whose adopted name was James Hudson Savage,[157] was born to a Koori mother in Victoria in 1963 and as a newborn forcibly removed and adopted to a couple who emigrated to the United States when he was six years old.[158] By his early teens he was homeless and caught up in the criminal justice system.[159] In 1991 he was sentenced to life imprisonment for murder.[160] Moore's birth mother and other family members located him while he was in a United States prison. Following the *Bringing Them Home* report recommendations, the Commonwealth did pass legislation to enable his transfer to Australia,[161] yet his bids to return to Australia were rejected by the United States Government in 2007 and 2012.[162] His bids to return were supported by the Victorian and Australian governments.[163] His mother

154 Human Rights and Equal Opportunity Commission, *Healing: A Legacy of Generations* (Parliamentary Paper No 410, November 2000) 28 [1.105] ('*Healing: A Legacy of Generations*'), citing Minister for Aboriginal and Torres Strait Islander Affairs (Cth), Submission No 36 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Stolen Generation* (21 March 2000) 599–600.

155 *Healing: A Legacy of Generations* (n 154) 28 [1.105].

156 Minister for Aboriginal and Torres Strait Islander Affairs (Cth), Submission No 36 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Stolen Generation* (21 March 2000) 599–600.

157 *Bringing Them Home* (n 88) 411.

158 Ibid.

159 See ibid.

160 Erin Pearson, 'Indigenous Man Dies in US Prison Following 30-Year Fight to Come Home', *The Sydney Morning Herald* (online, 3 June 2021) <https://www.smh.com.au/national/indigenous-man-dies-in-us-prison-following-30-year-fight-to-come-home-20210603-p57xra.html>.

161 *International Transfer of Prisoners Act 1997* (Cth).

162 Pearson (n 160).

163 Ibid.

campaigned for his return but passed away in 2017.[164] Russell Moore also died in Apalachee Correctional Institution in Florida of a sudden medical emergency aged 58.[165] He had already served his sentence but was not able to leave jail or return home. This tragic outcome of forced removal and deportation reverberates in the current moment where Aboriginal and Torres Strait Islander peoples continue to face deportation and permanent exclusion from Australia. It is also illustrative of the significant stressors faced by people detained indefinitely. We now turn to examine contemporary examples of the threatened or attempted deportation of First Nations peoples.

A *Cyclical Nature of Colonisation and Deportation: WSML and Minister for Home Affairs*

Contemporary examples of the visa cancellation and attempted removal of Aboriginal and Torres Strait Islander peoples from Australia show the ongoing and cyclical nature of colonisation. Australia's history of dispossession and resistance links concretely to the 2019 case of *WSML*.[166] WSML faced permanent exclusion from Australia after receiving a notice that he may not pass the 'character test' and that his visa was liable to cancellation based on discretionary cancellation provisions in s 501(2) of the *Migration Act*.[167] WSML was born in Aotearoa New Zealand and entered Australia on a temporary visa at age 22 with his partner (later wife).[168] While his partner took up Australian citizenship in 2013,[169] WSML did not. WSML has Aboriginal and Māori ancestral ties, having learnt at a family reunion some years prior that his family tree was traced to the Palawa people of Lutruwita/Tasmania.[170] At the time of the tribunal hearing, WSML had two children, both of whom identified as Aboriginal, and his partner was pregnant.[171] WSML's visa had been cancelled by a delegate of the Minister for Immigration and so he applied to the AAT for merits review of this decision. At the AAT he submitted:

> Even though I was born in New Zealand, I identify as indigenous Australian as my mother has ancestral connections to the indigenous people of Tasmania. My grandfather (5 generations back) [name omitted] left Tasmania for New Zealand to escape the massacre of Tasmania's indigenous people. My material (sic) family has always recognised its indigenous ties to Australia and I have applied to become a member of the [name omitted] Aboriginal Corporation. Many of my maternal family members are already members of the Corporation and are recognised as being of Aboriginal descent. Both of my sons identify as indigenous Australians as well.[172]

A media article reported in more detail about his links to Lutruwita/Tasmania. Interviewed by journalist Hannah Ryan, WSML stated that his ancestors were removed from the Tasmanian mainland and taken to the settlement of Wybalenna on

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[164] Ibid.
[165] Ibid.
[166] *WSML* (n 22).
[167] Ibid [3] (Senior Member M Evans).
[168] Ibid [143].
[169] Ibid [2].
[170] Ibid [5], [122].
[171] Ibid [113], [122], [150].
[172] Ibid[147].

Flinders Island.[173] His 'nan's great grandfather, escaped [Wybalenna] by sailing to New Zealand'.[174] Putting these threads together, WSML's family were deported to Flinders Island and escaped to New Zealand. WSML returned to Australia and was then subject (again) to deportation as a result of having his visa cancelled under the *Migration Act*. Evaluating this context brings the cyclical nature of deportation to the surface and into full view.

Deportation, understood as 'a constituent element of historical genocides',[175] was one of several strategies undertaken by the British government against the Aboriginal peoples of Lutruwita/Tasmania. Lutruwita/Tasmania was invaded by the British in the early 19th century.[176] In a period known then as the Black War, violent conflict between Aboriginal and non-Aboriginal peoples ensued.[177] Martial law was declared on 30 October 1828,[178] Lutruwita/Tasmania being one of only three locations in Australia where this occurred.[179] Aboriginal people were 'methodically hunted down' in 'hunting expeditions',[180] and their lands stolen in a series of land 'grants' to non-Aboriginal people. This culminated in the establishment of a 'final all-out assault':[181] a military operation known as the Black Line which involved 2,000 men walking in a line across Lutruwita/Tasmania, seeking to drive the Aboriginal population to the south-east.[182] This was a costly military operation and ultimately unsuccessful, leading to the pursuit of deportation as a strategy.[183]

Deportation to Flinders Island was intended to expel Aboriginal peoples to be 'remade as human beings in British terms'.[184] It took place under ostensibly 'humanitarian' terms by its champion, George Augustus Robinson.[185] Humanitarianism is regularly invoked in securitisation discourse as a mode of governing.[186] Robinson 'suggested to the government that he negotiate with

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173 Hannah Ryan, 'This Man Was Told That Just Because He's Aboriginal That Doesn't Make Him an Australian', *Buzzfeed* (online, 5 March 2019) <https://www.buzzfeed.com/hannahryan/aboriginal-deportation-new-zealand-home-affairs-dutton>.

174 Ibid.

175 John Docker, 'A Plethora of Intentions: Genocide, Settler Colonialism and Historical Consciousness in Australia and Britain' (2015) 19(1) *International Journal of Human Rights* 74, 79–80, citing Raphaël Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, 1944).

176 Docker (n 175) 75, 80, citing Ian McFarlane, *Beyond Awakening: The Aboriginal Tribes of North West Tasmania* (Fullers Bookshop, 2008).

177 *Bringing Them Home* (n 88) 79.

178 Docker (n 175) 78.

179 One of the other sites for martial law was the authors' hometown of Bathurst: see Alison Gerard, Andrew McGrath, Emma Colvin and Annette Gainsford, *Children, Care and Crime: Trauma and Transformation* (Routledge, 2023) 29–30.

180 Ian McFarlane, *Beyond Awakening: The Aboriginal Tribes of North West Tasmania* (Fullers Bookshop, 2008), quoted in Docker (n 175) 80.

181 James Boyce, *Van Diemen's Land* (Black Inc, 2008), quoted in Docker (n 175) 79.

182 *Bringing Them Home* (n 88) 79.

183 Ibid 79–80.

184 Docker (n 175) 82.

185 Ibid 81–2.

186 Marmo (n 124) 258–9. See also Alison Gerard and Leanne Weber, '"Humanitarian Borderwork": Identifying Tensions between Humanitarianism and Securitization for Government Contracted NGOs Working with Adult and Unaccompanied Minor Asylum Seekers in Australia' (2019) 23(2) *Theoretical Criminology: An International Journal* 266.

[Aboriginal people to gain their trust] and offer protection, food, clothing and shelter away from the mainland'.[187] *Bringing Them Home* records the impact of this so-called 'friendly mission'.[188] More than 200 Aboriginal peoples were moved to the newly created Wybalenna settlement on Flinders Island by 1835.[189] Children were forcibly separated on the island and sent to live with the storekeeper and catechist.[190] Devastatingly, by 1843, only about 50 people remained due to inadequate shelter, insufficient rations and disease.[191] Forty-eight survivors from Wybalenna were moved to Oyster Cove on the Tasmanian mainland in 1847, with children again separated and sent to an orphan school in Hobart.[192] Those of 'mixed descent' again had to leave Oyster Cove in 1855, and by 1876 'everyone left had died'.[193] This use of deportation had catastrophic consequences.

The impact on WSML and his family of the prospect of visa cancellation, removal and being detained in immigration detention was immense. He slipped into 'deep depression' for which he was medicated.[194] Both he and his wife had expected that notification of his Aboriginality would prompt the proceedings against him to be stopped.[195] His Aboriginality had been recognised by other government departments, and in *WSML* was recognised by the AAT.[196] Despite this, the Department's view was that WSML was still a non-citizen.[197] In November 2018 he was taken into Yongah Hill immigration detention centre, separating him from his family, for whom he was the primary breadwinner, and his employment. His wife, who was pregnant at the time, was the only parent to support the family.[198] These impacts on WSML and his family could have been prevented had the recommendations of the Stolen Generations Inquiry been implemented. If the discretion under s 501(2) had been exercised differently by immigration authorities, WSML could have avoided spending over two months in immigration detention. Ultimately, the AAT set aside WSML's visa cancellation and made a decision in substitution that discretion should not be exercised to cancel the visa.[199] WSML may still be liable to visa cancellation in the future.

Departmental officers and AAT members are instructed to take different matters into account when assessing the discretionary cancellation of visas and when considering when cancellation should be revoked or set aside, as outlined in Part II(A) above.[200] The Ministerial Direction which applied at the time of this decision, *Direction No 65*, contained no reference to Aboriginality, Indigenous

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187 *Bringing Them Home* (n 88) 80.
188 Docker (n 175) 81.
189 *Bringing Them Home* (n 88) 80.
190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid.
194 *WSML* (n 22) [95].
195 Ryan (n 173).
196 *WSML* (n 22) [148].
197 Ibid [6].
198 Ibid [150].
199 Ibid [174].
200 *Migration Act* (n 30) s 499.

sovereignty, or the importance of cultural ties, specifically to land and family.[201] Moreover, while the best interests of the children are a primary consideration, the Direction did not list the impact on Aboriginal and Torres Strait Islander children of separating them from their families and communities. We know from other policy areas that without specific reference to these particular collective rights of Indigenous peoples, the result can be discriminatory.[202] As Marcelle Burns writes, 'policy driven by the normalised and universalised values may too easily become "colour-blind" to Indigenous needs and aspirations'.[203]

The lack of any reference to the specific collective rights of Indigenous peoples in the Ministerial Direction continued in the three Directions that followed[204] and remains the case in *Direction No 110* today.[205] In relation to child protection, the lack of consideration given to 'cultural connection' in determining the best interests of Aboriginal and Torres Strait Islander children has been heavily criticised.[206] Writing in the context of child protection, Krakoeur and colleagues argue that 'the values and ideologies that are prioritised when "best interests" are conceptualised through an Anglo-European lens can result in problematic assumptions about risk and safety for Indigenous children'.[207] They advance their own definition of cultural connection that emphasises subjectivity and the complexity of this connection:

> We conceptualise cultural connection as a process of culturally connecting that encompasses the complexity of culture and identity, where subjectivity is pertinent. In this way, individual experiences of culturally connecting are diverse (as are First Nations cultures and identities), and are impacted by the broader settler-colonial environment within which identity is formed and cultures are practised.[208]

Krakouer and colleagues write that it is important to harness self-determination to navigate these complexities.[209] They argue that this principle of cultural connection risks becoming a bureaucratic site of compliance rather than the source of health and wellbeing Aboriginal activists intended this to be.

In contrast, at a state level, in Western Australia, where WSML resides, the government had an emphasis on cultural ties to family and land. Its Building Safe

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201 Minister for Immigration and Border Protection (Cth), *Direction No 65: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (22 December 2014) ('*Direction No 65*').

202 Burns (n 4) 119.

203 Ibid 120.

204 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (20 December 2018); Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 90: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (8 March 2021); Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 99: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (23 January 2023)

205 *Direction No 110* (n 51) is the current Ministerial Direction at the time of writing.

206 Krakouer et al (n 4) 346.

207 Ibid 351.

208 Ibid 352.

209 Ibid 353.

and Strong Families strategy of September 2016 recognises 'the long history of Aboriginal and Torres Strait Islander peoples on this land and acknowledges that the past is not just in the past. The past, the present and the future are, as they always are, part of each other — bound together.'[210] Moreover, the Director General of the Department for Child Protection and Family Support recognises that a 'critical measure of the success of earlier intervention and family support must be to establish improvement in the outcomes and life circumstances for Aboriginal children and families'.[211] By contrast with this emphasis, the Australian government was seeking to separate this family by deporting WSML to New Zealand. The impact of forced separation on families, particularly Aboriginal and Torres Strait Islander families, is clear,[212] yet the Australian government was seeking to do this again, in a repeat of the past. As noted at the end of Part II(C), given the sacred nature of connection to Country, it might be expected that cultural connection would be given prominence in policy and laws on visa cancellation and removal.

B *Indigenous Resistance to 'Transformative Coloniality': Montgomery v Minister for Immigration*

Despite the victory in *Love*, however slim, the effect of 'transformative coloniality'[213] or 'shape-shifting'[214] can be seen in what happened next. The government sought to re-open, or limit, the *Love* decision with a High Court appeal against *Montgomery*.[215] In this case the Federal Court had ordered the release from immigration detention of an Aboriginal man with New Zealand citizenship whose Special Category (Temporary) visa had been cancelled.[216] Shayne Montgomery identified as Aboriginal and was the father of five children.[217] He identifies as a member of the Mununjali people and is recognised by Elders, having been culturally adopted decades before these court proceedings.[218] The Commonwealth argued that the decision in *Love* was 'entirely novel' and 'not carefully worked out in a succession of cases'.[219] It argued that 'biological descent' was defined in a positivist way to preclude cultural adoption,[220] despite the prevailing view otherwise in native title determinations, under international law, and in most indigenous communities around the globe.[221] Ultimately, the Commonwealth argued that Montgomery did

210 Department for Child Protection and Family Support (WA), *Building Safe and Strong Families: Earlier Intervention and Family Support Strategy* (September 2016) 2.
211 Ibid 3.
212 *Bringing Them Home* (n 88).
213 Marmo (n 124) 259.
214 Moreton-Robinson (n 14) 192.
215 *Montgomery* (n 23).
216 Ibid 6 [2].
217 Ibid 18 [53].
218 Ibid.
219 Commonwealth, 'Submissions of Appellants and Attorney General for the Commonwealth (Intervening)', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 28 January 2021, 9 [21] ('*Appellants Submission*').
220 Ibid 21 [53].
221 Kirsty Gover, 'Indigenous Citizenship in Settler States' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 453.

not meet one of the limbs of the tripartite test of Indigeneity[222] — 'biological descent' — which the Commonwealth argued should apply in all cases where the definition of 'alien' in accordance with *Love* is being considered.[223] This was challenged by Montgomery's legal team and several organisations, including the NNTC and the NLC who intervened to resist the re-opening of *Love* and the Commonwealth's claims.

Shayne Montgomery was born in New Zealand and came to Australia as a 15 year old in 1997.[224] In the same year, he was placed in Dundalli House, a homeless shelter for Aboriginal youth in Brisbane.[225] He learned about Aboriginal cultures from Elders and was taken on Country.[226] He was initiated by Mununjali Elders in 2000,[227] and lived with an Aboriginal family in Brisbane from 1998 to 2006.[228] Prior to his initiation, he had registered with Centrelink and Aboriginal and legal medical services as an Aboriginal person. Commonwealth government agencies had considered Shayne Montgomery to be Aboriginal for decades.[229]

In 2018 Montgomery received a 14-month sentence of imprisonment upon which his visa was cancelled under mandatory visa cancellation provisions in s 501(3A) of the *Migration Act*.[230] He requested revocation of this decision and was taken into immigration detention in February 2019 after serving 11 months in prison.[231] After more than a year in immigration detention without an outcome on his revocation request, in May 2020 he made an application to the Federal Court seeking a writ of mandamus to obtain a result on the revocation application with the Department of Home Affairs.[232] A few days after filing this claim, the Minister decided not to revoke the visa cancellation.[233] This meant that the decision could not be appealed on a merits basis to the AAT and Montgomery's only option became judicial review in the Federal Court.[234] Montgomery then amended his Federal Court application seeking review of the Minister's decision, adding a writ of habeas corpus, a declaration that he is not an 'alien' within s 51(xix) of the *Constitution*, and an order that he not be detained under ss 189 and 196 of the *Migration Act.*[235] In November 2021, the Federal Court granted his application and ordered that Montgomery be released from immigration detention and the matter be sent back to

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222 *Mabo [No 2]* (n 108) 70 (Brennan J).
223 *Appellants Submission* (n 219) 23–5 [54]–[56].
224 *Montgomery* (n 23) [1], [26] (SC Derrington J).
225 Shayne Paul Montgomery, 'Amended Submissions of Respondent', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 5 April 2022, 3 [5].
226 Ibid.
227 Ibid 3 [8].
228 *Montgomery* (n 23) [53].
229 See ibid.
230 Ibid [29]–[30].
231 Ibid [29], [31].
232 Ibid [7].
233 Ibid.
234 See ibid [8].
235 Ibid [12].

the Minister for determination.[236] By this time, Shayne Montgomery had spent close to three years in immigration detention.

Shortly after Montgomery's release from immigration detention, the Commonwealth lodged an appeal in the High Court, and several Indigenous organisations, lawyers and advocates — alongside the Australian Human Rights Commission ('AHRC') and the Attorney-General of Victoria — intervened. Senator Lidia Thorpe called upon the government to discontinue the case, a request echoed by Dr Eddie Cubillo.[237] Submissions by Indigenous lawyers and advocates, rallied by the Indigenous Law and Justice Hub at the University of Melbourne, led by Dr Cubillo, created a Black Caucus, 'a group of Indigenous organisations who pool their resources to have the greatest impact'.[238] As we explore below, the impact was significant. After several rounds of hearings and submissions, the new Labor Government abandoned the High Court appeal in July 2022. The Department of Immigration then revoked Montgomery's original visa cancellation.[239] In doing so, it is unclear whether or not immigration authorities can cancel Montgomery's visa in the future. This has the effect of creating protracted legal uncertainty, and a change of government could again threaten deportation. Montgomery's lawyer told *The Guardian* her client had 'lost years of his life fighting to remain with his children, his family, including his parents and siblings, and his community'.[240]

The High Court submissions by the NNTC and the NLC resist the ongoing impacts of colonisation that saw Montgomery entangled in visa cancellation and removal. *Love* was absent an Indigenous 'voice at the table' which the NNTC states was 'wholly unsatisfactory'.[241] This absence was also noted by Gageler J in *Love*.[242] In their submissions, the NNTC and the NLC set out the complexities of defining Indigeneity and of seeking to place limits on Indigenous peoples' connections to Country. The NLC is a land council of the Northern Territory representing the northern half and is a recognised representative body under the *Native Title Act 1993* (Cth) ('*Native Title Act*'). The NNTC is the peak native title body in Australia. Both submissions illustrate the knowledge of Indigenous peoples since time immemorial and the impact that deportation and attempts to sever connection to Country create. In the view of the NNTC:

> *Love* provides recognition of what Aboriginal and Torres Strait Islander people … have always known, that people are part of 'an organic part of one

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[236] Ibid [160]; Minister for Immigration, Citizenship and Multicultural Affairs and Minister for Home Affairs, 'Appellants' Chronology', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 28 January 2022, 3–4.

