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BOOK REVIEWS

THE RIGHT TO LIBERTY IN A PANDEMIC

REBEKAH MCWHIRTER*

The European Convention on Human Rights has given rise to the most extensive and influential case law of any human rights jurisdiction, and the inclusion of an express infectious diseases exception to the right to liberty suggests that its jurisprudence is likely to provide the best available guidance to states on the circumstances in which such measures may be justifiable and lawful. However, this article argues that the principles developed to date are limited in their applicability to the current crisis, and are insufficient for determining the appropriate balance between public health and the right to liberty when seeking to control the spread of a large-scale, highly infectious disease.

I INTRODUCTION

Governments have struggled to respond effectively as the coronavirus pandemic has swept across the globe. In many places, various limitations on movement have been imposed in an effort to control the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes coronavirus disease 2019 (COVID-19). Such measures have given rise to a range of responses from the public, from vehement support to outraged opposition.[1] Frequently, opposition is framed in terms of violation of human rights. States confronted with the task of responding to the pandemic are having to make rapid decisions on the basis of incomplete or uncertain information, balancing the competing imperatives of multiple fundamental human rights. Such decisions are particularly vulnerable to challenge on the basis of whether the appropriate balance has been struck.

For example, in the recent Victorian case of *Loielo v Giles* ('*Loielo*'),[2] Loielo contended that the nightly Melbourne curfew, imposed as part of a package of

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1 See, eg, the polarization of debate in Victoria into distinct camps: '"Dictator Dan Mob" Versus the "I stand with Dan Crowd" Reflect Partisan Division' *SkyNews* (online, 17 September 2020) <https://www.skynews.com.au/details/_6191508290001>. For an international perspective, see Adam Chilton, Kevin Cope, Charles Crabtree and Mila Versteeg, 'Support for Restricting Liberty for Safety: Evidence During the Covid-19 Pandemic from the United States, Japan, and Israel' (SSRN preprint, 2 May 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591270>.

2 (2020) 63 VR 1 ('*Loielo*').

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interventions to reduce movement and prevent the spread of coronavirus, unlawfully infringed her rights to liberty and freedom of movement. In finding that the restrictions on human rights caused by the curfew were proportionate to the purpose of protecting public health, Ginnane J looked to the medical evidence on which the decision was made, the temporary duration of the measure, the purpose of the emergency powers, and the lack of other reasonably available means for achieving the same purpose.[3] This case is, however, limited in what it can tell us about the lawfulness of restrictions on liberty for the purpose of protecting public health more generally, given its narrow focus on the nightly curfew rather than the full package of Victorian *Stay at Home Directions* that comprised one of the most severe (and successful) lockdowns in the world.[4]

Australia's international human rights obligations in this regard arise under the *International Covenant on Civil and Political Rights*, particularly art 12, which protects the right to liberty of movement while allowing for restrictions:

> which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.[5]

However, there is a dearth of case law from the Human Rights Committee addressing when the public health exception may be invoked or providing guidance on what the Covenant requires, limiting the extent to which it can inform domestic decision-making. The *Loielo* decision, and other cases examining compliance with Australian human rights Acts,[6] frequently draw on the case law of the European Court of Human Rights ('the Court') as a potential source for persuasive authority, as a highly influential human rights jurisdiction.[7] In this context, it is useful to consider the extent to which the Court's case law provides sufficient guidance to states on how to protect individual liberty in a pandemic.

In the aftermath of the 1918 Spanish flu pandemic, the drafters of the *European Convention on Human Rights* ('*ECHR*') had good reasons for including a public health exception to the right to liberty, and for expecting it to be widely

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3 Ibid 11 [21].

4 Ibid 5-6 [1]; Deputy Public Health Commander (Vic), *Stay at Home Directions (Restricted Areas) (No 15)* (13 September 2020).

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

6 Consideration of international law and the judgments of foreign and international courts and tribunals is provided for within Australian human rights acts; see, eg, *Human Rights Act 2004* (ACT) s 31(1); *Charter of Human Rights and Responsibilities 2006* (Vic) s 32(2); *Human Rights Act 2019* (Qld) s 48(3).

7 The Court's case law has also been influential in Australian case law. See, eg, Michael Kirby, 'Australia and the European Court of Human Rights' (Conference Paper, Re-Appraising the Judicial Role — European and Australian Comparative Perspectives, 14 February 2011).

utilised.[8] Restrictions on personal liberty designed to address the current COVID-19 pandemic engage the exception under art 5(1)(e), which provides that 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants' will not constitute a violation of the right to liberty and security.

While infectious diseases take precedence in this list, detention on the basis of mental health concerns has dominated the Court's case law on art 5(1)(e). Only one judgment addresses the infectious diseases exception, a case involving an HIV-positive man.[9] HIV differs, in important respects, from those diseases likely envisaged by this exception. By contrast, the coronavirus underpinning the current pandemic would have fitted neatly within the drafters' expectations. Yet, states confronted with the task of responding to the pandemic have only case authority on HIV and mental health to guide their choice of interventions and ensure they comply with their obligation to protect the right to liberty.

This article argues that existing case law on art 5 of the *ECHR* provides insufficient guidance to states on how to protect individual liberty in a pandemic. It does this by, first, defining the key interventions used by states around the world to limit the spread of infection through physical separation of individuals, and considering whether they constitute deprivations or mere restrictions of liberty under the *ECHR*. Secondly, it examines the case law relating to the lawfulness, necessity and proportionality of measures taken under the infectious disease exception. From this analysis, three major limitations are identified. Finally, originalist and evolutive interpretations are compared to provide indications of future directions for art 5 jurisprudence.

II Definitions and Deprivations

A *Typology of Interventions*

While waiting for an effective and safe vaccine to be developed and rolled out, a substantial part of state responses to the coronavirus pandemic involved variations on physical separation of individuals. The three most common forms employed by states were:[10]

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8 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

9 *Enhorn v Sweden* (ECtHR, Second Section, Application No 56529/00, 25 January 2005) ('*Enhorn*').

10 World Health Organisation, 'Considerations for implementing and adjusting public health and social measures in the context of COVID-19' (Web Page, 14 June 2021) < https://www.who.int/publications/i/item/considerations-in-adjusting-public-health-and-social-measures-in-the-context-of-covid-19-interim-guidance>.

1. 'Isolation', defined as the separation of ill persons from others so as to prevent the spread of infection;
2. 'Quarantine', defined as the separation from others of persons who are not known to be ill, but who may have been exposed to infection and may therefore be in the incubation phase of the disease, in order to prevent the possible spread of infection; and
3. 'Lockdown', defined as the imposition of restrictions on movement on persons within a defined geographical area, irrespective of individual risk of exposure, to the extent that individuals are predominantly confined to their place of residence, and may only leave for approved purposes and times, in order to restrict community transmission.[11]

Each of these measures differs in significant ways from the others. Isolation is directed at relatively small numbers of people, who present a high risk of transmission, but fails to capture those who are undiagnosed or asymptomatic but infectious. Quarantine affects a moderate number of people, who present a moderate risk of transmission as not all will be infectious, but excludes those not identified as having been at increased risk of exposure. Finally, lockdown affects large numbers of people, who individually pose a low risk of transmission, but reduces the opportunities for community transmission to the lowest feasible levels. The duration of these interventions can vary widely: patients may be discharged from isolation ten days after onset of symptoms plus at least three additional days without symptoms;[12] quarantine is usually 14 days;[13] and lockdowns can last from days to months.[14]

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[11] These terms are not used with consistent meaning in public discourse, and are frequently used interchangeably. For the purposes of this article, these terms have been defined to be consistent (as far as possible) with definitions under the World Health Organisation, *International Health Regulations* (3rd ed, 2005) pt I, art 1. Further, while recognising that lockdown, in particular, frequently involves additional measures, such as the closing of non-essential businesses and social distancing or mask requirements, the definition used here focuses on the aspects most relevant to an analysis of deprivation of liberty.

[12] This equates to a minimum of ten days for asymptomatic patients, through to an indeterminate maximum depending on the number of symptomatic days. See World Health Organisation, 'Criteria for Releasing COVID-19 Patients from Isolation: Scientific Brief' (Web Page, 17 June 2020) <https://www.who.int/news-room/commentaries/detail/criteria-for-releasing-covid-19-patients-from-isolation#:~:text=It%20is%20important%20to%20note,days%20since%20symptom%20onset>.

[13] World Health Organisation, 'Consideration for Quarantine of Contacts of COVID-19 Cases: Interim Guidance' (Web Page, 19 August 2020) <https://www.who.int/publications/i/item/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-(covid-19)>.

[14] For example, South Australia imposed a six-day lockdown in November 2020 under the *Emergency Management (Stay at Home No 3) (COVID-19) Directions 2020* pursuant to the *Emergency Management Act 2004* (SA) s 25, and Victoria imposed a lockdown stretching for 112 days (nearly four months) from 7 July 2020 under a series of *Stay at Home Directions (Restricted Areas)* issued under the *Public Health and Wellbeing Act 2008* (Vic) s 200.

Despite these differences, in practice it is not always a straightforward exercise to distinguish between these interventions. For example, in early July 2020, the Deputy Chief Health Officer of Victoria issued directions under the *Public Health and Wellbeing Act 2008* (Vic) detaining residents of nine Melbourne public housing towers to their homes.[15] This intervention, which affected large numbers of people, was applied somewhat indiscriminately, and included very few approved reasons for leaving detention for any period of time, was popularly referred to as a lockdown. However, the directions were issued in response to an outbreak of COVID-19 associated with the North Melbourne public housing estate; that is, there was good reason to be believe that residents had been exposed to infection, and their detention was for the purpose of preventing the possible spread of infection.[16] On this basis, the intervention is best classified as a quarantine, rather than a lockdown. This approach is further supported by subsequent developments, in which restrictions on eight of the nine towers were eased following extensive testing for SARS-CoV-2, with restrictions remaining on one tower where more than 10 per cent of residents had returned positive test results.[17] The unusually large scale of these interventions and the interchangeable use of terms in popular discourse perhaps obscure their classification, but being clear about the nature and purpose of an intervention is critical to determining whether any human rights infringements caused by it are justifiable, and conceptual clarity is therefore essential.

B *Deprivation or Mere Restriction?*

Isolation and quarantine appear prima facie to be clear examples of deprivations of liberty, in that the physical liberty of an individual is infringed through confinement (usually to a room or dwelling) for a non-trivial period of time.[18] Lockdown, on the other hand, is less clear cut. Article 5(1) prohibits deprivation of liberty, in the sense of physical liberty of the person, and its purpose 'is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion.'[19] To come within the scope of this article, the impugned conduct needs to exceed

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15 Victorian Ombudsman, 'Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020' (Report, December 2020) 22.

16 Ibid 49.

17 Ibid 12.

18 See, eg, UN GA Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc A/HRC/45/16 (24 July 2020), annex II 35 [8].

19 *Engel v The Netherlands* (1976) 22 Eur Court HR (ser A) 21 [58] ('*Engel*').

mere restriction of movement, which would fall under art 2 of Protocol No 4.[20] However, there is no bright line between the two; the Court has described the difference as 'merely one of degree or intensity, and not one of nature or substance.'[21] Further, in determining whether an individual has been deprived of their liberty for the purposes of art 5, 'the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'.[22]

Context can be influential. For example, in *Engel v The Netherlands* ('*Engel*'), the Court considered whether different penalties imposed on soldiers in the Netherlands army for offences against military discipline constituted deprivations of liberty.[23] The Court noted that, in being disciplined by confinement to their barracks for the lighter forms of discipline, the servicemen 'remain[ed], more or less, within the ordinary framework of their army life',[24] and thus did not find them to have been deprived of their liberty. In doing so, the Court acknowledged that some restrictions on liberty are to be expected within the military context.

By contrast, in *Guzzardi v Italy* ('*Guzzardi*'), the Court found a violation of the right to liberty in circumstances involving comparatively greater freedom than the servicemen in *Engel*, by holding that if individual circumstances did not establish a deprivation of liberty, they could be considered 'cumulatively and in combination' to meet the requisite threshold.[25] In this case, Guzzardi was placed under an order for special supervision and compulsory residence, requiring him to live on the island of Asinara. He was free to move about the island during the day, including visiting the town of Cala Reale, although he was confined to his residence between 10pm and 7am each night and was required to report to authorities twice a day. In making its finding, the Court emphasised the limited area within which Guzzardi could move, the dilapidated state of the lodgings, and the limited opportunities for social contacts, combined with the extended period

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20 Ibid 21 [57]; *De Tommaso v Italy* (European Court of Human Rights, Grand Chamber, Application No 43395/09, 23 February 2017) 20 [80] ('*De Tommaso*'); *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, opened for signature 16 September 1963, ETS No 46, as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) ('*Protocol No 4*').

21 *Guzzardi v Italy* (1980) 39 Eur Court HR (ser A) 30 [93] ('*Guzzardi*'). For application in Australia, see *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 109 [664].

22 *Guzzardi* (n 21) 29–30 [92]. See also *Engel* (n 19) 21–2 [59]; *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010) 25 [73]; *De Tommaso* (n 20) 20 [80].

23 *Engel* (n 19).

24 Ibid 22 [61].

25 *Guzzardi* (n 21) 30 [95].

of his residence.[26] Given the extent of restrictions in lockdown, the degree of control over the movement of individuals, and the extent of social isolation experienced by individuals, a strong case could be made for lockdown representing a deprivation of liberty.

Whether a particular lockdown is found to be a deprivation of liberty will depend on the specific effects on the individual complainant, rather than the general effects of the lockdown on the population, as was made clear in the recent case of *Terheş v Romania*.[27] The Court found that Terheş had not explicitly detailed the effects of the 52-day Romanian lockdown on his life.[28] In contrast to Guzzardi, the Court considered that Terheş had not been deprived of all social contact, was not forced to live in a cramped space, and was free to leave his home for specific reasons, and so his situation could not be equated with house arrest and therefore did not constitute a deprivation of liberty.[29] This suggests that an individual affected more severely than Terheş, such as elderly people deprived of all social contact or casualised workers deprived of all income, might be able to establish a deprivation of liberty under lockdown, although precisely where that threshold lies is currently unclear.

In *Loielo*, Ginnane J found that the curfew direction engaged the right to freedom of movement, but not the right to liberty.[30] In reaching this conclusion, Ginnane J drew on Convention-related decisions that found 'that not all measures confining a person to their home are deprivations of liberty.'[31] His Honour focused particularly on *Secretary of State for the Home Department v JJ*, an English case applying the principles established by the Strasbourg Court in relation to the right to liberty, and the emphasis in that judgment on assessing the impact of the measure on the person affected, including 'the actual lives these people were required by law to lead, how far they were confined to one place, how much they were cut off from society, how closely their lives were controlled.'[32] On this basis, Ginnane J held that the impact of the curfew on Loielo's life was such that right to freedom of movement was engaged, but not the right to liberty. Significantly, Loielo's complaint related to the personal effect of the restrictions on her arising only from the curfew. This leaves open the possibility that the Victorian lockdown taken as a whole might constitute a restriction on the right to liberty, and that

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26 Ibid 4-5, 30 [12], [95].

27 *Terheş v Romania* (ECtHR, Fourth Section, Application No 49933/20, 13 April 2021) ('*Terheş*').

28 Ibid 13-4 [44].

29 Ibid 13 [43].

30 *Loielo* (n 2) 58-9 [217]–[218].

31 Ibid 58 [215].

32 *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 [63], cited in *Loielo* (n 2) 59 [218]–[220].

other people's experience of the curfew may, as a result of their particular circumstances, engage the right to liberty instead of freedom of movement.[33]

C *In the Interests of the Common Good?*

In assessing the 'type' and 'manner of implementation' of a given measure, the Court may have regard to the context in which the action is taken. The Court in *Austin v the United Kingdom* ('*Austin*') held context to be 'an important factor … since situations commonly occur in modern society where the public may be called upon to endure restrictions on freedom of movement or liberty in the interests of the common good.'[34] The facts in *Austin* did not fall within one of the permissible grounds for deprivation of liberty listed under art 5(1), but the actions were held to be necessary 'to avert a real risk of serious injury or damage', and the Court noted that the actions used were 'the least intrusive and most effective means to be applied'.[35] This approach holds that art 5 prohibits only *arbitrary* deprivations of liberty, and appears to introduce a proportionality-style test into the definitional stage of an art 5 analysis. As Feldman has noted, allowing such considerations at the definitional stage potentially poses a problem for people in countries that have not signed onto Protocol No 4.[36] This would leave them without a right to freedom of movement and, thus, 'without a legal remedy for any confinement if the detainor could persuade a court that there was a good, public interest reason for it, even if the reason lay outside the range of permitted justifications for depriving someone of liberty.'[37]

On this approach, an argument could be made that lockdown is a restriction implemented in the interests of the common good, to prevent serious harm to the community. It is therefore arguably not an arbitrary deprivation of liberty and thus not within art 5. This argument is unlikely to be advanced for two reasons. First, the existence of the infectious diseases exception under art 5(1)(e) renders it somewhat redundant. Second, it is inconsistent with other recent Grand Chamber judgments, which hold that the purpose behind restrictions 'no longer appears decisive for the Court's assessment of whether there has in fact been a

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33 This latter possibility was expressly acknowledged, and the former possibility hinted at, by Ginnane J: *Loielo* (n 2) 5-6 [1], 60 [222].

34 *Austin v the United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 39692/09, 40713/09 and 41008/09, 15 March 2012) 23 [59].

35 Ibid 23–4 [66].

36 *Protocol No 4* (n 20).

37 David Feldman, 'Counter-Infection Methods and ECHR Article 5' (2020) 25(2) *Judicial Review* 80, 86.

deprivation of liberty' and that purpose is taken 'into account only at a later stage of its analysis', casting doubt on its continued relevance.[38]

However, in *Terheş*, the Court seemed to take the purpose of the lockdown into consideration when evaluating whether it represented a deprivation of the right to liberty, noting that if the authorities had not taken such extreme measures, there would have been serious consequences for the rights to life and health.[39] While this may have been merely a contextual observation, given the extent of the restrictions under consideration, it suggests that the purpose of prevention of serious harm to the community was influential in the Court's reasoning here, in spite of the availability of an infectious diseases exception.

III The Infectious Diseases Exception

A *Lawfulness*

Assuming all three interventions constitute a deprivation of liberty, they might nevertheless be lawful if they are found to fall within the grounds in art 5(1)(e). Lawfulness requires compliance with 'a procedure prescribed by law'. This domestic law must itself comply with the general principles implied in art 5 of the *ECHR*: the rule of law (including legal certainty); proportionality; and protection against arbitrariness, which is 'the very aim' of art 5 and runs throughout all elements of art 5 analyses.[40]

Legal certainty is a challenge for domestic legislators: laws have been implemented rapidly, in evolving circumstances and with limited reliable clinical information, contributing to difficulties in creating accessible, precise and foreseeable laws. Provisions for isolation and quarantine are relatively easy to articulate, remain reasonably stable over time, and draw on past practice. By contrast, lockdown is comparatively novel. It is difficult to specify the duration of lockdown, undermining the goal of precise and foreseeable laws. Hastily enacted legislation has also resulted in ambiguities. For example, the legality of English and Welsh Regulations issued under the *Public Health (Control of Diseases) Act 1984* (UK) to authorise lockdowns has been called into question. Hickman and colleagues argued that there is 'a significant question mark' over whether the Act

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38 *Creangă v Romania* (European Court of Human Rights, Grand Chamber, Application No 29226/03, 23 February 2012) 31-2 [93]; *Rozhkov v Russia (No 2)* (European Court of Human Rights, Third Section, Application No 38898/04, 31 January 2017) 13 [74]. See also *Merabishvili v Georgia* (European Court of Human Rights, Grand Chamber, Application No 72508/13, 28 November 2017) 71 [298].

39 *Terheş* (n 27) 12-3 [40].

40 *Simons v Belgium* (ECtHR, Second Section, Application No 71407/10, 28 August 2012) 9-10 [32].

authorises restrictions on the movement of the general population,[41] while King has argued that it is 'reasonably clear' that the Act 'can be construed literally to confer powers to impose the lockdown.'[42] Either way, as Blair observed, 'if there is a question mark over the *vires* of the subsidiary legislation creating these restrictions, it would surely be preferable for the powers to be explicitly authorised by Parliament.'[43]

Emergency circumstances can create conditions that hamper compliance in the application of existing laws. The use of emergency detention powers on the Melbourne public housing towers was undertaken at such speed that there was insufficient time for the human rights implications of the intervention to be properly considered, as required. This resulted in inadequate planning and preparation and, in turn, additional — and avoidable — human rights breaches caused by deficiencies in implementation.[44]

Further, the rapid introduction of lockdown laws has led to a lack of precision and broad discretion in enforcement, which arguably introduces an element of arbitrariness. For example, lockdown in Spain was enforced under the *Organic Law on Citizens' Security (Law no 4/2015)*, which has a history of arbitrary application, and the Spanish Ombudsman is investigating whether fines have been issued correctly and proportionately.[45] In the United Kingdom, confusion between regulations and non-binding health advice may have contributed to excessive use of discretionary powers by police.[46] And in New Zealand, stay-at-home instructions issued by the government went beyond the health order made by the Director-General of Health, with the result that the first nine days of lockdown had no legal basis.[47] This was rectified through a second health order being issued, but highlights the ease with which mistakes of this nature can be made when responding to a rapidly evolving crisis.[48]

Importantly, however, Convention case law in this area is clear. While practical challenges are undeniable, legislators know the standard required: the

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41 Tom Hickman, Emma Dixon and Rachel Jones, 'Coronavirus and Civil Liberties in the UK', *Blackstone Chambers* (Article, 6 April 2020) 10 [340] <https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/>.

42 Jeff King, 'The Lockdown is Lawful', *UK Constitutional Law Blog* (Blog Post, 1 April 2020) <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/>.

43 David Blair, 'Human Rights' (2020) 65(5) *Journal of the Law Society of Scotland* 31.

44 Victorian Ombudsman (n 15) 14; 18.

45 Fran Warren, Francesca Gualco, Hannah Davidson and Ella Edginton, *Part 1 — International Policing Responses to COVID-19: During Lockdown* (Research Report, Scottish Government, 27 July 2020) <https://www.gov.scot/publications/part-1-international-policing-responses-covid-19-during-lockdown/pages/17/>.

46 Liora Lazarus, 'Introduction' in Bonavero Institute of Human Rights, *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions* (Bonavero Report No 3/2020, 6 May 2020) 13.

47 *Borrowdale v Director-General of Health* [2020] NZHC 2090.

48 Director-General of Health (NZ), *Section 70(1)(f) Health Act Order* (3 April 2020).

law must outline the conditions for deprivation of liberty sufficiently clearly and precisely 'to allow the person — if need be, with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[49] Relevant elements, or 'safeguards against arbitrariness', include 'the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention', as well as a mechanism for contesting the lawfulness and length of detention.[50] Despite the practical challenges, the guidance provided by the Court on this aspect is sufficient to allow states to work towards meeting the requisite standard, even if their initial efforts fall short. The same cannot be said of the requirements of necessity and proportionality.