[237] Karp, 'Government Urged to End Legal Fight' (n 8).

[238] Indigenous Law and Justice Hub (n 132).

[239] Rachael Knowles, 'Labor Stops High Court Appeal Aimed at Skittling Aboriginal "Aliens" Ruling', *SBS NITV* (online, 28 July 2022) <https://www.sbs.com.au/nitv/article/labor-stops-high-court-appeal-aimed-at-skittling-aboriginal-aliens-ruling/a90yxtxfx>.

[240] Paul Karp, 'Labor Drops Coalition Bid to Overturn High Court Ruling that Indigenous Australians Can't Be Aliens', *The Guardian* (online, 28 July 2022) <https://www.theguardian.com/australia-news/2022/jul/28/labor-drops-coalition-bid-to-overturn-high-court-ruling-that-indigenous-australians-cant-be-aliens> ('Labor Drops Coalition Bid').

[241] *NNTC Submission* (n 132) 7 [18].

[242] *Love* (n 7) 211 [134].

> indissoluble whole' with the land, and that this connection is of the most profound 'cultural and spiritual' significance.[243]

Both the NNTC and the NLC argued that only Aboriginal and Torres Strait Islander peoples should decide who is Aboriginal and Torres Strait Islander. It was a matter for self-determination as reflected in art 26 of the *UNDRIP*. The NLC stated that

> self-identification and community acceptance are probative of descent … The better view, in the NLC's submission, is to understand the concept of descent as capturing the principles of descent that are recognised by the Aboriginal peoples concerned in accordance with their customs and traditions determining status or membership, which may not be confined to a European view of genealogy.[244]

The NNTC and NLC refer to this position being accepted in native title determinations.

The NLC went on to outline how the government's preoccupation with defining Aboriginality was a historical legacy of colonisation with ongoing impacts. The NLC referred to the 'bewildering array of legislative and administrative acts that imposed genetically and fractionally based (blood quantum) definitions of Aboriginality'.[245] It stated that these were racist and discriminatory measures that 'reflected the misconceptions of Aboriginal social organisation that underpinned the doctrine of terra nullius'.[246] The NLC's submission outlined research highlighting that 'assessments of descent were unreliable and capable of giving offence, and failed to take account of self-identification and community acceptance'.[247] It also highlighted art 33(1) of the *UNDRIP* which provides that 'it is the right of Indigenous peoples to determine their own identity or membership in accordance with their customs and traditions'.[248] The normative standard should be 'set by the customs of the Aboriginal peoples concerned'.[249] Moreover the 'arguments of administrative convenience put by the Commonwealth parties … cannot control the point of principle in issue'.[250]

An international survey of the constitutions and membership codes of Indigenous peoples across the globe revealed that naturalisation is common in over half of those surveyed.[251] Gover writes:

> Contemporary expressions of indigenous citizenship reveal the legal pluralism of settler states by showing that many indigenous persons are dual nationals, and that legal indigeneity is the product of a jurisdictional relationship between settler and tribal governments.[252]

243 *NNTC Submission* (n 132) 7 [16], citing *Love* (n 7) 260 [290] (Gordon), 314 [451] (Edelman J), 276 [349] (Nettle J).
244 *NLC Submission* (n 132) 14 [33] (citations omitted).
245 Ibid 6 [16].
246 Ibid (citations omitted).
247 Ibid 7 [17].
248 Ibid 7 [19].
249 Ibid 9 [23].
250 Ibid 15 [34], citing *Appellants Submission* (n 219) 24 [55].
251 Gover (n 221) 463.
252 Ibid 454.

In 2008 Gover did a survey of 535 'tribal constitutions and membership codes' and found that all 'use descent to allocate birthright citizenship'.[253] Moreover, 57% of the surveyed documents contain a pathway to naturalisation for non-descendants 'at the discretion of the tribal decision-makers'.[254] Membership by social descent is common within Aboriginal communities, as also highlighted in the AHRC's submissions in *Montgomery*.[255] These understandings of descent offer a pointed contrast to the government's narrow view of sovereign power and membership. This Indigenous knowledge has the potential to influence policy and jurisprudence in migration law, as it has in native title determinations, such that belonging is better understood. To illustrate, this approach may assist to determine appropriate limits on the power to cancel visas and remove people from Australia.

The NNTC and NLC submissions do not set out a test for Aboriginality. The NNTC rejected the idea that the tripartite test was 'a universally applicable test of "Aboriginality"' and considered that 'given the plurality and diversity of Aboriginal and Torres Strait Islander communities … a single legal test for determining who is Aboriginal Australian may be inappropriate'.[256] It emphasised that the legal framework and timeframes of the proceeding did not allow for 'the kind of extensive consultations with memberships that should, in the NNTC's view, be conducted in order to reach a collective view about the appropriate test to apply in factual circumstances' like those in *Montgomery*.[257] Since that time, however, the definition of Aboriginality captured by immigration authorities and applied is the tripartite test in *Mabo [No 2]*, as documents released under freedom of information laws reveal.[258]

The NNTC rejected the conflation of 'Aboriginal Australians' and 'native title holders'. It stated that

> while all native title holders may be 'Aboriginal Australians', not all 'Aboriginal Australians' hold native title'. So much flows from the judgments in *Love*, in recognising the existence of Aboriginal Australian identity distinct from the existence of native title rights. The NNTC acknowledges that some Aboriginal Torres Strait Islander peoples do not know which first people they connected to or belong to. This is a product of settler-colonialism.[259]

The NNTC submission spelt out the way in which dispossession has precluded, for many Aboriginal and Torres Strait Islander peoples, any capacity to show continuous observance of their traditional customs, or inhabitancy, such that they can apply for and attain legislative native title rights.[260] The NNTC and NLC took issue with the Commonwealth's submissions that sought to narrow *Love* to native title holders only.[261] 'In the communities the NNTC knows and represents, traditional law and custom is determinative of belonging. Belonging is not impacted by whether the

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253 Ibid 463.

254 Ibid.

255 Australian Human Rights Commission, 'Submissions of the Australian Human Rights Commission Seeking Leave to Appear As Amicus Curiae', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v Shayne Paul Montgomery*, Case No S192/2021, 9 March 2022, 13 [34].

256 *NNTC Submission* (n 132) 17–18 [50].

257 Ibid 8 [19].

258 *Interviewing Located Persons* (n 122) 7.

259 *NNTC Submission* (n 132) 12 [31].

260 Ibid 12 [32].

261 Ibid 12 [31]; *NLC Submission* (n 132).

communities have claimed or hold native title.'[262] The NNTC argued it can bring a perspective on

> (a) the recognition of individuals within a wider traditional collective as applied under traditional law and custom, as well as through the [*Native Title Act*] and alternative legislative and policy processes;
>
> (b) understanding of the challenges of coming to a unified position amongst Aboriginal and Torres Strait Islander peoples on the appropriate 'test(s)' for 'Aboriginality' in various contexts, including constitutional contexts, given the plurality of groups and cultures;
>
> (c) the impact of colonisation on … connections to culture and land and the challenges of native title law; and
>
> (d) the likely impacts of [the current proceedings] on native title claims and rights holders.[263]

The NNTC also drew the distinction between the government's arguments and the National Agreement on Closing the Gap which recognises the 'unique and enduring connection' of Indigenous peoples to this land and a commitment 'to no longer make decisions *for* and *about* Aboriginal and Torres Strait Islander peoples without the genuine involvement of the "community" through representative bodies'.[264]

News of the discontinuance of the High Court appeal was welcomed by different advocacy groups. NNTC chief executive Jamie Lowe wrote, 'We applaud the Albanese government for their intervention so those First Nations people could be set free on their own soil.'[265] According to *The Guardian*, 12 people were released from detention as a result of this decision.[266] One of them was Jack Hobson, a New Zealand citizen with Aboriginal ancestry and recognised by the Darug people, whose visa had been cancelled for suspicion of being a member of a bikie gang, a claim he denied.[267] Hobson had never been charged or convicted of a crime, but spent time in immigration detention which he described as an 'awful place' that aimed to 'break your spirit'.[268] He told *The Guardian*: 'I'm happy, I'm relieved. Hopefully, I can move on to a better life and not have to look over my shoulder'.[269] Yet First Nations peoples will continue to face the effects of 'crimmigration' into the future. This highlights that lasting change is needed at all levels, including legal education, to transform skills, knowledge and attitudes to appropriately recognise Indigenous sovereignty.

V Conclusion

This article has analysed how deportation and colonisation continue to overlap by examining the case studies of *WSML* and *Montgomery*. Our analysis makes visible

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262 *NNTC Submission* (n 132) 8 [21].

263 Ibid 5–6 [12].

264 Ibid 8 [20] (emphasis in original).

265 Giovanni Torre, 'Number of Indigenous People Facing Threat of Deportation Revealed after Court Case Canned', *National Indigenous Times* (online, 9 August 2022) <https://www.nit.com.au/number-of-indigenous-people-facing-threat-of-deportation-revealed-after-court-case-canned>.

266 Karp, 'Labor Drops Coalition Bid' (n 240).

267 Ibid.

268 Ibid.

269 Ibid.

the historical legacy relevant to the contemporary moment in which First Nations peoples again face deportation from Australia under s 501 of the *Migration Act*. Critically, this article reveals that if the recommendations of *Bringing Them Home* had been implemented, Aboriginal and Torres Strait Islander peoples would not have faced the crimmigration gaze leading to deportation and would not have endured immigration detention and the concomitant impact on families and communities.

The attempted and actual deportation of First Nations peoples from Australia has multiple tributaries including the lack of recognition of Indigenous sovereignty and self-determination, and the contemporary legacy of colonisation that is chiefly implicated in the ongoing criminalisation of Aboriginal and Torres Strait Islander peoples. Since the *Love* and *Montgomery* decisions, many Indigenous peoples have been released from detention but many others still face an uncertain future.

Migration policy has a lot to gain from Indigenous peoples' understanding of belonging and membership. Membership by social descent is common within Indigenous communities and is a sharp contrast to the Australian government's narrow view of sovereign power and membership. It could teach policymakers much about ties and belonging and the measure of fairness in visa cancellation, removal and deportation.

This article has explored the current and historical appetites for expulsion and severing connections to Country/family/culture in deporting, or attempting to deport, First Nations peoples. Aboriginal and Torres Strait Islander peoples, scholars and organisations have been resisting these ongoing forms of colonisation, and the article highlights these contributions as strength-based approaches to navigating previously unthinkable developments to control our borders. Clearly more needs to be done to recognise Indigenous sovereignty and prioritise realising the specific collective rights of Indigenous peoples. Two ways this can be achieved are through the Ministerial Direction on visa refusal and cancellation under s 501 and revocation under s 501CA, and through the broader policy process applied by immigration authorities. At present, these collective rights are silenced in the migration control system, which uniquely impacts First Nations peoples yet continues to be resisted.

Epilogue

> For many years there have been repeated calls for legal education to prepare graduates who have the knowledge and professional capabilities to work effectively with and for First Nations peoples across the legal profession.[270] Decolonisation requires recognition of the leadership of First Nations peoples,[271] and legal education provides one avenue for this. Legal education plays a pivotal role in shaping the perspectives and approaches of future lawyers, particularly in relation to Indigenous communities. By integrating professional capabilities to work with and for Indigenous peoples, legal education ensures that future lawyers

270 See *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 1, 295, 91; *Bringing Them Home* (n 88) 256.

271 Thalia Anthony, Harry Blagg, Carly Stanley and Keenan Mundine, 'Decolonizing Criminology Theories by Centring First Nations Praxis and Knowledges' in Chris Cunneen, Antje Deckert, Amanda Porter, Juan Tauri and Robert Webb (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 504.

are well prepared to understand and address the unique challenges faced by Indigenous communities. This not only helps close the gap between Indigenous and non-Indigenous Australians but also promotes a more inclusive and equitable legal system.[272] To date there continues to be limited action by law schools in Australia to embed professional capabilities into legal education, with only a few demonstrating a commitment to the call.[273] Exploring the concept of sovereignty and the sovereign rights of First Nations peoples, understanding First Nations peoples' unique connection to Country, and recognising how First Nations peoples were impacted by colonisation — including through deportation — are essential knowledge requirements for legal education. This article has shown how the incorporation of such understandings is critical to shifting the operation of criminal, migration and citizenship law to prevent further injustice to First Nations peoples. As Michael Guerzoni and Maggie Walters argue, decolonisation requires recognition of the colonial nature of a discipline and its use of Western perspectives, people and power as the default.[274] It also requires revision and reconfiguration for the betterment of Indigenous peoples.

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[272] Larissa Behrendt, Steven Larkin, Robert Griew and Patricia Kelly, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, July 2012) xi; Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) v.

[273] See Alison Gerard, Annette Gainsford and Kim Bailey, 'Embedding Indigenous Cultural Competence: A Case Study' in Kevin Lindgren, François Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection* (Thomson Reuters, 2018) 323; Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising the Law Curriculum at UWA' (2019) 29 (1–2) *Legal Education Review* 155; Burns, Hong and Wood (n 272). See also Gainsford, Gerard and Colvin (n 20).

[274] Michael Guerzoni and Maggie Walter, 'Decolonizing Criminological Research Methodologies: Cognition, Commitment, and Conduct' in Chris Cunneen, Antje Deckert, Amanda Porter, Juan Tauri and Robert Webb (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 492.

Before the High Court

Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*

Ashleigh Barnes[*]

Abstract

In *Commonwealth v Yunupingu*, the High Court of Australia will consider, inter alia, whether the requirement in s 51(xxxi) of the *Australian Constitution* that acquisitions of property must be on just terms applies to a Commonwealth law that is supported by the territories power in s 122 and no other head of power in s 51. Whether the just terms requirement applies to laws made under the territories power is a question of enormous significance. This question is in part answered by whether either *Wurridjal v Commonwealth* or *Teori Tau v Commonwealth* is good law, and whether either or both of those cases should be reopened and overruled. This column analyses this question in light of novel insights into the Court's current approach to *stare decisis* in the constitutional setting drawn from the Court's recent application of the doctrine in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, *Vanderstock v Victoria* and *Vunilagi v The Queen*.

I Introduction

In *Commonwealth v Yunupingu* ('*Yunupingu*'),[1] the High Court of Australia will consider, inter alia, whether the requirement in s 51(xxxi) of the *Australian Constitution* that acquisitions of property must be on just terms applies to a Commonwealth law that is supported by the territories power in s 122 and no other head of power in s 51.[2] Whether the just terms requirement applies to laws made

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1 *Commonwealth v Yunupingu* (High Court of Australia, Case No D5/2023).

2 The Court will also consider whether a Commonwealth law that extinguishes or impairs native title rights in land is a law with respect to an acquisition of property within the meaning of s 51(xxxi) so

under the territories power is a question of enormous significance. This question is in part answered by whether either *Wurridjal v Commonwealth* or *Teori Tau v Commonwealth* is good law, and whether either or both of those cases should be reopened and overruled.[3]

In the final weeks of the 2023 term, the High Court had cause to focus on the doctrine of *stare decisis* as applied to constitutional cases. In three different cases, the Court had to consider whether it was appropriate to overrule constitutional precedent. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[4] the Court overruled its 2004 judgment in *Al-Kateb v Godwin*,[5] a precedent that had withstood various challenges for almost two decades. In *Vanderstock v Victoria*,[6] the Court divided on the question of whether to overturn *Dickenson's Arcade v Tasmania*,[7] a decision which had withheld challenge for 50 years, but unanimously denied leave to reopen *Capital Duplicators v Australian Capital Territory*[8] and *Ha v New South Wales*.[9] The Court was also asked in *Vunilagi v The Queen*[10] to reopen and re-explain or overrule *R v Bernasconi*.[11] Only Edelman J considered it appropriate to consider this aspect of the appeal. The three decisions offer new insights into when and how the High Court will overrule its previous decisions, and expose substantive and procedural questions which persist in this area of jurisprudence.[12] This column is limited to one such question: whether the protection of constitutional guarantees is relevant to the decision to reopen and overrule constitutional precedent.

It is 'now generally accepted that s 51(xxxi) is a constitutional guarantee';[13] this is the position advanced by some of the respondents in the pending appeal.[14] However, this has been doubted by some scholars;[15] this is the position advanced by

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as to attract the just terms requirement, and whether the grant of a pastoral lease by South Australia in 1903 that excepted and reserved timber, minerals and other substances extinguished a non-exclusive native title right to use the natural resources of the land insofar as that native title right relates to minerals. The appeal thus concerns the appropriate interpretation of the scope of s 51(xxxi), including touching on remedies and the content of the Commonwealth's constitutional obligation. This question is addressed in another column contribution: see Lael K Weis and Rosalind Dixon, 'Rethinking "On Just Terms": *Commonwealth v Yunupingu*' (2024) 46(3) *Sydney Law Review* 363.

3 *Wurridjal v Commonwealth* (2009) 237 CLR 309 ('*Wurridjal*'); *Teori Tau v Commonwealth* (1969) 119 CLR 564 ('*Teori Tau*').

4 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254 ('*NZYQ*').

5 *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

6 *Vanderstock v Victoria* (2023) 98 ALJR 208 ('*Vanderstock*').

7 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

8 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561.

9 *Ha v New South Wales* (1997) 189 CLR 465.

10 *Vunilagi v The Queen* (2023) 411 ALR 224 ('*Vunilagi*').

11 *R v Bernasconi* (1915) 19 CLR 629.

12 My ongoing research with Jemimah Roberts probes these questions.

13 Lael K Weis, '"On Just Terms", Revisited' (2017) 45(2) *Federal Law Review* 223, 223. See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403 (Barwick CJ) ('a very great constitutional safeguard'); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J) ('an important provision … which deals with individual rights'); 655, 661 (Kirby J) ('relevant to the fundamental rights of all persons', an 'express constitutional promise') ('*Newcrest*').

14 See below Part IV. Note that some of the respondents did not make submissions on this point.

15 Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s51(xxxi) of the Constitution' (2005) 27(4) *Sydney Law Review* 639.

the Appellant.[16] It is beyond the scope of this column to defend the view that s 51(xxxi) *is* correctly understood as a constitutional guarantee. The aim of this column, rather, is to consider, assuming it is a constitutional guarantee, the relevance of that status to questions of *stare decisis*. However, it is also worth underscoring that *Yunupingu* provides the Court with an additional opportunity to clarify the scope and application of s 51(xxxi) and the 'underlying constitutional values … to be given expression or priority under s 51(xxxi)'.[17]

The principles of *stare decisis* as applied to constitutional precedent are a centrepiece of the submissions in *Yunupingu*. Part II briefly examines the relevant history of the case. Part III argues that the nature of the case — concerning a constitutional guarantee — *is* relevant to the application of *stare decisis*. Part IV applies this analysis to *Yunupingu*.

II Background and Procedural History

The proceedings involve two applications made under s 61 of the *Native Title Act 1993* (Cth) by Dr Yunupingu AM (deceased), on behalf of the Gumatj Clan or Estate Group, related to the resource-rich Gove Peninsula, in north-east Arnhem Land in the Northern Territory. In the Full Court of the Federal Court of Australia the claimants sought a determination of native title over this land and compensation

> for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the coming into force of the *Northern Territory Self-Government Act 1978* (Cth).[18]

It was uncontested that the case was 'the latest in a long campaign by Yolngu peoples for the recognition of their title'.[19]

The pending appeal raises several complex and constitutionally significant questions, including the following:

(1) Does the just terms requirement in s 51(xxxi) of the *Constitution* apply to a Commonwealth law that is supported by the territories power in s 122 and no other head of power in s 51?

(2) Is a Commonwealth law that grants or asserts interests in land, such as to extinguish or impair native title rights in that land, a law with respect to an acquisition of property within the meaning of s 51(xxxi) so as to attract the just terms requirement?

(3) Did the grant of a pastoral lease by South Australia in 1903 that excepted and reserved timber, minerals and other substances extinguish a non-

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[16] Commonwealth, 'Appellant's Submissions', Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 28 March 2024, 16 [43] ('Appellant's Submissions').

[17] Dixon (n 15) 640.

[18] *Yunupingu v Commonwealth* (2023) 298 FCR 160, 165–6 [1]–[2] (Mortimer CJ, Moshinsky and Banks-Smith JJ) ('*Yunupingu FCAFC*').

[19] Ibid 166 [3] (Mortimer CJ, Moshinsky and Banks-Smith JJ).

exclusive native title right to use the natural resources of the land insofar as that native title right relates to minerals?[20]

This column focuses on the background, reasoning and argumentation with respect to one aspect of the first question only. The first question broadly concerns the application of the just terms requirement in s 51(xxxi) to the territories power in s 122. In the Full Court of the Federal Court, this question was answered by applying the doctrine of precedent: *Wurridjal* had overruled *Teori Tau* and was binding law. According to *Wurridjal* the just terms requirement in s 51(xxxi) of the *Constitution* applies to laws supported by the territories power in s 122.[21]

Teori Tau, decided in 1969, concerned mineral rights ordinances passed with respect to the (then) Territory of Papua and New Guinea. The Court held that the territories power in s 122 of the *Constitution* does not attract the just terms requirement. This was on the basis that the territories power is 'plenary in quality and unlimited and unqualified in point of subject matter'[22] and 'akin to that possessed by the States ... to make laws for the compulsory acquisition of property without necessarily providing in those laws for terms of acquisition which can be seen in the circumstances to be just'.[23]

Wurridjal, decided in 2009, involved a proceeding, on demurrer, regarding the validity of two Acts of the Howard Government underpinning the Northern Territory National Emergency Response (or Intervention), passed under s 122 of the *Constitution*.[24] Each Act was impugned on the basis that it constituted an acquisition of property otherwise than on just terms, in contravention of s 51(xxxi). Allowing the demurrer, a majority of the Court observed that *Teori Tau* ought to be overruled. The Full Federal Court in *Yunupingu v Commonwealth* held that for four of the Justices in *Wurridjal*, 'a necessary step in their reasoning was the proposition that s 51(xxxi) applies to an acquisition of property pursuant to a law made only under s 122'.[25]

In the appeal pending before the High Court, the legal battlefield shifts from the doctrine of precedent to the doctrine of *stare decisis*. If the Court accepts that *Wurridjal* overruled *Teori Tau*, a key question for all parties is whether either *Wurridjal* or *Teori Tau* should be reopened and overruled. The Commonwealth challenges the Full Federal Court decision as to the binding nature of *Wurridjal*. It

20 Evidently, the case involves several grounds of appeal. This means that even if the Court finds for the respondents regarding the application of the just terms requirement to the territories power, the Court may find against them on either or both of the remaining grounds.

21 *Yunupingu FCAFC* (n 18) 221–6 [257]–[279] (Mortimer CJ, Moshinsky and Banks-Smith JJ).

22 *Teori Tau* (n 3) 570 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

23 Ibid 569 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

24 *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

25 *Yunupingu FCAFC* (n 18) 223 [266] (Mortimer CJ, Moshinsky and Banks-Smith JJ). For a helpful summary of *Yunupingu FCAFC*, see Aaron Moss, 'The Constitutional Relationships between "Just Terms" Acquisition, Territories, and Native Title: Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia', *AUSPUBLAW* (Blog Post, 16 June 2023) <https://www.auspublaw.org/blog/2023/6/the-constitutional-relationships-between-just-terms-acquisition-territories-and-native-title-yunupingu-on-behalf-of-the-gumatj-clan-or-estate-group-v-commonwealth-of-australia-2023-fcafc-75>.

argues that *Teori Tau* is binding (that is, that *Wurridjal* did not overrule *Teori Tau*). In the alternative, it submits the Court should reopen and overrule *Wurridjal*. The Respondents maintain that *Wurridjal* is binding. If not, they submit the Court should reopen and overrule *Teori Tau*.

III Stare Decisis in the Constitutional Setting: The Role of Constitutional Guarantees

A *The Sui Generis Nature of Stare Decisis in the Constitutional Setting*

It is well recognised that the decision to overrule constitutional precedent is governed by different considerations than the decision to overturn precedent concerning statutory construction or the common law.[26] This is because the 'sworn loyalty' of the High Court is to the '*Constitution* first of all' rather than the doctrine of *stare decisis*.[27] In constitutional cases *especially*, it is 'not … better that the Court should be persistently wrong than that it should be ultimately right'.[28] The reasoning of the Court in an earlier judgment on a constitutional question 'may not be used as a substitute for the *Constitution*'.[29] This is at least partly because '[e]rrors in constitutional interpretation are not remediable by the legislature'.[30] The Court has noted that outside the referendum procedure, the only way a question of constitutional interpretation can be altered is by the Court reopening and overruling precedent.[31] This means the threshold for reopening and overruling constitutional precedent is lower than in other matters.[32]

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[26] Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93, 94; Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31(1) *Federal Law Review* 167, 169; Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28(3) *Australian Bar Review* 243, 247; Joshua Thomson and Madeleine Durand, 'Overruling Constitutional Precedent' (2021) 95(2) *Australian Law Journal* 139, 139. See also *Street v Queensland Bar Association* (1989) 168 CLR 461, 489 (Mason CJ), 518–19 (Brennan J), 549 (Dawson J), 588 (McHugh J) ('*Street*'); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 38 (McHugh J) ('*Re Tyler*'). For an overview of the relevant principles regarding decisions to overrule common law precedents, see Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34(2) *Melbourne University Law Review* 519. For an overview of the relevant principles regarding decisions to overrule statutory precedents, see Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42(2) *Sydney Law Review* 209.

[27] *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J).

[28] Ibid.

[29] *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ).

[30] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted) ('*Lange*'). See also *Queensland v Commonwealth* (1997) 139 CLR 585, 598–9 (Gibbs J), 630 (Aickin J) ('*Territory Representation Case [No 2]*'); *Re Tyler* (n 26) 38 (McHugh J).

[31] *Cole v Whitfield* (1988) 165 CLR 360, 400; *Lange* (n 30) 400 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted). See also *Territory Representation Case [No 2]* (n 30); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 72 (Aickin J) ('*Hospital Contribution Fund*').

[32] *Territory Representation Case [No 2]* (n 30) 620 (Aickin J); *Street* (n 26) 620 (Aickin J); *Re Tyler* (n 26) 38 (McHugh J); *NZYQ* (n 4) 264 [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

Notwithstanding this, the question of whether to reopen and overrule constitutional cases is still subject to ' a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law'.[33] Exceptional circumstances will be required to overrule a constitutional holding and caution should be exercised in so doing.[34] An error in constitutional interpretation alone is usually not sufficient and would need to be supported by other factors before *stare decisis* will be lifted.[35]

The four factors set out in *John v Federal Commissioner of Taxation* are typically cited as matters that may justify departure from earlier decisions.[36] These factors include:

(1) whether the earlier case rested upon 'a principle carefully worked out in a significant succession of cases';

(2) whether there were differences between the justices in the reasoning in the earlier case;

(3) whether the earlier case had 'achieved no useful result but ... led to considerable inconvenience'; and

(4) whether the earlier case 'had not been independently acted on in a manner which militated against reconsideration'.[37]

However, the following doctrinal examination of overruling in constitutional cases suggests this list of factors is incomplete.

B *Is the Protection of Constitutional Guarantees Relevant to the Application of Stare Decisis Principles?*

Another factor that has been historically *expressly* relevant to the Court's decision whether or not to overrule is the impact of the constitutional precedent on the constitutional guarantees or individual rights protected by the *Constitution*.[38] Assuming the just terms requirement is one such individual right,[39] *Yunupingu* provides an important opportunity for the Court to clarify the relevance and weight of this factor when applying *stare decisis* to constitutional precedent.

The factor was relied on in *Street v Queensland Bar Association*.[40] The case was brought by a New South Wales barrister who was refused admission by the Queensland Bar unless he guaranteed he would practise principally in Queensland.

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33 *Wurridjal* (n 3) 352 [70] (French CJ). See also at 353 [71] (French CJ); *NZYQ* (n 4) 259–60 [18] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (referring to the 'strongly conservative cautionary principle'); *Vanderstock* (n 6) 315 [426] (Gordon J, citing Kitto J in *Hughes & Vale Pty Ltd v New South Wales* (1952) 87 CLR 49, 102) ('[e]ven in constitutional cases ... it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason').

34 *Territory Representation Case [No 2]* (n 30) 599 (Gibbs CJ), 602 (Stephen J), 620 (Aickin J).

35 For an overview and critique of the Court's approach, see Boeddu and Haigh (n 26); Thomson and Durand (n 26).

36 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 ('*John*').

37 Ibid 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

38 This section draws on the helpful analysis in Boeddu and Haigh (n 26) 172.

39 See above nn 13–15 and accompanying text.

40 *Street* (n 26).

He argued that this infringed s 117 of the *Constitution*, a provision which prohibits discrimination on the basis of state residency. This argument required the High Court to overrule *Davies v Western Australia*[41] and *Henry v Boehm*, cases which had held that the challenged requirements were constitutional as they applied equally to all persons.[42] Mason CJ decided to overrule the two precedents as they supported an incorrect interpretation of 'an important provision in the *Constitution* dealing with *individual rights central to federation*'.[43] Brennan J stated that 'the doctrine of stare decisis … is *least cogent* in its application to those few provisions which are calculated to protect human rights and fundamental freedoms'.[44] In addition, McHugh J stated that '*most importantly*, the decision, if followed, will greatly reduce the scope of a great constitutional protection for the residents of this country'.[45] Boeddu and Haigh note that their Honours did not simply rely on disagreement with the prior precedents as sufficient to overrule these decisions. Instead, the emphasis on s 117 as an individual right acted as 'a short qualifier'[46] supporting the decision to overrule.

Similar reasoning was used by Gummow J in *Newcrest*, and this is of particular relevance to *Yunupingu*.[47] In *Newcrest* the Court considered whether to overturn *Teori Tau*. Gummow J held that when an issue before the Court relates to 'an important provision of the *Constitution* which deals with *individual rights* ... the "Court has a responsibility to set the matter right"'.[48] Thus, Gummow J relied on rights-based reasoning as part of his decision to overrule *Teori Tau*.[49]

Conversely, but relatedly, that no rights would be adversely affected in the precedent being challenged was a factor contributing to the decision to overrule in *Commonwealth v Hospital Contribution Fund of Australia*.[50] Writing in 2003, Boeddu and Haigh argued that, together, these statements from *Street* and *Newcrest* suggest that

> once the Court is asked to consider an individual right granted or protected by a constitutional provision, then deciding upon the 'correct' interpretation for that section, rather than one supported by precedent, becomes the overriding aim. …
>
> In these decisions the need to adhere to precedent has been inversely related to the importance of the constitutional subject matter involved. In particular, constitutionally enshrined individual rights have been categorised as being

41 *Davies v Western Australia* (1904) 2 CLR 29.
42 *Henry v Boehm* (1973) 128 CLR 482.
43 *Street* (n 26) 489 (emphasis added).
44 Ibid 518–19 (emphasis added).
45 Ibid 588 (emphasis added).
46 Boeddu and Haigh (n 26) 172.
47 *Newcrest* (n 13).
48 Ibid 613 (emphasis added) (citations omitted).
49 His Honour also relied on other factors, such as that *Teori Tau* had *not* 'been significantly acted upon by the Parliament or territorial legislatures': ibid 614.
50 *Hospital Contribution Fund* (n 31) 58 (Gibbs J) (emphasising '[n]o one will be adversely affected if the decisions are overruled', in express comparison to *Western Australia v Commonwealth* (1975) 134 CLR 201 ('*Territory Representation Case [No 1]*').

> more important than some 'other' constitutional principles and thus more likely to outweigh the need to preserve precedents.[51]

The 2023 jurisprudence provides some support for this claim.

1 *Vunilagi*

The majority of the Court in *Vunilagi* denied leave to reopen *Bernasconi* and did not engage in a detailed application of the *John* factors or other discussion of *stare decisis* in the constitutional setting. Notwithstanding this, Edelman J, in dissent, impliedly endorsed the claim that the subject matter of the impugned case (and, relatedly, whether the case causes injustice) is a relevant factor to the application of *stare decisis*. His Honour observed:

> There may even be cases that are so fundamentally contrary to basic principle, involving reasoning that is so *abhorrent* or involving such significant and manifest error or *injustice*, that the result or reasoning should never be permitted to stand even if the decision might be thought to have become structurally embedded and even if overruling would lead to large consequences. Such cases are likely to be extremely rare. But, if and when those cases arise, a judge's ethical duty precludes timorous acceptance of grave injustice even if the price of that duty is perpetual dissent.[52]

This passage suggests that *stare decisis* is weaker where the impugned constitutional precedent is 'contrary to basic principle' and involves 'significant and manifest … injustice'. While Edelman J did not expressly invoke the language of individual rights, safeguards or guarantees, his Honour's reasoning possibly captures both constitutional precedents concerning express constitutional safeguards alongside a broader category of constitutional precedents that generate injustice. This could possibly also include constitutional precedents concerning structural implications drawn from the *Constitution* and having rights-protecting ramifications.

2 *NZYQ*

In *NZYQ*, the Court unanimously overturned *Al-Kateb*. This line of jurisprudence does not concern an express constitutional guarantee; instead, it concerns the constitutionally guaranteed separation of judicial powers. This doctrine, sourced in the text and structure of the *Constitution*, arguably has rights-protecting ramifications for individuals the subject of judicial and executive power in Australia. In particular, *NZYQ* concerned the constitutional immunity drawn in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* that

> the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[53]

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51 Boeddu and Haigh (n 26) 172.

52 *Vunilagi* (n 10) 263 [164] (emphasis added).

53 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ) ('*Lim*').

NZYQ concerned the application of this constitutional immunity to indefinite immigration detention of non-citizens in Australia by the executive. In *Al-Kateb* the High Court had upheld as constitutionally valid the indefinite immigration detention of a stateless Palestinian man.

In *NZYQ*, the identification of 'error' in or 'incompatibility' of *Al-Kateb*, revealed by conflict with 'a stream of authority',[54] was the basis for granting leave to reopen and for overruling. The lack of 'consistency and continuity'[55] of *Al-Kateb* in light of subsequent jurisprudence appears to be the Court's predominant consideration in favour of overruling. This factor was (briefly) weighed against one countervailing factor:

> Having regard to the importance of continuity and consistency in the application of *fundamental constitutional principle*, the legislative reliance and implicit legislative endorsement which weighed in favour of not reopening the statutory construction holding in *Al-Kateb* necessarily assumes less significance in considering reopening of its constitutional holding. The same is true of administrative inconvenience.[56]

In short, the inconsistency of *Al-Kateb* with the immunity stated in *Lim* and subsequently understood and applied was the reason for overturning *Al-Kateb*.

While the Court did not *expressly* consider the impact of the impugned precedent on the liberty of the individual or the rights-protecting ramifications of the scope of the *Lim* principle, the above passage does refer to 'the importance of consistency and continuity in the application of fundamental constitutional principle'. This possibly indicates the relevance of the importance of the constitutional subject matter in *Lim*. Moreover, the substantive differences between *Al-Kateb* and *Lim* were arguably averted to by the Court in the following statement:

> The Lim principle would be devoid of substance were it enough to justify detention, other than through the exercise of judicial power in the adjudgment and punishment of guilt, that the detention be designed to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.[57]

It is clear that the substantive differences between the *Lim* principle as articulated in *Al-Kateb* (the 'outlier'[58]) and the remaining stream of authority that the Court is referring to lie in the different articulations of the scope of executive and judicial power, which result in different protections of the liberty of the individual.[59]

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[54] *NZYQ* (n 4) 264 [35] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[55] Ibid 259 [17], 264 [36]–[38], [41] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[56] Ibid 264 [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (emphasis added).

[57] Ibid 265–6 [45] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (emphasis added).

[58] Ibid 264 [35] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[59] Indeed, in the course of explaining the authoritative background principles that are drawn from *Lim*, the Court observed that 'Ch III is concerned with substance and not mere form, and ... it is the involuntary deprivation of liberty itself that ordinarily constitutes punishment': ibid 262 [28] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

Responding to the case, Sanderson and Malone considered that

> [t]he choice not to avert to the dire human consequences of the holding in *Al-Kateb* may have helped to clearly position *NZYQ* as a decision based in law, in anticipation of the kind of political backlash against activism which has followed several High Court decisions giving rise to constitutional developments.[60]

It is certainly plausible that the Court did not resort to such express reasoning because it was prioritising other defensible stylistic choices (such as publishing a short, unanimous judgment)[61] or because the 'consistency and continuity' ground was *sufficient* to warrant reopening and overruling. However, this does not necessarily mean that rights-based reasoning is not a valid consideration in the application of *stare decisis* to constitutional precedent, or that the subject matter of the case (concerning a structural limitation with liberty-protecting ramifications) was not relevant to the Court's decision to overrule.

C Alternatively, Is There a Category of Constitutional Cases of 'Vital Importance' That Have Particular Weight in Stare Decisis Questions?