B *Necessity and Proportionality*

All three interventions are clearly intended to pursue the legitimate aim, with respect to COVID-19, of 'the prevention of the spreading of infectious diseases', found in art 5(1)(e). In assessing whether they are also necessary and proportionate means for doing so, there is only one *ECHR* case to draw upon. In *Enhorn v Sweden* ('*Enhorn*'), the Court was asked to consider whether the compulsory isolation of an HIV-positive man constituted a violation of art 5(1) of the *ECHR*.[51] Enhorn had unknowingly transmitted HIV to another man prior to his diagnosis, and was given instructions by the county medical officer aimed at preventing further transmission. After failing to keep several medical appointments, the Administrative Court found he had failed to comply with the prescribed measures and ordered compulsory detention at the hospital for up to three months. This was repeatedly renewed every six months, although Enhorn absconded for prolonged periods. The parties agreed that the isolation orders amounted to a deprivation of liberty, and that the purpose of Enhorn's detention was to prevent him from infecting others with HIV. As such, the order could be examined under art 5(1)(e).[52]

In an example of understatement, the Court observed that it had 'only to a very limited extent decided cases where a person has been detained "for the prevention of the spreading of infectious diseases"' and was for that reason 'called upon to establish which criteria are relevant when assessing whether such a detention is in compliance with the principle of proportionality and the requirement that any detention must be free from arbitrariness.'[53] The Court drew

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49 *Khlaifia v Italy* (ECtHR, Grand Chamber, Application No 16483/12, 15 December 2016) 38 [92].
50 *JN v United Kingdom* (ECtHR, First Section, Application No 37289/12, 19 May 2016) 19-20 [77].
51 *Enhorn* (n 9).
52 Ibid 15-16 [33]–[35].
53 Ibid 18 [41].

on the comparatively voluminous case law relating to the detention of persons 'of unsound mind'. In particular, the judgment highlighted the *Winterwerp* criteria, drawn from *Winterwerp v the Netherlands*,[54] which comprise the minimum conditions for justification of detention on mental health grounds:

> firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends upon the persistence of such a disorder.[55]

To these was added the requirement that 'there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention',[56] citing *Ashingdane v the United Kingdom* as authority for the principle that lawful detention of a mental health patient can only be effected in a hospital, clinic or similarly appropriate institution.[57]

The Court drew an explicit link between each of the categories of person listed in art 5(1)(e), reasoning that all of the listed conditions justified detention of individuals posing a threat to public safety, as well as in their own interests (for treatment or to prevent self-harm). This claim perhaps elides the very real difference in the purpose of deprivations of liberty of people with an infectious disease, which is predominantly for the protection of the public, and people with a mental illness, which must have a therapeutic purpose.[58] Nevertheless, the Court adapted the *Winterwerp* criteria to the infectious disease context, articulating the 'essential criteria' to be:

> whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.[59]

These criteria speak directly to necessity (danger to public health or safety) and proportionality (least severe measure able to sufficiently safeguard the public interest), but are less informative regarding appropriate thresholds for 'danger' or 'sufficiency'. In the application of these criteria in *Enhorn*, the Court found HIV to be indisputably dangerous to public health and safety.[60] Certainly, at the time of Enhorn's original isolation order in the mid-1990s, HIV was among the most feared of infectious diseases, but without any reasoning this finding adds little to

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54 (1979) 33 Eur Court HR (ser A) 14-5 [39] ('*Winterwerp*').
55 *Enhorn* (n 9) 18 [42].
56 Ibid.
57 (1985) 93 Eur Court HR (ser A) 16-7 [44] ('*Ashingdane*').
58 *Rooman v Belgium* (European Court of Human Rights, Grand Chamber, Application No 18052/11, 31 January 2019) 61 [210].
59 *Enhorn* (n 9) 19 [44].
60 Ibid 19 [45].

our understanding of what constitutes sufficient danger to the public to warrant detention.

It is notable that the Court framed the issue in terms of the danger of the virus, without consideration of mode of transmission, available treatments or other potentially mitigating factors, given that so much of the judgment was devoted to examining evidence of the risk posed by Enhorn to others. As HIV transmission requires contact with bodily fluids, risk of transmission would seem to be a relevant consideration in determining necessity of detention. Judge Costa addressed transmissibility in terms of intention, rather than risk, suggesting that detention was:

> acceptable only for limited periods ('quarantine'), where the disease is curable, as in the case of tuberculosis (I do not think that placement in a sanatorium is in principle contrary to Article 5), and where the disease is spread unintentionally, which is not normally the case with sexually transmitted diseases …[61]

There is no doubt that risk is a difficult concept to integrate into legal frameworks, as it is usually determined on the basis of incomplete information and, even when it is possible to calculate, does not tell us what is an *acceptable* risk. As Martin noted, in other fields, the 'precautionary principle' is applied when there is a risk of significant or irreversible harm, even in the absence of all the relevant information.[62] Yet in relation to the right to liberty, the presumption is weighted in the other direction, as articulated in *Enhorn*:

> detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained.[63]

Interestingly, in *Loielo*, Ginnane J noted that the Victorian *Public Health and Wellbeing Act 2008* included a provision endorsing the precautionary principle. Section 6 provides that:

> If a public health risk poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk.

In the context of the use of deprivation of liberty to control a threat to public health, this public health provision is potentially in tension with human rights case law to date. Evidence for the efficacy of the curfew as an independent factor in reducing SARS-CoV-2 infections was not strong, as its effect could not be disentangled from the wider package of interventions. As a result, it perhaps does

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61 Ibid 25 [11] (concurring opinion of Judge Costa).

62 Robyn Martin, 'The Exercise of Public Health Powers in Cases of Infectious Disease: Human Rights Implications: *Enhorn v Sweden*' (2006) 14(1) *Medical Law Review* 132, 141.

63 *Enhorn* (n 9) 16 [36].

not align well with the presumption in favour of liberty, except that in this case, the focus was restricted to the curfew, and a lower threshold appears to be applied to considerations of freedom of movement compared to deprivation of liberty. Measures that constitute deprivations of liberty must be both effective in safeguarding the public interest and also the least severe option available to achieve that goal. It is not clear from *Loielo* how the precautionary principle in s 6 might interact with the need for any proposed measure to involve the 'minimum restriction on the rights of any person',[64] in a proportionate and non-arbitrary manner,[65] and *ECHR* case law provides no guidance.

The Court found that the second criterion, relating to necessity, had not been fulfilled in *Enhorn*, 'because less severe measures had not been considered and found to be insufficient to safeguard the public interest.'[66] Interestingly, the Court added a further consideration at this point, observing that — in extending the compulsory isolation order over almost seven years, including one and a half years of involuntary detention in a hospital — 'the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.'[67] In a concurring opinion, Judge Cabral Barreto distanced himself from this inclusion of balancing in the reasoning, stating:

> [I]t follows both from the letter of the Court's settled case-law on deprivation of liberty and, above all, from the spirit that has imbued it and continues to do so, that if a review of a measure depriving a person of his liberty were to allow the State a certain margin of appreciation in such matters, this would not in any way accord with a line of case-law which ... has taken care to stress the importance of the Article 5 safeguards ...[68]

The problem with framing the evaluation in terms of 'balancing' is that the assumptions underpinning the weighting on each side of the scales are hidden. Here, it appears that the Court viewed the risk to Enhorn's liberty as of greater weight than the risk to the public. Presciently, in 2006 Martin warned:

> The decision in *Enhorn* prioritised the private right of liberty over the public benefit of disease protection in a case of HIV/AIDS, despite the assessment of government public health officials that there was some risk to public health. *The extent to which this decision can serve as a precedent where the risk is of large-scale, fast-spreading disease of unknown epidemiology is questionable*.[69]

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64 *Public Health and Wellbeing Act 2008* (Vic) s 111.

65 Ibid s 9.

66 *Enhorn* (n 9) 21 [55].

67 Ibid.

68 Ibid 28 (concurring opinion of Judge Cabral Barreto). Although the margin of appreciation is an important part of ECHR judgments, and it might be expected that a wide margin would be afforded to states managing a pandemic, Judge Cabral Barreto's comments here reflect the fact that the preponderance of case law is against the application of the margin of appreciation to art 5.

69 Martin (n 62) 142 (emphasis added).

This warning was borne out in *Loielo*, in which the challenge of using a 'balancing' approach was identified in the legal advice relating to the compliance of the curfew with the *Charter of Human Rights and Responsibilities 2006* (Vic):

> [T]here is some risk of incompatibility with respect to the evening curfew. We draw your attention to the fact that the more onerous the limits become, the more difficult it is to assess whether the balance they strike is proportionate with their objective in part because it is not possible to consider how those limits will impact each individual.[70]

That is, the scale of the intervention raised issues in evaluating its impact. *Enhorn* and cases relating to detention on mental health grounds considered particular individuals, and emphasised that analysis should focus on the actual effects of the law on those individual lives. In stark contrast, lockdown measures affect large numbers of individuals, whose lives may be impacted in various ways and in varying degrees, complicating the human rights analysis in a way that means that the existing case law is of little assistance.

IV Limitations

Presented with a case involving an infectious disease of a particular type, the Court in *Enhorn* drew an analogy with mental illness that was adequate for the case at hand, but which reveals significant problems when applied to other infectious diseases. From the analysis above, three major limitations can be identified, relating to thresholds, risk and affected status of individuals.

A *Thresholds*

There is a lack of guidance on how to determine what constitutes sufficient danger to public health and safety or whether a given measure is sufficient to safeguard the public interest. Evidence about the long-term effects of COVID-19 is lacking, but it appears that in the majority of cases it can be a relatively mild disease. The threat comes from its highly infectious nature and the consequently large number of cases. This means that even if only a small proportion of cases result in death, the absolute figures will still be very large. Further, such large numbers threaten to overwhelm health systems, reducing the ability to effectively care for affected individuals as well as those in need of healthcare for other reasons.

This would seem sufficient to establish a clear danger to public health and safety. Yet some commentators have argued that lockdowns are fundamentally incompatible with the basic purpose of art 5, in that 'they reverse the essential

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70 *Loielo* (n 2) 61 [229].

principle of art 5 that liberty is the rule and deprivation of it must be strictly limited and rigorously justified. Instead, … confinement is the rule, and leaving confinement requires a "reasonable excuse".'[71] Others, such as King, point out that the rights to life and health of others in society, as well as the rights of health service staff to just working conditions, are equally important.[72] King further argues that there is 'basic compatibility between the lockdown and human rights principles' as long as it is 'lawful, non-discriminatory and strictly proportionate'.[73]

It is in ensuring continued proportionality that governments are mostly likely to encounter difficulties. At what point during a lockdown is the threat to the public sufficiently diminished? At ten cases per day? Or five? Or none? Lazarus suggests that:

> While extreme lockdown measures may well be justified in the initial short term, the State is required to seek out all alternative measures (such as upscaling medical health provision and testing) as the pandemic progresses. It cannot rely indefinitely on extreme measures alone.[74]

This implies that continual re-evaluation of the necessity and relative effectiveness of lockdown will be important. Feldman goes further, and warns against the potential for 'long-term, widespread deprivation of people's liberty, accepted pragmatically in the face of a special threat' to become normalised and to erode the presumption of liberty as the default position.[75] He argues that such responses were historically not used for other infectious and potentially fatal diseases, and that 'requiring the population as a whole to sacrifice its liberty to protect potentially vulnerable people violates art 5 of the *ECHR* and tends to undermine the foundation of a liberal society.'[76] He does, however, concede that it may be reasonable to facilitate the voluntary isolation of vulnerable people.

This approach appears to assume that vulnerable people constitute a small and identifiable minority. Emerging epidemiological evidence suggests that this may understate the extent of vulnerability to COVID-19, as well as the significant risks to the general public presented by overwhelmed health systems. Feldman's position fails to account for the impacts on the rights to life and health that would result in the absence of lockdown. Viewed in this way, arguments that lockdowns are intended to protect far more than a limited set of potentially vulnerable people seem more persuasive.

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71 Feldman (n 37) 91.

72 Jeff King, 'The Lockdown is Lawful: Part II', *UK Constitutional Law Blog* (Blog Post, 2 April 2020) <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/>.

73 Ibid.

74 Lazarus (n 46) 4.

75 Feldman (n 37) 92.

76 Ibid 93.

Nevertheless, restrictions on liberty need to be justified, reviewable and temporary. These requirements are echoed, for example, by the Working Group on Arbitrary Detention of the United Nations Human Rights Council, who note that even in a public health emergency, '[a]ll … measures must be publicly declared, be strictly proportionate to the threat to the public caused by the emergency, be the least intrusive means to protect public health and be imposed only for the time required to combat the emergency.'[77] This imperative, however, does not address the central issue of how to identify when the tipping point has been reached and lockdown can no longer be justified, especially in circumstances of uncertainty or where any available less severe measures are likely to be comparatively less effective. Uncertainty may be especially acute in circumstances in which it is not clear that a vaccine or other alternative mechanism will be forthcoming, and transitioning to an endemic disease state may be appropriate, making it difficult to identify when the public health emergency is over.

B *Risk*

The failure to engage with the concept of risk ignores a fundamental element of public health decision-making, creating a disjuncture between municipal practice and human rights analysis. Perception and assessment of risk has been critical to all aspects of responding to the COVID-19 pandemic, with decisions resting on assessments of the risk of transmission, of serious illness or death, of health systems' inability to cope, of masks or social distancing not preventing transmission, and so on. In *Loielo*, it was clear that the decision to retain the curfew as part of the public health response was founded entirely on considerations of risk:

> [I]t reduces movement, which in turn reduces the risk of community transmission. Further, it is one part of a suite of measures that have proven to be highly effective in reducing community transmission. There is a risk that removing the curfew component from this suite may undermine the effectiveness of the measures taken together; this risk is considered to be unacceptably high.[78]

This was, as Ginnane J observed, the 'cautious or precautionary approach',[79] and it is somewhat at odds with cases such as *Enhorn*, in which the presumption in favour of liberty displaces consideration of the precautionary principle. This is likely to be a consequence of the focus within the case law to date on detention of individuals, rather than large groups of people, which has allowed the centrality

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77 Human Rights Council (n 18) annex II 34 [3].
78 *Loielo* (n 2) 62 [230].
79 Ibid 68 [253].

of risk to public health decision making to be understated. Risk is potentially relevant to establishing both the necessity and proportionality of a measure, but the current case law provides no guidance as to how information pertaining to risk should be used, how it should be balanced against the imperative to protect individual liberty, or the extent to which use of the precautionary principle is consistent with the right to liberty.

C *Affected Status*

All art 5(1)(e) case law to date has focused on the detention of affected individuals.[80] This facilitates an analysis of isolation measures, which only applies to diagnosed cases, but it is unclear how these principles should be applied to undiagnosed individuals, as in quarantine and lockdown. Greene argued that it is unlikely and undesirable that the infectious disease exception be expanded to include the ability to deprive healthy people of their liberty to prevent the spread of disease.[81] Hickman and colleagues were strongly critical of this approach, noting that there is nothing in the wording of art 5(1)(e) precluding its application to healthy persons; the focus on affected individuals, they suggest, is simply an artefact of the types of cases brought before the Court.[82] Feldman agreed that the language of the exception was capable of supporting application to healthy people, but noted that establishing the necessity of detention of non-infectious individuals may be more difficult, and might potentially lead to issues of arbitrariness.[83]

This point was addressed in *Loielo*, where it was reasoned that the curfew direction was not depriving people of their liberty in an arbitrary manner because there were exceptions that addressed core needs of affected individuals, it was reasonably justified, and it was a temporary measure.[84] The logical consequence of Greene's approach, however, is that the early lockdown of a relatively small area in order to prevent widespread infection would be prohibited, prioritising the right to liberty of a few individuals over the rights to life and health of potentially many more individuals. Reconciling the need to avoid arbitrariness with the need to prevent potentially greater future infringements of rights is likely to require a means of evaluating risk as part of the necessity and proportionality analyses.

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80 See, eg, *Enhorn* (n 9); *Winterwerp* (n 54); *Ashingdane* (n 57).

81 Alan Greene, 'States Should Declare a State of Emergency using Article 15 ECHR to Confront the Coronavirus Pandemic', *Strasbourg Observers* (Blog Post, 1 April 2020) <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>.

82 Hickman, Dixon and Jones (n 41).

83 Feldman (n 37) 87.

84 *Loielo* (n 2) 63 [233].

V Theories of Interpretation

Greene has suggested that states should declare a State of Emergency under art 15 of the *ECHR*, so that derogations from art 5 in the form of public health interventions can be pursued without attracting the scrutiny of the Court.[85] This, he argues, means that 'any jurisprudence of the ECtHR that may be affected by undue deference in a time of crisis can be quarantined to the exceptionality of the situation.'[86] This seems an unhelpful approach, given the complete lack of safeguards or interrogations of justifications for particular actions under art 15 derogations and the fact that — far from representing an exceptional outlier — the present pandemic is very likely exactly the type of situation envisaged by the drafters of the *ECHR* when including the infectious disease exception.

This is not to suggest that an originalist interpretation is appropriate. Although an originalist approach may be appealing in its delegation of decisions to appointed legislators and consequent restraint of creativity by unelected judges, too great a focus on the origins of the *ECHR* would fail to appreciate the significant evolution in function and mission since its drafting.[87] The Court has, since *Tyrer v United Kingdom*,[88] developed an evolutive approach to interpretation, which conceives of the *ECHR* as a 'living instrument' and which, as Letsas explained, 'puts the emphasis upon present-day conditions as an important factor in interpreting the Convention'.[89] Drafters' intentions are only relevant insofar as they advance or elucidate the object and purpose of the *ECHR*.[90] The application of this approach to interpreting art 5 is evident in Judge Costa's concurring opinion in *Enhorn*:

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85 Similarly, art 4(1) of the *ICCPR* (n 5) provides that States may derogate from their obligations under that Convention 'to the extent strictly required by the exigencies of the situation' in a 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Note, however, that the United Nations Human Rights Committee issued guidance on the use of emergency measures in relation to COVID-19 and recommended that 'measures suspending rights should be avoided when the situation can be adequately dealt with by establishing proportionate restrictions or limitations on certain rights': United Nations Human Rights Office of the High Commissioner, 'Emergency Measures and COVID-19: Guidance' (Newsletter, 27 April 2020) <https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf>.

86 Greene (n 81).

87 A trap arguably exemplified by Sir Gerald Fitzmaurice's dissent-filled tenure on the Strasbourg Court. See, eg, his dissenting opinion in *Marckx v Belgium* (1979) 31 Eur Court HR (ser A). See also Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press, 2010) 361–5.

88 *Tyrer v United Kingdom* (1978) 26 Eur Court HR (ser A) 11-2 [30].

89 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2018) 76.

90 Ibid 72; see also *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

> [AIDS] was unknown when the Convention came into force, but the Convention is a living instrument which must be interpreted in the light of present-day conditions of living (and — alas! — dying).[91]

The point here, though, is that the correct approach to interpreting the *ECHR* does not require a great deal of evolution. Isolation and quarantine are clearly within scope. To determine whether lockdown may also come within the scope of the infectious disease exception, we can look to both present-day conditions and the object and purpose of the exception.

The drafters may not have anticipated the use of lockdowns for preventing the spread of infectious diseases. The logistics of such an endeavour may have appeared ludicrous. Present-day conditions, however, render the logistics — if not comfortable — at least achievable. Further, it is only recently that it has become realistic to expect — and, indeed, to witness — a vaccine being developed to counter a novel virus within a year or two.[92] The purpose of the exception is to prevent the spreading of infectious diseases, which is entirely consistent with the purpose of lockdown. Cumulatively, these factors make it more likely that lockdown will, at least in some circumstances, come within the scope of the exception. If the experiences of the current pandemic result in cases coming before the Court, it may be hoped that this leads to the development of principles better suited to guiding states' public health decision-making so that an appropriate balance can be struck between protecting individual liberty and public health in circumstances of incomplete or changing information.

VI Conclusion

The European Court of Human Rights has produced the most extensive case law of any human rights jurisdiction in the world, and the inclusion of an express public health exception to the right to liberty suggests that its jurisprudence is likely to provide the best available guidance to states on the circumstances in which physical separation measures against infectious diseases are justifiable and lawful. Despite this, the principles developed to date are limited in their applicability to the current crisis, because they were developed in the context of illnesses that are not directly analogous to the coronavirus driving this pandemic. Many of these limitations are evident in the Victorian curfew case of *Loielo*, which draws heavily on *ECHR* case law in determining which rights are engaged. However, that case also essentially breaks new ground in evaluating the necessity

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91 *Enhorn* (n 9) 24 [6].

92 The first vaccinations against COVID-19 outside of clinical trials were administered in December 2020, with mass vaccination programmes now being rolled-out across the world: 'Covid-19 Vaccine: First person receives Pfizer jab in UK' *BBC News* (online, 9 December 2020) <https://www.bbc.com/news/uk-55227325>.

and proportionality of a public health measure aimed at large numbers of people, most of whom are unaffected, and which is based predominantly on assessments of various forms of risk.

The drafters of the *ECHR* may have been surprised by debates over the applicability of art 5(1)(e) to interventions against COVID-19, but it is an evolutive interpretation that demonstrates that even lockdown is likely to be found to fall within the exception. The development in future judgments of principles better suited to large-scale, poorly-characterised diseases is needed to provide adequate guidance to states seeking to implement measures infringe the right to liberty in defence of public health.

A Uniform Hermeneutic Thesis: Objectivity and the High Court of Australia's Approach to Interpretation Across the Private Law

NA Tiverios*

At a broad level of generality, the orthodox approach to interpreting contracts, trusts, wills, security documents, company constitutions and so forth is the same: a search for the objective meaning to be attributed to the author or authors of the instrument (the 'uniform hermeneutic thesis'). This article has two primary objectives. The first is to respond to a common criticism of this uniform objective approach. The criticism is that, as each species of legal obligation is different, different rules of interpretation should apply when the given legal context changes. For example, why not ask the settlor of an inter vivos trust what she meant to say when an interpretational dispute arises? The second reason is to demonstrate that the explanations most commonly given in defence of an objective approach to interpretation, namely to promote legal certainty and economic efficiency, fail to capture the essential reason why the objective approach permeates the general law. The thesis put forward in this article is that an objective theory of interpretation is a justifiable aspect of private law because language (being a form of communication) does not operate unilaterally, but rather requires stable and dependable shared conventions. This argument is supported by the further claim that, where the author of a legal instrument utilises these publicly recognised conventions in order to affect her or his legal relations with others, she or he ought to be bound by those conventions. One cannot have the benefit of 'conventions for me but not for thee'.

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I Introduction

> There's glory for you!' [Humpty Dumpty said to Alice]. 'I don't know what you mean by "glory",' Alice said. Humpty Dumpty smiled contemptuously. 'Of course you don't — till I tell you. I meant "there's a nice knock-down argument for you!"' 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is', said Humpty Dumpty, 'which is to be master — that's all.[1]

When confronted with Humpty Dumpty's famous question from Lewis Carroll's *Through the Looking Glass*, as applied to the proper interpretation of a legal instrument, most private lawyers have a rote answer: Mr Dumpty's unexpressed subjective beliefs are irrelevant. No court will allow him to suggest that the words used in a private law legal instrument mean only what he subjectively chooses them to mean.[2] What is legally significant is the meaning that Mr Dumpty's words convey to the reasonable recipient of that communication. The lawyer will then caution that a failure to adopt this approach would detract from the objective approach to legal interpretation that permeates the general law. While lawyers (correctly) hold this principle of objectivity to be sacrosanct, this article argues that many of the most familiar reasons given in defence of the objective approach to legal interpretation fail to capture the essential reason *why* the objective approach permeates the general law. These commonly-cited reasons are likely to be familiar to readers:[3] an objective approach to interpretation promotes certainty in attributing meaning to written instruments; there is little utility in departing from an objective approach, as it might be difficult to establish the actual state of mind of a relevant author regarding what the written instrument means; the objective approach is cost effective as it limits the evidence that can be adduced in the course of litigation by eschewing any inquiry into a relevant party's state of mind; and the objective approach protects third parties who may arrange their affairs based on their understanding of the meaning of a written instrument. While at first blush these reasons may appear to serve as attractive justifications for an objective approach to interpretation, however, they are properly understood as consequential and incidental benefits of an objective approach.

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1 Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass* (Penguin Classics, 2009) 186.

2 Cf John Locke, *The Works of John Locke in Nine Volumes* (Rivington, 12th ed, 1689) vol 1, 434: '[E]very man has so inviolable a liberty to make words stand for what ideas he pleases, that no one hath the power to make others have the same ideas in their minds that he has, when they use the same words that he does'. See also Glanville Williams, 'Law and Language — IV' (1945) 61(4) *Law Quarterly Review* 384, 384: 'Humpty Dumpty's theory was that supported by Locke, who laid it down that the significance of all words is perfectly arbitrary, and that every man has an inviolable liberty to make words stand for what ideas he pleases.'

3 See below nn 46–88 and accompanying text.

If the need to promote legal certainty or economic efficiency does not justify the objective approach to interpretation, then what is its justification? The thesis put forward in this article is that there is a sound, but generally underappreciated, underlying reason why an objective approach permeates the private law:[4] simply put, since the very purpose of language is to enable communication between parties, there can be no such thing as an individual or internal subjective language.[5] By its very nature, therefore, language can only sensibly be understood on the basis of the conventional understanding that is attributed to those words. It is my position that this claim is true in the context of the private law irrespective of whether we accept a formal distinction between the 'speaker meaning'[6] and the 'sentence or conventional meaning'[7] of an utterance[8] (and I accept such a distinction).[9] That is, the general law provides a strong analytical example of what

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4 In the interests of brevity, the primary focus of this article is on the law of contract. However, the arguments deployed are nonetheless capable of applying to other private legal instruments (and could apply further still to areas of public law).

5 For examples of legal academic commentary that mostly support the thesis presented in this article see: Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 12–3, 87–8; Stephen Smith, *Contract Theory* (Oxford University Press, 2004) 271–9; David Goddard, 'The Myth of Subjectivity' (1987) 7(3) *Legal Studies* 263; Stephen Smith, *Atiyah's Introduction to the Law of Contract* (Oxford University Press, 6th ed, 2005) 149; Robert Stevens, 'The Meaning of Words and the Intentions of Persons' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016) 167; Mindy Chen-Wishart, 'Objectivity and Mistake: the Oxymoron of *Smith v Hughes*' in J Neyers, R Bronough, SGA Pitel (eds), *Exploring Contract Law* (Hart, 2009) 341, 345–7. In the context of public law see Richard Ekins and Jeffery Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39.

6 While the speaker meaning and sentence meaning of words will often coincide, they can come apart. For example, I am out for dinner with my wife and order a gammon steak from the waiter (being the only steak on the menu). I am unaware that a gammon steak is a pork dish and I mistakenly believe that I am ordering a beef steak. In this example, I have misused a word; I intended gammon to mean beef and I also intended to be taken by the waiter to have referred to beef (although my usage of the word gammon will not be understood as such by the waiter as my usage was unconventional). In this example, my mistaken reference to gammon can be termed the 'speaker meaning' to be ascribed to the word. On speaker meaning, see Goddard (n 5) 265–6. See also Ekins and Goldsworthy (n 5) 47, who have observed with respect to a non-objectively discernible speaker meaning: '[w]e might say: "That may be the meaning you intended to communicate, but it is not the meaning you did communicate"; or "That may have been what you meant, but it is not what your statement meant."' See also Robin Kar and Margaret Radin, 'Pseudo-Contract and Shared Meaning Analysis' (2019) 132 *Harvard Law Review* 1137, 1145–6.

7 That is, the meaning ascribed to an utterance by use of a narrow conventional standard. See John R Searle, 'What is Language: Some Preliminary Remarks' (2009) 11(1) *Ethics & Politics* 173, 193, who notes that it is 'the creation of conventional devices for performing acts of speaker meaning, which gives us something approaching sentence meaning, where sentence meaning is the standing possibility of speaker meaning. Sentence meaning is conventionalized.'

8 The term 'utterance' is used in this article to mean any 'communitive act'. For example, writing would constitute an 'utterance'.

9 The best explanation for the continuing relevance of the speaker's intentions in conferring meaning on a communicative act is derived from the fact that the conventional meaning of an utterance falls away if the recipient knows that the speaker is being disingenuous. See the example in Paul Grice, 'Meaning' (1957) 66(3) *Philosophical Review* 377, 383: 'If I frown spontaneously, in

is, at the very least partially, an externalist approach to language by asking what the reasonable recipient of the communication would have understood the author to mean. Put another way, an objective theory of interpretation is a justifiable aspect of the general law because language and communication do not operate unilaterally or internally but necessarily depend, at least in part, on the existence of a publicly recognised conventional device (that is, a multilateral, or at least bilateral, understanding of the proper use of the language). Further, where the author of a legal instrument utilises these publicly recognised conventional standards in order to effect legal relations with, or affect the legal position of, others then she ought to be bound by those standards. By using conventional standards to affect the legal position of others the author has 'given her word' to those others, and so cannot now resile from the objective meaning attributed to her utterance without undermining those standards. The author ought not to be able to take advantage of how the other party will typically grasp those conventions.[10]

Two important observations flow from the arguments presented in this article. First, the objective hermeneutic thesis set out by the High Court of Australia, which is applied consistently in the attribution of meaning to all instruments used in the private law, is coherent and justifiable. Second, any departure from the objective approach to interpretation would be unprincipled. Appreciating the underlying reasons for the objective approach to interpretation also assists in placing a number of contemporary debates concerning the law of interpretation into their proper context.

The article is divided into three substantive parts. Part II establishes what is meant by legal interpretation in contrast with legal construction. Part III explains why the other commonly cited justifications for the objective approach to interpretation, centring on the need to promote legal certainty and economic efficiency, ultimately provide insufficient reasons for the objective approach. Part IV

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the ordinary course of events, someone looking at me may well treat the frown as a natural sign of displeasure. But if I frown deliberately (to convey my displeasure), an onlooker may be expected, provided he recognizes my intention, still to conclude that I am displeased. Ought we not then to say, since it could not be expected to make any difference to the onlooker's reaction whether he regards my frown as spontaneous or as intended to be informative, that my frown (deliberate) does not mean anything? I think this difficulty can be met; for though in general a deliberate frown may have the same effect (as regards inducing belief in my displeasure) as a spontaneous frown, it can be expected to have the same effect only provided the audience takes it as intended to convey displeasure. That is, if we take away the recognition of intention, leaving the other circumstances (including the recognition of the frown as deliberate), the belief-producing tendency of the frown must be regarded as being impaired or destroyed. Perhaps we may sum up what is necessary for A to mean something by X as follows. A must intend to induce by A: a belief in an audience, and he must also intend his utterance to be recognized as so intended.' See also the authorities listed at nn 99 and 118. For another example of a distinction between the content of what we say *using* language and what a speaker *intends* by using the language, see Saul Kripke, 'Speaker's Reference and Semantic Reference' (1977) 2(1) *Midwest Studies in Philosophy* 255, 262–6.

[10] This argument does, however, leave room for an uncommon *bilateral* understanding of language. See the discussion at n 121 and accompanying text.

sets out what is meant by the objective approach to interpretation and provides what could be termed a 'rights-based justification' for this approach. Part V concludes.

II The Distinction between Interpretation and Construction

In order clearly to define the thesis defended in this article, it is important to draw a distinction between legal interpretation and legal construction. This distinction is often overlooked (perhaps justifiably),[11] even by experienced lawyers.[12] The reader need not necessarily accept the meanings that I ascribe to the terms 'interpretation' and 'construction'. It must surely be accepted, however, that there are two distinct concepts at play, and that howsoever we choose to label those concepts, there is a need to clearly distinguish between them. It follows that any objection to the account that I offer is likely to be semantic, not substantive.

The process of legal interpretation,[13] as I use that term in this article, is understood to include two things: (i) discerning the conventional linguistic or semantic meaning of a legal text or document (finding the meaning of the text);[14] and (ii) discerning inferences and implications that are to be 'read into', 'drawn from' or 'implied into' a legal text in order to ensure that the text is efficacious.[15] In contrast, the process of legal construction is broader. The process of legal construction is not limited to discerning the meaning of a legal text, but includes establishing the ultimate legal effect to be given to that text. Thus, the term 'construction' is often used when applying what amounts to a substantive legal rule that changes the meaning of a text.[16] As Lindley LJ observed in *Chatenay v The Brazilian Submarine Telegraph Co Ltd*:

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11 See below n 20 and accompanying text.

12 See, eg, Lewison LJ's interchangeable references to 'interpretation' and 'construction' in *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata Clo 2 BV* [2014] EWCA Civ 984, [39]. However, in Lewison's leading text on contractual interpretation these two concepts are captured in various references as independent. See Kim Lewison, *The Interpretation of Contracts* (Sweet and Maxwell, 6th ed, 2015) 28 [2.01]. See also *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580, 1587 (Lord Steyn).

13 On the interpretation and construction distinction drawn in this article see also Elisabeth Peden, 'Cooperation' in English Contract Law — to Construe or Imply?' (2000) 16(1) *Journal of Contract Law* 56, 57–8; Catherine Mitchell, *Interpretation of Contracts* (Routledge, 2007) 26–7; Lawrence Solum, 'The Interpretation–Construction Distinction' (2010) 27(1) *Constitutional Commentary* 95: James Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' in Degeling, Edelman and Goudkamp (n 5) 107–8.

14 These are the branches of linguistics known as semantics and syntax. The former considers the study of the meaning of words and sentences and the latter concerns the formal rules for creating proper sentences. For an accessible introduction to these concepts in the context of the law see Ryan Catterwell, *A Unified Approach to Contract Interpretation* (Hart, 2020) 45–8 [2-39]–[2-44].

15 This is the branch of linguistics known as pragmatics. That is, what speakers in a community do with language including what a listener can rationally infer from a speaker. On implications and what are termed 'indirect speech acts', see below nn 105–111 and accompanying text.

16 See n 13.

> The expression 'construction', as applied to a document, at all events as used by English lawyers, includes two things: first the meaning of the words; and secondly *their legal effect, or the effect which is to be given to them*.[17]

Likewise, in *Paciocco v Australia and New Zealand Banking Group Ltd*,[18] the question of whether an impugned contractual clause was a penalty was framed as a question of construction, and construction in that context referred to 'something beyond the attribution of legal meaning'.[19] It encompasses the ultimate legal characterisation of the contractual rights in question.

While it is often the case that the terms interpretation and construction are used interchangeably in Anglo-Australian law,[20] this generally has little practical effect. This is because whenever a court tries to give legal effect to a text (be it a contract, trust, statute or otherwise) there is little substantive difference between the two concepts. Indeed, the two concepts become interdependent because an *interpretation* is given to a text *en route* to its ultimate legal effect.[21] For example, as the law of contract gives effect to the parties' externally communicated intentions to be bound by certain promises (subject to formalities),[22] it is no surprise that the meaning of those externally communicated intentions is typically the same as their ultimate legal effect. Therefore, a failure to delineate between the processes of interpretation and construction in the law of contract does not much matter when a court is simply giving effect to the meaning of the parties' agreement (and the same could be said about all manner of legal instruments).

However, the distinction between interpretation and construction becomes important when a court departs from the objective meaning of a contract and gives ultimate legal effect to an agreement through the application of external substantive legal rules (that is, rules *beyond* those pertaining to interpretation). Examples of construction in this sense include the rule against penalties, which limits contracting parties' legal powers to create consent-based remedies, and the doctrines of *Cy-pres* and perpetuities in the context of trusts, which are often

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17 [1891] 1 QB 79, 85 (emphasis added), cited in *Life Insurance Company of Australia Ltd v Phillips* (1925) 36 CLR 60, 78 (Isaacs J). See also John Salmond, *Jurisprudence* (Sweet and Maxwell, 6th ed, 1920) 137.

18 (2016) 258 CLR 525.

19 Ibid [31] (Kiefel J, French CJ agreeing); [146] (Gageler J). See also NA Tiverios, 'A Restatement of Relief against Contractual Penalties (I): Underlying Principles in Equity and at Common Law' (2017) 11(1) *Journal of Equity* 1, 5–19.

20 Joshua Getzler, 'Interpretation, Evidence, and the Discovery of Contractual Intention' in Degeling, Edelman and Goudkamp (n 5) 121 n 2; Mitchell (n 13) 26; Allsop (n 13) 107–8.

21 *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389, 396–7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).

22 Smith, *Contract Theory* (n 5) 57. See also Fried (n 5) 7–17; Charles Fried, 'The Ambitions of Contract as Promise' in Gregory Klass, George Letsas and Prince Saprai, *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 17; Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, rev ed, 2017) 17–19 [4:402]–[4:403]. For a critique of the promise theory of contract see Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press, 2019) 22–39.

framed as questions of 'construction'.[23] Where there is a difference between the meaning of a legal text applying the rules of interpretation on the one hand, and the ultimate legal effect given to the terms of an instrument applying a rule of construction on the other, a fundamental question is raised: what justification does the court have for failing to give effect to the objective meaning of the externally communicated rights and obligations contained in a legal instrument? It is not the purpose of this article to address the various moral and policy justifications raised by certain questions of legal construction. Rather, a distinction between interpretation and construction is drawn here to make clear that the scope of this article is limited to the former, and to emphasise that legal construction ought not be masked as interpretation. As Arthur Corbin correctly cautioned:

> [T]he line separating mere interpretation from judicial construction, although logically quite clear, will always be practically indistinct and difficult of determination, especially because the courts so frequently construct under the guise of mere interpretation.[24]

III Four Common but Insufficient Justifications for the Objective Approach

A *Framing the Issue*

It is trite law that an objective theory of interpretation of written instruments permeates[25] the general law.[26] The expression 'general law' here includes both

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23 The doctrine of *Cy-pres* in the context of trusts, is said wholly to 'belong to construction': see Francis Lieber, *Legal and Political Hermeneutics* (Charles C Little and James Brown, 1839) 63. The same has been said about the rule relating to perpetuities in the context of trusts: see Solum (n 13), and the law relating to contractual penalties. See also, NA Tiverios, *Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice* (The Federation Press, 2019) 62-63.

24 Arthur Corbin, *Principles of the Law of Contract: With a Chapter on the Law of Agency* (Oxford University Press, 3rd (American) ed, 1919) 406.

25 This proposition is correct insofar as we are concerned with the general interpretation of legal instruments. However, where fraud is involved, for example in the context of a sham trust, the court may engage in a wider inquiry that considers evidence as to parties' states of mind. For a strong academic defence of how the sham trust doctrine can be reconciled with the objective approach to interpretation, see Simon J Douglas and Ben McFarlane, 'Sham Trusts' in H Conway and R Hickey (eds), *Modern Studies in Property Law* (Hart, 2017) 237.

26 *Byrnes v Kendle* (2011) 243 CLR 253, 275 [59] (Gummow and Hayne JJ), 282–92 [93]–[118] (Heydon and Crennan JJ) ('*Byrnes*'); *Cusack v London Borough of Harrow* [2013] UKSC 40 [58]–[59] (Lord Neuberger with whom Lord Sumption and Lord Hughes agreed).

equity[27] and the common law.[28] At a broad level of generality,[29] the orthodox approach to interpreting contracts,[30] trusts,[31] deeds,[32] wills,[33] bonds,[34] and security documents[35] is the same: meaning is attributed to a legal relationship by inferring what the author or authors reasonably intended in the light of the text of the instrument when read as a whole against the relevant factual and admissible contextual evidence.[36] That is, the general interpretative task for a court is to consider the meaning that will be attributed to a particular manifestation of intention (being in the form of a communicative act or utterance that creates the relevant private law relationship) to the reasonable recipient of that communication.

This explanation highlights an important distinction between: (1) a legal relationship; and (2) an instrument or communicative act that provides evidence for the existence and content of that legal relationship. This truism is all too often

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27 *Parkin v Thorold* (1851) 2 Sim NS 1, 6; 61 ER 239, 241 (Lord Cranworth VC); *Tilley v Thomas* (1867) LR 3 Ch App 61, 67 (Lord Cairns); *Solomons v Halloran* (1906) 7 SR (NSW) 32, 42–4 (Street J). Such an approach is wholly consistent with the High Court of Australia's recent emphasis on there being a uniform law of interpretation: *Byrnes* (n 26) 263 [17] (French CJ); 282–92 [93]–[118] (Heydon and Crennan JJ).

28 For example the cases in (n 26).

29 This is not to overlook the fact that, for example, the objective approach to interpreting an informal contract that is operative for a limited duration will raise different contextual considerations than, for example, the interpretation of a federal constitutional compact settled between various states, which is designed to endure over a long period.

30 See below n 39 and accompanying text.

31 Where the intention of the settlor is the intention that has been expressed in the communication giving rise to the trust, the trust instrument is to be interpreted objectively by the reasonable person: *Inland Revenue Commissioners v Raphael* [1935] AC 96, 134 (Lord Warrington); *Byrnes* (n 26) 290 [115]; *The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd* [2015] NSWCA 225 [69] (Bathurst CJ, Macfarlan and Emmett JJA agreeing); Douglas and McFarlane (n 25); Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and the Use of Legal Sources* (Lawbook Co, 2009) 607 [25.3.1070]; *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 244–5 [6-005].

32 *Kneipp v Annunaka Pty Ltd* [2015] QSC 359 [14] (North J); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 527 [18] (Kiefel CJ, Gageler, Nettle & Gordon JJ); NC Seddon, *Seddon on Deeds* (Federation Press, 2nd ed, 2015), 173–5 [5.2].

33 *Walsh v Adrian Cory Sloan as Executor of The Estate of The Late Laurette Dorothy Keddie* [2019] WASCA 107, [24] (Quinlan CJ): 'The starting point is that the object of construing a Will is to ascertain the testator's intention as expressed in the Will itself. As Lord Simon LC said in *Perrin v Morgan* [1943] AC 399, 406]: "[T]he fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case — what are the 'expressed intentions' of the testator".' See too *Lemon v Mead* [2017] WASCA 215, [151] (Buss P).

34 *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, 111 [78] (Gageler, Nettle and Gordon JJ): 'There was also no dispute about those principles of construction. The proper construction of each [performance bond] is to be determined objectively by reference to its text, context and purpose.' See too *Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd* (2017) 96 NSWLR 329, 343–5 [60]–[67] (Meagher, Payne and White JJA).

35 *Whiteley v Hodge* [2000] NSWSC 866, [13] (Hamilton J); *Police & Nurses Credit Society Ltd v National Australia Bank Ltd* [2005] WASCA 68, [11] (Murray J).

36 Such uniformity is not a recent development. See JD Heydon, 'Comment on Lord Hoffmann's "Interpretation of Contracts"' in John Sackar and Thomas Prince, *Heydon: Selected Speeches and Papers* (The Federation Press, 2018) 710, 712–14.

overlooked by lawyers. Where A provides B with a standard form contract that B readily signs, the contract between the parties is a legal abstraction evidenced by the physical document (indeed, there would still be a binding contract even if the physical contract happened to be destroyed).[37] As observed in Part II, interpretation is the process of inferring the meaning of a legal relationship from the relevant *evidence* in order to reach an ultimate legal effect.

So applied to the law of contract, on the objective approach, the impugned contractual rights, obligations and stipulations should be interpreted in accordance with how a reasonable recipient of the communication in the parties' position would have understood the relevant contract, read as a whole, in the circumstances and context in which that contract was entered into (that context including the purpose and object of the transaction, shared background information,[38] and the recipient's general powers of rationality).[39] Accordingly, what is actually meant when reference is made to the 'parties' intentions' when interpreting a contract is not the parties' subjective intentions (by applying facts particular to, and known only by, one party) or, at the other end of the spectrum, the literal meaning of a particular contractual provision read in artificial isolation (by applying meaning to a specific part of a text with the most limited potential application of context). Rather, the term 'intention' is used to describe the parties' intentions when applying the objective theory of contract law to the impugned bargain.[40] This approach was succinctly captured by the unanimous decision of the High Court of Australia in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[41] and has been reaffirmed many times since:

> This Court … has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References

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37 *Wave v Harrop* (1861) 6 H & N 768, 774–5 158 ER 317, 320 (Bramwell B): 'a written contract … is not the contract itself but only evidence — the record of the contract'.

38 The extent to which non-notorious background evidence can be used to discern the objective intentions of the parties absent ambiguity in a contractual text in Australia remains open for debate. A useful summary of this controversy and the relevant authorities is provided in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd* [2019] 1 QR 392, [118]–[121] (Jackson J). For commentary see Thomas Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (2015) 89(7) *Australian Law Journal* 491; John Eldridge 'Surrounding Circumstances in Contractual Interpretation: Where are we Now?' (2018) 32(3) *Commercial Law Quarterly* 3.

39 *Byrnes* (n 26) 284 [98] (Heydon and Crennan JJ); *Maggbury Pty Ltd v Hafele Aust Pty Ltd* (2001) 210 CLR 181, 188 [11] (Gleeson CJ, Gummow & Hayne JJ); *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 [35] (French CJ, Hayne, Crennan and Kiefel JJ); *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 CLR 104, 116 [46]–[47] (French CJ, Nettle and Gordon JJ); *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16] (Kiefel, Bell and Gordon JJ), 571 [73] (Nettle J).

40 See, eg, George Leggatt, 'Making Sense of Contracts: the Rational Choice Theory' (2015) 131 (July) *Law Quarterly Review* 454, 456, 467.

41 (2004) 219 CLR 165.

> to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction. [42]

Notwithstanding the centrality of the unified objective theory of interpretation in judicial pronouncements, that approach to interpretation still raises two important and interrelated questions. First, is the objective theory of interpretation inconsistent with the idea that a contract contains voluntarily assumed obligations that arise from mutual promises?[43] What, one may ask, is 'voluntarily assumed' about an obligation, the existence and content of which is not determined by reference to a person's internal mental state, but by a court-constructed, reasonable-person-based interpretation of a series of displays of outward human behaviour? Or, as Richard Calnan has succinctly and thought provokingly observed: 'If the law of contract is concerned with the voluntary assumption of liability, why not carry it to its logical conclusion and say that what matters is what the parties actually intended'.[44] No doubt a similar question could be asked of trusts (giving effect to the settlor's actual intentions), wills (giving effect to the testator's actual intentions), security documents (giving effect to the parties' actual intentions) and so on. Second, despite constant curial reaffirmations of the objective theory of interpretation, the question of *why* a legal instrument is to be interpreted objectively is insufficiently engaged with in the case law. This lack of engagement may ultimately reflect a cautious approach, which enables judges to agree on abstract and ambiguous concepts without agreeing on the particular meaning of those abstractions.[45]

The object of this Part is to illustrate why four commonly-cited justifications proffered in support of the objective approach to interpretation ultimately provide insufficient support for it (notwithstanding that such justifications

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42 See the cases cited above at n 39. See also *Toll (FGCT) Pty Ltd* (n 41) 179 [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). For a thought-provoking contrast see art 4.1 of the International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2010* (UNIDROIT, 2010), [1] of which envisages the possibility of there being a common subjective intention between the parties, and [2] of which makes the 'objective approach' the default the 'fall back' position.

43 See n 22 and accompanying text.

44 Richard Calnan, *Principles of Contractual Interpretation* (Oxford University Press, 2013) 14. This critique was most prominently set out in the writings of PS Atiyah who noted (it is submitted incorrectly) that the use of the objective reasonableness standard in contractual interpretation suggests that the law of contract is not chiefly concerned with voluntary obligations. See *Essays on Contract* (Clarendon, 1986) 21–2. See also the discussions in Smith, *Contract Theory* (n 5) 60–2; and Catterwell (n 14) 91 [4-18].

45 See generally, Cass Sunstein 'Beyond Judicial Minimalism' (2008) 43(4) *Tulsa Law Review* 825, 828.

identify significant consequential benefits of the objective approach).[46] The first two justifications (centring on the need to promote efficiency and certainty) are dealt with together as they raise some broadly common issues, notwithstanding that they are conceptually distinct. The third and fourth justifications (centring on the need to protect reasonable reliance and to protect third parties) are dealt with in turn.

B *Certainty and Efficiency*

The first commonly-cited justification for an objective approach to interpretation is the difficulty, high evidentiary burden, and potential impossibility of establishing the subjective state of mind of the relevant draftsperson of a legal instrument or a subjective common intention between contractual counterparties (particularly, although not exclusively, where a relevant entity is a corporate or non-natural person).[47] The objective approach to interpretation is said to be both a practical and economically efficient workaround for this problem.[48]

A second, and related, commonly-cited justification for an objective approach is that it promotes certainty, is cost effective and removes the potential for the parties to engage in *ex post facto* attempts to embellish the content of a legal instrument once a dispute arises.[49] Lord Wilberforce commented on the issue of self-serving evidence in *Prenn v Simmonds*,[50] noting that it would be dangerous for a court to consider one party's reasons for entering into a contract when that objective might be self-serving in the light of the final compromise reached between the parties as expressed in the text of the agreement. Likewise,

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46 These justifications can be identified from works such as Calnan (n 44) 14–7; Lewin (n 31) 244–5 [6-005]; Mitchell (n 13) 78–9; Stevens (n 5); Smith, *Contract Theory* (n 5) 271–7; Ewan McKendrick, *Contract Law: Text, Cases and Materials* (Oxford University Press, 7th ed, 2016) 378, 382; Hugh Collins, *The Law of Contract* (Cambridge University Press, 4th ed, 2003) 228–31; and Atiyah (n 44) 21, 86–7.