Part III(B) illustrated that there is evidence *at least* for a weaker application of *stare decisis* to precedent that concerns constitutional guarantees or individual rights. However, Part III(C) suggests that there is also an argument, on a careful reading of the jurisprudence, for a broader set of constitutional cases where the doctrine of *stare decisis* is weakened. Building on the previous section, it could be argued that *NZYQ* provides support for the understanding that a weaker application of *stare decisis* is warranted for certain constitutional cases in particular (albeit not only those that touch an express individual right). Historically, Australian commentators have limited the identification of this factor — that the protection of constitutional guarantees is relevant to the application of *stare decisis* principles — to the individual rights cases explored above, citing *Street* (concerning s 117) or *Newcrest* (concerning s 51(xxxi)). However, early jurisprudence may also support a more capacious framing of this category. It is suggested here that the factor could be broadened beyond express constitutional safeguards and instead be based, in broad terms, on the 'importance' of the subject matter of the constitutional case. It may be equally relevant to the application of *stare decisis* whether the impugned precedent touches on an express constitutional guarantee, a freedom secured by a constitutional implication, or another constitutional doctrine of 'vital importance'.[62]

There is some support for this framing in the jurisprudence. In *Lange v Australian Broadcasting Corporation*, for example, a unanimous Court held that

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60 Harry Sanderson and Meghan Malone, 'NZYQ: Consistency, Continuity, and Human Rights', *AUSPUBLAW* (Blog Post, 5 February 2024) <https://www.auspublaw.org/blog/2024/2/nzyq-consistency-continuity-and-human-rights>.

61 See Stephen McDonald, 'NZYQ: A New Style of Unanimous Judgment for the High Court of Australia', *AUSPUBLAW* (Blog Post, 31 January 2024) <https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>.

62 This suggestion does not cure any concern as to the 'ill-defined' nature of the latter category in particular: Boeddu and Haigh (n 26) 171.

stare decisis is weaker (that is, 'the Court will re-examine a decision') 'if it involves a question of "vital constitutional importance" and is "manifestly wrong"'.[63] Questions persist as to whether these terms are or can be 'satisfactorily defined'.[64] In an arguably similar vein, in *HC Sleigh Ltd v South Australia*, Jacobs J said the Court needed to be 'convinced' of both the decision's wrongness *and* its causing of intolerable 'social, economic or political consequences'.[65] Boeddu and Haigh understand this as the Court proposing different tests in cases concerning fiscal arrangements than those it fashioned for overruling individual rights cases, comparing this reasoning to that in *Street* and *Newcrest*.[66] However, the reference to intolerable *social* consequences could also be understood as recognising that cases touching on certain subject matter are to be treated differently (while also accepting that the broader comment invokes the third *John* factor).

An additional example is drawn from the more recent case of *Re Day (No 2)*.[67] This case, which has not been analysed from the perspective of *stare decisis*, concerned the interpretation of s 44(v) of the *Constitution*. That provision renders certain persons incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives if they have any direct or indirect pecuniary interest in any agreement with the Commonwealth Public Service. The case concerned whether *Re Webster*, the only decision of the Court concerning s 44(v), should be reopened and overruled.[68] Nettle and Gordon JJ acknowledged that the impugned precedent was 'of a special kind' because it involved 'constitutional provisions respecting Parliament and its members'.[69] This is arguably also reminiscent of Edelman J's comments in *Vunilagi* set out above.[70]

The brief review of the case law possible within the scope of this column suggests that there is a set of cases — a broader category than previously understood — where the Court has been prepared to treat the importance of the subject matter as weighing against the application of *stare decisis*. It may be that the critical issue is not whether a provision, principle or implication can be characterised as a constitutional guarantee or individual right. Rather, it is that certain provisions, principles or implications raise such fundamental consequences or questions of justice that *stare decisis* is more likely to give way and that questions impacting individual rights are more likely to be of such a nature.

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63 *Lange* (n 30) 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted) (emphasis added).

64 Boeddu and Haigh (n 26) 171

65 *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475, 513.

66 Boeddu and Haigh (n 26) 176

67 *Re Day (No 2)* (2017) 263 CLR 201.

68 *Re Webster* (1975) 132 CLR 270.

69 *Re Day (No 2)* (n 67) 220 [45] ('There is the consideration that persons may have ordered their affairs on the basis of that decision, and may have to act promptly to regularise them. In any event the decision is of a special kind, involving as it does constitutional provisions respecting Parliament and its members. If the construction adopted in *Webster* is affected by error, it should not be allowed to stand.')

70 See above n 52 and accompanying text.

IV Application to *Yunupingu*

The pending appeal presents an important opportunity for the Court to explain the relevance of the protection of constitutional guarantees to *stare decisis* reasoning, and to articulate the scope of this factor — that is, does it apply only to express constitutional guarantees or to a broader sub-category of constitutional precedent. Several of the respondents emphasise the status of the just terms requirement as a constitutional safeguard. The submissions made on behalf of Dr Yunupingu (the First Respondent) indicate that the 'heart' of the present appeal

> involves a consideration as to whether Indigenous people should be denied the protection of a *constitutional safeguard* that applies to property owned by other Australians, based on a discriminatory denigration of native title as 'inherently defeasible' for the purposes of s 51(xxxi).[71]

The First Respondent emphasises that

> this Court would not be intimidated by the prospect that its function of interpreting and applying the *Constitution* … may occasion fiscal inconvenience to the Commonwealth. That is *especially so in the case of the* '*great constitutional safeguard*' that s 51(xxxi) represents.[72]

Moreover, the First Respondent observes:

> If it be the case that a 'vast' Commonwealth liability would arise under the Full Court's orthodox approach to ss 51(xxxi) and 122 of the *Constitution*, that could only be on account of a 'vast' number of Indigenous peoples of the Northern Territory having been historically and unjustly dispossessed of their property, to the Commonwealth's countervailing benefit, in contravention of the limits on Commonwealth power under the *Constitution*. … Insofar as the scale of such unconstitutional acquisition of property on other than just terms is 'vast', that would only underscore the importance of the Court recognising the specific constitutional wrong underlying the present case.[73]
>
> In numerous important cases in this Court's history, the application of the *Constitution* in accordance with legal principle has occasioned substantial inconvenience, whether financial, administrative, or other. The Commonwealth has occasionally sought to sustain a position on the basis of what it urged would be the intolerable consequences of a contrary decision.[74]
>
> In each such case, this Court has not eschewed its responsibility to enforce the *Constitution*, but has instead embraced it. No less would be true in the present appeal which at its heart involves a consideration as to whether Indigenous people should be denied the protection of a constitutional safeguard that applies to property owned by other Australians, based on a discriminatory denigration of native title as 'inherently defeasible' for the purposes of s 51(xxxi).[75]

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71 Yunupingu on behalf of the Gumatj Clan or Estate Group, 'First Respondent's Submissions', Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 27 May 2024, 6 [10] (emphasis added).
72 Ibid [7].
73 Ibid [8].
74 Ibid [9] (citations omitted).
75 Ibid [10].

In response to the Commonwealth submission that *Teori Tau* is good law, the Rirratjingu Parties (the Twenty-Fifth to Twenty-Eighth Respondents) seek leave for *Teori Tau* to be reopened and overruled. The Rirratjingu Parties also expressly cite the relevance of the application of *stare decisis* principles to cases where the 'constitutional question is of "vital" importance' such as where it concerns a 'constitutional guarantee'.[76] Likewise, the Northern Land Council and the Arnhem Land Aboriginal Land Trust (the Twenty-Ninth Respondent and the Thirty-Second Respondent, respectively) — together, the NLC Parties — submit that 'inconvenience does not overcome principle'[77] in an argument reminiscent of the First Respondent's argument and which raises, albeit in different [or more oblique] language, the significance of the constitutional question in the pending appeal.

Notably, the Commonwealth (the Appellant) denies the status of the just terms requirement as an individual right.[78] Moreover, in the context of the submission that *Wurridjal* did not overturn *Teori Tau*, the Commonwealth submits:

> That said, given the stark differences of opinion expressed in [the impugned precedent] … in this Court the answer to the above question [of whether the territories power is subject to the just terms requirement] *is more appropriately resolved by reference to constitutional principle than by arguments about the ratio of those cases*.[79]

The Rirratjingu Parties contest this submission, arguing that it seeks to 'skip over' issues of precedent:

> The Court should pause before taking that approach. Constitutional principle does not exist in a vacuum, disconnected from precedent. The pages of the law reports are not 'blank'; they record the judgments in *Teori Tau*, *Newcrest* and *Wurridjal*.[80]

Interestingly, the Commonwealth submission is not framed in the language of *stare decisis*; nor does it seek to argue that the case should *not* be determined by the doctrine of precedent because it concerns a constitutional safeguard or some other special category of constitutional questions of fundamental importance or with rights-protecting ramifications. Instead, this submission is more akin to the general claim identified at the outset of this column: that *stare decisis* is weaker in the constitutional setting.

It thus appears there are at least three possibilities with respect to *stare decisis* in the constitutional setting:

(1) *Stare decisis* is weaker in the constitutional setting generally (the Commonwealth position).

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[76] The Rirratjingu Parties, 'Submissions of the Twenty-Fifth to Twenty-Eighth Respondents (The Rirratjingu Parties)', Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 27 May 2024, 28–9 [92] (citations omitted) ('Submissions of the Twenty-Fifth to Twenty-Eighth Respondents').

[77] The Northern Land Council and the Arnhem Land Aboriginal Land Trust, 'Submissions of the NLC Parties (Twenty-Ninth Respondent, Northern Land Council, Thirty-Second Respondent, Arnhem Land Aboriginal Land Trust)', Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 27 May 2024, 11 [28] (citations omitted).

[78] Appellant's Submissions (n 16) 16 [43].

[79] Ibid [14].

[80] The Rirratjingu Parties, 'Submissions of the Twenty-Fifth to Twenty-Eighth Respondents (n 76) 19 [56].

(2) *Stare decisis* is weaker in the constitutional setting generally *and* especially so when assessing precedent that concerns an express constitutional guarantee (the position of Dr Yunupingu, the Rirratjingu Parties and the NLC Parties).

(3) *Stare decisis* is weaker in the constitutional setting generally *and* especially so when assessing precedent that concerns constitutional principles of fundamental importance, whether these be express constitutional guarantees or requirements or implications drawn from other provisions (the alternative explored in Part III(C) of this column).

V Conclusion

If the role of express constitutional guarantees is relevant to the application of *stare decisis*, a further question arises. This question is relevant to *Yunupingu*, though beyond the scope of this short column:

> [I]s overruling only more appropriate where it will increase an individual right or does the same higher standard apply where it would restrict it? In other words, is *stare decisis* less important to incorrect interpretations of constitutional rights that had previously expanded such a right or should it be treated the same?[81]

Reflecting on the historic applications of this factor in *stare decisis* reasoning, Boeddu and Haigh initially note: 'It is not clear in either *Street* or *Newcrest* whether their Honours' readiness to overrule was influenced by the fact that the constitutional right involved in each case had been *restricted* by precedent.'[82] However:

> [T]he tenor of these decisions suggest[s] that the Court would be less inclined to take away rights than to ensure protection of rights. This is especially true where individual rights are vying against collective or governmental rights — the Court's past attitude appears to have been driven by a need to prevent restricting rights.[83]

Applying the narrower formulation (that reopening is only more appropriate where it will increase an individual right) supports both of the claims by Dr Yunupingu, the Rirratjingu Parties and the NLC Parties that *Wurridjal* should not be reopened and, alternatively, that *Teori Tau* should be reopened. Applying the broader formulation (that reopening is more appropriate wherever the impugned precedent touches upon an individual right) *also* supports the Commonwealth's argument that *Wurridjal* should be reopened (although this was not an argument made in the Commonwealth's written submissions).

Within the scope permitted by this column, I have also considered whether the category of cases of special relevance is broader than the category of cases that concern an express constitutional guarantee. I have suggested that the 'importance' of the subject matter of the impugned constitutional case generally may be a relevant consideration for the application of *stare decisis*. This may include cases where the impugned precedent touches on an express constitutional guarantee, concerns a

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81 Boeddu and Haigh (n 26) 173.
82 Ibid (emphasis in original).
83 Ibid.

freedom secured by a constitutional implication or touches some other 'vital' or 'fundamental' constitutional provision or principle. However, this possibility provokes further questions, including most importantly how this broader category is to be defined. It is hoped the Court takes the opportunity in *Yunupingu* to clarify the relevance of the rights-protecting factor and the scope of its operation.[84]

[84] This echoes earlier calls for more express reasoning in this regard: ibid 173–4.

Rethinking "On Just Terms": *Commonwealth v Yunupingu*

Lael K Weis[*] and Rosalind Dixon[†]

Abstract

Commonwealth v Yunupingu raises a number of constitutionally significant issues concerning the scope of the Commonwealth Parliament's power under s 51(xxxi) of the *Australian Constitution* and its relationship to the territories power in s 122. One issue that is not directly raised by the questions before the High Court of Australia, but that will nevertheless inform the Court's answers, concerns the meaning of 'on just terms'. Is 'on just terms' a narrow and inflexible requirement to provide full market-based compensation? Or does it permit a broader and more flexible approach to determining the obligations of the Commonwealth and territory governments, which would allow for structural reparations and non-pecuniary remedies? We suggest that a broader and more flexible approach is generally to be preferred as a matter of both principle and prudence and that such an approach is especially relevant for the Court as it considers the consequences of its answers to the questions before it.

I Introduction

In *Commonwealth v Yunupingu* ('*Yunupingu*'),[1] the High Court of Australia will consider the scope of s 51(xxxi) of the *Australian Constitution*, which gives the Commonwealth Parliament the power to make laws for the acquisition of property 'on just terms'. Specifically, the Court will be asked to consider: (1) whether laws made exclusively under the territories power in s 122 attract the 'on just terms' requirement; and (2) whether laws that amount to the acquisition of native title rights

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1 *Commonwealth v Yunupingu* (High Court of Australia, Case No D5/2023).

attract the 'on just terms' requirement. (The case also involves interesting questions concerning the operation of the doctrine of precedent; this is addressed in another contribution and will not be taken up here.[2])

The purpose of this contribution is to draw attention to a set of issues that underpin the High Court's approach to questions about the scope of s 51(xxxi), but that has received insufficient attention: namely, issues concerning remedies and the character of the 'on just terms' requirement. It is clear that if a Commonwealth law acquires property that it must do so 'on just terms'. But what does that requirement demand? What is the nature of the Commonwealth's constitutional obligation?

II Not Just a Power: Duty-Based Dimensions of Section 51(xxxi)

In *Yunupingu*, questions concerning the scope of s 51(xxxi) arise in the context of a compensation application made by the Gumatj Clan or Estate Group under s 61 of the *Native Title Act 1993* (Cth) ('*Native Title Act*') on the basis that certain acts under the *Northern Territory (Administration) Act 1910* (Cth), including the reservation of minerals to the Crown,[3] qualify as 'past acts'.[4] In general terms, 'past acts' are legislative acts prior to 1 July 1993 or any other act prior to 1 January 1994, which are invalid because of the existence of native title. The question of compensation in *Yunupingu* thus turns, inter alia, on whether the acts in question qualify as an 'acquisition of property' on other than 'just terms' within the meaning of s 51(xxxi), which would render them invalid (and therefore 'past acts' for the purposes of the compensation regime under the *Native Title Act*). The Full Court of the Federal Court of Australia held that they do,[5] and the Commonwealth has appealed that decision. The Commonwealth's principal submissions on appeal are that: (1) laws made under s 122 do not attract the 'on just terms' requirement under s 51(xxxi);[6] and (2) native title rights are 'inherently defeasible' and therefore do not attract the 'on just terms' requirement under s 51(xxxi).[7]

Given this framing of the questions on appeal, issues concerning remedies and the character of the Commonwealth's constitutional obligation do not, strictly speaking, arise. Remedies for the extinguishment of native title are statutorily defined, and it can be accepted that the *Native Title Act*'s compensation regime, however imperfect, satisfies the 'on just terms' requirement. However, the statutory regime for compensation created by the *Native Title Act* cannot displace the meaning of the requirement. Nor can it exhaust the ways of satisfying it — and, ultimately, the *Native Title Act*'s terms are subject to potential amendment.

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2 See Ashleigh Barnes, 'Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*' (2024) 46(3) *Sydney Law Review* 347.

3 *Mining Ordinance 1939* (NT) s 107.

4 See *Native Title Act 1993* (Cth) s 228(2).

5 *Yunupingu v Commonwealth* (2023) 298 FCR 160.

6 Commonwealth, 'Appellant's Submissions', Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 28 March 2024, 6–8 [12]–[19] ('Appellant's Submissions').

7 Ibid 22–3 [57]–[59].

Although s 51(xxxi) is a power-conferring provision, it has long been understood as a constitutional guarantee. Given the dual function of s 51(xxxi) and its status as a constitutional guarantee, the questions that the Court has to consider cannot be addressed as pure questions of legislative power. They are also questions about constitutional obligations. This aspect of s 51(xxxi) draws attention to the normative dimensions of legislative power, including the manner in which it is conferred, and the manner in which it is exercised.[8]

III A Broader and More Flexible Approach: Considerations of Principle and Prudence

The High Court has long assumed that the phrase 'on just terms' is a requirement to provide monetary compensation for any property rights that have been acquired, using fair market value as the benchmark. This, however, is not the only construction open to the Court. The phrase 'on just terms' in s 51(xxxi) arises in a distinctive context: that of a constitutional provision at once conferring power on the Commonwealth, and at the same time limiting that power by imposing a duty.[9] Accepting, as the High Court has,[10] that s 51(xxxi) is a constitutional guarantee and not merely a supplementary grant of legislative power means that the phrase should be interpreted like a constitutional guarantee.[11] That is, it should be interpreted in a broad and purposive manner that reflects both: (1) the *values* underpinning the constitutional protection of property; and (2) notions of *reasonable limitations* on the enjoyment of property rights that are implicit in the constitutionally prescribed system of government.

Values underpinning the constitutional protection of property include, at a minimum, values associated with preventing arbitrary confiscation. This is how Dixon J described the purpose of s 51(xxxi) in *Grace Bros v Commonwealth*,[12] and it is a view that many High Court justices have endorsed over time.[13] Although not always explicit, values associated with this purpose clearly inform the Court's analysis. For instance, in the course of asking whether the essential character of a

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8 See Lael K Weis, 'The Constitutional Office of the Legislature' (2020) 70 (Supplement 2) *University of Toronto Law Journal* 214; Rosalind Dixon and Lael K Weis, 'Legislative Constitutional Duties and the Judicial Role' [2023] (2) *Public Law* 311, 324.

9 Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s 51(xxxi) of the *Constitution*' (2005) 27(4) *Sydney Law Review* 638; Lael K Weis, 'Property' in Cheryl Saunders and Adrienne Stone, *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1013.

10 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

11 Lael K Weis, '"On Just Terms", Revisited' (2017) 45(2) *Federal Law Review* 223 ('On Just Terms').

12 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 291 ('*Grace Bros*').