47 On judicial scepticism of collective intentions in deliberative bodies, see *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); Robert French, 'The Courts and the Parliament' (2013) 87(12) *Australian Law Journal* 820, 825; Murray Gleeson, 'The Objectivity of Contractual Interpretation' in Hugh Dillon (ed) *Advocacy and Judging: Selected Papers of Murray Gleeson* (Federation Press, 2017) 276, 282–3. In response, Ekins and Goldsworthy (n 5) 47, have observed: 'an alternative theory of legislative intent … is that the legislature is a complex purposive group — an institution — that forms and acts on intentions, which arise from but are not reducible to the intentions of the members of the group (the individual legislators). … It follows that group intention does not involve spooky group mental states. Intentions are plans that persons adopt as a means to ends they seek. The intention of a group is the plan of action that its members adopt, and hold in common, to structure how they are to act in order to achieve some end that they want to reach together.' For another good defence of collective intentionality see Catterwell (n 14) 92 [4-20].

48 Calnan (n 44) 15–6.

49 See particularly, Calnan (n 44) 16; Lewin (n 31) 244–5 [6-005]. Regarding the importance of certainty see *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348, 357 (Latham CJ).

50 *Prenn v Simmonds* [1971] 1 WLR 1381, 1385.

on the issues of certainty and efficiency, one leading English text has noted that, without an objective approach, 'no lawyer would be safe advising on the construction of a written instrument, nor any party taking under it'.[51] Or, as one commentator has crisply put the argument, the written contract facilitates the ability for the parties' respective legal positions to be 'determined from their writing with as a high degree of certainty and efficiency as possible'.[52]

To the extent that the justifications raised above allude to the impossibility of subjective or private rule-following and the morality of holding parties to their objectively discernible intentions, I will not quibble with them. The important point for present purposes is that neither economic efficiency nor certainty alone are persuasive justifications for an objective approach to interpretation. It is true that the objective approach is both generally efficient and promotes certainty. But such benefits are not, in and of themselves, sufficient reasons for having the rule. This is because legal arguments focusing on certainty and efficiency do not seek to justify their claim exclusively to control the law.[53] Put simply, arguments centring exclusively on efficiency and certainty do not count for much where the consequence of considering such criteria is the creation of a legal rule that is otherwise morally indefensible.[54] Efficiency and certainty are insufficient justifications for a rule because it is easy to come up with examples (real or fictitious) of legal rules that are efficient or certain (or both), but which are nevertheless morally difficult to justify.

For example, the old common law practice of wager of law or compurgation was a certain way of resolving simple debt cases.[55] However, no serious lawyer or legal scholar would suggest today that the oaths of 11 'witnesses'[56] — often with

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51 Lewin (n 31) 244 [6-005], a statement which mirrors that in *Shore v Wilson* (1842) 9 Cl & F 355; 8 ER 450, 532 (Tindal CJ).

52 Prince (n 38) 503. See too Jonathan Morgan, *Contract Law Minimalism* (Cambridge University Press, 2013) 233: 'Rules in commercial matters should be as clear as possible to enable decisions to be made swiftly and confidently.' In making this point, however, Morgan is cognisant of the insights from philosophy of language and the mind contained in this article.

53 See Jon Hanson, Kathleen Hanson and Melissa Hart, 'Law and Economics' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2nd ed, 2010) 300: 'the vast majority of law and economics scholarship assumes without hesitation that the goal of the law should be efficiency'. See also 322–4. Further, the theory of efficient breach has drawn some criticism from the High Court of Australia. See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–90 [13]–[20] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

54 Stevens (n 5) 170.

55 The use of the defence of wager of law in debt cases helped facilitate the development of assumpsit to enforce contracts: John Baker, 'A New Light on Slade's Case' (1971) 29(1) *Cambridge Law Journal* 213, 219. Although note that in an action for debt on a bond a defendant was not entitled to defend the action by way of wager of law: Anon, 'A Lecture of Wager of Law (15th Century)', in JH Baker, *Baker and Milsom Sources of English Legal History* (Oxford University Press, 2nd ed, 2010) 283.

56 Often paid witnesses based in London. See JH Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 81: 'The *nisi prius* system was never extended to enable compurgators to appear at the assizes, and it was unrealistic to expect eleven men to be brought

no local nexus to, or knowledge of, the dispute attesting to B's credibility that he has paid A a debt — is a sound way of resolving the substantive merits of a debt claim.[57] Consider, also, the contentious common law rule that allowed double recovery under a bond during the early modern period.[58] The traditional common law procedure enabled an obligee holding a simple bond to enforce the bond multiple times. Indeed, at common law, A could successfully sue on a bond stolen back from B, even where B had paid the sum due under the bond.[59] The rationale for allowing double recovery was that the common law procedure favoured the universal benefits of simplicity, efficiency and certainty in making the mere production of the bond to the common law court non-traversable proof of an obligation to pay a debt as stipulated in the bond.[60] This meant that a careless party who failed to destroy the bond or take an acquittance on his performance of the bond ran the risk of the double enforcement of the bond,[61] although relief

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from far afield in routine cases. At Westminster, therefore, the difficulties came to be eased by the toleration of a charade. A defendant could hire professional compurgators to help out, and by the end of the sixteenth century it was part of the official duty of the court's door-keepers to provide them, for a fixed fee.'

57 The procedure whereby, in response to A's debt claim, B would swear on oath that he did not owe A the impugned debt. The court would accept B's oath as a full answer to A's claim if B obtained the oaths of typically 11 'witnesses' testifying to B's character and not the facts of the case (ie, the witnesses did not attest to the debt being paid): JH Baker (n 56) 81; TFT Plucknett, *A Concise History of the Common Law*, (Little & Brown Co, 5th ed, 2010) 115–6. The process was fully abolished in 1833 by statute. See *Civil Procedure Act 1833*, 3 & 4 Will IV, c. 42, s 13.

58 See *Donne v Cornwall* (1486) YB Pass 1 Henry VII, fo 14v, pl 2 (CP), extracted in Baker, *Sources of Legal History* (n 55) 283.

59 Indeed, in *Donne v Cornwall* (n 58), A successfully sued in the Common Pleas and then on appeal to the non-statutory Exchequer Chamber on a simple bond that he stole back from B's wife, after B had already paid to A the sum of £10 owing under the bond. For completeness, it ought to be noted that Bryan CJCP did observe that B would be able to sue A for trespass for stealing back the bond and thus 'recover back the same amount in damages' as was payable on the stolen bond.

60 Indeed, this is part of a wider historical trend. As the enforcement of bonds and conditional bonds was in general, and more broadly, almost irresistible (ie, there were only very limited ways in which a defendant at common law could escape the obligation to pay the sum on the face of the bond). See also Tiverios (n 23) 10–31; Edith Henderson, 'Relief from Bonds in the English Chancery: Mid-Sixteenth Century' (1974) 18(4) *American Journal of Legal History* 298, 300.

61 *Waberley v Cockerel* (1541) Dyer 51, extracted in Baker, *Sources of Legal History* (n 55) 285, where Serjeants Staunford and Bromley captured the utilitarian justification for double recovery: '[I]t is nevertheless better to suffer mischief to one man than inconvenience to many, which would subvert the law. For if matter in writing could be so easily defeated and avoided by such a surmise, by naked breath, a matter in writing would be of no greater authority than a matter of fact.' See also TFT Plucknett and JL Barton (eds), *St German's Doctor and Student* (Selden Society, 1974) 77–8. The label 'utilitarian' could be used to justify this approach, notwithstanding that term was not in use in the fifteenth century. Utilitarianism would only become an identifiable moral and political philosophy after 1780 with the publication of Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (T Payne & Son, 1790). However, the nomenclature of 'utility' was borrowed by Bentham from the earlier works of David Hume and had been used by Bentham in *A Fragment on Government* (T Payne, E Elmsly and E Brooke, 1776).

eventually became available in equity.[62] Again, making a bond non-traversable proof of a debt in a common law case is very certain and efficient. Indeed, the common law approach was expressly justified on the basis that it was efficient for the great many who were trying to enforce bonds at the expense of a few careless individuals.[63] But where there is clear and accessible evidence that B has discharged his obligation to A under the bond, there appears little merit in allowing A to double recover under the bond by virtue of his mere possession and production of the document.

This does not mean that economic efficiency and legal certainty are irrelevant to the creation and form of a legal rule. Starting with economic efficiency, while this ought not be the exclusive goal of the law, it ought nevertheless to be seen as a desirable goal for any legal system. Accordingly, when selecting between multiple morally defensible approaches to a particular legal issue, economic efficiency can serve as a useful supplementary (or second order) criterion for deciding on one approach over another. Put simply, economic efficiency considerations serve a tiebreaker function. It can be a useful analytical tool deployed to break a tie between two fairly evenly poised and otherwise justifiable approaches to an area of law (ie, choosing between (i) two different underlying non-consequentialist moral approaches to an area of law; or (ii) two different methods or forms of a legal rule when translating high-level moral principles into positive law).[64]

Similarly, with respect to the importance of legal certainty, it is true that the general law and associated coercive power of the state should ultimately 'be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used'.[65] A lack of certainty in the law can be a friend of tyranny.[66] It is antithetical to the rule of law for a legal instrument to mean

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62 Relief became available in equity during the reign of Edward IV (1442–83): AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 (July) *Law Quarterly Review* 392, 416–18; DEC Yale (ed), *Lord Nottingham's Chancery Cases (Vol 2)* (B Quaritch, 1957–61) 9; DEC Yale (ed) *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge University Press, 1965) 213; WT Barbour, *The History of Contract in Early English Equity* (Oxford University Press, 1914) 85–9.

63 *Waberley v Cockerel* (n 61).

64 See Hanson, Hanson and Hart (n 53) 324: 'recognizing some weaknesses in law and economics does not justify ignoring it. Whatever its costs, law and economics also has some benefits. After all, while the claim that efficiency should serve as *the* goal of the law might not find much support, many people — and perhaps most people — still believe that efficiency should be *a* goal of the legal system. And, where the model's relevant assumptions are plausible, law and economics can contribute in important ways to our understanding of laws' effects, of how those laws might be altered to better serve the goal of efficiency, or, alternatively, of what the efficiency costs of pursuing different policy goals … might be'.

65 FA Hayek, *The Road to Serfdom* (Routledge & Kegan Paul Ltd, 1944) 62. See also JD Heydon, 'The "Objective" Approach to Statutory Construction' in John Sackar and Thomas Prince, *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 332, 335–6; J Dinwiddy, 'Bentham' in W Twining, *Bentham: Selected Writings of John Dinwiddy* (Stanford University Press, 2003) 54.

66 Lieber (n 23) 88.

whatever an apparatchik thinks is an expedient way to resolve a given dispute. Accordingly, I do not wish to be taken as suggesting that certainty is not important to the general law. Rather, I am making the modest claim that certainty in and of itself does not exclusively provide a positive justification for a particular legal rule. Arguments based on legal certainty need to be deployed carefully and in a manner that does not prove too much. A legal rule that you become my indentured servant under set conditions can be enacted by parliament in a sufficiently certain manner, but few would think this a moral rule. It is for this reason that there is much wisdom in Glanville Williams' observation that 'it is to the interest of legal certainty that, other things being equal, the rules of law should be as clear of application as possible'.[67] For present purposes, the ultimate question is whether 'other things' are indeed equal. Thus, we must appeal to some further factor beyond legal certainty to explain the objective approach to interpretation. The rights-based thesis in the Part IV of this article achieves this aim, while nonetheless providing sufficient efficiency and certainty.

C *Protecting Reasonable Reliance*

The third commonly-cited justification for an objective approach to interpretation is that it is justifiable to depart from the actual intentions of a draftsperson in order to protect a relevant party's reasonable reliance on the legal instrument.[68] This argument has particular force in the context of the law of contract, where it is said by some commentators that an objective approach to interpretation is required where contractual obligations are conceptualised as 'obligations to ensure that others whom we induce to rely upon us are not made worse off as a consequence of that reliance'.[69] If this underlying approach to the law of contract were to be adopted then, as Collins has observed,

> the objective test implies that a court should in principle not be concerned with an inquiry into intention at all. The issue is rather what a *reasonable* promisee would have understood by the promises being made in the contract, not what the promisor intended nor what the promisee had hoped for at the outset.[70]

There are several problems with the reliance-based justification for the objective approach to legal interpretation. First and foremost, very few modern legal commentators would suggest that the law of contract is concerned with protecting reasonable reliance. The promissory model remains the orthodox

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67 Glanville Williams, 'Law and Language — II' (1945) 61 (January) *Law Quarterly Review* 179, 185.
68 A position identified in Collins (n 46) 228–31; Atiyah (n 44) 21, 86–7; and Mitchell (n 13) 13.
69 Smith, *Contract Theory* (n 5) 78. For commentators that favour this approach see Collins (n 46) 228–31; Atiyah (n 44) 21, 86–7.
70 Collins (n 46) 228–9.

explanation of the law of contract.[71] Second, the reasonable reliance justification cannot explain why an objective approach permeates the general law, as an objective approach is used to interpret written instruments even where detrimental reliance on the instrument is impossible or improbable (for example, a sealed will, secret and half-secret trusts, the draft contract that never left the desk of the law graduate, or the private member's Bill which is destined to languish in parliament and never come to a substantive vote).[72]

Third, a reliance-based model does not fit analytically with areas of the law in which the objective approach to interpretation persists. This is for the simple reason that, in the law of obligations, the parties' bilateral rights and obligations precede any reliance by the counterparty (putting estoppels to one side).[73] Take, for instance, a trustee's primary obligation to comply with the terms of her trust and the related strict remedies arising from the accounting procedure where she fails to do so.[74] The imposition of such legal duties and the related legal remedies cannot be explained by virtue of protecting a trustee's or a beneficiary's reasonable reliance on the terms of the trust instrument. This is because, for example, the remedy has the potential greatly to exceed a beneficiary's reliance on the written instrument.

The reliance-based argument for an objective approach to interpretation in its most defensible context is problematic even if it is confined to the law of contract. This is because a reliance-based conceptualisation of contractual obligations cannot account for many key analytical features of the law, including that:[75] (i) a contract is binding from the moment of creation and not the moment

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71 See, eg, Smith, *Contract Theory* (n 5) 43–4.

72 One potential rejoinder to this point might be to say that such instruments are being interpreted *as if* they were to be relied upon later.

73 PS Atiyah viewed equitable estoppel and contract as operating in the same substantive space. On this view, both doctrines enforce a contract, albeit with detrimental reliance standing in for the consideration requirement whenever estoppel is invoked. In response, Ben McFarlane correctly observes that salient analytical differences between the jural relations involved in contract and estoppel mean that this cannot be the case: the law of contract imposes an immediate right–duty relationship at the point of formation, which obliges the promisor to perform the promise, whereas estoppel only imposes a primary *liability* on the promisor at some later point in time and only if there is a prospect of the promisee suffering a detriment as a result of his or her reasonable reliance on the promise. Cf PS Atiyah, 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 (April) *Law Quarterly Review* 174, with B McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press, 2nd ed, 2020); B McFarlane, 'Equitable Estoppel as a Cause of Action: Neither One Thing nor One Other ' in Degeling, Edelman and Goudkamp (n 5) 359, 370.

74 See *Youyang Pty Ltd* v *Minter Ellison Morris Fletcher* (2003) 212 CLR 484, where the High Court of Australia emphasised that a trustee's duty to comply with the terms of the trust is fundamental. See generally on this point Charles Mitchell, 'Stewardship of Property and Liability to Account' [2014] (3) *Conveyancer and Property Lawyer* 215; James Edelman and Steven Elliott, 'Money Remedies Against Trustees' (2004) 18(3) *Tolley's Trust Law International* 116; NA Tiverios and Clare McKay, 'Orthodoxy Lost: The (Ir)Relevance of Question in Quantifying Breach of Trust Claims' (2016) 90(4) *Australian Law Journal* 231.

75 Smith, *Contract Theory* (n 5) 90–6.

of reliance.[76] Accordingly, a promise or agreement between A and B is the prerequisite for the general law's imposition of contractual obligations, not A and B's reasonable reliance of the content of the contract; (ii) contractual obligations are read, and given effect to, as primary obligations to perform what was promised and *not* as secondary obligations to provide a remedy to B for the adverse consequences of her reasonable reliance on A's promise; (iii) the default measure of compensation for breach of contract does not seek to remedy B's reliance, but rather seeks to put B in as good a position as she would have been in had the contract been performed.[77] Indeed, it is only in the exceptional circumstance that B cannot prove the position she would have been in had the contract been performed that she might be able to recover as damages such expenditure as was reasonably incurred in reliance on the broken promise.[78] In sum, the promissory model explains why many features of contract law turn out to be consistent with the reliance model, without having to erect a conceptually independent defence of the reliance approach. This is for the simple reason that, in protecting promising, the law of contract also necessarily protects reliance as a *derivative* matter.

D *Protecting Third Parties*

The final commonly-cited justification for an objective approach to interpretation is said to be the protection of third parties.[79] The argument is that, given that juridical relationships created within the law of obligations can form the subject matter of further equitable interests (such as equitable assignments,[80]

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76 Reliance alone is insufficient because a valid contract requires: (i) offer; (ii) acceptance; (iii) consideration; (iv) an intention to create legal relations; and (v) semantic certainty of the agreement. See Andrew Burrows (ed) *A Restatement of the English Law of* Contract (Oxford University Press, 2016) 52–79; and NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th ed, LexisNexis 2008) 10 [1.16].

77 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J).

78 Indeed, reliance damages for breach of contract are only recoverable to the extent which B would have recovered them if A had properly performed the impugned contract (ie, as a matter of law expectation damages *cap* reliance damages showing it is the expectation measure performing the important remedial work in this context): *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 414 (Dixon and Fullagar JJ); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 85–6 (Mason CJ and Dawson J), 126–7 (Deane J); *Clark v Macourt* (2013) 253 CLR 1, 11 [27] (Crennan and Bell JJ).

79 Calnan (n 44) 16; Lewison (n 12) 14 [1.04]; Prince (n 38) 504; Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 44; Murray Gleeson, 'Legal Interpretation — The Bounds of Legitimacy' in Hugh Dillon (ed) *Advocacy and Judging: Selected Papers of Murray Gleeson* (Federation Press, 2017) 242, 245; Gleeson (n 47) 279.

80 See, eg, *Brice v Bannister* (1877–78) LR 3 QBD 569.

charges,[81] charge backs,[82] trusts[83] and sub-trusts[84]), an objective approach to interpretation protects vulnerable third parties by giving evidential primacy to the content on the face of the impugned instrument (as opposed to giving evidential primacy to evidence that is only within the knowledge of the parties or relevant draftsperson). Again, this justification does not, in and of itself, provide a wholly convincing reason for adopting an objective approach to interpretation across the general law.

While third parties do indeed benefit from the objective approach to interpretation, there are two main problems with this justification. First, equitable interests derived from a contract (such as a trust, assignment or charge) cannot be greater than the source of rights contained in the contract itself.[85] Accordingly, if the contract does not allow for such equitable interests to be created in favour of third parties (by the insertion of an non-assignment clause, for example) then there is no reason to be worried about the prejudice suffered by interested third parties when interpreting such instruments. Nonetheless, instruments incapable of creating third party rights are still interpreted objectively. Second, it is less clear why, in interpreting a bilateral legal instrument, courts should apply a default rule of interpretation that is primarily concerned with protecting potentially interested third parties. Ultimately, whatever approach to interpretation courts adopt, third parties (or, perhaps more accurately, the lawyers representing third parties) will take the necessary steps to protect themselves before taking an interest in a contract (or other bilateral legal instrument) between unrelated parties.

However, it ought to be noted that third party interests may nonetheless be relevant to the interpretative questions of: (i) who is the relevant recipient of the communication contained within a legal instrument. For example, some legal instruments, such as a charge, are expressly intended by the author to give third parties notice of an equitable interest and thus are intended to be read as such; and (ii) the related question of how much bilateral contextual extrinsic evidence ought to be admitted in the process of interpretation where a third party is an intended recipient of the communication. For example, where the document between A and B is intended to be publicly registered,[86] and thereby to affect directly the legal interests of C (a third party), an uncommon bilateral

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81 See, eg, *Holroyd v Marshall* (1861–62) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 532, 543 (Lord Macnaghten).

82 See, eg, *Re Bank of Credit and Commerce International SA (In Liquidation) (No 8)* [1998] AC 214.

83 See, eg, *Don King Productions Inc v Warren (No1)* [2000] Ch 291 (CA); *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 CLC 434.

84 See, eg, *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch), [226] (Briggs J).

85 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 404 [32] (Finn and Sundberg JJ); *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* (2017) 94 NSWLR 108, 137 [112] (Bathurst CJ).

86 Such as a registered mortgage or charge.

understanding of the language between A and B ought not to affect C.[87] As Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ observed in *Westfield Management Limited v Perpetual Trustee Company Limited*:

> [T]he third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[88]

IV Foundations of the Objective Approach

A *Conventions*

The argument made in this Part is that the principal reason why an objective approach to interpretation permeates the general law is that language and communication are interpersonal by nature.[89] There is no such thing as an individual having his own internal or subjective language: 'words are used for communication and communication requires shared or public meanings'.[90] Put another way, language does not operate unilaterally but multilaterally (or at the very least bilaterally). Before this argument is outlined in more detail, it ought to

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87 Gleeson (n 47) 279–80, 288. See also the detailed discussion on this point in Paul S Davies, 'The Meaning of Commerical Contracts' in Paul S Davies and Justine Pila (eds) *The Jurisprudence of Lord Hoffmann* (Hart, 2017) 215, 226–30.

88 (2007) 233 CLR 528, 539 [39]. See also *Re Sigma Finance Corp (In Administration)* [2010] 1 All ER 571, 589 [37].

89 The original basis for this 'use' philosophy of language is set out in Ludwig Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell, 4th ed, 2009) 86–111 [198]–[315]. For a good modern defence of Wittgenstein's thesis see Saul A Kripke, *Wittgenstein on Rules and Private Language* (Blackwell Publishing, 1983) 56–113. See also Hilary Putnam, 'The Meaning of "Meaning"' (1975) 7 *Minnesota Studies in the Philosophy of Science* 131, 144, where he concludes that you can 'cut the pie any way you like, "meanings" just ain't in the head!'; and Hilary Putnam, *Meaning and the Moral Sciences* (Routledge, 1978) 97–9. Such 'use' theories of language have been built upon in the modern context by John R Searle, 'How to Derive 'Ought' From 'Is'' (1964) 73(1) *The Philosophical Review* 43, 52–8; JL Austin, 'Performative Utterances' in JL Austin, *Philosophical Papers* (Oxford University Press, 2nd ed, 1970) 233, 237–45; John R Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979); Searle (n 7) 199–200. The question whether a language is being followed (ie, whether its use is correct) and the rejection of the idea of a subjective language is distinct from the question of how languages come into existence and are learnt. For a scholarly and accessible discussion of the latter see Steven Pinker, *The Language Instinct: How the Mind Creates Language* (Penguin Science 1994) 25–54 where Pinker defends the thesis that the capacity for *homo sapiens* to learn language is an inherent biological instinct (akin to a spider's instinctual ability to spin a web), and where he gives examples of language being reformed (eg, isolated hearing-impaired individuals who have developed unique sign languages once they form a community).