13 See, eg, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 169 (Mason CJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 255 (Toohey J) ('*Peverill*'); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 659 (Kirby J); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 26 [44] (Toohey J) ('*WMC*'); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 207 [176] (Heydon J) ('*ICM Agriculture*'); *JT International SA v Commonwealth* (2012) 250 CLR 1, 124 [354] (Kiefel J) ('*JT International*'); *A-G (NT) v Emmerson* (2014) 253 CLR 393, 446 [109], 449 [119], 452 [132] (Gageler J) ('*Emmerson*'); *Cunningham v Commonwealth* (2016) 259 CLR 536, 559–60 [57] (Gageler J) ('*Cunningham*').

law meets the description of an 'acquisition of property', notions of legitimate expectations often inform the High Court's analysis.[14] Indeed, such considerations arguably underpin the notion of 'inherent defeasibility' or 'inherently susceptible to variation' as a disqualifying feature[15] — a central issue in *Yunupingu*. Moreover, these values can be seen as connected to a broader set of constitutional values related to the rule of law.[16]

The High Court's s 51(xxxi) jurisprudence has also consistently recognised reasonable limitations on property — albeit here, too, often only implicitly through the lens of characterisation. For instance, in the course of upholding the water licensing regime in *ICM Agriculture v Commonwealth*, members of the majority emphasised that: water conservation is an important social policy;[17] the regulation of water entitlements via a statutory licensing regime is a rational method for achieving that social policy;[18] and the burden on property rights was reasonable, given the reciprocity of benefits and burdens inherent in such a regulatory scheme.[19]

A broader and more flexible approach to the 'on just terms' requirement would allow the Court to more openly articulate these kinds of considerations, rather than having to subsume them within the singular concept of an 'acquisition of property'.[20] Reasons for the result in cases such as *ICM Agriculture* would be better captured by openly articulating why, in the Court's view, the burden imposed on private property owners was justified.

A broader and more flexible approach would also open up the possibility that only some, and not all, acquisitions of property require compensation equivalent to full market-based value. This possibility might arise, for example, because the burdens imposed by a regulatory scheme are justified in light of the importance of the objective, the lack of reasonable and equally effective alternatives, and the overall reciprocity of benefits and burdens achieved by the scheme. Again, *ICM*

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14 See, eg, *Peverill* (n 13) 243–4 (Brennan J), 249 (Dawson J), 267 (McHugh J); *Airservices Australia v Canadian Airlines* (2000) 202 CLR 133, 179 [96], 181 [101] (Gleeson CJ and Kirby J), 255 [351]–[354] (McHugh J), 297–8 [492]–[493] (Gummow J); *Cunningham* (n 13) 547 [7]–[8], 554 [39], 557 [50] (French CJ, Kiefel and Bell JJ), 583 [151], 583–4 [153], 585–6 [166], 588 [169] (Keane J), 602–3 [224], 603 [226], 608–9 [237], 609 [239] (Nettle J). See also Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)' (2000) 11(3) *Public Law Review* 183, 203.

15 Weis, 'Property' (n 9) 1027–9.

16 See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J). See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ).

17 For instance, at the outset of the joint reasons of Hayne, Kiefel and Bell JJ, their Honours acknowledge that 'water and rights to use water are of critical importance … to society as a whole': *ICM Agriculture* (n 13) 182 [90].

18 The history of the regulation of water entitlements is considered at length in both majority judgments: ibid 174–6 [58]–[67] (French CJ, Gummow and Crennan JJ), 191–5 [116]–[129] (Hayne, Kiefel and Bell JJ).

19 Arguably, important considerations here were the fact that the licence holders' rights were replaced rather than simply eliminated, and the fact that they received structural adjustment payments to help offset their losses: ibid 159–60 [6]–[7] (French CJ, Gummow, and Crennan JJ).

20 For a general argument about the link between a focus on values and transparency, see Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2014) 43(3) *Federal Law Review* 455; Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3.

Agriculture is arguably such an example.[21] Moreover, a broader and more flexible interpretation of the 'on just terms' requirement also opens up the possibility of non-monetary remedies,[22] either in addition to or else as an alternative to monetary compensation.[23] As discussed below, this possibility is particularly relevant to the native title context.

Considerations of both principle and prudence support such an approach.

Starting with considerations of principle, the approach just described would promote consistency and coherence in constitutional doctrine by bringing the analysis of s 51(xxxi) in line with the High Court's well-established approach to other constitutional guarantees, such as the freedom of interstate trade (s 92) and the implied freedom of political communication.[24] In both of those contexts, the Court approaches the question of constitutional validity through a wider requirement of justification that encompasses both values and reasonable limitations — *not* through a narrow and inflexible approach that focuses exclusively on the law's essential character.

The usual tools of constitutional construction — text, structure and purpose as discerned from drafting history — also support such an approach. The Commonwealth's constitutional obligation is not described as a requirement for 'compensation' but a requirement that acquisitions of property be 'on just terms'. As Dixon J once observed, '[u]nlike "compensation", which connotes full money equivalence, "just terms" are concerned with fairness'.[25] Indeed, s 51(xxxi)'s description of this obligation is a distinguishing feature of the *Australian Constitution*: whereas reference to 'compensation' is commonplace (used in at least 167 constitutions), only five other constitutions use the phrase 'on just terms' (and only one other constitution *only* uses this phrase).[26] There is evidence that the framers of the *Constitution* selected the phrase 'on just terms' in order to incorporate notions of fair dealing that go beyond the payment of compensation.[27] Interpretation of the obligation contained in s 51(xxxi) 'must not be unmindful of its specially Australian character'.[28]

In addition, there is strong historical support for interpreting the *Constitution* in a manner that allows the state to play a *positive* role in the protection of individual

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21 See Weis, 'On Just Terms' (n 11) 253–4.
22 See Celia Winnett, '"Just Terms" or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition' (2010) 33(3) *UNSW Law Journal* 776.
23 See Weis, 'On Just Terms' (n 11) 246–9.
24 On the call for even greater consistency in the application of proportionality-style logic and considerations across all areas of Australian constitutional jurisprudence, see Rosalind Dixon, 'A New Australian Constitutionalism? Purpose, Proportionality and Process-Theory in the High Court of Australia' (George Winterton Memorial Lecture, University of Western Australia, 11 April 2024).
25 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 569 (Dixon J) ('*Nelungaloo 1948*').
26 See Weis, 'On Just Terms' (n 11) 228–9.
27 See Duane L Ostler, 'The Drafting of the Australian Commonwealth Acquisition Clause' (2009) 28 *University of Tasmania Law Review* 211, 232–5.
28 *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600 (Kitto J) ('*Nelungaloo 1952*').

and social welfare.[29] This was a key commitment of the social liberal ideas and Chartist movement that influenced many of the framers, and is an enduring idea in Australian social and political thought.[30] A broad and flexible approach to the notion of 'just terms' supports this role. Often, the acquisition of property by the Commonwealth occurs in the context of programs that have a substantial public interest. Requiring the government to pay full market-based compensation for *any* acquisition of property has the potential to deter socially beneficial state action.[31]

Finally, there is High Court precedent that supports approaching the 'on just terms' requirement as a broader and more flexible demand for justification that admits of a wider range of remedial possibilities.[32] Overall, it is fair to say that the possibility of a broader and more flexible approach has not been rejected, but has simply been neglected.[33] In *JT International v Commonwealth*, French CJ left open the possibility of adopting such an approach, deferring 'careful consideration' to 'an appropriate occasion'.[34] We suggest that any future consideration of remedies following the decision in *Yunupingu* may provide such an occasion.

To be clear, in advancing this argument from principle, we are not suggesting that market-based compensation is never required under s 51(xxxi). There are cases where providing less than full market-based compensation could create other problems: for example, encouraging rent-seeking behaviour and resulting in programs that fail to meet a cost-benefit test, or that impose substantial injustice on individuals by asking them to bear a disproportionately high individual cost.[35] Our point is simply that in some cases less than full market-based compensation may be required to satisfy the requirements of justice. The Court's approach to s 51(xxxi) should be flexible enough to accommodate that possibility.

Turning to prudential considerations, there are arguments for adopting a broad and flexible approach to the 'on just terms' requirement that appeal to the Court's institutional role. A strict requirement of market-based compensation may lead to outcomes that attract substantial public disapproval, and even political backlash — for example, because of a perception that the relevant compensation is

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29 Adrienne Stone, 'More than a Rule Book: Identity and the Australian Constitution' (High Court of Australia Public Lecture, High Court of Australia, 9 November 2022); Ashleigh Barnes, 'Constitutional Dignity' (2023) 46(3) *Melbourne University Law Review* 683; William Partlett, 'Australian Popular Political Constitutionalism' (2024) *Federal Law Review* (forthcoming); Will Bateman, 'Federalising Socialism without Doctrine' (2024) 52(3) *Federal Law Review* (forthcoming); Lynsey Blayden, 'Active Citizens and an Active State: Uncovering the "Positive" Underpinnings of the Australian Constitution' (2024) *Federal Law Review* (forthcoming).

30 Blayden (n 29); Bateman (n 29).

31 Rosalind Dixon, 'Fair Market Constitutionalism: From Neo-Liberal to Democratic Liberal Economic Governance' (2023) 43(2) *Oxford Journal of Legal Studies* 221 (arguing that constitutions need to protect property rights, but in a relatively weak or flexible way that allows for less than full market-based compensation, in certain cases of clear social benefit) ('Fair Market Constitutionalism').

32 See, eg, *Grace Bros* (n 12) 279–80 (Latham CJ), 285 (Starke J), 290–1 (Dixon J); *Nelungaloo 1948* (n 25) 569 (Dixon J); *Nelungaloo 1952* (n 28) 600 (Kitto J); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 424–5 [305], 426 [309] (Kirby J); *Emmerson* (n 13) 446 [109] (Gageler J).

33 See *WMC* (n 13) 102–3 [262] (Kirby J) (observing that there has been very 'little judicial elaboration of what the phrase means').

34 *JT International* (n 13) 64 [158] (French CJ).

35 Dixon, 'Fair Market Constitutionalism' (n 31).

too generous to individuals, relative to the public interest, or even because of a perception that monetary compensation is an inappropriate form of redress.

There is, of course, room for debate as to whether public perceptions should inform the Court's approach to constitutional construction: some scholars suggest that it is a relevant, if not decisive, factor,[36] whereas others suggest that it is a consideration only in cases of immediate threat to a court's institutional legitimacy.[37] Notwithstanding this debate, it is a factor that militates in favour of a broader and more flexible approach to the 'on just terms' requirement under s 51(xxxi).

Moreover, the potential impact of the ruling on the Court's institutional legitimacy has clear relevance to *Yunupingu* itself. It is not improbable that a large-scale compensation award could attract substantial political backlash, given past responses to *Mabo v Queensland [No 2]*[38] and *Wik Peoples v Queensland*.[39] The Gageler Court has already experienced substantial backlash following its decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[40] Arguments for prudential flexibility in the Court's approach to the constitutional questions presented in *Yunupingu* are thus especially timely and compelling.

The political stakes are put front and centre in the Commonwealth's submissions, which emphasise the potentially 'enormous financial ramifications' of finding that there has been an acquisition of property within the meaning of s 51(xxxi):

> If the Full Court is correct, then for almost seven decades a vast but indeterminate number of grants of interests in land in the Territory would have been invalid. Further, upon the validation of those grants by the *Native Title Act 1993* (Cth) … the Commonwealth would have become liable to pay compensation of a vast but presently unquantifiable amount (including interest, potentially going back to 1911).[41]

This is not, in our view, a reason to accept the Commonwealth's argument that laws made exclusively under the territories power in s 122 do not attract the 'on just terms' requirement. But it does provide an additional reason for the Court to endorse a broad and flexible approach to the content of this requirement that allows for consideration of whether monetary or in-kind forms of compensation (which, of course, could themselves be controversial) are more likely to be capable of winning ongoing democratic support.

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36 See, eg, Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7(1) *International Journal of Constitutional Law* 106; Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013); Rosalind Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (2019) 17(3) *International Journal of Constitutional Law* 904; Roni Mann, 'Non-Ideal Theory of Constitutional Adjudication' (2017) 7(1) *Global Constitutionalism* 14.

37 Cf Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Harvard University Press, 2018).

38 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

39 *Wik Peoples v Queensland* (1996) 187 CLR 1.

40 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254.

41 Appellant's Submissions (n 6) 3 [3].

IV 'On Just Terms' and Native Title

Yunupingu does not require the Court to decide the precise scope or content of any requirement of just terms under 51(xxxi), as applied to s 122. Instead, if the Court were to uphold the decision of the Full Court of the Federal Court, it would then be for the Commonwealth and the territory governments to decide whether to enact new legislation explicitly acquiring the relevant native title interests and providing just terms.

There are also good arguments for the Court to avoid pre-judging this question. It is not strictly necessary to decide and doing so would reduce the scope for the Commonwealth and territory executives and parliaments to contribute to answering this question. Moreover, the Court has not had the benefit of full argument on this issue. Nevertheless, the Court may still provide useful guidance regarding the process of executive and legislative deliberation, and reassure the broader public that there is scope for a broad and flexible approach to the 'on just terms' requirement that can accommodate a range of remedial possibilities suited to the specific issues that arise in the native title context.

In emphasising the benefits of a broader and more flexible approach to the 'on just terms' requirement in the native title context, we are not suggesting that such an approach should *only* apply to native title interests. This would clearly be problematic, and potentially even be in breach of commitments to racial non-discrimination of the kind found in the *Racial Discrimination Act 1975* (Cth). As discussed in Part III, above, we think that a broader and more flexible approach is supported as a matter of constitutional principle and would better capture the factors that the High Court routinely considers in s 51(xxxi) cases, which concern a range of different proprietary interests. Nevertheless, the native title context provides a powerful illustration of why such an approach is needed.

Native title is a distinctive form of proprietary interest, the attributes of which should inform any approach to the notion of 'just terms'. First and foremost, as Celia Winnett notes, native title is a form of spiritual, non-commodified interest that is not readily valued in monetary terms and therefore demands consideration of non-monetary obligations.[42] Second, and relatedly, because native title is a non-alienable, non-transferrable interest for which there is no direct market, there are conceptual difficulties in applying market-based notions of compensation. Although *Northern Territory v Griffiths*[43] has opened up the possibility of compensation for non-economic losses, the spiritual and cultural dimensions of native title cannot be captured through a narrow and inflexible approach to the just terms requirement, which reduces Country to 'real estate' and value to 'monetary valuation'. Third, native title is a form of collective property that is constitutive of community: figuratively speaking, communities hold native title for the benefit of current and future generations. This collective and inter-temporal nature of native title underpins the notion of custodianship and may inform the notion of just terms for any interruption to or change in that custodianship.

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42 Winnett (n 22) 798–801.
43 *Northern Territory v Griffiths* (2019) 269 CLR 1.

It is, therefore, quite likely that just terms for the acquisition of native title would include recognition of *spiritual* and *cultural* harms and encompass forms of spiritual and cultural redress, which recognise rather than repudiate the status of traditional native title holders and their connection to land and, wherever possible, find ways of facilitating that ongoing connection. Such redress might include, for example, memorials and public displays, land restitution and other land-related terms.[44]

Just terms for the acquisition of native title would also likely include recognition that the relevant economic harms to First Nations take the form of a lost opportunity for economic self-sufficiency and the means of self-governance. Appropriate redress for such harm could, in turn, take the form of a requirement that previous native title holders receive priority in employment opportunities in any economic activity conducted on the relevant land, or else forms of revenue sharing in the context of taxes or royalties generated by that activity.

Equally, a broader and more flexible approach to just terms would highlight the importance of consultation by governments with First Nations, or 'free, prior and informed consent' to changes in the use and incidents of native title.[45] This reflects the broader context in which native title interests are embedded: a structure that includes a commitment to indigenous recognition and self-determination, including as understood and defined by international law.[46]

There is no straightforward answer to how these considerations should be evaluated or balanced in any given case. Other countries have grappled with similar issues in the context of the award of compensation to indigenous peoples for a variety of harms, including harms associated with the wrongful removal of children, institutional abuse and under-funding of indigenous welfare programs. Canada, for example, has made several large-scale compensation awards to its First Peoples for harms of this kind. The most recent award, of over CAD23 billion, for harms associated with the under-funding of indigenous family welfare programs[47] also involves a mix of individual compensation and collective redress in the form of structural programs aimed at overcoming past harms and disadvantage, and empowering future generations through better funded and targeted forms of family support. The Canadian example also underscores the existence of comparative precedent for a broad and flexible approach to notions of collective compensation for past injustices.

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44 See Winnett (n 22) 802–3.

45 See ibid 803–4.

46 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 19. See also United Nations High Commissioner for Human Rights, 'Free, Prior and Informed Consent of Indigenous Peoples' (Fact Sheet, September 2013).

47 'Final Settlement Agreement on Compensation and Agreement-In-Principle for Long-Term Reform of First Nations Child and Family Services and Jordan's Principle', *Government of Canada* (Web Page, 20 March 2024) <https://www.sac-isc.gc.ca/eng/1646942622080/1646942693297>; Indigenous Services Canada, 'Revised Settlement Agreement of $23B Reached to Compensate First Nations Children and Families' (News Release, 5 April 2023); Darren Major and Olivia Stefanovich, 'Judge Approves Historic $23B First Nations Child Welfare Compensation Agreement', *CBC* (online, 24 October 2023) <https://www.cbc.ca/news/politics/judge-approves-23-billion-first-nations-child-welfare-agreement-1.7006351>.

At the same time, we acknowledge that there is no direct analogy between these harms and the harms associated with the past or future extinguishment of native title interests. We also do not suggest any precise answer to the way in which harms of this kind should be measured or addressed, including but not limited to providing monetary compensation. Our argument is simply that, should the Court in *Yunupingu* uphold the decision of the Full Court of the Federal Court, it should also lend its approval for a broad and flexible approach to the 'on just terms' requirement, which encompasses notions of fair dealing and allows for the consideration of these remedial issues.

V Conclusion

A fundamental principle of the common law is that there is no right without a remedy. The same can be said of constitutional guarantees. This column has suggested that although remedial questions do not, strictly speaking, arise in the questions before the High Court in *Yunupingu*, they nonetheless loom large. Conceptually and practically speaking, issues concerning remedies and the character of the Commonwealth Parliament's constitutional obligation — what 'on just terms' requires — cannot be neatly separated from questions concerning the scope of the Commonwealth Parliament's power under s 51(xxxi).

This is also true as a political matter: the Gageler Court has already weathered a political storm, which has arguably left its sociological legitimacy substantially diminished,[48] especially among political conservatives. Whether the Court is positioned to weather an even larger storm in the context of native title is a question that should be on the minds of all of those concerned with constitutionalism and the rule of law in Australia.