90 Smith, *Contract Theory* (n 5) 273, citing Wittgenstein (n 89). Further, since thoughts, intentions and beliefs are linguistic objects, there are no such things as private thoughts, intentions, and beliefs, in the sense that their *semantic* contents are not determined by their holders: Gottlob Frege, 'The Thought: A Logical Inquiry' (1956) 65(259) *Mind* 289.

be emphasised that the idea that a legal doctrine or area of law that depends on external communication necessarily depends on conventional meanings to give content to that communication is not a novel one. It is consistent with the uniform hermeneutic thesis across the private law as set out by Heydon and Crennan JJ in *Byrnes v Kendle*.[91] In defending a uniform hermeneutic thesis, their Honours made the important point that, in the context of contractual interpretation, legal relationships are ultimately contingent on a court giving meaning to external communications or signals that are intended by the author to have legally significant effects:

> These conclusions flow from the objective theory of contractual obligation. Contractual obligation does not depend on actual mental agreement. Mr Justice Holmes said:
>
> '[P]arties may be bound by contract to things which neither of them intended, and when one does not know the other's assent …
>
> '[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, — not on the parties' having *meant* the same thing but on their having *said* the same thing.'[92]

Similarly, in *Mannai Investment Co Ltd v Eagle Star Life Assurance*,[93] Lord Hoffmann emphasised that, in interpreting a contract, one must start by examining the words by their shared or public understanding — a process which his Lordship termed as reading such words as if they were 'utterances in everyday life'.[94] Likewise, in a speech that was otherwise critical of Lord Hoffmann's approach towards contractual interpretation,[95] Lord Sumption opined that '[l]anguage is a mode of communication. Its efficacy depends on the acceptance of a number of conventions that enable people to understand each other.'[96]

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91 *Byrnes* (n 26).

92 Ibid 285 [100], citing Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 463–4. See generally James Edelman, 'Uncommon Statutory Interpretation' (Seminar Paper, Western Australia Constitutional Centre, 30 May 2012); Heydon (n 36) 711.

93 [1997] AC 749.

94 Ibid 774. See also Leggatt (n 40) 468.

95 Lord Sumption's view is that surrounding circumstances help to understand the meaning of words in context. However, Lord Sumption argues that the use of background circumstances is only permissible in the interpretative context as a means to understanding language. Accordingly, Lord Sumption cautions that Lord Hoffmann's broad interpretative approach of considering the background matrix of factors that lead to the creation of written obligations may enable a court to reach impossible interpretations on the grounds of reasonableness or fairness. See Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, 309. For the response see, Leonard Hoffmann, 'Language and Lawyers' (2018) 134 (October) *Law Quarterly Review* 553. For a discussion of the disagreement between Lord Sumption and Lord Hoffmann see Ewan McKendrick, 'Interpretation' in William Day and Sarah Worthington (eds) *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart, 2020) 3.

96 Sumption, above n 107, 309.

The position taken here is that an objective approach to interpretation is justifiable across private law transactions notwithstanding the fact that such transactions are ultimately consent-based. Four premises underpin this argument. The first premise is that language involves, as an essential component, a series of conventional rules. The rules of language are rules that are applied to determine the meaning of an expression. The meaning of an expression is determined by the 'use' that a community conventionally attributes to that expression.[97] That is, the proper use of a word depends on the ability of a potential rule-follower (A) to follow the conventional rules that govern a language. Put another way, the existence of a public convention determines the use to be attributed to an expression and therefore the rules of a language.[98]

To make this claim is not wholly to overlook the fact that language is ultimately used by a speaker who intends to convey a certain meaning to a recipient.[99] Language can have a genesis in individuals wishing to represent a certain state of affairs to the world (or simply another person), but for this process to be effective it must, at some point, become conventionalised. In order to convey meaning, a speaker will require a repeatable and dependable standard that recipients can deploy for this purpose. The necessary connection between 'speaker meaning' and conventional meaning was made by John Searle in the following terms:

> We have to assume that [*homo sapiens* or some equivalent hypothetical species] are capable of evolving procedures for representing [internal] states of affairs; where the representations have speaker meaning ... They can represent states of affairs that they

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97 See also Searle (n 7): 'The introduction of conventional devices for representing states of affairs already presupposes the notion of speaker meaning. Any agent who is capable of using those devices must be able to use them meaningfully.'

98 I am not referring here to a private code that could be deciphered into English but the possibility of a truly private or subjective language.

99 The seminal work in this area is Grice (n 9) 383: 'Perhaps we may sum up what is necessary for A to mean something by X as follows. A must intend to induce by X: a belief in an audience, and he must also intend his utterance to be recognized as so intended.' See also Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1989). Grice answers the question 'what is it to communicate meaningfully?' with three points: (i) to get people to recognise speaker's intentions (ie, the speaker's intention is to produce an effect in the listener); (ii) the speaker means something if the utterance produces an effect on the hearer to recognise an intention to produce that effect; (iii) a communication is successful if the hearer understands the speaker's actual intention (ie, understanding is the hearer's recognition of speaker meaning). For an overview see John R Searle, *Mind, Language and Society: Philosophy in the Real World* (Basic Books, 1998) 139–45: 'Grice saw correctly that when we communicate to people, we succeed in producing understanding in them by getting them to recognize our intention to produce that understanding. Communication is peculiar among human actions in that we succeed in producing an intended effect on the hearer by getting the hearer to recognize the intention to produce that very effect. ... I am trying to tell someone that it is raining, I succeed in telling them as soon as they recognize that I am trying to tell them'. For an overview of the philosophy of language in the legal context see Leggatt (n 40) 457–9; Ekins & Goldsworthy (n 5); Chris Staughton, 'How Courts Interpret Commercial Contracts?' (1999) 58(2) *Cambridge Law Journal* 303, 304.

> believe exist, states of affairs they desire to exist, states of affairs they intend to bring about, etc.
>
> These procedures, or at least some of them, become conventionalized. What does that mean exactly? It means that given collective intentionality, if anyone intentionally engages in one of these procedures, then other members of the group have a right to expect that the procedures are being followed correctly. This, I take it, is the essential thing about conventions. Conventions are arbitrary, but once they are settled they give the participants a right to expectations. [100]

On this understanding, it is still correct to care about a speaker's intentions.[101] Indeed, a speaker's objective intentions are necessarily contingent on her subjective intentions. What is acknowledged, however, is that those subjective intentions must be funnelled through dependable and stable conventional rules, which, in turn, give recipients an expectation that those conventions are being followed (ie, conventions are the accepted common stock clues by which a speaker's meaning is conveyed). Thus, the objective intention of the speaker is that which the reasonable recipient of the communication would infer, given the totality of the accessible evidence, was the speaker's subjective intention.

The second premise concerns the existence of rules and how they are followed. Compliance with rules is objective. It is not conceptually possible for there to be a 'closed' or 'private' system of rule following. Whether or not A is complying with a convention cannot be assessed on the basis of the facts particular to, and known only by, A (or perceived due to A's state of mind) alone.[102] If it were possible to determine rule following on account only of A's state of mind, then A merely thinking that he was following a rule would constitute compliance with that rule. Accordingly, rule following is not an internal process particular to, or known only by, A. Rather, whether or not a rule (or convention) is being followed is to be judged by an external (normative) standard. I do not wish to be taken as saying that individuals ought not choose to act virtuously,[103] or to seek

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100 Searle (n 7) 199–201. See also at 189: 'But which really comes first, speaker meaning or convention? In the order of logical dependence the speaker intentionality must be logically prior, because these conventions for unstructured propositions encode preexisting speaker meanings. However, without language and its conventions you can only have very simple speaker meanings.' See also John Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press, 1983) 176–9. For a similar point, see Kripke (n 9) 271.

101 In the legal context see Ekins & Goldsworthy (n 5) 46.

102 See also Stevens (n 5) 168.

103 For example, Aristotle's project in *Nicomachean Ethics* argued that to achieve *eudemonia* (or happiness), an individual ought to live their life in a manner that cultivates a set of virtues of character and intellect (including the character of 'justice'). Thus the morally right course of action in a given set of circumstances becomes the course of action that fosters virtuous characteristics and therefore self-development. Unlike a rights-based theory (which has primary explanatory force in the private law), Aristotle argued that a person should not be a stickler for his legal rights where to do so would not be virtuous, therefore stultifying the chances of personal development towards happiness. This idea was given a spiritual underpinning by St Thomas Aquinas, who

meaning or self-improvement on a day-to-day basis. I am simply making the point that personal vows, internal goal-setting and subjective thoughts (for example, your private New Year's resolutions) are not the domain of the externally binding rights and obligations with which the private law is concerned.

The third premise is that a purely private or subjective approach, being a potential alternative to an objective approach, is not possible as there would be no 'rules of the game'. That is, there would be no conventions against which to assess the future use of language and therefore no ability to ascertain compliance with the rules of the language. Wittgenstein put this point in the following terms:

> To follow a rule, to make a report, to give an order, to play a game of chess, are *customs* (usages, institutions). To understand a sentence means to understand a language. To understand a language means to have mastered a technique. … '[F]ollowing a rule' is a practice. And to think one is following a rule is not to follow a rule. And that's why it's not possible to follow a rule 'privately'; otherwise thinking one was following a rule would be the same thing as following it. … Shared human behaviour is the system of reference by means of which we interpret an unknown language.[104]

The fourth premise is that, while the narrow conventional meanings of words are used to understand the meaning of an utterance, they are not the whole picture. This is because a speaker of the English language relies on additional general principles when communicating, such as: (i) the assumed existence of shared background information;[105] (ii) a recipient's general powers of reasoning and

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observed that acting virtuously facilitates an individual attaining eternal life. It then follows that once such virtues have been cultivated temporally, they will continue to exist spiritually and thus in perpetuity. See Roger Crips (ed), *Nicomachean Ethics* (Cambridge University Press, rev ed, 2014) 16–24, 30–6, 76–9, 98. Aristotle's observation is picked up by Thomas Aquinas, *Summa Theologica, Part 1–2 (Pars Prima Secundae)* q 96 art 6. For an overview of the influence of Aristotle's work on that of Aquinas see James Doig, 'Aquinas and Aristotle' in Brian Davies and Eleonore Stump (ed), *The Oxford Handbook of Aquinas* (Oxford University Press, 2012) 33.

104 See Wittgenstein (n 89) 86–8 [198]–[206]; Michael Beany 'Wittgenstein on Language: From Simples to Samples' in Ernest Lepore and Barry C Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford University Press, 2006) 40, 55 where it is noted that Wittgenstein's 'private language argument … can be seen as developing [his] rule-following considerations'. See also Herman Cappelen and Josh Dever, *Puzzles of Reference* (Oxford University Press, 2018) 89. However, this is not to say there are no meaningful differences between compliance with a language and compliance with other social rules. One clear difference is that *other* social rules require a language on which they can build, whereas language evolves from a complex mix of speaker meaning and convention.

105 For example, where I straightforwardly offer 'to sell you 100 bushels of corn for $1000 AUD', understanding this utterance requires us to accept a large number of contextual assumptions, including: (i) an understanding of what an exchange or sale is; (ii) an understanding of what a contract is; (iii) an understanding of a particular unit of fiat currency; (iv) an understanding of what corn is; (iv) an understanding of imperial weights and measurements; (v) a basic understanding of numeracy (we could go on). As Grice (n 9) 387 notes: 'In cases where there is doubt, say, about which of two or more things an utterer intends to convey, we tend to refer to the context (linguistic or otherwise) of the utterance and ask which of the alternatives would be relevant to other things he is saying or doing, or which intention in a particular situation would fit

rationality; and (iii) the assumption that parties to a conversation intend to communicate meaningfully.[106] Such principles explain the ability of linguists to account for phenomena such as irony, metaphor, hints, implications and other like cases.[107] I do not consider that such principles do harm to the general thesis put forward in this article. On the contrary, they form part of the public rules against which a speaker makes an utterance.

Consider an example where Holmes asks Diplock to go to the 'Bentham's Head Pub tonight for a couple of milkshakes'. Diplock responds: 'I have to look after my baby son and my wife is away.' Diplock's response is generally understood to mean that he is rejecting Holmes' proposal, but this cannot be explained by virtue of the narrow linguistic meaning of the text or utterance alone. The reasoning deployed to take Diplock's utterance as a rejection of Holmes' proposal appears to be that, first, we assume as a general rule that Diplock is not speaking nonsense but is attempting to communicate meaningfully with Holmes and cooperate in the conversation (that is, unless there is evidence to the contrary). Second, from Holmes' perspective it appears that Diplock must have meant something more than the literal meaning of what he said, as the literal meaning of the words neither expressly reject nor accept Holmes' proposal to go to the pub. Third, Holmes (and the average person for that matter) understands certain notorious background information — such as that looking after a baby is labour intensive, that a baby cannot be left alone, that a pub at night is not a good place for a baby and that childcare arrangements may take some time to organise and are difficult to finalise at late notice. Fourth, given the content of the third point the 'rational person'[108] in Holmes' position will realise that it is

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in with some purpose he obviously has (eg, a man who calls for a "pump" at a fire would not want a bicycle pump). Nonlinguistic parallels are obvious: context is a criterion in settling the question of why a man who has just put a cigarette in his mouth has put his hand in his pocket; relevance to an obvious end is a criterion in settling why a man is running away from a bull.' See also *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, 653 [73] (Leeming JA); JW Carter, 'Context and Literalism in Construction' (2014) 31(2) *Journal of Contract Law* 100, 118.

106 Searle (n 89) 31–6; Grice (n 99) 26–31, 109. This idea has been expanded on by relevance theory, which argues that the meaning of express linguistic expressions are generally underdetermined such that there is a significant gap between the intentions of the speaker and a narrow, literal meaning of an utterance. See, eg, Deirdre Wilson, 'Relevance Theory' in Yan Huang (ed) *The Oxford Handbook of Pragmatics* (Oxford University Press, 2017) 85–9 [4.3]: 'The goal [of relevance theory] is to find an overall interpretation that confirms the presumption of optimal relevance. For this, the addressee must enrich the decoded sentence meaning at the explicit level, and complement it at the implicit level, so as to yield enough cognitive effects to satisfy his expectations of relevance. … What makes it reasonable for the addressee to follow a path of least effort is that the speaker is expected (within the limits of her abilities and preferences) to have made the utterance as easy as possible for him to understand.' See also Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (Blackwell Publishing, 2002) 83.

107 Searle (n 89) 30.

108 Michael Dummett, *The Seas of Language* (Clarendon University Press, 1993) 104: 'Any adequate philosophical account of language must describe it as a rational activity on the part of creatures to

unlikely that Diplock can both attend the pub and look after his baby son. Finally, given that to accept a proposal one must be able to perform one's side of whatever the proposal is, as a matter of basic inductive reasoning it appears to be most probable that Diplock is rejecting (politely) Holmes' proposal, as Diplock does not have capacity to attend the pub and his communication, which was made in direct response to a proposal, likely means something. Such contextual reasoning is standard in Anglo-Australian contractual interpretation jurisprudence.[109] However, it ought not to be overlooked that the context between the parties might nonetheless suggest that a court should give interpretative primacy to textual clues over other contextual and purposive clues. For example, think of the common rule that a formal and professionally drafted instrument is to be interpreted more precisely than a communicative act of a lay person.[110] This rule, which favours text over certain aspects of context, is itself a contextual assumption — an assumption that certain persons *generally* wish to be taken more literally.[111] Thus, sometimes the context may itself point to the parties' intending a text to have a narrow meaning.

In this connection I wish to emphasise that, just because the interpretive task at general law is a search for objective meaning, it does not stand to reason that there are no difficult interpretive questions at general law.[112] This follows from the fact that day-to-day interpretation requires inductive and not deductive reasoning. The aim of interpretation is to infer the author's most probable intention from the communicative act. As such, intentionality provides a guide in this process. The court arrives at the correct answer by inductively balancing competing principles through which intentionality has been funnelled, namely the public meaning of the specific words the author has deployed and a range of permissible contextual factors.[113] Context can, at its broadest, include: notorious background facts; prior negotiations and preparatory works; the purpose and

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whom can be ascribed *intention* and *purpose*' (emphasis added). Thus Lord Hoffmann was correct to observe in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 ('*Investors Compensation Scheme*'): 'Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listener.'

109 There are plenty of examples, but four good illustrative examples are *Investors Compensation Scheme* (n 108); *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2004) 240 CLR 45, 62 [36] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ); *Thorney Park Golf v Myers Catering Ltd* [2015] EWCA Civ 19, [26] (McCombe LJ) ('*Thorney Park Golf*'); *Ecosse Property Holdings* (n 39) 551 [16], 555 [27] (Kiefel, Bell and Gordon JJ).

110 For a simple example of this principle in action see *Thorney Park Golf* (n 109) [24] (McCombe LJ).

111 A point made in Morgan (n 52) 233.

112 David McLauchlan, 'Contractual Interpretation: What Is It About?' (2009) 31(1) *Sydney Law Review* 5, 6; Ryan Catterwell 'Striking a Balance in Contract Interpretation: The Primacy of the Text' (2019) 23(1) *Edinburgh Law Review* 52.

113 For good lists of contextual factors and related rules of interpretation see Smith, *Contract Theory* (n 5) 274; Leggatt (n 40) 468–70; Catterwell (n 112). Leggatt notes that language users will nonetheless have subtle preferences regarding the application of such contextual factors.

internal logic of a written instrument; common industry and institutional practice; the parties' powers of rationality; and even shared normative understandings[114] (although there is a legitimate debate to be had concerning when context should yield to secondary considerations of legal certainty and efficiency).[115] Finally, in the very rare case in which the court cannot arrive at the most probable meaning of a text when contrasting multiple meanings, the contract will be void for uncertainty (unless the impugned term can be severed).[116]

B *Morality and Conventions*

The final aim of this Part is to identify why the legal system is justified in accepting the objective meaning attributed to the text by a recipient of a legal instrument over a subjective speaker meaning.[117] That is to say, the account so far provided is somewhat incomplete as it does not fully explain *why* the drafter of a legal instrument must be bound by public standards (as discussed in the previous section) for determining meaning, as opposed to a 'mistaken' subjective speaker meaning (in the sense that the meaning fails to coincide with the public meaning attributed to the speaker's intentions as understood by the reasonable recipient.)[118] It is all well and good to identify conventional standards, but why do those standards apply to me when I never agreed to them? Why trample upon my expressive individuality? In cases where an undisclosed speaker meaning and the conventional meaning come apart, why does the law choose to favour the reasonable listener rather than the speaker? The fundamental point made in this

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114 See, eg, Ronald Dworkin, *Law's Empire* (Hart, 1998) 19–20, using the example that one ought not profit from his own wrong, as applied in *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889). See also 65–6 and 76–83.

115 In this connection, arguing in favour of a more textualist (ie, *Codelfa* style) approach to contractual interpretation, which limits the use of extrinsic material in the United States of America on the basis of utility or efficiency *albeit at the expense of interpretive accuracy*, see Alan Schwartz and Robert E Scott, *Contract Interpretation Redux* (2010) 119(5) *Yale Law Journal* 926, 930. See also Morgan (n 52) 228–37.

116 See the novel case of *Raffles v Wichelhaus* (1864) 2 Hurl & C 906; 159 ER 375, where a contract was void for uncertainty in circumstances where the court could not identify the subject matter of the central obligation contained within the instrument. In this case the subject matter of the contract was a cargo of cotton on the ship *The Peerless* sailing from Bombay, India, in circumstances where there where two ships called *The Peerless* sailing from Bombay within several months of each other and it was not possible to discern which ship the contract identified.

117 Although this argument would not strictly be limited to the law. See Searle (n 7) 199–201.

118 By allowing for the possibility of a 'mistaken' speaker meaning, I believe that the position taken in this article is *typically* wider than that taken by 'use' theorists such as Wittgenstein (n 89) 86–8 [198]–[206]. This is because I acknowledge that a speaker may not use a term correctly and thus the speaker meaning and the sentence meaning of a sentence can come apart. This will particularly be the case in circumstances where a speaker is ignorant of his incorrect use of a word. See the example concerning gammon steak above at (n 6). See also Leggatt (n 40) 459 noting that 'the possibility of concluding that the parties to a contract have used the "wrong" words presupposes the existence of an intention to convey a meaning which is distinct from the conventional meaning of the words used. That seems to import the psychological theory of interpretation.'

article is that if the author of a legal instrument utilises socially recognised conventional standards in order to affect her private law legal relations with others, she should be bound by those standards. That is, by using conventional or public standards, the author has implicitly 'given her word' to the recipient or recipients , and so cannot resile from the expectations immediately created by the objective meaning attributed to her utterance by application of those standards. The creation of such expectations is why the defence of the objective approach in this article could be termed 'rights-based'; individuals become obliged to follow such conventions once they are deployed, because they create in the other party a 'right' to expect that those conventions will be followed.

It is worth introducing the point with a simple example derived from the law of contract. You attend my house one evening to play a series of boardgames. During the evening I draft a brief contract to which you assent. The central promises in the contract are that I am obliged to sell you 'the chessboard on my bookshelf for the sum of $100'. Assume, however, that I honestly believe that the reference to 'chessboard' as specified in our agreement actually refers to the boardgame 'snakes and ladders', which is sitting next to my chessboard on the same bookshelf. You have paid me $100 and now the time has arrived for me to perform and deliver up the chattel to you. In this example, which meaning is to govern our contractual relations? Is it: (i) the conventional meaning that my use of 'chessboard' would have conveyed to you; or (ii) my honestly held subjective belief that I have sold you my copy of 'snakes and ladders'? The answer is, of course, (i). You are entitled to the chessboard and not my copy of snakes and ladders.[119] As the promisee, you must be entitled to insist on performance of a promise in terms of the expectations created by the meaning conveyed to you by my communication.[120] The corollary of this point is that, for present purposes, we can put to one side my undisclosed subjective intentions in making the promise.[121] However, if I had outlined in my offer to create a contract that 'chessboard' actually means 'snakes and ladders', then a contextual interpretation of my offer would now match my inner will. It is for this reason that it is unobjectionable for us to define the shared understanding of terms within an agreement (think of the

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119 See, eg, *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–2 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ): '[This] case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to [the promisee].' See too *Toll (FGCT) Pty Ltd* (n 41) 177–8 [35].

120 A classic enunciation of this principle is *Smith v Hughes* (1871) LR 6 QB 597, 607 (Blackburn J): 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

121 In making this claim I am not ruling out the potential for vitiating factors to allow me to set aside the contract or have the contract declared *void ab initio* in circumstances where, for example, I did not understand the transaction. The salient point is that the contract is binding and legal effect is given to its objective meaning *unless* there is some good reason for the court to allow me to escape the bargain. See further, Heydon (n 36) 711; Gleeson (n 47) 284.

common glossary of definitions that is contained in most contracts, trusts or deeds etc). As Stephen Smith has explained:

> [I]f John and Ann agree that whenever John says 'dog' he means 'cat', then the next time John says 'dog' to Ann, the meaning is what John says will be the thing ordinarily called 'cat'. Although language must be shared, it is possible for there to be only two sharers.[122]

Putting to one side cases where the parties have expressly defined the terms of an agreement (which still depend on a shared convention), the question remains why courts should adopt the objective conventional and public meaning in the original snakes and ladders example above. Let us examine the different elements of this simple example. First, I have utilised a series of conventional standards — a series of words in English — in order to communicate to you my intention to be bound by the promise. Second, I can attempt (ultimately unsuccessfully) to resile from this promise by arguing that while it is true that, applying public conventions, I have promised to sell you the 'chessboard on my bookshelf', I nonetheless never subjectively intended to make such a promise and thus I should not be bound by the conventional meaning of my promise. Third, on the other hand, in applying the conventional standards of the English language, you quite rightly understood my promise to mean that I intended to sell you my chessboard for the sum of $100. Fourth, only one of our two potential approaches is capable of being applied universally across time without contradicting itself.

Let us imagine for a moment what would happen under a legal system in which I am allowed to resile from the conventional understanding of my promise to you. More importantly, extrapolate this out to all contracting parties in our position. If the law allowed me, and others in my position, to resile from selling you 'the chessboard on my bookshelf' on account of my undisclosed subjective intentions, then the conventional standards, and the related promissory conventions and other legal institutions that they reinforce, would be undermined. That is, unless the common linguistic conventions are followed there would cease to be a stable objective linguistic convention on which the private law could properly develop rights, duties, powers, liabilities, privileges and immunities.[123] Indeed, the intended effect of the act of promising is the

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122 Smith, *Contract Theory* (n 5) 274. See also McLauchlan (n 112) 5, 15–23.