Perhaps the Court is live to these questions, in which case our arguments from principle and prudence may well converge: in order for the Court to recognise the past harms of an unconstitutional acquisition of property by the Northern Territory, it may need to anticipate at least the conceptual possibility of a remedial standard that political elites and the general public can live with. The Court's answer to the constitutional questions in *Yunupingu* might therefore depend — albeit indirectly — on the meaning of the 'on just terms' requirement.

[48] On the concept of 'sociological legitimacy', see Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) 97–8.

Before the High Court

Trustees' Indemnities and Fiduciary Duties: The High Court Appeal in *Naaman v Jaken Properties Australia Pty Ltd*

Aryan Mohseni*

Abstract

The High Court of Australia appeal in *Naaman v Jaken Properties* raises the question whether a successor trustee owes a 'fiduciary duty' to the former trustee to not destroy, jeopardise or diminish the former trustee's right of indemnity over trust assets. That question arises to determine whether third parties are liable to account in equity as knowing recipients of property dissipated to frustrate the former trustee's indemnity. It is argued in the appeal that the successor trustee holds the trust assets on express trust for the former trustee to the extent of the former trustee's indemnity. That conclusion does not account for the variety of equitable interests. Three main points emerge. First, a current trustee has a 'beneficial interest' in trust assets only in a superficial sense. Second, upon transfer, that 'beneficial interest' is not 'retained' by the former trustee; the entitlement of a former trustee over the trust fund changes, and becomes analogous to a charge over a fund. The language of 'beneficial interest' in each case is misleading and should be eschewed. Third, it is unnecessary to ask, for the purposes of *Barnes v Addy* liability, whether any 'duty' owed by a successor to a former trustee is a 'fiduciary duty'.

I Introduction

In *Naaman v Jaken Properties*,[1] the High Court of Australia will have occasion to consider the obligations, if any, owed by a successor trustee to a former trustee to honour the former trustee's right of recourse to the trust property for properly incurred expenses. That question arises to determine the scope of relief available in

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1 *Naaman v Jaken Properties Australia Pty Ltd*, High Court of Australia, Case No S26/2024.

equity against third parties who knowingly receive trust assets disbursed to frustrate the former trustee's right of indemnity. To that end, the appellant has framed the question as whether the relationship between former and current trustees is *fiduciary* in nature, to render third parties liable to account under *Barnes v Addy*.[2]

These questions are best answered by considering the fundamental nature of trustees' rights of recourse to trust property. What is the nature of a former trustee's right of indemnity? Does it differ from the right of an incumbent trustee? And is it helpful to speak of 'the' right continuing after retirement and transfer of title?

The issues raised in the pending High Court appeal bring into sharp focus the fallacy of dual estates, the variety of equitable interests falling short of the trust, the relation between fiduciary relationships and third-party liability in equity, and problems with reasoning downwards from an imprecise label or metaphor, such as 'beneficial interest', used to describe a legal relationship.

Importantly, to ask whether any 'duty' to honour the indemnity is a 'fiduciary duty' proceeds from a defective major premise; it is an unnecessary starting point when determining third-party liability in equity.

II The Proceedings

Jaken Property Group Pty Ltd ('JPG') was the trustee of the Sly Fox Family Trust. It incurred various expenses as a trading trustee. Before it could recoup those expenses from the trust property, JPG was replaced as trustee by Jaken Australia Pty Ltd ('Jaken'), the first respondent in the pending appeal. The Deed of Appointment vested title to the assets in Jaken. Clause 1.5 of the Deed required Jaken to 'indemnif[y] the Retiring Trustee against all debts which the Retiring Trustee has incurred and which are unpaid at the time of execution of this deed by all parties … out of the assets of the Trust'.[3]

The appellant in the pending appeal, Mr Naaman, was a trust creditor. There is no dispute that the appellant could be subrogated to JPG's equities in respect of the fund. At trial, Kunc J found that Jaken deliberately transferred trust property to 'defraud or hinder creditors'.[4] That was sufficient to void the transfers made to related parties with nominal consideration, under s 37A of the *Conveyancing Act 1919* (NSW) ('*Conveyancing Act*'). But Naaman argued, further, that third parties should be held liable to account for receiving property they knew was disbursed in breach of a 'fiduciary duty to JPG not to deal with the assets of the trust in a way which destroys, diminishes or jeopardises JPG's right of indemnity from those assets'.[5] Kunc J accepted that submission and held each of the respondents liable for equitable compensation.

On appeal,[6] Leeming JA held that there was no such duty, for reasons with which Kirk JA agreed. If the successor was a fiduciary vis-à-vis the former trustee,

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2 *Barnes v Addy* (1874) LR 9 Ch App 244.
3 *Jaken Properties Pty Ltd v Naaman* [2022] NSWSC 517, [38] (Kunc J) ('*Jaken Trial*').
4 Ibid [428].
5 Ibid [8] (Kunc J).
6 *Jaken Properties Pty Ltd v Naaman* (2023) 112 NSWLR 318 ('*Jaken Appeal*').

that would put them in a position of conflict difficult to reconcile with the 'undoubted fiduciary obligations owed to beneficiaries' of the trust.[7] JPG's rights were analogous to those of a chargee — a right of recourse to a fund for some amount. While these are undoubtedly equitable proprietary rights, 'fiduciary obligations are not [ordinarily] owed by the mortgagors, chargors, clients [of a solicitor with a lien over fruits of litigation] or purchasers [of land subject to a vendor's lien] to the persons with equitable proprietary rights'.[8] As to vulnerability, Leeming JA held that 'the former trustee is no less vulnerable than any other creditor with a security interest recognised in equity'.[9] By contrast, Bell CJ held that the relationship was fiduciary, and emphasised the fact that JPG was deprived of direct access to the trust property, and that Jaken was now able to exercise powers over property to the detriment of JPG's indemnity.[10]

In the High Court, the appellant's challenge is essentially three-fold. First, it argues that the fiduciary nature of the relationship 'follows from the authorities recognising the proprietary nature of the interest generated by the right of exoneration'.[11] The utility of the indemnity to the office of trusteeship warrants it being protected by fiduciary duties. Second, the appellant points to authority indicating that the former trustee's right of recourse to trust funds is a '"beneficial interest in" the assets of the Trust'.[12] That is language reminiscent of the archetypal fiduciary relationship. Third, and more fundamentally, the appellant argues that because Jaken received assets 'which [it] is to hold, apply or account for specifically for [Jaken's] benefit', Jaken is 'a trustee in the ordinary sense'.[13]

III The Current Trustee's Right of Indemnity

Any consideration of the above must begin with an analysis of the nature of an incumbent trustee's right of indemnity. A trust is a relationship, not an entity. The trustee is liable personally for all liabilities whether incurred in the administration of the trust or otherwise. In exchange, equity suffers the trustee rights of exoneration and reimbursement out of the trust assets for properly incurred expenses.[14] This has been called a 'lien'. Confusion with its common law counterpart has misled some to suppose that the right disappears when possession is lost.[15] Hence the unfortunate course of argument in *Equity Trust v Halabi*.[16] With more success it has been called

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7 Ibid 355 [139].
8 Ibid 331 [38].
9 Ibid 355 [141].
10 Ibid 326 [18].
11 Anthony Naaman, 'Appellant's Submissions', Submissions in *Naaman v Jaken Properties Australia Pty Ltd*, Case No S26/2024, 28 March 2024, [18] ('Appellant Submissions').
12 Ibid [19], quoting *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524, 559–62 [80]–[84] (Bell, Gageler and Nettle JJ), 578–82 [133]–[142] (Gordon J) ('*Carter Holt*').
13 Ibid [23], quoting *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 524 [113] (Bell, Gageler and Keane JJ).
14 *Re Johnson Shearman v Robinson* [1880] 15 Ch D 548, 552 (Jessel MR); *Jennings v Mather* [1902] 1 KB 1, 7 (Stirling LJ); *Re Beddoe* [1893] 1 Ch 547, 558 (Lindley LJ).
15 *Meritus Trust Co Ltd v Butterfield Trust (Bermuda) Ltd* [2017] SC (Bda) 82 Civ. Cf *Re Pauling's Settlement Trusts [No 2]* [1963] 1 Ch 576, 585 (Wilberforce J).
16 *Equity Trust (Jersey) Ltd v Halabi* [2023] AC 877 ('*Halabi*').

a 'charge'. But once it is appreciated that the current trustee is the legal owner of assets, the absurdity of having a charge over one's own property becomes clear.[17] The beneficial estate is engrafted onto, and does not diminish, the legal estate.[18] More fundamentally, the 'right' is not securing any debt owed to the trustee.[19] Speaking in the golden age of American equity, Harlan F Stone said:

> A 'right' without a corresponding duty on the part of some other person or persons [and] a 'lien' upon property legally owned by and under control of the lienor … are anomalous and only superficially appropriate uses of those terms.[20]

The language of 'charge' was only properly used in this context to convey a conclusion about priorities — Maitland said the trustee has a 'first charge' over the assets for their expenses, before distribution.[21] Even so, that is not because the trustee has some separate right which takes priority over the beneficiaries' equitable rights.[22] The position is more negative than positive. Rather, the current trustee's 'right' of indemnity is but an incident of their ownership. One simply cannot know what the *trust* property is — the property for which the trustee must account in equity to the beneficiaries — until the trustee has recouped their proper expenses.[23]

One way of putting this is that the current trustee's indemnity is simply an expression of trust accounting.[24] Describing the nature of a trustee's indemnity, Scott said: 'In rendering his accounts, [the trustee] credits himself with the expenditures he has made, and he is not bound to pay over any of the income to the *cestui que trust* until he has been reimbursed.'[25] The upshot is that, to the extent of those credited expenses, equity stays its hand and does not encumber the trustee's recourse to their legal title. The trustee can only be called to account for the net.[26] That is the 'indemnity'.

So while it has been argued that the indemnity is an equitable 'power',[27] that proceeds from the fallacy of dual estates. As the present author has argued elsewhere,

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17 *Agusta Pty Ltd v Provident Capital Ltd* (2012) 16 BPR 30,397, 30,406 [41] (Barrett JA) ('*Agusta*').

18 William Gummow and Aryan Mohseni, 'The Selection of a Defective Major Premise' (2023) 53(1) *Australian Bar Review* 11, 21.

19 *Ridge Estate Pty Ltd v Fairfield Pastoral Holdings Pty Ltd* (2024) 302 FCR 375, 394 [104] (Banks-Smith J).

20 Harlan F Stone, 'A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee' (1922) 22(6) *Columbia Law Review* 527, 531 (citations omitted).

21 FW Maitland, *Equity: Two Courses of Lectures* (Cambridge University Press, 1909) 96; Denis Browne (ed), *Ashburner's Principles of Equity* (Butterworth, 2nd ed, 1933) 160; *Dodds v Tuke* [1884] 25 Ch D 617, 619 (Bacon V-C).

22 *Sexton v Kessler & Co Ltd*, 225 US 90, 98–9 (Holmes J) (1912).

23 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 245–7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

24 Stone (n 20) 533–4.

25 Austin W Scott, 'Liabilities Incurred in the Administration of Trusts' (1915) 28(8) *Harvard Law Review* 725, 727.

26 George G Bogert and George T Bogert (eds), *Trusts and Trustees* (West Publishing, 2nd rev ed, 1983) 421–6 [972]; *Re Exhall Coal Co Ltd* (1866) 55 ER 970, 971 (Lord Romilly MR); *Boensch v Pascoe* (2019) 268 CLR 593, 601 [9] (Kiefel CJ, Gageler and Keane JJ).

27 HAJ Ford, 'Trading Trusts and Creditors' Rights' (1981) 13(1) *Melbourne University Law Review* 1, 26; Jessica Hudson and Charles Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35(1) *Trust Law International* 3; Mark Leeming, 'Trusts and Trustees: Their Successes and Successors' (2023) 53 *Australian Bar Review* 97.

the 'power' of appropriating property to one's expenses is simply an entitlement that comes with absolute ownership.[28] The indemnity, if there is anything equitable about it, is an equitable *immunity*. It is true that this immunity leaves the incumbent trustee with a 'beneficial interest' in the assets — but only in a superficial sense. An absolute owner does not own two split estates — one legal and one beneficial.[29]

IV The Former Trustee's Right of Indemnity

That proposition is significant background to the appellant's argument that, upon transfer, the former trustee is divested of legal title, but retains their 'beneficial interest', such that there emerges a 'split' in estates typical of any trust relationship. Critically, the idea of the former trustee 'retaining' the same interest is problematic.

A current trustee's right of indemnity is an incident of their ownership. That is not to say that upon retirement they lose all recourse; authority suggests that equity affords the former trustee some form of recourse to the trust assets. But it is to say that once a trustee is deprived of legal title, the juristic nature of their right must change.[30]

What is the normative basis of the entitlement that equity gives the former trustee? This has been the subject of more sustained study in the United States than in England. There, Story concluded, consistently with other species of equitable lien,[31] that equity grants the former trustee recourse to the trust fund because the successor and beneficiaries 'ought not, in conscience, as between them, be allowed to keep [the fund] and not to pay the full consideration money'[32] which was, *ex hypothesi*, properly incurred to advance or preserve that fund. Pomeroy put it in the language of the 'unearned enrichment' of those interested in a common fund.[33] The idea is closely analogous to salvage,[34] being a 'reward out of the fruit of one's exertions' despite, or precisely because of, the absence of legal title to those fruits.[35] It is a similar equity that founded a bill for contribution (from a specific fund) where there is a community of interest,[36] and for the expenses of receivers,[37] liquidators,[38]

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[28] Gummow and Mohseni (n 18) 18–22.

[29] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519 (Hope JA).

[30] Gummow and Mohseni (n 18) 21. Although it has been doubted that an 'equitable simulacrum could spring up in place of the trustee's former legal interest', that is what occurs: cf Marcus Roberts, '*Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth*: The True Nature of the Trustee's Right of Indemnity' (2020) 43(3) *Melbourne University Law Review* 1100, 1126.

[31] *Hewett v Court* (1983) 149 CLR 639, 663 (Deane J).

[32] Joseph Story, *Commentaries on Equity Jurisprudence* (Stevens & Haynes, 1st English ed, 1884) 849–50 [1219].

[33] John N Pomeroy, *A Treatise on Equitable Remedies* (Bancroft-Whitney, 1905) vol 2, 1492; *Williams v Gibbes*, 61 US 535, 538 (1857).

[34] *Shirlaw v Taylor* (1991) 31 FCR 222, 230–1 (Sheppard, Burchett and Gummow JJ) ('*Shirlaw*'); *Re Duke of Norfolk's Settlement Trusts* [1979] Ch 37, 59 (Walton J); *Halabi* (n 16) 943 [286] (Lady Arden).

[35] *Sympson v Prothero* (1857) 26 LJ Ch 671, 673 (Wood V-C).

[36] *Hobbs v McLean*, 117 US 567 (1886); *Shirlaw* (n 34) 228 (Sheppard, Burchett and Gummow JJ).

[37] Browne (ed) (n 21) 159.

[38] *Re Universal Distributing Co Ltd* (1933) 48 CLR 171, 174–5 (Dixon J); *Stewart v Atco Controls Pty Ltd* (2014) 252 CLR 307, 317–9 (Crennan, Kiefel, Bell, Gageler and Keane JJ).

retired partners,[39] co-adventurers,[40] and those who improve property under a mistaken claim.[41]

The interest thus created is apparently 'analogous to a constructive trust'[42] and is 'in the nature of a trust'.[43] But as will be seen below, these descriptions are at best metaphorical. Equity has consistently regarded the incidents of a charge — judicial sale and the appointment of receivers to that end — as sufficient to redress the unconscientious advantages described above.[44] A liquidator (usually) lacks title to the company's property, but by their industry creates a fund for the benefit of creditors. So too a litigant who spends money petitioning for the winding-up of a company, after which creditors 'come in'. In these cases, the conscientious improver has only an entitlement to 'the assistance of a court of equity to secure their rights' by judicial sale, receivership or injunctive relief, over the fund they have created.[45] Further, a solicitor by their efforts may have facilitated a settlement or judgment debt. But the solicitor has 'merely a claim to the equitable interference of the Court' for that fund to be applied to his costs.[46] The trust relationship is expressly disclaimed.[47] Again, an insured is held harmless thanks to contributions from their insurer. So where the insured also recovers from the wrongdoer, the insurer has an equitable interest in those recovered funds, to recoup their contributions.[48] But, again, 'the full panoply'[49] of the trust relationship is disclaimed,[50] and the insurer's interest in the fund is likened to a charge. '[T]o impose fiduciary liabilities on the assured is commercially undesirable and unnecessary to protect the insurers' interests.'[51] And this despite the fund's susceptibility to dissipation, and the lienee's corresponding 'vulnerability'.

That is not to deny that in all these cases, as with the successor trustee, the enriched party receives the fund based 'on her adherence to terms'[52] (whether those terms be express, for example under cl 1.5 of the Deed, or imposed by equity). But

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39 Nathaniel Lindley, *A Treatise on the Law of Partnership* (Charles H Edson, 5th ed, 1888) vol 1, 520.
40 *Ex parte Hill* (1815) 56 ER 24.
41 Story (n 32) 862 [1237]–[1238]; Fiona R Burns, 'The Equitable Lien Rediscovered: A Remedy for the 21st Century' (2002) 25(1) *UNSW Law Journal* 1.
42 Pomeroy (n 33) vol 2, 1492.
43 Story (n 32) 849 [1219]; *Thompson v Palmer* (1933) 49 CLR 507, 537 (Dixon J).
44 *Shirlaw* (n 34) 228–30 (Sheppard, Burchett and Gummow JJ); Jairus W Perry, *Treatise on the Law of Trusts* (Little, Brown & Co, 6th ed, 1911) vol 1, 206.
45 *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32, 50–1 (Edward Nugee QC sitting as a Deputy High Court Judge).
46 *Barker v St Quinton* (1844) 12 M & W 441, 445 (Parke B). See also Samuel Prentice (ed), *Chitty's Archbold's Practice of the Court of Queen's Bench* (Stevens & Haynes, 11th ed, 1862) vol 1, 137; *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] 1 WLR 2052, 2056 [3] (Lord Briggs JSC).
47 *Worrell v Power & Power* (1993) 46 FCR 214, 221 (Wilcox, Ryan and Gummow JJ) ('*Worrell*').
48 *Lord Napier v Hunter* [1993] AC 713, 737 (Lords Templeman, Goff, Jauncey, Browne-Wilkinson and Slynn) ('*Napier*'); Andrew Burrows (ed), *English Private Law* (Oxford University Press, 2nd ed, 2000) 451 [5.92].
49 WMC Gummow, 'Names and Equitable Liens' (1993) 109 (April) *Law Quarterly Review* 159, 163.
50 *Napier* (n 48).
51 Ibid 752 (Lords Templeman, Goff, Jauncey, Browne-Wilkinson and Slynn).
52 Appellant Submissions (n 11) [23], quoting Jessica Hudson, 'Trustee Succession and Indemnification' (2024) 98(6) *Australian Law Journal* 454, 462–3.

conditional receipt of property does not transform the relationship into one of trust.[53] There remain charges, conditional gifts and — that *rara avis* — the equitable personal obligation.[54] It is also well to remember that 'reimbursement' and the equity of 'exoneration' were terms of art in equity, indicating equitable interests in a specific fund, often falling short of beneficial ownership.[55] Indeed, those interests may even fall short of a charge.