123 See Searle (n 100) 178; JL Austin, *How to do Things with Words* (Oxford University Press, 1962) 101. It is important to appreciate that, for example, promises are not internal mental events. Rather, promises are a type of outward communicative act. Such acts were termed 'performatives' by JL Austin. Performatives are linguistic acts that *do not* consist of using language to describe or report something that exists in the world. Rather than being descriptive 'performatives' actually change the nature of the world. Thus a performative act (such as a promise) is not merely a communicative act to convey information or describe the world. The act of uttering the performative makes it

creation of stable expectations concerning people's future actions. It cannot be the case that the promisor can only have 'stability for me but not for thee'. This is, however, not intended to provide an indefeasible argument for a promisor to *always* do what was promised. As made clear in the earlier discussion on legal interpretation in contradistinction to legal construction, there are other events of greater normative pull that can, in limited circumstances, justify releasing a promisor from the objective meaning attributed to her promise.[124] The point here is to defend the baseline objective approach to interpretation and to observe that this approach is nonetheless consistent with promissory theories of contract.

By using conventional standards to effect a promise with a counterparty, the promisor cannot now resile from the objective meaning attributed to her utterance by application of those standards without damaging the shared legal institutions that those standards create. In short, there exist public conventions as to how one can express intentions.[125] The use of such conventions creates expectations in others. If one is to take the benefits of such conventions in order to enhance one's own autonomy then one must also take on the burden that, as a matter of parity, others are entitled to those same benefits. The conventions will break if employed disingenuously or erroneously, and so it is wholly justifiable to hold a promisor to the objective meaning attributed to her utterance.

Objectivity in interpretation protects the underlying linguistic standards on which the private law builds shared institutions. The objective approach to legal interpretation enables the creation of a sophisticated social reality in that it provides the underlying building blocks for the creation of the shared legal institutions of the private law, being the underlying rights, duties, powers, liabilities, privileges and immunities between two jural parties that the state can enforce. This argument mirrors Immanuel Kant's famous hypothesis that, in a society where the truth of an expression can no longer be taken at face value, the conventional standard of promising would be swiftly abolished:

> I ask myself: would I actually be content that my maxim (to extricate myself from a predicament by means of an untruthful promise) should hold as a universal law (for

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reality. Some examples generally favoured by Austin and Searle are as follows: (i) an official naming a ship ('[w]hen I say "I name this ship the *Queen Elizabeth*" I do not describe the christening ceremony, I actually perform the christening' (Austin (n 89) 235)); (ii) marriage – where A says 'I do' to B in the right circumstances, he marries B and thus the nature of the world is changed by the communicative act (Austin (n 89) 235)); (iii) promising — where A says to B that 'I promise to wash your windows on date Y' in the right circumstances, a *new* promise to wash B's windows has been created by this act (Austin (n 89) 242)).

124 See n 23. There are plenty of examples including relief against penalties, relief against forfeiture, restraint of trade, and vitiating factors. One clear example is a contract being voidable in equity for a unilateral mistake. A unilateral mistake when entering the contract will render it voidable if, one party (ie, A) is mistaken and B knows, or ought reasonably to know, of the mistake, provided that: (i) the mistake is to the terms or subject matter of the contract; (ii) the mistaken party (ie, A) is the party who is alleging that the contract is voidable; and (iii) there is a degree of 'unconscionability' on the part of B in taking advantage of the mistake: *Taylor v Johnson* (1983) 151 CLR 422.

125 See, Goddard (n 5) 268–71.

> myself as well as others), and would I be able to say to myself: everyone may make an untruthful promise when he finds himself in a predicament from which he can extricate himself in no other way? Then I soon become aware that I could indeed will the lie, but by no means a universal law to lie; for according to such a law there would actually be no promise at all, since it would be futile to pretend my will to others with regard my future actions, who would not believe this pretense; or, if they rashly did so, would pay me back in like coin, and hence my maxim, as soon as it were made a universal law, would have to destroy itself.[126]

C *The Bilateral Nature of Private Law*

The reasoning set out above, which binds a person to the objective meaning attributable to their intentions, is not limited to the law of contract but applies *mutatis mutandis* more broadly to other areas of the private law. A more fundamental observation can also be made with respect to the various other species of private law legal instruments to which the objective theory applies (such as trusts, wills, bonds and security documents). All of these examples involve vesting in an individual or institution the legal power to change the legal relations of others concerning a certain activity.[127] In the context of private law, such legal powers are normatively bilateral.[128] That is, the exercise of such powers affects both the power holder and the liability holder, and for this reason such powers must be exercised through communication of the power holder's intention to bring about the relevant change. Only communication of that intention enables the change to be effected in a way that publicly implicates both juridical parties.[129]

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126 Kant (n 22) 17–19 [4:402]–[4:403]. Note that other normative theories come to a not dissimilar conclusion as that adopted in this article. See, eg, Joseph Raz, 'Review: Promises, Morals, and Law' (1982) 95(4) *Harvard Law Review* 916, 936–8 (justifying objectivity based on utilitarianism on the grounds that it protects the institution of promising from harm); John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2nd ed, 2011) 303 (justifying objectivity based on the stability and cooperation required to build the 'common good' from the perspective of natural law). For a view of natural law like Finnis see Nicholas J McBride, *The Humanity of Private Law Part I: Explanation* (Hart Publishing, 2018) 165: 'Contract law would fail in its mission to facilitate the orderly workings of the marketplace were it *not* to give effect to the objective principle'.

127 I will refer to an individual who is liable to have their legal position changed by a power holder as being under a 'legal liability' or a 'liability holder'. See WN Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 44. Under Hohfeld's schema a legal power is defined as the ability (or factum) of the power holder (A) to directly change the nature of the legal relationship between A and another individual (B) regarding a certain activity (thus with respect to that activity B is said to be under a liability vis-à-vis A). See also Chris Essert, 'Legal Powers in Private Law' [2015] 21(3–4) *Legal Theory* 136, 145.

128 Essert (n 127) 136, 145–52. See also John Finnis, 'Some Professorial Fallacies About Rights' (1972) 4(2) *Adelaide Law Review* 377, 379.

129 EJ Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) 103: 'On stepping into a world of interaction, the freely willing actor establishes a presence there though acts that have an externally recognizable nature. Purely mental imaginings and reservations, however real they are to the actor or however serious the consequences to which they might in due course leave, have no status in this world of interaction.'

The following implications flow from this argument. First, facts particular to, or known only by, the power holder about her intentions are insufficient to serve this purpose because they do not implicate the liability holder. Secondly, given that the power holder must engage in an act of communication to affect the liability holder, she must, at some point, deploy a conventional public standard in order to do so. Thirdly, given the power holder's utilisation of conventional public standards, she can be taken by the liability holder to have utilised those standards honestly and correctly, lest those standards and the legal and social institutions they support be undermined. Fourthly, and finally, it follows that a power holder might conceivably exercise the power unintentionally — that is, the power holder might bring about a change in her jural relations with others by communicating an objective intention to do so, but without possessing the relevant subjective intention to do so. As Chris Essert observes, in the context of the law of contract and the law of property:

> [A legal] power is exercised through a single juridical event that cannot be conceived of by reference to some facts about A alone, or some facts about B alone, or indeed some facts about A alone and some facts about B alone. Rather, the power is exercised through an event — A's communication of intention to B — that must be understood in terms of A and B and the relationship between them. Thus the exercise of power in this paradigmatic case invokes the correlatively structured normativity that is characteristic of private law. …
>
> The orthodox view says that the common law of contract allows that one can contract unintentionally if one communicates or manifests the intention to contract. … [There] are dissenters, … [but] on the understanding of powers that I offer here, the orthodox view must be correct: the formation of the contract affects both parties and so must be constituted entirely by facts that are public as between them and not by facts that are entirely about one of them (such as their internal psychological states). … [Similarly] subjective intention is not required to exercise the power of consent [for example, with respect to land]; by communicating an intention to render some touching (or some entry onto land) non-wrongful, of some act that otherwise would infringe upon a right of mine — affects not just me but also (say) you, and so it must be explained by some fact that is not merely about me (or merely about you) but about both of us, and the communication of my intention is just such a fact.[130]

This point regarding an overt communicative act to create a property right is clearly illustrated by cases that establish the rule that a property owner cannot transfer or create a proprietary or possessory interest in that property without some outward form of expression. As Megarry J observed in *Re Vandervell's Trusts (No 2)*:

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130 Essert (n 127) 147, 153–4. See also *Smith v Hughes* (1871) LR 6 QB 597, 607 (Blackburn J).

> [T]he mere existence of some unexpressed intention in the breast of the owner of property does nothing: there must at least be some expression of that intention before it can effect any result. To yearn is not to transfer.[131]

Likewise, a declaration of trust (even a self-declaration of trust or the declaration of a secret trust) must involve some form of external objective manifestation against which to assess rule compliance. As Briggs LJ said in *Juliet Bellis & Co v Challinor*, a 'person creates a trust by his words or conduct, not by his innermost thoughts'.[132] In a synthesis of the points made above concerning various types of legal instruments, Gleeson CJ observed:

> With statutes, as with wills and contracts, the courts will need to respect the primacy of the text, understood in light of context and purpose. That — the text — is what is being interpreted. The legitimate object of the exercise is to give legal effect to the expressed intention of the person, or persons, or institution which has the legal capacity to create the rights in question.[133]

A similar approach extends beyond the attribution of meaning to legal instruments and applies more generally to other areas of the private law. Imagine if, after giving a lecture, I take a stroll down Tottenham Court Road in London. I reach Leicester Square and come up with the bright idea of publishing a billboard. Accordingly, I purchase advertising space on a billboard and publish on it a message that states, without foundation, that my friend Julius engages in the practice of 'match fixing'.[134] Julius is readily identifiable from my statement because I include his personal details with the communication and he is a well-known local footballer playing for Tottenham Hotspur.

My communication is defamatory because the words have a clear conventional meaning attributable by the reasonable recipient of the communication.[135] They suggest to the ordinary reader that Julius engages in a negative type of cheating; rather than perform at his best, Julius attempts to influence the outcome of sporting contests to further his own self-interest. This is the conventional meaning attributed to the communication. It is simply not to the point for me to attempt to deny that this should be the meaning attributed to the words on the basis that my subjective intention is different. Suppose that I actually intended to express that Julius is a fine footballer — indeed, so good that his presence on the pitch ensures a fixed outcome. My subjective view of what the

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131 [1973] 3 WLR 744, 767. On the nature of an overt act to acquire a right of possession see also Ben McFarlane, *The Structure of Property Law* (Hart, 2008) 154–6.

132 [2015] EWCA Civ 59, [59] (Briggs LJ).

133 Gleeson (n 79) 253–4 (emphasis added). See also *Wilson v Anderson* (2002) 213 CLR 401, 418 [8] (Gleeson CJ).

134 On idiomatic expressions, irony, metaphors etc, see the discussion above from n 106 and accompanying text.

135 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 542 (Gaudron and Gummow JJ); 573 (Kirby J); *Trkulja v Google LLC* (2018) 263 CLR 149, 159-160 [31]–[32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

communication means simply does not matter; I must take the conventional rules of the English language as I find them.[136] If I were responsible for the creation of the defamatory billboard then I have committed a tort by infringing Julius's right to personal reputation. Importantly, a right to personal reputation would not be worth much unless it was underpinned by a stable conventional standard on which it could be based.

The salient point is that the drafter of a legal instrument is employing a conventional device in a particular social setting for the purpose of affecting the jural relations of (at least) one other person. That is, the speaker is attempting to create, change, regulate or abolish rights, duties, powers, privileges or immunities. Given that this can only be achieved in a manner that publicly implicates both juridical parties, the speaker should be *prima facie* bound to the commitments, directives and orders contained in her communicative act. A failure to adhere to these objective standards would erode or debase the conventional building blocks on which shared legal institutions are created. These are sound reasons for holding a speaker to the immediate expectations created by her or his communicative act. As John Searle puts it,

> [I]t is implicit that the speaker employing the conventional device in a social setting for the purpose, for example, of conveying some truth about the world to the hearer, is thereby committed to that truth. That is, we will not understand an essential feature of language if we do not see that it necessarily involves social commitments, and that the necessity of these social commitments derives from the social character of the communication situation, the conventional character of the devices used, and the intentionality of speaker meaning. It is this feature that enables language to form the foundation of human society in general. If a speaker intentionally conveys information to a hearer using socially accepted conventions for the purpose of producing a belief in the hearer about a state of affairs in the world, *then the speaker is committed to the truth of his utterance.*[137]

V Conclusion

There are three important points to take away from this article. First, there remains a meaningful distinction between legal interpretation and legal construction. The former is concerned with the attribution of meaning to a legal text, whereas the latter is concerned with the ultimate legal effect of that text. Secondly, the most cited justifications proffered in support of the objective approach to interpretation provide insufficient support for it. Finally, the unified hermeneutic thesis as enunciated by the High Court of Australia in respect of the interpretation of instruments across the private law is a justifiable consequence

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136 This point is detailed in Stevens (n 5) 171. See also Leggatt (n 40) 475.

137 Searle (n 7) 194–201 (emphasis added).

of: (i) the multilateral nature of language as involving shared conventions; (ii) there being no such thing as private rule-following and therefore private compliance with language; and (iii) the moral and policy-based conclusion that, when the author of a legal instrument utilises socially recognised conventional standards in order to affect her legal relations with others, she should be bound by those standards, lest they be undermined.

THE FATE OF CLASS ACTION COMMON FUND ORDERS: THE POLICY, PROCEDURAL AND CONSTITUTIONAL ISSUES OF A LEGISLATIVE REVIVAL

VICKI WAYE* AND MICHAEL DUFFY†

Common fund orders ('CFOs') have had a significant effect on Australian third-party-funded class actions by requiring all class members to make a contribution to the third-party litigation funder's fee in the event of a successful outcome. This altered past practice whereby only class members who had contracted with the litigation funder would be liable for such a contribution. However, in a 5:2 decision in BMW Australia Ltd v Brewster *(2019) 94 ALJR 51 ('*Brewster*'), the High Court cast doubt on CFOs, determining that neither s 33ZF of the* Federal Court of Australia Act *1976 (Cth) nor s 183 of* Civil Procedure Act 2005 *(NSW) provided a legal basis for making CFOs at the outset of proceedings so as to secure litigation funding support. In late 2020, the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services recommended that legislation be enacted to 'address uncertainty' arising from* Brewster *in a manner that would enable CFOs to be made at settlement or judgment. In this article, the authors canvass normative arguments as to the merits of CFOs and compare the alternative practice of making funding equalisation orders. They also consider the related issue of courts setting overall funding commissions. Given the possibility of legislative intervention, they also review arguments as to the potential constitutional validity of CFOs, a matter that was raised, but received very limited treatment from, the High Court in* Brewster*.*

I INTRODUCTION

Class actions are protracted and resource intensive. Accordingly, legal costs and disbursements associated with class proceedings are high.[1] Class representatives

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1 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) 208 [14.7] ('PJC Report'); Peter Cashman and Amelia Simpson, 'Costs and Funding Commissions in Class Actions' (UNSW Law Research Paper No 20-87, Faculty of Law, University of New South Wales,

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who initiate class proceedings on behalf of the class of persons harmed are typically not in a position to meet these costs themselves,[2] and so class law firms will generally act on a conditional fee basis.[3] In Victoria it is also possible for class law firms to seek a group costs order, and to effectively act on a contingency fee basis.[4] If the class proceedings are successful, ordinarily these legal costs including any conditional fee premium are deducted from the class settlement or judgment,[5] enabling their burden to be shared equitably among all class members.

Not many law firms in Australia are able to bear the high costs and risks associated with conditional or contingency fee arrangements.[6] Consequently, class actions will often require funding from third-party financiers.[7] Ensuring that the cost of this funding is also shared equitably among class members has led to the judicial development of several types of order. This article is primarily concerned with one of these orders, the common fund order ('CFO'), which was developed by the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* ('*Money Max*'),[8] and subsequently declared invalid by the High Court in *BMW Australia Ltd v Brewster* ('*Brewster*').[9]

This article comes on the heels of considerable agitation to enact legislation to either overturn or ringfence the scope of the *Brewster* decision. Much of that agitation was examined by the Parliamentary Joint Committee on Corporations and Financial Services ('PJC'), which, in late 2020, recommended that legislation be enacted to 'address uncertainty' in a manner that would enable CFOs to be

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December 11 2020) 45–6 <https://ssrn.com/abstract=3765081>, estimating that legal fees approximate 15 per cent of the settlement amount; Andrew Watson and Michael Donelly, 'Financing Access to Justice: Third-Party Litigation Funding and Class Actions in Australia' (2014) 55(1) *Canadian Business Law Journal* 17, 17–18.

2 Watson and Donelly (n 1) 20–1.

3 A conditional fee agreement is an agreement whereby payment of the class law firm's fees is contingent on the successful outcome of the action. It typically incorporates a premium on otherwise normal fees of up to 25 per cent. See, for example, *Legal Profession Uniform Law* (NSW) ss 181–3. Conditional fee agreements are available in civil matters in all Australian jurisdictions.

4 In Victoria, a group costs order may be sought by the lead plaintiff in a class action enabling legal costs payable in the proceeding to be assessed as a percentage of the judgment or settlement and thus shared pro rata among all class members: *Supreme Court Act 1986* (Vic) s 33ZDA. Group costs orders are not yet available in other Australian jurisdictions.

5 Australian Law Reform Commission, *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018) 83 [3.48] ('ALRC Final Report'). However, it is also possible to frame costs as an 'add on' to the settlement: see *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637 ('*Cantor*').

6 Camille Cameron, 'Litigation as 'core business:' Analyzing the Access to Justice and Regulatory Dimensions of Commercially Funded Class actions in Australia' in Deborah R Hensler, Christopher Hodges and Ianika Tzankova (eds), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar, 2016) 205.

7 See ALRC Final Report (n 5) 75, Table 3.1 and Figure 3.1, which show that the percentage of funded vs non-funded class proceedings grew steadily to 77 per cent between March 2017 and March 2018.

8 (2016) 245 FCR 191 ('*Money Max*').

9 (2019) 94 ALJR 51 ('*Brewster*'). The *Brewster* decision was a conjoined appeal from the Federal Court and from the New South Wales Court of Appeal. The Federal Court matter, *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 ('*Westpac v Lenthall*'), is discussed in the judgment at 59–61.

made at settlement or judgment.[10] In making that recommendation, the PJC declined to adopt an earlier, broader recommendation from the Australian Law Reform Commission ('ALRC'). The ALRC was of the view that an explicit power to make CFOs at any stage of the proceeding (not just at settlement or judgment) was required as part of a phalanx of provisions that would enable all affected by wrongdoing to enjoy the benefits of class proceedings, not merely those who took active steps to participate by entering funding and retainer agreements.[11]

The purpose of this article is to critically consider whether such statutory intervention is warranted. It begins by examining the mechanics of CFOs, then considers normative arguments for and against the creation of a statutory power to make them. It also examines how *Brewster* affects other judicial powers such as the power to make equalisation or cost contribution orders and the power to review funding fees encapsulated within pre-existing funding agreements. Finally, the article considers constitutional barriers that may impede the enactment of legislation facilitating CFOs.

II What is a Common Fund?

An order for a 'common fund' in Australian third-party-funded class actions refers to an order made in an open class proceeding,[12] which has the effect of requiring all class members — whether represented, identified or otherwise — to make a contribution to the third-party litigation funder's fee in the event of a successful outcome. It alters past practice whereby only those class members who had contracted with the litigation funder would be liable for such a contribution, notwithstanding that the entire class may have received the benefit of a finding or settlement.[13] The doctrine thus treats overall damages in a class action as a 'common fund' from which funders' costs may be deducted by the court regardless of whether the funder has a contract with the litigant.[14] Common funds appear to derive from equitable principles and, as noted by Lee J in *Klemweb Nominees Pty Ltd v BHP Group Limited* ('*Klemweb*'),[15] are now well-embedded in the law of the United States.

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10 PJC Report (n 1) 122–5, ch 9 and recommendation 7. See further discussion below in Part II.

11 ALRC Final Report (n 5) [4.1]–[4.2].

12 An open class is where the class is not limited to clients of the lawyer or funder but covers all persons who have suffered the loss described in the class definition.

13 *Perera v GetSwift Ltd* (2018) 263 FCR 1, 10, 14 (Lee J) ('*Perera*').

14 See further *Brewster* (n 9) 58 [1] (Kiefel CJ, Bell and Keane JJ). Their Honours state that a CFO is 'characteristically made at an early stage in representative proceedings and provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered'.

15 (2019) 369 ALR 583, 610 [128] ('*Klemweb*').

A *United States Common Fund Doctrine*

The common fund doctrine in the United States is quite old and is said to have its origins in two early Supreme Court cases,[16] *Trustees v Greenough*[17] and *Central RR & Banking Co v Pettus* ('*Pettus*').[18] The former case applied the idea in derivative litigation where a whole class of people — the shareholders of the corporation — benefitted from the litigation and were equitably called upon to bear a portion of the expense. The Court applied principles of trust law noting:

> Where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.[19]

In *Pettus* this was applied to a creditor class action against a corporate debtor and it was found that the plaintiff should be eligible for an award beyond what he had paid in fees, otherwise others who had benefitted would be 'free-riders'. The free-rider notion has subsequently been applied in a number of cases.[20] In *Boeing Co v Van Gerner*, the United States Supreme Court said that the common fund doctrine

> rests on the perception that persons who obtain the benefit of a lawsuit without contributing to court costs are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.[21]

The doctrine also appears in United States' disputes between plaintiffs and their attorneys on the one hand, and subrogated insurers on the other, where the latter have sought reimbursement of all plaintiff compensation obtained. The plaintiffs and their attorneys have used the doctrine to preserve an entitlement to legal costs where they have laboured to achieve the fund.[22]

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16 Mark J Loewenstein, 'Shareholder Derivative Litigation and Corporate Governance' (1999) 24(1) *Delaware Journal of Corporate Law* 1, 2.

17 105 US 527 (1881).

18 113 US 116 (1885).

19 105 US 527, 532 (1881).

20 The doctrine appears in *Harrison v Perea*, 168 US 311 (1897); *United States v Equitable Trust Co*, 283 US 738 (1931); *Sprague v Ticonic National Bank*, 307 US 161 (1939); *Mills v Electric Auto-Lite Co*, 396 US 375 (1970); *Hall v Cole*, 412 US 1 (1973). See generally Wayne McIntosh and Cynthia Cates, *Multi-Party Litigation: The Strategic Context* (UBC Press, 2009) 28, 207.

21 444 US 472, 478 (1980).

22 See, eg, *Wajnberg v Wunglueck*, 2011 IL App (2d) 110190; *Ex Parte State Farm Auto Ins Co*, 118 So 3d 699 (2012).

B *Common Funds in English Law*

In English law, a doctrine of the same name and similar nature appeared in older estate litigation where the costs of a plaintiff executor and competing beneficiaries in a will dispute might be taxed on the basis that all beneficiaries contribute equitably.[23] This is an expression of the equitable doctrine of the trustee's right to indemnity from trust assets for costs reasonably incurred.[24] Trust law might thus provide some analogies with the doctrine, though it is important to note that class-action funders are not trustees. Lawyers for the representative party are clearly trustees as to damages settlements held by them but have usually not incurred financing costs payable to a funder for which they could claim indemnity from the fund (in fact the reverse is true in that lawyers will usually have been financially supported by the funders). Another possible analogy here might be that the representative party, as a fiduciary or trustee to group members for any overall sum received on their behalf, would have an equitable right of indemnity from that fund in relation to amounts owed to a funder for services rendered in recovering those sums (and the funder might in certain circumstances have a right against group members' damages by way of subrogation of the representative party's right).[25] Such a funding structure would have some difficulties, however, and class-action third-party funding arrangements have not developed along such lines.[26]

The English case of *National Bolivian Navigation Company v Wilson*[27] has been referred to in Australia by the Full Federal Court in *Westpac v Lenthall* as offering support for the common fund doctrine .[28] That case concerned, inter alia, costs orders in a representative proceeding brought in Chancery. The proceeding involved a representative suit by Wilson on behalf of himself and other bondholders who had suffered financial loss in a failed commercial venture to build canals and railways in Bolivia and Brazil. After appeals to the Court of Appeal[29] and House of Lords,[30] the trustees of the remainder of the bondholders' loan funds were ultimately ordered to repay the remaining funds proportionally

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23 Peter St John Hevey Langan, *Civil Procedure* (Sweet and Maxwell, 3rd ed, 1983) 327–8, referring to *Rules of the Supreme Court* 1965 (UK) O 62 r 28(1).