Meagher, Gummow & Lehane reminds us that

> equity has not confined itself to creating equitable property by means, say, of constructive trusts and equitable liens. A miscellany of equitable interests may be found, each of which owes its peculiar nature to the particular inequity which it is designed to redress or avoid.[56]

One example given in *Meagher, Gummow & Lehane* of the nature of an equitable interest in a fund for the limited purpose of recouping expenses is *Cummins v Perkins*, where Lindley MR stated: '[I]f a plaintiff had a right to be paid out of a particular fund he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights.'[57] Chitty LJ agreeing stated: [T]he order does not create a special charge on the fund so as to give any priority, but it does give … such a species of interest in the fund as entitled the then plaintiff to interfere and save the fund from being wasted.'[58]

That is in the nature of equitable execution. All this is to say that labels and metaphors such as 'beneficial interest', 'charge' and 'lien' prove too much, and they distract from the very particular function which the former trustee's equity fulfils. Hence the underappreciated force in the Privy Council's recent statement in *Halabi* that the former trustee's equity is '*no more and no less* than the right to have the trust property applied' to their expenses.[59]

V 'Beneficial Interests' and Trusteeship

Reference has already been made to the appellant's argument that a trustee's indemnity is a beneficial interest in the trust assets which is 'continued'[60] after the trustee loses title to those assets. This was the crux of the disagreement in the Court of Appeal:

> An important difference in my analysis of the issues to that of Leeming and Kirk JJA is that, whereas their Honours build upon the former trustee's interest as being in the nature of a charge or lien *over* the trust assets, I place

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53 Cf Hudson (n 52) 462–4.

54 *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 418–20 (Dixon J).

55 See Pomeroy (n 33) ch 47; Spencer W Symons (ed), *Pomeroy's Equity Jurisprudence* (Bancroft-Whitney, 5th ed, 1941) vol 4, 1070–5 [1416]–[1419].

56 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 109 [4-020] ('*Meagher, Gummow & Lehane*').

57 *Cummins v Perkins* [1899] 1 Ch 16, 19 ('*Cummins*'), quoted in *Meagher, Gummow & Lehane* (n 56) 965–6 [29-065].

58 *Cummins* (n 57) 20.

59 *Halabi* (n 16) 902 [110] (Lord Richards JSC and Sir Nicholas Patten) (emphasis added).

60 Appellant Submissions (n 11) [20], quoting *Jaken Trial* (n 3) [376] (Kunc J). See also at [22], citing *Agusta* (n 17) 30,413 [83] (Barrett JA).

> more weight upon the characterisation of the former trustee's interest as a 'beneficial interest *in* the trust estate' ...[61]

It remains the crux of the dispute in the pending appeal. Hudson argues that the trust model is apt because

> [t]he former trustee, like other beneficiaries, has an entitlement to control how the successor trustee uses the trust property. This entitlement is enforceable by equitable relief, such as an injunction to prevent an unauthorised dealing with trust property ...[62]

So much may be accepted. But it does not follow that the relationship is one of trust, however 'functionally equivalent' the entitlements may be.[63] A solicitor has an equitable interest in the fruits of litigation, 'entitling the solicitor to an injunction to prevent the payment of the fund to the client'.[64] Yet no trust is created and the protection afforded to the solicitor does not extend to placing the latter in the position of a beneficiary vis-à-vis the client.[65]

Again, the purchaser under a specifically performable agreement has equities sufficient to enjoin the vendor from making dispositions to another and to order the vendor to specifically perform the conveyance. But the vendor is only a 'constructive trustee' in a very imprecise sense; the purchaser has only 'an equitable *interest* in the land *which reflects the extent to which equitable remedies are available*'.[66] A beneficial interest is not a beneficial estate. As in much of equity, the nature of the 'right' is but an expression of the sorts of relief and intervention available. The existence of a 'right' is just an elliptical way of expressing that certain remedies are available to effect a certain end.[67] This is apt to exasperate the common lawyer. The fundamental point was made extra-curially by Justice White: 'The fact that an owner makes a contract, enforceable by injunction, as to how he or she will or will not exercise his or her rights of ownership does not necessarily mean he or she ceases to enjoy "beneficial ownership".'[68]

So there is some difficulty with reasoning upward from the availability of equities grounding injunctive and proprietary relief, to the label 'beneficial interest' or 'equitable proprietary right', and then reasoning downward from that label to the conclusion that the beneficial estate is reposed in the former trustee. The problem recalls Justice Holmes's salutary warning that '[a]s long as the matter to be considered is debated in artificial terms, there is a danger of being led by a technical

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61 *Jaken Appeal* (n 6) 330 [33] (Bell CJ) (emphasis in original) (citations omitted).
62 Hudson (n 52) 463.
63 Ibid 463 n 74.
64 *Firth v Centrelink* (2002) 55 NSWLR 451, 463 [35] (Campbell J) (citations omitted) ('*Firth*').
65 *Worrell* (n 47) 221 (Wilcox, Ryan and Gummow JJ).
66 *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 191–2 (Deane J) (emphasis added); *Stern v McArthur* (1988) 165 CLR 489, 522–3 (Deane and Dawson JJ). See also *Thynne v Sheringham* (2023) 111 NSWLR 617.
67 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 332–4 [53]–[56] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
68 Justice R White, 'The Nature of a Beneficiary's Equitable Interest in a Trust' (Speech, Supreme Court of New South Wales Annual Conference, 2007) [11] (citations omitted).

definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied'.[69]

In a long footnote when discussing equitable liens for exoneration, Pomeroy agitated against automatically transplanting personal obligations to account for profits and conflicts into this relationship, drawing on the distinction between beneficial 'interests' and beneficial 'estates'.[70] While Story considered these liens under the heading 'Implied Trusts', he also warned against the elision of charge and trust and concluded that the interposition of 'trusteeship' is a verbal embarrassment.[71] In other words, 'while the lienee acquired an "equitable interest" in the property, the lienee was never a full beneficial owner and was, at most, entitled to exercise the right to a judicial sale'.[72]

It is true that some modern authorities have also referred to the former trustee having a 'beneficial interest' in the trust assets. But they should be understood with the above nature of equitable interests firmly in mind. In *Ronori*, the former trustee's right was described as a 'beneficial interest'.[73] But that was only used in contradistinction to a common law lien, to make the limited point that the former trustee's interest is not possessory. The use of a label is 'functional, and is appropriate only to the extent of its rationale or the particular point it wishes to convey'.[74] So in *Carter Holt*, Bell, Gageler and Nettle JJ said a trustee is 'entitled to be indemnified … and *thus* enjoys a beneficial interest'[75] — and in *Ronori*, a former trustee 'continues to enjoy a beneficial interest in the trust property *commensurate with* its right of indemnity out of that property'.[76] That is, the former trustee enjoys 'the benefit of' a fund in a loose sense and to a limited extent, in a way reminiscent of security interests — the former trustee's indemnity 'is like a security (*as compared with a plain beneficial interest*)'.[77]

That final distinction was one made by no less an equity lawyer than a'Beckett J when, speaking for the Full Court of the Supreme Court of Victoria, he said that a trustee 'would be entitled to *go into* the property to indemnify themselves — *not to enjoy* the property'.[78] It is also the reason why the Privy Council recognised that

> the Australian courts have characterised the trustee's proprietary interest as a beneficial interest in the trust assets [but that] it is more in keeping with equitable principles as applied by the English courts to describe it simply as a proprietary interest.[79]

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69 *Guy v Donald*, 203 US 399, 406 (1906).
70 Symons (n 55) 693–4 [1234] n 5.
71 Story (n 32) 864–5 [1245].
72 Burns (n 41) 10–11.
73 *Ronori Pty Ltd v ACN 101 071 998 Pty Ltd* [2008] NSWSC 246, [15] (Barrett J) ('*Ronori*').
74 William Gummow and Aryan Mohseni, 'The Use and Misuse of Metaphors' (2024) 98(10) *Australian Law Journal* 1, 4.
75 *Carter Holt* (n 12) 560 [80] (emphasis added).
76 *Ronori* (n 73) [15] (Barrett J) (emphasis added).
77 *Halabi* (n 16) 931 [249] (Lord Briggs JSC) (emphasis added).
78 *Daly v Union Trustee Co of Australia Ltd* (1898) 24 VLR 460, 470 (a'Beckett J) (emphasis added).
79 *Halabi* (n 16) 909 [143] (Lord Richards JSC and Sir Nicholas Patten).

Again, it is 'no more and no less' than a right of recoupment, and there is much to be said for the view that the language of 'beneficial interests' should be eschewed in this context because of its misleading 'ambivalence'.[80]

The appellant in the pending appeal emphasises that '[a]ll members of the Court in *Carter Holt* described the former trustee's interest as a "beneficial interest in the trust assets"'.[81] Two points should be made. First, in *Carter*, the language of 'beneficial interest' was only used as an intermediate step, for the conclusion that the right is 'property' for the purposes of s 9 of the *Corporations Act 2001* (Cth) and for the limited purpose of determining whether such property is therefore amenable to distribution according to s 433 of that Act. Second, and in any event, *Carter Holt* concerned the nature of a *current* trustee's indemnity. It said nothing[82] of the situation of a *former* trustee which, as we have seen, is fundamentally different. As explained, the only sense in which a current trustee (superficially) has a 'beneficial interest' is by virtue of their unencumbered ownership. Again, the submission that 'there is no reason in principle why [the assets] should not also be subject to the *identical* interest of the former trustee'[83] mistakenly assumes that there is one continuous right. So too the submissions in the Court of Appeal with respect to the reasoning in *Carter*:

> [I]f the property constituted by the right of indemnity is 'property of' the trustee, and if that equitable proprietary interest subsists upon the retirement of a trustee, then it *must* follow that Jaken held as trustee property that was, in equity, the property of JPG.[84]

'A' proprietary interest subsists, but it is not 'that' proprietary interest the former trustee enjoyed as owner.

The judgments in *Carter Holt* went some way in warning against reasoning syllogistically from overbroad labels. The appellant invokes some statements in *Agusta* and *Lemery* that might be open to that criticism. In *Agusta*, Barrett JA said that to allow a successor's dissipation of trust assets entails an 'impermissible disregard of the beneficial interest in trust assets' which the former trustee enjoys, and that equity should 'give full effect to that beneficial interest'.[85] That teleological approach suffers from the vice upon which the High Court frowned in *Carter Holt* — to start with a label and fashion 'obligations' to fulfil that label, or to give it 'full effect'. In *Lemery*, Brereton J said that 'the former trustee is entitled to ensure the new trustee does not take steps which will destroy, diminish or jeopardise the old trustee's right of security'.[86] *Lewin on Trusts* treats this as establishing an equitable

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80 *Arjon Pty Ltd v Commissioner of State Revenue (Vic)* (2003) 8 VR 502, 530 [62] (Phillips JA).

81 Anthony Naaman, 'Appellant's Reply', Submissions in *Naaman v Jaken Properties Australia Pty Ltd*, Case No S26/2024, 17 May 2024, [5] ('Appellant Reply'). See also Appellant Submissions (n 11) [19], [20].

82 *Halabi* (n 16) 908 [134] (Lord Richards JSC and Sir Nicholas Patten).

83 Appellant Reply (n 81) [3] (emphasis added).

84 Anthony Naaman, 'Respondent's Written Submissions', Submission in *Jaken Properties Pty Ltd v Naaman*, Case No 2022/00219923, 29 January 2023, [28] (emphasis added). See now Appellant Submissions (n 11) [23].

85 *Agusta* (n 17) 30,413 [84].

86 *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, 560 [50] ('*Lemery*').

duty on the successor not to diminish or frustrate the former trustee's indemnity.[87] That is not what Brereton J said. It is not a 'duty'. Still less is it a 'fiduciary' duty. The passage simply recognises that, like in *Cummins v Perkins*, a former trustee has equities sufficient to enjoin dispositions before they are made; the former trustee 'can ask the court to restrain [the successor] from any activity that he uncovers, and which would jeopardise his indemnity right'.[88] That limited reading is fortified by the fact that Brereton J referred to *Global Funds Management v Burns Philp*, where Rolfe J made the confined point that although a former trustee has no right to withhold the assets, they may enjoin *anticipated* dispositions by the successor, quia timet.[89]

VI Fiduciary?

There remains the possibility of an ad hoc fiduciary relationship. Some statements in this appeal go so far as to suggest that to impose fiduciary obligations on what is essentially a question of 'proprietary rights' is 'a category error'.[90] As the appellant indicates, this should not mislead anyone into thinking that fiduciary relationships and proprietary rights are mutually exclusive. But it does go some way to resolving questions about 'vulnerability'.

The respondents emphasise that the former trustee 'is vulnerable to the successor's ability to deal with trust assets without notice to it'.[91] But it seems underappreciated that, dissipation apart, the former trustee can trace into disbursed assets. If Jaken's assets were disbursed with the intention to defraud creditors, that is a fraud on a power. An excessive execution is no execution of the power; the assets, if not in the hands of a bona fide purchaser, still answer the description of trust property susceptible to the former trustee's equity to seek judicial sale.[92] This was part of the claim in *Rothmore*.[93]

There is also the facility in s 37A of the *Conveyancing Act*. The former trustee is also likely to be entitled to a common account from the successor[94] (although this does not of itself suggest a fiduciary relationship).[95] And the former trustee can seek an undertaking from the successor, as is the usual practice.[96] In any event, vulnerability is not the touchstone of a fiduciary relationship. There needs to be more focus on the fact and terms of the successor's *undertaking*,[97] for example under cl 1.5

[87] Lynton Tucker, Nicholas Le Poidevin KC and Master Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th ed, 2023) [17-071].
[88] *Halabi* (n 16) 942 [282] (Lady Arden).
[89] *Global Funds Management (NSW) Ltd v Burns Philp Trustee Co Ltd* (1990) 3 ACSR 183, 186–90.
[90] Jaken Properties Australia, 'Respondents' Submissions', Submissions in *Naaman v Jaken Properties Australia Pty Ltd*, Case No S26/2024, 26 April 2024, [29] ('Respondent Submissions'), quoting *Jaken Appeal* (n 6) 331 [38] (Leeming JA). See also Respondent Submissions at [33].
[91] Appellant Submissions (n 11) [32].
[92] *Barnes v Alexander*, 232 US 117, 123 (Holmes J) (1914); Pomeroy (n 33) 1510; *West v Skip* (1749) 27 ER 1006.
[93] *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd* [2005] SASC 117.
[94] *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146.
[95] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; *Meagher, Gummow & Lehane* (n 56) 808 [23-090].
[96] Gummow and Mohseni (n 18).
[97] *C-Shirt Pty Ltd v Barnett Marketing & Management Pty Ltd* (1996) 37 IPR 315, 336 (Lehane J).

of the Deed (even though it is unlikely that cl 1.5 adds to the general law rights of a former trustee outlined above).[98]

In response, the respondents raise the spectre of a paralysed successor trustee placed in an 'irreconcilable position'[99] of 'actual or potential conflict of interest and duty' between its duties to the beneficiaries, and to the former trustee.[100] This picks up the concerns of Leeming JA[101] and Kirk JA.[102] But the position is not so irreconcilable. To ask whether someone 'is a fiduciary only begins analysis'.[103] There remains the question of scope.[104] The scope of the fiduciary's absolute loyalty, like a trustee's duty not to treat beneficiaries differentially, accommodates itself to the exigencies of each relationship.[105] For example, a trust relationship can admit of different classes of beneficiaries (for example, income and capital), with preference being given to some over others (for example, in unit trusts). And this is to say nothing of the plasticity of the remedial constructive trust. The scope and timing of the fiduciary obligations imposed in *Birmingham v Renfrew*, for example, admitted a freedom to make inter vivos dispositions and accommodated the ambulatory nature of wills.[106]

VII Irrelevance of the 'Fiduciary' Question?

Nevertheless, there is some awkwardness in the way the question is framed before the High Court. It is not strictly necessary to say that the breach is of a fiduciary *duty* (no-conflict or no-profit) to enliven *Barnes v Addy*. '[T]he breach of duty by the trustees to which accessorial liability may attach in equity is not breach of a fiduciary duty strictly understood'.[107] It is also debateable whether the requirement of a fiduciary *relationship* should stand like a colossus astride the path to third-party liability in equity. That view seems to be encouraged by the English tendency to read *Barnes v Addy* as a code exhausting the universe of third-party liability in equity. Sir Anthony Mason warned that seeing the fiduciary relationship as a 'passport' to such relief has put too much 'pressure' on the fiduciary relationship to expand to absurd limits.[108] And Waters complained that plaintiffs tend 'to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary *stricto sensu* but simply had withheld property from the plaintiff in an unconscionable manner'.[109] It may be that the preferable answer lies in the remedial

98 *Bruton Holdings Pty Ltd v Federal Commissioner of Taxation* (2009) 239 CLR 346, 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).
99 Respondent Submissions (n 90) [22].
100 Ibid [21].
101 *Jaken Appeal* (n 6) 355 [139].
102 Ibid 373 [236].
103 *Securities and Exchange Commission v Chenery Corporation*, 318 US 80, 85–6 (Frankfurter J) (1943).
104 *Anderson v Cannacord Genuity Financial Ltd* (2023) 113 NSWLR 151, 192–5 [152]–[166] (Gleeson, Leeming and White JJA).
105 *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100–1 [34] (French CJ and Keane J).
106 *Birmingham v Renfrew* (1937) 57 CLR 666, 690 (Dixon J). See also M Cope, *Constructive Trusts* (Law Book Co, 1992) 547; *Palmer v Bank of New South Wales* (1975) 133 CLR 150, 159 (Barwick CJ).
107 Hon William Gummow, 'Knowing Assistance' (2013) 87(5) *Australian Law Journal* 311, 318.
108 Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 (April) *Law Quarterly Review* 238, 248.
109 DWM Waters, *The Constructive Trust: The Case for a New Approach in English Law* (Athlone Press, 1964) 4.

constructive trust;[110] but even so, that does not necessarily make the relationship fiduciary.

The liability of third parties to account for interfering with a solicitor's equitable lien might reveal a more expansive view. In *Patience*, Jordan CJ recognised that where A (in that case, a solicitor) has an equitable right of recourse to B's fund and B and C 'make a collusive arrangement for the purpose of defeating' that equity, 'the Court will enforce that right' against the colluder.[111] The position was considered analogous to the equitable assignment of a fund (but probably only in the metaphorical sense in which an 'assignment' of a right is effected, for example, by subrogation[112]). In *Re Twigg & Keady*, Finn J left open whether this imposed on the collusive recipient a 'personal liability … to account'.[113] Nevertheless, *Firth v Centrelink* saw the circumstances as imposing an 'equitable personal obligation' on the custodian of the fund,[114] with any collusive disposition being 'at the defendant's own peril'[115] and 'in his own wrong' for which he must account.[116] This may well be a preferable course, quite apart from any 'fiduciary' analysis.

110 Gummow and Mohseni (n 18) 22.
111 *Ex parte Patience; Makinson v Minister* (1940) 40 SR(NSW) 96, 100.
112 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 236 (Lord Hoffman).
113 *Re Twigg & Keady* (1996) 135 FLR 257, 271.
114 *Firth* (n 64) 472 [69] (Campbell J).
115 Ibid 471 [68] (Campbell J), quoting *Ross v Buxton* [1889] 42 Ch D 190, 199 (Stirling J).
116 *Firth* (n 64) 470 [65] (Campbell J), quoting *Welsh v Hole* (1779) 99 ER 155, 155–6 (Lord Mansfield). See also *Ormerod v Tate* (1801) 1 East 464; Prentice (ed) (n 46) 137–8.

Review Essay

An Indigenous Right to Be Heard on the International Stage?

Self-Determination As Voice: The Participation of Indigenous Peoples in International Governance by Natalie Jones (2024) Cambridge University Press, 362 pp, ISBN 9781009406314

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Abstract

In the early 20th century, Indigenous peoples were effectively locked out of international organisations. In *Self-Determination As Voice*, a hugely valuable work of scholarship, Natalie Jones surveys the extent to which that has changed. Mechanisms for Indigenous participation in the United Nations and other organisations have proliferated since the creation of the Working Group on Indigenous Populations in 1982 and especially since the United Nations Declaration on the Rights of Indigenous Peoples of 2007. Jones concludes that it is arguable that there is now sufficient practice and opinio iuris to evidence a rule of customary international law about Indigenous participation in international governance. In this review essay, it is suggested that some might not fully agree with her analysis, either because they are more doubtful about the opinio iuris or because they place more weight on the practice of economic organisations and treaties that continue to exclude Indigenous peoples. But in any case the book identifies an accelerating trend. It also raises challenging questions about the role of soft law and how much it differs from international law in the strict sense.

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I Introduction

Natalie Jones begins *Self-Determination As Voice: The Participation of Indigenous Peoples in International Governance* by introducing us to the Haudenosaunee (Iroquois) and Māori leaders who petitioned the League of Nations in the early 20th century but who were turned away without a hearing.[1] Another Indigenous leader, who she does not mention but whose story will resonate with Australian readers, is Pearl Gibbs, a Ngemba or Muruwari woman and the general secretary of the Aborigines' Progressive Association.[2] Gibbs wrote to the League in 1938 about the 'ill treatment of the aborigines throughout Australia' and asked it to intervene in the Northern Territory 'in the cause of justice'.[3] An official from the League simply noted on the file: 'I don't think any action is possible or desirable'.[4]

How much has changed?

International organisations frequently still cannot act in the cause of justice; their power is limited by politics and practicalities. But insofar as they have influence, a precondition for getting these organisations to exercise it is to *participate* in them: to receive the hearing that Gibbs was denied. What Jones achieves in this book is to show that Indigenous participation in international governance is desirable and possible — and becoming more and more common. I begin this review essay by highlighting the value of that achievement. I then focus on two points where Jones might have deepened her analysis: the question whether this participation is an actual binding right under international law, and the question why its legal status matters.

II The Value of Surveying Indigenous Participation in International Governance

Figuring out what international law says on a topic can be an arduous task. Sometimes a treaty tells us explicitly and comprehensively. But often we face the daunting prospect of locating and weighing up the two elements that can evidence a rule of customary international law: 'a general practice' (primarily of states but sometimes also of international organisations) and the 'acceptance as law' of that

1 Natalie Jones, *Self-Determination As Voice: The Participation of Indigenous Peoples in International Governance* (Cambridge University Press, 2024) 1–3.

2 It is uncertain whether her mother was Ngemba or Muruwari: Jack Horner, 'Pearl Gibbs: A Biographical Tribute' (1983) 7(1) *Aboriginal History* 10, 10 n 1. See also Heather Goodall, 'Gibbs, Pearl Mary (Gambanyi) (1901–1983)' in Diane Langmore (ed), *Australian Dictionary of Biography* (Melbourne University Press, 2007) vol 17, 429.

3 Letter from Pearl Gibbs to President of the League of Nations, 4 July 1938 (ILO Archives, Political Section 1/34895), quoted in Marilyn Lake, 'Women's International Leadership' in Joy Damousi, Kim Rubenstein and Mary Tomsic (eds), *Diversity in Leadership: Australian Women, Past and Present* (ANU Press, 2014) 71, 84.

4 Lake (n 3) 85. See further Sophie Rigney, 'On Hearing Well and Being Well Heard: Indigenous International Law at the League of Nations' (2021) 2 *Third World Approaches to International Law Review* 122, 133–5, cited in Jones (n 1) 3 though without discussion of the particular example of Pearl Gibbs.

practice (*opinio iuris*).[5] That can involve trawling through a vast and open-ended category of materials comprising everything from diplomatic notes to public speeches to judgments by domestic courts.[6] If we come across a shortcut — as when a court or the International Law Commission does the work — we sigh with relief.[7]

Jones does not take any shortcuts; she does the work herself. Much of *Self-Determination As Voice* is an encyclopaedic survey of Indigenous participation in international organisations. She begins with the creation in 1982 of the Working Group on Indigenous Populations at the 'lowest level' in the United Nations system.[8] She progresses through milestones such as the emergence of the United Nations Permanent Forum on Indigenous Issues in 2000 and, in 2007, the adoption by the General Assembly of the *United Nations Declaration on the Rights of Indigenous Peoples* ('the *UNDRIP*', about which I will have more to say).[9] She looks at specialised agencies such as UNESCO, at development institutions such as the World Bank, at regional processes in the Arctic and the Americas and elsewhere, at environmental standard setting, and at potential future developments. She leads us with assurance through a forest of acronyms.

Jones is conscious that her perspective — like mine — is that of a non-Indigenous scholar who is writing about a system of international law whose origins and sensibility are Western.[10] She weaves Indigenous voices into her narrative while acknowledging that they are not monolithic and 'that mechanisms for Indigenous peoples' participation in international governance may function in part to legitimize and protect (neo)colonial global structures'.[11]

Even with that unavoidable caveat, her achievement is hugely valuable. This book is where other international lawyers will turn first whenever they want information on this topic.

III Is Indigenous Participation in International Governance Legally Obligatory?

Though all other international lawyers will value the evidence that Jones gathers, some might draw different conclusions from it. In particular, some might not fully

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5 'Conclusions on Identification of Customary International Law' [2018] 2(II) *Yearbook of the International Law Commission* 90, 90 (Conclusion 2) ('Conclusions on Identification'). On international organisations, see at 97 (Conclusion 4 Commentary [5]) (citations omitted): the 'practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (a) whose subject matter falls within the mandate of the organizations, and/or (b) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties)'. This reasoning is applied in Jones (n 1) 73–8.

6 'Conclusions on Identification' (n 5) 90 (Conclusion 6) (on forms of practice), 91 (Conclusion 10) (on forms of *opinio iuris*).

7 See further Rowan Nicholson, 'The International Court of Justice as a "Shortcut" to Identifying Custom' (2021) 20(3) *Law and Practice of International Courts and Tribunals* 490.

8 Douglas Sanders, 'The UN Working Group on Indigenous Populations' (1989) 11(3) *Human Rights Quarterly* 406, 407, quoted in Jones (n 1) 92.

9 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, UN Doc A/RES/61/295 (13 September 2007) annex ('*UNDRIP*').

10 Jones (n 1) 9–10.

11 Ibid 269.

agree with her analysis of whether, under customary international law, Indigenous peoples have a binding right to participate in international governance that other entities are obliged to respect.

A strength of Jones' analysis is how she positions it within the wider law of self-determination. Historically the most important function of that body of law has been decolonisation: to give certain peoples the right to establish their own independent states or to choose some other external status.[12] But this right to external self-determination only unambiguously and uncontroversially applies to Western colonies in Africa, Asia and elsewhere — in technical terms, trust and non-self-governing territories — and in analogous cases such as Palestine.[13] Relatively few cases like that remain.[14] External self-determination has generally not been seen as applicable to Indigenous minorities in settler colonies that are already independent, such as Australia — and in fact the *UNDRIP* provides explicitly that none of its provisions may be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[15] But as Jones observes, the law of self-determination continues to evolve: other 'specific legal rules have emerged in a remedial manner so as to provide redress' for other 'situations of domination, subjugation, or exploitation'.[16] Thus Indigenous peoples now have a right to self-determination of a different kind: to 'freely determine their political status and freely pursue their economic, social and cultural development' within the boundaries of an existing state.[17]

Jones argues that 'international organizations and collectives of states exert power over Indigenous peoples' in ways that create 'a relationship of the kind self-determination is concerned with … one of alien domination, subjugation, or exploitation'[18] and that 'it can be argued that the law of self-determination is called

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12 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, UN Doc A/RES/1514(XV) (14 December 1960); *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations*, GA Res 1541 (XV), UN GAOR, UN Doc A/RES/1541(XV) (15 December 1960) annex, principle VI; *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, UN Doc A/RES/2625(XXV) (24 October 1970) annex, principle (e) ('The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination').

13 *Re Secession of Quebec* [1998] 2 SCR 217, 282–6 [126]–[133]. On Palestine, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 230–48. There is a debate about whether the right also applies in rare cases of 'remedial secession': see Abhimanyu George Jain, 'Bangladesh and the Right of Remedial Secession' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Elgar, 2022) 312.

14 One remaining non-self-governing territory that has both an Indigenous population and a population descended from settlers is the French 'sui generis collectivity' of New Caledonia: see John Connell, 'The 2020 New Caledonia Referendum: The Slow March to Independence?' (2021) 56(2) *Journal of Pacific History* 144.

15 *UNDRIP* (n 9) art 46(1).

16 Jones (n 1) 24.

17 *UNDRIP* (n 9) art 3.

18 Jones (n 1) 30.

on to evolve to provide a remedy'.[19] Has it in fact evolved to answer that call? Several provisions of the *UNDRIP* may be relevant, depending on how they are interpreted, including arts 18 and 23.[20] The most directly on point is art 41, in particular its final sentence on participation in international organisations:

> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

The *UNDRIP*, since it is not a treaty, is not in itself legally binding.[21] At least some of its provisions correspond with binding rules of customary international law, though this must be assessed article by article or perhaps even by distinguishing between parts of a single article based on criteria articulated by the International Court of Justice.[22] The prevailing view up to now has been that art 41 is *not* one of the provisions that correspond with custom. Willem van Genugten and Federico Lenzerini — writing several years before Jones published her book — described art 41 as 'not controversial, either from a political or from a legal perspective' and pointed out that, in contrast to most of the surrounding provisions of the *UNDRIP*, it

> does *not* use the word 'right' or refer to law-related matters, such as legislative measures. That implies that the drafters of the Article did not mean to create a legally enforceable right to assistance, although the provision might evolve in that direction. Given the fact that the United Nations and other international organizations are the duty-holders of Article 41, it would in any case not be easy to apply the traditional customary law standards.[23]

Jones does not directly disagree with this. Her claim is modest and qualified: that, as van Genugten and Lenzerini foreshadowed, it is 'arguable that a rule of custom' about Indigenous participation in international governance now 'exists, or is at least emerging'.[24] She presents abundant practice by states and international organisations to support such a rule.

One respect in which her analysis might be deepened is in how she identifies the other element required for a customary rule: *opinio iuris*. Sometimes — I do not suggest she does this everywhere — she relies on assertions by states or international organisations that participation in an international body is 'a requirement of the *UNDRIP*'.[25] For example, 'some states, as well as [the Conference of the Parties to

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19 Ibid 35.

20 See ibid 51–8 for discussion of the relationship between these provisions and art 41.

21 'A resolution adopted by an international organization … cannot, of itself, create a rule of customary international law': 'Conclusions on Identification' (n 5) 91 (Conclusion 12.1). See further Jones (n 1) 66–71.

22 Willem van Genugten and Federico Lenzerini, 'Legal Implementation and International Cooperation and Assistance: Articles 37–42' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 539, 570; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 255; 'Conclusions on Identification' (n 5) 108 (Conclusion 12 Commentary [5]–[6]) (summarising further statements by the Court).

23 Van Genugten and Lenzerini (n 22) 571 (emphasis in original).

24 Jones (n 1) 259.

25 Ibid 190.

the *United Nations Framework Convention on Climate Change*] itself, have stated that the participation of Indigenous peoples in [the Local Communities and Indigenous Peoples Platform] is required by the *UNDRIP*'.[26] In its plain meaning this is an unremarkable and straightforward observation about what the *UNDRIP* says: it just applies the final sentence of art 41 to the particular case of the Platform. Affirming that something is a requirement of the *UNDRIP* is not necessarily the same thing as accepting it as a binding legal requirement — the kind of acceptance that qualifies as *opinio iuris*. To some extent Jones acknowledges this. When she quotes Australia's view that the Platform should facilitate Indigenous participation in line with the *UNDRIP*, she clarifies in a footnote that 'Australia does not accept that the *UNDRIP* represents binding international law, so it is unlikely that this statement can be viewed as an instance of *opinio juris*'.[27] But the problem is not restricted to states such as Australia; it exists wherever a statement refers solely to the *UNDRIP*, as distinct from going further by referring expressly or impliedly to binding law. Despite this problem with the evidence Jones cites, she concludes that the Platform 'is a good example of a mechanism for Indigenous participation … that states are beginning to accept as required by law'.[28]

The result is that, though Jones can also point to clear instances of *opinio iuris*, she intermingles them with statements that are unlikely to be *opinio iuris*. That may overplay the evidence for a customary rule on Indigenous participation in international governance. Similarly, she may underplay countervailing evidence, in particular from economic bodies such as the World Trade Organization. As she points out, 'of all existing treaties, only trade and investment treaties have consistently achieved their intended objectives'.[29] She makes an astute observation about how these bodies and treaties represent barriers to Indigenous self-determination:

> [A]ll of the international organizations, treaties, and processes discussed herein relate to the environment, development, human rights, and regional governance. What the previous chapters have not discussed is Indigenous peoples' participation in international economic law-making, policymaking, and decision-making. This is because states and international organizations, on the whole, have not enabled Indigenous peoples to participate in these processes.[30]

This may suggest that the practice of facilitating Indigenous participation in international organisations is not 'general' enough — meaning 'both extensive and virtually uniform'[31] or 'sufficiently widespread and representative, as well as consistent'[32] — in order to constitute customary international law. It may be that states and international organisations are willing to engage in the practice in some

26 Jones (n 1) 198, citing *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered in force 21 March 1994).
27 Jones (n 1) 198 n 274.
28 Ibid 199.
29 Ibid 266.
30 Ibid 265.
31 *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits)* [1969] ICJ Rep 3, 43 [74].
32 'Conclusions on Identification' (n 5) 91 (Conclusion 8.1). In addition, inaction or 'negative practice' may, in limited circumstances, constitute a form of practice in itself: at 91 (Conclusion 6.1), 99 (Conclusion 6 Commentary [3]).

contexts but wish to remain free *not* to engage in it when that suits them. Jones does not seem to give this due weight in her survey of practice.

IV Why Might It Matter Whether Indigenous Participation Is Legally Obligatory?

Since Jones does not assert categorically that Indigenous peoples have a right to participate in international governance under customary international law — only that it is 'arguable'[33] — my comments about how she deals with practice and *opinio iuris* are ultimately just quibbles. Most international lawyers will agree that it is not possible to speak categorically either way. What Jones establishes beyond doubt is that, at a minimum, there is a body of soft law on Indigenous participation in international governance that includes provisions of the *UNDRIP* such as art 41 but is being extended further through the practice of international organisations.

'Soft law' is law in the same sense that plant-based meat is meat. That is to say: it is not law at all; the term is just an analogy. It refers to

> principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law … a complex of norms lacking binding force, but producing significant legal effects nevertheless.[34]

In theory, the distinction between the two categories of norms is sharp. But in practice in international law the categories blur together. Frequently — unlike at the domestic level, where the police can be called in — international law in the strict sense is no more enforceable than soft law. Frequently both law and soft law serve, instead, to influence the behaviour of states and international organisations in more subtle ways. And frequently, as seen here in *Self-Determination As Voice*, the content of both can be fuzzily expressed and difficult to pin down.

All those propositions are true of the *UNDRIP* insofar as it applies to Indigenous participation in international governance. It might have been interesting, then, to hear more from Jones about why the distinction between law and soft law might matter in this context.

For example, if the participation of Indigenous peoples is — or becomes — legally obligatory under international law whenever issues affect them, will that have implications for the interpretation of the internal rules of international organisations or in other areas of international law? Will that have any effect on economic bodies and treaties that continue to exclude Indigenous peoples from participation? And

33 Jones (n 1) 259.

34 Daniel Thürer, 'Soft Law' (2009) in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online, September 2024) [5], [37]. See further CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *International & Comparative Law Quarterly* 850; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, both cited in the discussion of the status of the *UNDRIP* in Jones (n 1) 66–71.

precisely how much participation will be obligatory in a particular case? As Jones observes, the meaning of the term 'participation'

> varies across a spectrum: at one extreme lies Indigenous peoples' exclusive control over decision-making; close by lies co-governance or power-sharing with states; while at the other extreme Indigenous peoples might be invited to consultations, have one seat or a small minority of seats on a decision-making committee, or make up an advisory body to the decision-maker.[35]

It might be assumed that, if their participation becomes legally obligatory, the law will also have to contend with some other difficult questions, including which peoples qualify as Indigenous and which individuals and entities can represent them.[36] Jones suggests that, on the contrary, the term 'Indigenous peoples' has 'in no case … needed to be defined in order for mechanisms enabling their participation to effectively function' and '[w]e have also not seen any requirement for participating Indigenous peoples' organizations to demonstrate that they are representative'.[37]

V An Inchoate and Developing Area of Law

These may be matters for future legal research that builds on the foundations laid by Jones. She identifies some further open questions and possible future developments. One is the potentially 'transformative' idea of 'a category of membership for Indigenous peoples at the General Assembly … designed in a way that preserves and promotes Indigenous self-determination and sovereignty'.[38] Another is how Indigenous experiences 'might inform the questions asked by other peoples and marginalized groups when seeking access to, or justice from, international institutions and the wider international community'.[39] *Self-Determination As Voice* illustrates how much progress has been made since Pearl Gibbs sought a hearing in 1931 but, at the same time, suggests that this is still an inchoate and developing area of international law.

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35 Jones (n 1) 260.

36 Some of these questions are discussed in ibid 178–82. Further on the definition of 'Indigenous', see José R Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7 (March 1987) vol 5, 29 [379]–[380], quoted in Jones (n 1) 11 n 38; *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) art 1; Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing, 2016) ch 1.

37 Jones (n 1) 261.

38 Ibid 271.

39 Ibid 272.