24 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324–5 (Latham CJ), 335–6 (Dixon J).

25 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ).

26 This position is, nonetheless, consistent with the view that the court might adjudicate on these matters once a settlement is received (which is the most popular interpretation of *Brewster*, discussed see below in Part IIC. The fact that the representative party is usually not liable to the funder for the entirety of its fees is a stumbling block to this approach. A second, related difficulty is that while a funding agreement might conceivably make a representative party liable for all funding fees in proving common issues, it could hardly make them liable for funding fees relating to proving individual issues of group members.

27 (1880) 5 App Cas 176 ('*National Bolivian*').

28 *Westpac v Lenthall* (n 9) 49 [103] (Allsop CJ, Middleton and Robertson JJ).

29 *National Bolivian Navigation Company v Wilson* (1879) 13 Ch D 1.

30 *National Bolivian* (n 27).

to all bondholders. Wilson's legal costs were ordered to be paid out of the fund held by trustees on behalf of all bondholders.

The Full Court of the Federal Court in *Westpac Banking Corporation v Lenthall* noted of this decision:

> There was no discussion of the doctrinal basis of the order, but it is plain that it was just and fair and a reflection of equity being equality: all bondholders who had benefited from the suit by Mr Wilson were responsible for a proportionate share of all proper costs, charges and expenses that he paid or for which he was liable in pursuit of an action that had realised a benefit for them.[31]

C *Common Fund Orders in Australian Class Actions*

While CFOs had been made in several earlier cases at settlement,[32] the Full Federal Court decision in *Money Max* heralded a practice whereby CFOs could be made shortly after commencing proceedings. In that case and subsequent cases,[33] the CFO was made conditional on court approval of the terms of the funding agreement, although final approval of the funding commission rate was postponed until settlement or judgment when all matters related to liability, harm and scope of harm were determined.[34] The Full Court also held that, as a matter of principle, no class member should be worse off as a result of the making of a CFO versus other forms of expense sharing.[35] According to the Full Court, the power to make 'commencement CFOs'[36] stemmed from the Court's general power under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) to make any order necessary to do justice in the proceeding.[37]

However, in a 5:2 decision in *Brewster*,[38] the High Court determined that, absent an express power, neither s 33ZF of the *Federal Court of Australia Act 1976* (Cth) nor its New South Wales counterpart, s 183 of the *Civil Procedure Act 2005* (NSW), provided a legal basis for CFOs. According to the High Court, these provisions do not extend to the making of a CFO at the outset of proceedings in order to secure litigation funding support. When considering the validity of CFOs,

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31 See further *Westpac v Lenthall* (n 9) 49.

32 See, eg, *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625; *Farey v National Australia Bank Ltd* [2014] VSC 625.

33 See, eg, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* [2019] FCA 1500 ('*Asirifi-Otchere*'); *Duck v Airservices Australia* [2018] FCA 1541; *Pearson v State of Queensland* [2017] FCA 1096.

34 *Money Max* (n 8) 209–10. In some later cases, a CFO was made with an indicative funding commission ceiling. See, eg, *Asirifi-Otchere* (n 33); *Carpenders Park Pty Ltd (as trustee of the Carpenders Park Pty Ltd Staff Superannuation Fund) v Sims Metal Management Ltd* [2019] FCA 1040 ('*Carpenders*'); *Perera* (n 13); *Impiombato v BHP Billiton Limited* [2018] FCA 1272 ('*Impiombato*').

35 *Money Max* (n 8) 213–5. Other expense sharing orders such as a funding equalization order are discussed below in Part IV.

36 See *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 384 ALR 650, 655–8 (Lee J) ('*Davaria*'), distinguishing between a 'commencement CFO', a 'settlement CFO' and a 'judgment CFO,'

37 *Money Max* (n 8) 222–6.

38 *Brewster* (n 9).

the High Court also examined other types of order that might enable the costs of advancing class proceedings to be spread among funded and non-funded class members. The majority Justices acknowledged that providing equity of contribution between funded and non-funded members was required to mitigate against 'free riding' by class members.[39] Provided they were made at the conclusion of proceedings, the Court therefore accepted that funding equalisation orders ('FEOs') were a valid means of ensuring justice as between group members.[40] From the High Court's perspective, CFOs were not required to deal with free riders as FEOs already provided a solution to the problem.[41]

An FEO involves deducting a sum from non-funded class members' compensation equivalent to what would be payable to litigation funders if those members had entered into litigation funding agreements. These amounts are then pooled and redistributed pro rata among all class members.[42] Thus, the amount of the funder's entitlement from funded group members is deducted from the recovery of all putative group members (not just the funded group members). The sum deducted from unfunded group members is then paid back into the overall settlement sum (rather than to the funder). Consequently, FEOs do not augment the sums paid to the funder whereas other forms of expense sharing such as CFOs do augment such sums. Under a CFO, an amount equivalent to the funding commission that would have been payable is deducted from unfunded members' compensation pro rata and then remitted to the funder.[43] The difference between class member returns under an FEO and a CFO is set out in modelling outlined in Table 1.

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39 Ibid 71 [85] (Kiefel CJ, Bell and Keane JJ). See further 86 [167] (Gordon J).

40 Ibid 72 [88]–[90] (Kiefel CJ, Bell and Keane JJ), 86 [169] (Gordon J).

41 Ibid, 72 [88] (Kiefel CJ, Bell and Keane JJ).

42 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [14], [17] (Stone J); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [28] (Finkelstein J); *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [58] (Gordon J); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [85] (Murphy J) ('*Earglow*'); *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289, [61] (Lee J); *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, [13] (Anastassiou J) ('*Clime Capital*').

43 See, eg, *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [12] ('*Caason*').

Table 1 – Comparing Funding Equalisation Orders with Common Funds Orders

<table>
<tr><td colspan="2">Assumptions for simplified model
(a) Open class action with two litigants with identical claims, one third-party funded, one unfunded.
(b) A settlement of $200,000.
(c) The funder has a contractual right to 20 per cent commission from litigant One.
Note: Australian class actions in fact require at least seven members however the model uses only two for simplicity and illustration. Similar percentage results might be achieved with 100 funded and 100 unfunded litigants with identical monetary claims.</td></tr>
<tr><td colspan="2">Scenario One — Funding Equalisation Order (FEO)</td></tr>
<tr><td>Litigant A (funded)
$100,000 claim
<u>Less $20,000 to funder</u>
$80,000 net to A</td><td>Litigant B (unfunded)
$100,000 claim

$100,000 net to B</td></tr>
<tr><td colspan="2">Equalisation
Deduct $20,000 from B — goes back to overall pool.</td></tr>
<tr><td>$80,000 + $10,000 from A = $90,000</td><td>$80,000 + $10,000 from A = $90,000</td></tr>
<tr><td>Possible further funder commission[44]
<u>Less $2,000 to funder (20 per cent of $10,000)</u>
$88,000</td><td>

$90,000</td></tr>
<tr><td>Outcome
Litigant A receives $88,000
Funder receives $22,000.</td><td>Litigant B receives $90,000</td></tr>
</table>

[44] The funding agreement may allow a funder to subsequently charge a further commission on the amount redistributed to the pool (of all class members) from unfunded class members' recoveries. This issue is discussed by Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* (2018) 132 ACSR 258, 307 [222] ('*Petersen*') (see Part IV below) and by Beach J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receiver and Manager appointed)(in liq)* (2017) 343 ALR 476, 490, 503 ('*Blairgowrie Trading*').

Scenario Two — Common Fund Order (CFO)	
Litigant A (funded) $100,000 claim Less $20,000 to funder $80,000 net to A	*Litigant B* (unfunded) $100,000 claim Less $20,000 to funder $80,000 net to B
Outcome Litigant A receives $80,000 Funder receives $40,000	Litigant B receives $80,000
Scenario Three — Common Fund Order (CFO) with change to assumption (c) (Changed assumption — existence of CFOs and competition see market commissions reduce by a quarter to 15 per cent.)	
Litigant A (funded) $100,000 claim Less $15,000 to funder $85,000 net to A	*Litigant B* (unfunded) $100,000 claim Less $15,000 to funder $85,000 net to B
Outcome Litigant A receives $85,000 Funder receives $30,000	Litigant B receives $85,000

Following *Brewster*, there has been a series of cases considering whether the High Court's decision was confined to pre-settlement or pre-judgment CFOs and whether other powers such as ss 33V (approval of settlement) or 33Z (2) (distribution of judgment sums) of the *Federal Court of Australia Act 1976* (and their state equivalents) might be relied upon to make CFOs. On the one hand, there have been cases where the courts have determined that a power to make a CFO at settlement is available under s 33V.[45] On the other hand, some judges have expressed the view that the High Court's pronouncements regarding the validity of CFOs and its preference for FEOs apply across the board.[46] At the time of writing, the Full Federal Court and the New South Wales Court of Appeal have

45 See, eg, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [31] ('*McKay Super Solutions*'); *Clime Capital* (n 42) [9]; *Uren v RMBL Investments Ltd & Anor (No 2)* [2020] FCA 647, [50]–[53].

46 See, eg, *Cantor* (n 5), [418].

declined to rule on the matter.[47] The uncertainty created by these divergent views prompted the PJC to recommend the enactment of a statutory provision apparently with the intent of ensuring that the courts are empowered to make a CFO at the resolution of class proceedings.[48]

In *Klemweb*,[49] a further issue arose as to whether a CFO could allow commission-based litigation funding by the lawyers for the lead plaintiff rather than just by a litigation funder. It was argued that this would indirectly allow a contingency fee to the lawyers in breach of s183 of the *Legal Profession Uniform Law*. A majority of the Full Court (Middleton and Beach JJ) found that, in formulating the terms of a CFO, the express or implied policy against contingency fees should be taken into account.[50] Conversely, Lee J suggested that the (state law) prohibition on contingency fees ought not inhibit the Federal Court in exercising its broad discretion to make orders to ensure justice in the proceeding, including what deductions should be made from a common fund.[51] The High Court's decision in *Brewster* throws further doubt on Lee J's dissenting view although a CFO incorporating a class law firm contingency-style fee remains a possibility if CFOs might still be made at settlement or judgment. Meanwhile, insofar as representative proceedings are concerned, in Victoria the public policy against contingency fees encapsulated within s 183 of the *Legal Profession Uniform Law* has been overridden by legislative reform facilitating a group costs order that all class members pay a contingency fee to the lead plaintiff's lawyer.[52]

Putting aside the question of whether the courts are validly empowered to make CFOs, the next Part of the article considers the normative arguments in support of explicitly enacting such a power.

III Normative Issues

Many (but not all) of the normative arguments favouring a broad-based CFO power were explored in the *Money Max* decision. This Part canvasses these arguments considering subsequent case law and developments, including the ALRC's *Final Report on Integrity, Fairness and Efficiency — An Inquiry into Class*

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47 *Davaria* (n 36); *Brewster v BMW Australia Ltd* [2020] NSWCA 272.

48 PJC Report (n 1) 125 [9.124], which recommends 'the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in [*Brewster*]'. That recommendation may not be entirely clear given that the precise ratio of *Brewster* is not universally agreed. However, the commentary in the PJC Report at 119–25 [9.96]–[9.122] suggests that the PJC has adopted views given in several courts that, although there is a lack of any power to make a CFO at an early stage in the proceeding, such a power remains (and should remain) at the point of settlement or judgment in a class action.

49 *Klemweb* (n 15).

50 Ibid 588 [22].

51 Ibid 612 [137].

52 *Supreme Court Act 1986* (Vic) s 33ZDA.

Action Proceedings and Third-Party Litigation Funders ('*ALRC Final Report*'),[53] the decision in *Brewster* and the PJC Report.

A *Reduction in Expensive Book Building Costs*

Costs associated with book building can comprise a substantial component of a litigation funder's project management fees or costs, which will ultimately be recovered from the class compensation pool.[54] Book building refers to the process of recruiting class members to tripartite funding and retainer agreements.[55] It is a time consuming and expensive process, especially where the class is numerous and diffuse.[56] Recruitment and marketing methods include the use of websites, mainstream as well as social media exposure, and personal pitching to larger class members such as institutional investors.

Prior to *Money Max*, because litigation funders' entitlement to recoup the above fees and commission was primarily contractual, book building was critical to the viability of class proceedings.[57] Alternately, if the proceedings had already commenced and an insufficient volume of class members entered funding agreements, the proceedings might have to be discontinued pursuant to s 33N of the *Federal Court of Australia Act 1976* (Cth).[58]

Apart from being expensive, book building is thus inherently risky. Despite deploying substantial resources to engage class members, not enough class members might be recruited and the funders' book building costs might be wasted.[59] This partly explains why litigation funders have historically preferenced shareholder class actions where larger institutional shareholders representing relatively high claim value can be more easily identified and recruited. Even where enough members can be recruited, time and effort expended explaining funding fees and commissions may also be wasted if the funder's return is subsequently reduced by a court when approving settlement.[60]

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53 ALRC Final Report (n 5).

54 *Perera* (n 13) 66 [246] (Lee J) ('*Perera*').

55 *Brewster* (n 9) 72 [91] (Kiefel CJ, Bell and Keane JJ), 80 [133] (Gordon J).

56 PJC Report (n 1) 104 [9.40].

57 Kaitlin Ferris, 'The Increasing Role of Class Developments in Litigation' (2019) 153 *Precedent* 36, 38.

58 Section 33N empowers the court to discontinue proceedings if the proceedings are no longer an efficient and effective means of obtaining collective redress. See further *Brewster* (n 9) 67 [65] (Kiefel CJ, Bell and Keane JJ), 81 [138]–[140] (Gordon J).

59 Ibid 84–5 [160] (Gordon J).

60 See, eg, *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq) (rec and mgr apptd)* [2019] FCA 2113, [53]–[54] (Murphy J) ('*Rushleigh*'), in which settlement approval was given on basis that the funder undertook to reduce the agreed rate of 35 per cent commission to 23.94 per cent of the gross settlement; *Petersen* (n 44) 308 [231] (Murphy J), in which it was agreed that the funding commission rate be reduced from 25 per cent to 13.7 per cent in settlement approval proceedings. The court's power to fix funding commissions at settlement is discussed below at Part V.

By making all class members equally responsible for the costs of funding proceedings without the necessity of contractual entitlement, CFOs obviate the need for expensive book building.[61] This reduces the amount of transaction costs that might be passed onto class members by funders, and also reduces the potential for the wasted costs referred to above. By reducing transaction costs, class proceedings are made more efficient and, by this means, the amount of redress received by class members can be enhanced.

CFOs may also make it more likely that class actions involving comparatively high book-building costs will proceed. Examples of class actions that might not proceed because they are made economically unviable due to high book-building costs include mass torts where the ambit of the class is unknown and actions where the personal characteristics of class members, including their vulnerability, make recruitment difficult.[62] Permitting CFOs for these types of claims may therefore improve access to justice by broadening the scope of matters initiated as class proceedings, reorienting them away from their current domination by shareholder and investor matters.[63]

Conversely, others argue that book building should not simply be characterised as an unnecessary transaction cost that incentivises shareholder and investor proceedings at the expense of other worthy class proceedings. The *ALRC Final Report* outlined submissions which argued that book building had several useful functions.[64] By requiring funders to invest substantial sums in engaging with potential class members, these advantages included: reducing the prospects of funder and law firm teams racing to the court house and competing for the right to manage lucrative, large scale class claims; building a culture of engagement among class members; and subjecting the funder and law firm's class project proposal to market scrutiny. For these reasons, the ALRC did not recommend that CFOs should be mandatory.[65]

The PJC Report adopted many of the views that had previously been put to the ALRC regarding the utility of book building, opining that early stage CFOs may 'encourage commencement of class actions without undertaking investigations to determine interest among class members and the potential for less consideration of the merits and viability of the claims'.[66] In expressing this view and in ultimately recommending against empowering the court to make an early stage CFO, the PJC did not reference the data demonstrating that the majority of

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61 See, eg, *Perera* (n 13) 14 [25] (Lee J): 'Rather than the economics of a class action being dictated by the size of sign-up, a CFO allows an open class representative proceeding to be commenced without the necessity to build a book of group members who have bargained away part of the proceeds of their claim.'

62 *McKay Super Solutions* (n 45) [16] (Beach J).

63 ALRC Final Report (n 5) 75 [3.20] Table 3.3, showing that between 2013 and 2018, 76 per cent of all class proceedings filed in the Federal Court were either shareholder or investor claims.

64 ALRC Final Report (n 5) 98 [4.32]–[4.33].

65 Ibid 99 [4.35].

66 PJC Report (n 1) 123 [9.112].

class proceedings are viable in that they were settled in a manner leading to beneficial outcomes for class members.[67] Nor did the PJC appear to take account of the deterrent power of the court to make adverse costs orders against lead plaintiffs, funders and, in egregious cases, law firms in the event that class claims are unsuccessful.

B *Impact on the Funder–Class Member Relationship*

As noted, CFOs avoid the need for book building. Consequently, the relationship between class members, the class law firm and the litigation funder will be more attenuated for a greater volume of class members than might have been the case if closed-class proceedings were pursued. This increase in attenuation has certain implications. The first relates to the funder-class member relationship and the utility of a regulatory regime that assumes a contractual relationship between them. The second relates to the impact on class law firm duties to non-client class members.

While there is limited argument supporting the imposition of fiduciary obligations between funder and funded parties,[68] such a duty is less likely in respect of class members who do not enter funding agreements (though duties of representative parties to all group members is a developing area and may ultimately impact both funders and lawyers).[69] Consequently, if as a result of a CFO the volume of class members without funding agreements increases, then the reach of the litigation funder's fiduciary and contractual obligations will correspondingly decrease. The absence of fiduciary or contractual duties upon funders therefore imposes considerable responsibility upon the courts to protect unfunded class members from the impact of unfair funder behavior, such as that raised in *Botsman v Bolitho*.[70] This lack of funder obligations to the court prompted the PJC to recommend extending the duty to act consistently with the overarching

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67 Vince Morabito, 'Shareholder Class Actions in Australia — Myths v Facts' (Research Paper, Department of Business Law and Taxation, Monash University, November 2019) 21 <https://ssrn.com/abstract=3484660>, noting settlement rates as follows: 'product liability class actions (57 per cent); mass torts class actions (60.8 per cent); employment class actions (62.9 per cent); and investor class actions (73 per cent)' and 55.5 per cent for shareholder actions'.

68 Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244. The argument made by these authors rests on typical funding terms that repose day-to-day management of litigation into the hands of funders.

69 Thus, if a representative party makes decisions that are in reality made by funders and/or lawyers in whom they have contractually reposed decision-making power, and such decisions breach duties to the class, group member action against the representative party may ultimately lead to third-party indemnity claims by the latter against funders and lawyers. These types of issues are partly illustrated in *Dyczynski v Gibson* (2020) 381 ALR 1 ('*Dyczynski*'), where the Court noted that representative parties have fiduciary obligations to class members: 209.

70 *Bolitho v Banksia Securities Limited* (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020). The problematic behavior of the funder and legal team are summarised in the PJC Report (n 1), 276–8, box 15.2.

purposes of the civil justice system to litigation funders. The PJC also recommended that litigation funders should be subject to cost penalties if they fail to comply with that duty.[71]

Meanwhile, regulatory developments post *Brewster* have added another layer of potential obligation between funders and class members. On 21 May 2020, the federal government announced that litigation funders would be subject to greater regulatory oversight by requiring them to hold an Australian Financial Services Licence ('AFSL') and to comply with the managed investment scheme ('MIS') regime.[72] The implementation of these new requirements involved removing exemptions from holding an AFSL and exemptions for litigation schemes,[73] effectively reinstating the decision of the Full Federal Court in *Brookfield Multiplex Funds Ltd v International Litigation Funding Partners Pty Ltd* ('*Brookfield*').[74] The amendments came into effect on 21 August 2020. The changes followed media and public debate about the increased incidence of class actions[75] (the extent of the increase being one matter of debate)[76] as well as concerns about high commissions and profits of unregulated funders and risks for businesses trying to trade through the COVID-19 pandemic.[77]

The background to this regulatory regime were reforms in the late 1990s under which financial services providers such as banks, insurers, superannuation funds and others were required to hold an AFSL under the *Corporations Act 2001* (Cth). Further, collective investment 'schemes' (such as public unit trusts) have for many years been required to be registered. 'Schemes' involve, inter alia, situations where people contribute money (or money's worth) to a common enterprise to produce financial benefits but do not have day-to-day operation of the enterprise.[78] Unregistered schemes are liable to be wound up by the Australian Securities and Investment Commission ('ASIC').[79]

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71 PJC Report (n 1) 287–8 [15.131].

72 Josh Frydenberg, Commonwealth Treasurer, 'Litigation Funders to be Regulated Under the *Corporations Act*' (Media Release, 21 May 2020).

73 Explanatory Statement, *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

74 (2009) 180 FCR 11. However, it should be noted that *Brookfield* appears contrary to the High Court's view of litigation funding as a credit facility in *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* (2012) 246 CLR 455, and therefore makes it harder to characterise even funded class members' interests as a contribution of money's worth to a scheme.

75 See, eg, David Crowe, 'New Rules for Litigation Funders after Jump in Class Actions', *Sydney Morning Herald* (online, 22 May 2020) <https://www.smh.com.au/politics/federal/new-rules-for-litigation-funders-after-jump-in-class-actions-20200521-p54vak.html>.

76 Ben Butler, 'Josh Frydenberg's Claim that Class Action Lawsuits Have 'Tripled' is Incorrect, Expert Says', *The Guardian* (online, 22 July 2020) <https://www.theguardian.com/australia-news/2020/jul/22/josh-frydenbergs-claim-that-class-action-lawsuits-have-tripled-is-incorrect-expert-says>.

77 Tom McIroy and Michael Pelly, 'Crackdown on Class Action Funders' *Australian Financial Review* (online, 21 May 2020) <https://www.afr.com/politics/federal/crackdown-on-class-action-funders-20200521-p54va0>.

78 As defined in the *Corporations Act 2001* (Cth) s 9.

79 Ibid s 601EE.

ASIC has given some guidance as to how it will treat the requirements imposed by the 2020 regulatory regime,[80] including that there must be appropriate training, conflicts of interest management, professional indemnity insurance, nomination of responsible managers who demonstrate organisational competence, scheme constitutions and audited compliance plans.[81] On the other hand, on 20 August 2020, ASIC issued a legislative instrument providing relief from many aspects of the re-regulation.[82] This includes relief with the effect that:

1. Funders do not have to give a disclosure document to group members if the latter have not entered agreements with the funder or lawyer (and have not notified their intention to participate to the funder or lawyer).[83] This exemption applies if, first, the funder has made the disclosure document publicly available on its website for the class action; and, second, there is a prominent reference to the disclosure document and to the website where it may be accessed, in any notice to group members and in any advertising material for the class action. Despite this, disclosure documents must be given to group members before they sign up with the funders or lawyers.
2. The funder is exempt from the obligation to regularly value scheme property and the obligation under the AFSL provisions to maintain a register of all class members.[84]
3. Statutory provisions in relation to members withdrawing from a managed investment scheme do not apply to a group member withdrawing from a class action. Funders must permit withdrawal only if the group member opts out of the class action in accordance with the applicable court rules.
4. Funders are exempt from the main requirements for product disclosure set out in s 1013D(1)(l) of the *Corporations Act 2001* (Cth). These

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80 *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

81 'Litigation Funding', *Australian Securities and Investments Commission* (Web Page) <https://asic.gov.au/regulatory-resources/funds-management/litigation-funding/>.

82 *ASIC Corporations (Litigation Funding Schemes) Instrument* 2020/787 (Cth).

83 This summary assumes that the funder is the nominated responsible entity. Class law firms cannot operate MIS: *Legal Profession Uniform Law* (NSW) No 16A of 2014; *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1 s 258.

84 ASIC has also indicated that it will take no action with respect to registration of passive class members in open class proceedings under the MIS provisions. See Australian Securities and Investments Commission, '*No-Action Position for Responsible Entities of Certain Registered Litigation Funding Schemes in Relation to Member Registers*' (Media Release, 21 August 2020).

> requirements normally include the disclosure of benefits, risks and costs.[85]

The 2020 regulatory framework thus continues to distinguish between class members that enter litigation-funding agreements and those who do not. Nonetheless, as AFSL holders, funders must provide their services efficiently, honestly and fairly.[86] Funders also remain subject to an obligation to maintain adequate practices and to follow procedures for managing conflicts of interest that may arise between them, the lead plaintiff, class members and the class law firm.[87] Under the regime that operated between 2012 and 2020, it was unclear whether these duties applied to class members who do not engage with funders.[88] That uncertainty continues to apply under the current regime.[89] If commencement CFOs were resurrected, the need to resolve that uncertainty would become more acute as larger proportions of class members would be less likely to have any dealings with funders.

C *The Impact on the Lawyer–Client Relationship*

In contrast with funders, a general consensus is emerging in favour of class lawyers owing an overarching fiduciary duty to class members.[90] Even if class lawyers' duties to class members who do not enter retainer agreements fall short of being fiduciary, *Dyczynski v Gibson* makes it clear that class lawyers at least have a duty to act in the interests of all class members.[91] However, the nature and scope of those duties when it comes to addressing difficult conflicts that arise when

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85 The last exclusion is puzzling as it seems to defeat much of the better disclosure rationale for making funded litigation a financial product in the first place and may create uncertainty as to what is required in the disclosure document.

86 *Corporations Act 2001* (Cth) s 912A(1)(a).

87 Ibid s 912A(1)(aa). Guidance in relation to how to fulfill these requirements is set out in Australian Securities and Investments Commission, *Regulatory Guide 248 Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013).

88 At that time *Corporations Regulations 2001* (Cth) reg 5C.11.1(1)(b)(v) and (d)(iii) defined a litigation funding scheme and funding arrangements by reference to entry into a funding agreement. Following the 2020 revisions, this provision now exempts insolvency and single member litigation funding from the MIS regime: *Corporations Regulations 2001* (Cth), reg 5C.11.1(4) and (5).

89 See *Corporations Regulations 2001* (Cth) reg 7.1.04N(3)(e), which defines a litigation funding scheme among other things by reference to a funding agreement to provide 'funding, indemnities or both under a funding agreement (including an agreement under which no fee is payable to the funder or lawyer if the scheme is not successful in seeking remedies) to enable the general members of the scheme to seek remedies'.

90 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *University of New South Wales Law Journal* 914, which concludes that that class law firms owe fiduciary duties to non-client class members: 924–5. See further Jeremy Kirk, 'The Case for Contradictors in Approving Class Action Settlements' (2018) 92(9) *Australian Law Journal* 716, which states that 'there is good reason to think that the legal representatives of an applicant in a class action owe a fiduciary duty not only to the applicant but to all members of the class': 717.

91 *Dyczynski* (n 69) 50 [209]–[10] (Murphy and Colvin JJ), 86–7 [378]–[9] (Lee J).

funding commissions are being reviewed is far from clear,[92] and the inter-relationship of these quasi-fiduciary obligations with the general duty of care and other professional duties even less so. For instance, there are statutory obligations upon lawyers to provide clear and timely advice to enable the client litigant to understand the relevant legal issues and to inform them about alternatives to a fully contested adjudication of the case.[93] Other obligations include a duty to disclose the basis upon which clients will be charged for legal services and to provide a reasonable estimate of those costs.[94] Whether these more specific professional obligations will apply to class law firms *apropos* class members who have not signed a retainer agreement is debatable.[95] In a real sense, the class law firm is representing non-client members and providing a service from which they benefit and for which they must indirectly pay pro rata when legal fees are deducted from the overall class settlement. On the other hand, given that unrepresented class members are not able to instruct the class law firm (and are often unidentifiable), that they are only liable to contribute to the costs of the lead plaintiff and other class members who enter retainer agreements rather than provide payment to the law firm directly, and that they can opt out without any obligation to the firm, it seems that they should not be categorised as clients. Nonetheless, where a law firm purports to settle the individual claim of an unrepresented group member it is unclear how they can do so without having some obligation toward them.

Again, the lack of clarity regarding the nature of fiduciary obligations and other professional duties of class law firms to class members with whom the firm has never engaged heightens the courts' responsibilities to non-client class members. By submitting funding and allied retainer arrangements to scrutiny, CFOs issued at an early stage of the proceeding provide the courts with a stronger platform for exercising those responsibilities in the main area where litigants and their lawyers' and funders' interests can conflict – legal and funding costs. The discussion in Parts IIIE and V below elaborates on this issue and, in particular, considers recommendations of the PJC which might otherwise empower the courts to undertake that scrutiny without the necessity of a CFO.

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92 See, eg, *Botsman v Bolitho* (2018) 57 VR 68, 135–6 [327]–[37] (Tate, Whelan and Niall JJA) ('*Botsman*'). See further Kirk (n 90).

93 *Australian Solicitors Conduct Rules* 2015 [7.1]–[7.2], made pursuant to *Legal Profession Uniform Law* (NSW) No 16A of 2014 s 427.

94 *Legal Profession Uniform Law* (NSW) No 16A of 2014 s 174; *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1 s 174.

95 The *Legal Profession Uniform Law* (NSW) No 16A of 2014 s 6 and the *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1 s 6 define a client as 'a person to whom or for whom legal services are provided' Yet in *Dyczynski* (n 69) Lee J opined that only class members who entered a retainer with the law firm were owed these statutory duties, see 86–87 [378]–[379].

D *Increase in the Supply of Funding and Therefore Greater Vindication of Rights Through Class Proceedings and More General Deterrence Against Unlawful Activities*

Money Max did not of course expressly consider whether CFOs would make class proceedings a more attractive investment vehicle for litigation funders, and in so doing increase the availability of funding. However, some judicial[96] and academic[97] commentary post *Money Max* has suggested that obviating the need for undertaking book building (thereby decreasing costs) and increasing the pool of persons required to contribute to class financing (thereby boosting revenue) would make the funding of class actions more profitable and thus attract greater funding supply. Assuming many class actions could not proceed previously as a result of a shortfall in the availability of funding, increasing funding supply ought then to lead to an increase in the total volume of class actions. Provided the growing number of class actions are meritorious this will, in turn, enable greater numbers of those affected by harm to be compensated for the harm done to them, and can thereby enhance general deterrence against unlawful behavior.

Statistical data regarding class actions instigated post *Money Max* indicates that the number of class actions did increase, albeit from a very low base.[98] Nonetheless, as Morabito warns, that increase may be due to more Australian jurisdictions adopting class-action procedures rather than a direct flow-on from the CFO imprimatur. Moreover, as class actions have been increasing at a steady rate over the past 15 years, any increase post *Money Max* may simply reflect general trends rather than the impact of the decision itself. Morabito contends that, compared with Canada and Israel, Australia has a very low rate of class actions. Therefore, even if there was an increase in the volume of class actions as a result of the *Money Max* decision, that is likely to have had only a small impact on access to justice and general deterrence. Additionally, Morabito notes that the Australian data is made up of a significant number of parallel proceedings in respect of the same legal dispute, thus unduly inflating the volume of reported cases.[99]

Consistent with Morabito's explanation in its report, the PJC has also noted that recent class-action growth has been propelled by a wide range of factors, including increases in Australian jurisdictions adopting class-action procedures, growing maturity of the class-action system and the concomitant increased

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96 See, eg, *Brewster* (n 9) 83 [153] (Gordon J); *Westpac v Lenthall* (n 9) 29–30 [19] (Allsop CJ, Middleton and Robertson JJ); *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [16] (Beach J).

97 See, eg, Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91(8) *Australian Law Journal* 655, 662–3; Stefanie Wilkins, 'CFOs in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*' (2017) 36(2) *Civil Justice Quarterly* 133, 143.

98 Morabito (n 67) 13.

99 Ibid 13–14.

expertise of its frequent users, misconduct identified by the Hayne Royal Commission Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, increasing avenues for civil compensation, and liberal regulation.[100]

IBISWorld reports an increase in the number of funders operating in Australia since the *Money Max* case, implying that funder return on investment since that decision did attract more market players.[101] However, that increase had been progressively building over a number of years and, like the data collected and analysed by Morabito, may be more reflective of the light-touch regime of regulation that operated in Australia between 2012 and 2020, a growing awareness of the litigation financing industry, a relative decline in the profitability of other categories of financial investment, and the rising number of larger scale, more profitable class actions, rather than the advent of CFOs. IBISWorld explains that while total litigation funder revenue has grown, revenue remains very volatile due to the unpredictable length and outcome of cases, and so, as a result, industry profit margins have fluctuated.[102] By the same token, overall the litigation finance industry is strongly outperforming GDP and remains on a growth trajectory, indicating that the demand for litigation funding still outstrips supply by a substantial margin.[103]

Given the difficulty in distinguishing between the impact of CFOs and general environmental trends that might favour an increase in class actions and funders, it is unclear whether the adoption of CFOs or their subsequent invalidation has had any significant bearing upon the supply of litigation funding or the volume of class actions. The introduction of AFSL and MIS requirements outlined above at 3B is far more likely to affect these matters.

E *Greater Judicial Control of Funding Fees and Commissions and Increased Protection of Class Member Interests*

As the Court in *Money Max* noted, litigation funding commissions are typically the biggest single deduction made from funded class action settlements and judgments.[104] Consequently, one of the most significant impacts of CFOs was their effect upon litigation-funder commission rates. Between 2013 and 2018, funding commissions averaged 27.1 per cent of class recoveries.[105] The median percentage

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100 PJC Report (n 1) 30–2 [4.13].

101 Kim Do, *Litigation Funding in Australia* (IBISWorld, Australia Specialized Industry Report OD5446, February 2019).

102 Ibid 7.

103 Ibid 10.

104 *Money Max* (n 8) 208 [72] (Murphy, Gleeson and Beach JJ).

105 Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: CFOs, Funding Fees and Reimbursement Payments' (Research Paper, Department of Business Law and Taxation, Monash University, January 2019) 13 <https://ssrn.com/abstract=3326303>.

for funding commissions in all settled cases during that same period was 25.5 per cent.[106] However, a review of post *Money Max* case law undertaken by Morabito found that, in most instances, funder commissions were lower than these longer term average and median commission rates.[107]

The observation that funding rates decreased post *Money Max* has also been confirmed by some members of the judiciary.[108] In particular, Beach J commented that he did not

> recall a reported case prior to *Money Max* where any efforts were made as part of judicial case management to reduce the contractual commission rates, which were usually around 35 to 40 per cent. Judges seemed to accept all of this as a *fait accompli* and applied funding equalisation mechanisms … But CFOs addressed that vice to the advantage of group members. It gave the Court direct control over the commission rate. Thereafter, there has only been downward pressure on commission rates.[109]

Consequently, as funding commissions have fallen there has been growing recognition that, in the past, funding commissions in Australian class actions may have been too high.[110] Certainly, that was the view of the PJC, which characterized the profit made by litigation funders in class proceedings as 'often unreasonable, disproportionate and unfair'.[111]

According to *Money Max*, the need for increased scrutiny of litigation funding commissions afforded by CFOs rests on: (1) information asymmetry between the funder and class members in relation to the costs and risks of class proceedings; (2) the absence of negotiation between the funder and many small value claimholders; and (3) class members' dependence on funder support.[112] Thus, the Court approached the setting of funding commissions as a form of market failure that required it to step in and act as guardian of class members' interests so as to avoid disproportionate and excessive commissions that did not properly reflect

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106 Ibid 12.

107 Ibid 15–20.

108 See, eg, *Carpenders* (n 34) [17]–[18] (Rares ACJ); *Lenthall v Westpac Life Insurance Services Ltd* (2018) 363 ALR 698, 705–6 [17]–[24] (Lee J) ('*Lenthall v Westpac*').

109 *McKay Super Solutions* (n 45) [28] (Beach J). However, see the discussion below at Part V regarding the courts' powers to vary funding commission rates.

110 *Lenthall v Westpac* (n 108) 706 [22] (Lee J); *Australian Executor Trustee Ltd v Provident Capital Ltd* [2018] FCA 439, [25]–[26] (Rares J), in both cases citing Michael Legg, 'A Critical Assessment of the Shareholder Class Action Settlements — The Allco Class Action' (2018) 46(1) *Australian Business Law Review* 54, 64. However, see qualifying comments in *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [16] (Beach J), indicating that there may be other explanations for the fall in funding rates post *Money Max*.

111 PJC Report (n 1) 157 [13.53].

112 *Money Max* (n 8) 208 [72] (Murphy, Gleeson and Beach JJ). See also Peter Cashman and Amelia Simpson, 'Class Actions and Litigation Funding Reform: The Views of Class Action Practitioners' (UNSW Law Research Paper No 20-73, Faculty of Law, University of New South Wales, December 4 2020) 18 <https://ssrn.com/abstract=3765069>, noting collated class-action practitioner views in favour of CFOs on the ground that they ensure court oversight of funder commissions and behaviour.

funders' commercial risks.[113] That role was particularly justified where class members who had not entered into funding agreements were required to contribute to funding costs.

Since the *Money Max* decision, and pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (and its state equivalents), the Court's protective mandate has extended to reviewing agreed funding commissions at settlement.[114] The validity and rationale of these types of orders is considered below in Part V. At this point, however, it is worth noting that, while they might have been the catalyst for greater judicial scrutiny, the application of a judicial blowtorch to funding commissions is not necessarily tied to CFOs. Provided judges are able and willing to critically examine claimed funding commissions, it will still be possible for courts to allow funders to be appropriately recompensed for the risk they bear and ensure that members' interests are safeguarded. Although this will not occur *ex ante* and so could be unduly influenced by hindsight, judges are in a good position to evaluate the fairness and reasonableness of what was initially agreed compared with what is known at the time of settlement, especially if assisted by litigation funding fees assessors with financial and capital market expertise as recommended by the PJC.[115] Given that CFOs usually impose an upper cap on commissions with the proviso that they might subsequently be revised downwards,[116] *ex post* as opposed to *ex ante* inquiry may not lead to radically different outcomes.

Even if the PJC's recommendations regarding funding fees assessors are not enacted, given that contradictors are now routinely employed to ensure that adversarial investigation of legal costs and funder fees occurs[117] and given the more activist stand taken by the judiciary towards ensuring that class-action costs are proportionate with class-member returns,[118] it is anticipated that funder commissions will not unduly increase as a result of the decision in *Brewster.*

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113 *Money Max* (n 8) 210 [82] (Murphy, Gleeson and Beach JJ).

114 See, eg, *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 ('*Endeavour River*'); *Petersen* (n 44); *Caason* (n 43); *Earglow* (n 42).

115 PJC Report (n 1) 164 [11.92]–[11.93].

116 See, eg, *Asirifi-Otchere* (n 33) [12.2] (Gleeson J); *Carpenders Park Pty Ltd (as trustee of the Carpenders* (n 34) [4] (Rares ACJ). See also *Perera* (n 13) 73 [283] (Lee J), in which the cap imposed tied funding commissions to a multiple of expenditures.

117 See, eg, *Endeavour River* (n 114) [36] (Murphy J); *Botsman* (n 92) 136 [334]–[336] (Tate, Whelan and Niall JJA). See also Kirk (n 90).

118 See, eg, *Rushleigh* (n 60).

F *Better Informed Class Members Prior to the Time Fixed for Opt-Out*

One advantage of CFOs is the information they provide to class members regarding their decision to remain in or opt out of the proceeding.[119] Even though the CFO may be subsequently varied once the quantum of the settlement or judgment is known, the CFO signals the maximum amount that the funder will be entitled to charge class members so that they can determine whether they are better off continuing to participate in the proceeding at an early point, before any limitation or opt-out periods might expire.[120]

G *Discouragement of Closed Class Proceedings*

Under Australia's class action framework it is possible for class actions to be constituted on behalf of all those who have suffered harm due to the wrongdoing of the defendant (known as an open class proceeding) or on behalf of a defined segment of those who have suffered harm (known as a closed class proceeding).[121] In some cases, the closed class has been defined according to whether class members have entered legal retainer agreements or co-dependent legal retainer and funder agreements.[122] Being able to define the class in this manner has been described as a boon for litigation funders because it allows them to better manage their litigation and class dispersion risks,[123] and it disables free riders that might otherwise enjoy sharing in any open class compensation pool.[124]

However, as the ALRC pointed out in 2018,[125] closed classes appear antithetical to the principles of scale and broad-based access to justice that were built into the original recommendations made by the ALRC in 1988 when it proposed an Australian class-action regime.[126] In its 1988 report, the ALRC wanted to ensure 'a single binding decision that applies to all claimants and not just those who have taken active steps to join the class action'.[127] On the basis that this was the best way to secure access to justice, in its subsequent 2018 report the

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119 *Lenthall v Westpac* (n 108) 707–8 [29] (Lee J); *Impiombato* (n 34) [28] (Moshinsky J); *Blairgowrie Trading* (n 44) 502 [94] (Beach J); *Money Max* (n 8), 196 [13] (Murphy, Gleeson and Beach JJ).

120 *Money Max* (n 8), 215 [110] (Murphy, Gleeson and Beach JJ).

121 *Matthews v SPI Electricity Pty Ltd (No 13)* (2013) 39 VR 255, 274 [79] (Forrest J) ('*SPI Electricity*'); *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 ('*Multiplex Funds Management*')

122 See, eg, *Multiplex Funds Management* (n 121).

123 Jarrah Hoffman-Ekstein, 'Funding Open Classes Through Common Fund Applications' (2013) 87(5) *Australian Law Journal* 331, 334.

124 ALRC Final Report (n 5) 67 [2.73]; *Perera* (n 13) 10–11 [16] (Lee J).

125 ALRC Final Report (n 5) 90–2 [4.4]–[4.10].

126 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, December 1988).

127 Ibid 44 [92].

ALRC recommitted to open, opt-out proceedings, recommending that Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that in future all class actions are initiated as open class actions.[128]

Nonetheless, up until September 2018 only 36 per cent of funded class actions were initiated as closed class proceedings where the class was defined according to entry into funding agreements.[129] Thus, prior to *Money Max*, funders were often prepared to finance open class proceedings and were not as concerned by free riders as might be supposed. It is likely that their concerns were allayed by the development of practices such as class closure orders that compelled class members to come forward and register with plaintiff law firms to participate in settlement,[130] the making of contribution or funding equalisation orders to mitigate against free riding,[131] and the other means at their disposal to refine class qualification criteria such as the imposition of a minimum claim threshold or the application of temporal or geographical limits upon class membership.

The data available indicates that, following *Money Max*, the number of funded actions that were commenced where the class was defined according to entry into a funding agreement fell from 36 per cent to 13.2 per cent.[132] Thus, *Money Max* did appear to discourage funded, closed-class proceedings, without the necessity of mandating an open-class regime. By this means, and depending upon the terms of any class closure orders made, the CFO may have contributed to ensuring that all aggrieved by harm were entitled to recover.

Insofar as class closure orders are concerned, it is important to note that Australian courts rarely make declarations on common issues binding on the original class as the ALRC envisaged. Once a settlement is in the wind, it is common to order class closure requiring all class members to register with the class law firm prior to a stipulated date to qualify for participation in the settlement.[133] As a result, the ALRC's aspiration for as broad a scope of recovery as possible may never be realized in practice, with or without CFOs.

In the past, closure orders were usually accompanied by orders that extinguished the claims of unrepresented and unregistered group members who failed to register within the stipulated time frame. Consequently, those class members ended up being worse off than they would have been as a member of a closed class they did not opt into (as their choses in action would not have been prematurely extinguished). Such an outcome was of particular concern to the New

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128 ALRC Final Report (n 5) 90 rec 1.

129 Morabito (n 105) 9.

130 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (2017) 252 FCR 1, 22 [72]–[75] (Jagot, Yates and Murphy JJ); *SPI Electricity* (n 121) 273 [22]–[80] (Forrest J). However, readers should note the subsequent decision of *Haselhurst v Toyota Motor Corporation* (2020) 101 NSWLR 890 ('*Haselhurst*'), which held class closure orders invalid.

131 Discussed below at Part IV.

132 Morabito (n 105) 10.

133 Simone Degeling and Michael Legg, 'Class Action Settlements, Opt-Out and Class Closure: Fiduciary Conflicts' (2017) 11(3) *Journal of Equity* 319, 322–4.

South Wales Court of Appeal in *Haselhurst v Toyota Motor Corp Australia Ltd* ('*Haselhurst*'),[134] which held that the power to contingently extinguish class members' claims fell outside of s 183 of the *Civil Procedure Act 2005 (NSW)* (and therefore implicitly its interstate and federal equivalents)[135] and was contrary to the overarching principle of an opt-out regime.

Reducing the capacity of the lead plaintiff and defendant to seek orders that limit the scope of persons entitled to claim compensation from the settlement pool may encourage the revival of closed classes as a means of limiting those likely to pursue claims, potentially making an early CFO a more attractive tool for dealing with multiple closed classes on the same issues. On the other hand, if enacted, the PJC's recommendation to introduce an express legislative power to order class closure would reverse the *Haselhurst* decision and favour open class proceedings.[136]

H *Reduction in Parallel Class Proceedings*

Apart from enhancing access to justice in cases involving mass harm, other rationales of Part IVA of the *Federal Court of Australia Act 1976* (Cth) and its state equivalents include promotion of efficient use of judicial resources and consistency in the determination of common issues.[137] The institution of parallel class actions in respect of the same harm against the same respondent(s) runs counter to those rationales.[138] Apart from the extra-judicial resources required to consolidate actions and/or oversight collaboration arrangements,[139] evaluate whether competing proceedings should be declassed or stayed,[140] and deploy other mechanisms to reduce duplication,[141] if parallel class actions proceed (albeit in some consolidated form) they may impose considerable burdens on respondents and class members. First, parallel class actions are likely to make it more difficult to settle proceedings because it will be harder for respondents to achieve consensus between multiple teams of lawyers and funders employing

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134 *Haselhurst* (n 130).

135 Unlike other states, Victoria has an express legislative power to order class closure: *Supreme Court Act 1986* (Vic) s 33ZG.

136 The PJC has suggested that there needs to be an express legislated power to order class closure: PJC Report (n 1) 94 [8.50]. It should be noted, however, that such a law may 'acquire' a litigant's chose of action so that the constitutional issues and the need for just terms such as proper notice discussed in Part VI are also relevant to this issue.

137 Australian Law Reform Commission (n 126) 8 [13].

138 ALRC Final Report (n 5) 102 [4.49]–[4.50]. See also Michael Duffy, 'The Conundrum of Competing Class Actions and the Efficiency Question' (2019) 93(4) *Australian Law Journal* 270.

139 See, eg, *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 2)* [2019] FCA 1061; *Southernwood v Brambles Limited* [2019] FCA 1021 ('*Southernwood*').

140 See, eg, *Wigmans v AMP Ltd* [2019] NSWCA 243; *Perera* (n 13).

141 See, eg, *McKay Super Solutions Pty Ltd v Bellamys Australia Ltd* [2017] FCA 947 in which the closure of one class proceeding was ordered and another was allowed to remain as an open class with a joint trial for both.

different retainer and funding models, thus prolonging proceedings and increasing costs for both respondents and class members. Second, multiple proceedings increase the costs borne by respondents in countering multiple pleadings, discovery and interlocutory applications. Third, multiple proceedings increase the transaction costs borne by class members who are deprived of the benefit of scale for legal fees.[142] Consequently, the ALRC recommended that as a matter of public policy only one class action should be permitted to proceed and the court should be given express power to resolve competing proceedings.[143] Its view was that requiring law firm and funder teams to compete before the court for the right to manage a single class action supported by a CFO would place downward pressure on funder and legal fees.[144]

The Full Federal Court in *Money Max* stated that, 'by encouraging open class proceedings, a common fund approach may reduce the prospect of overlapping or competing class actions and reduce the multiplicity of actions that sometimes occurs with class actions'.[145] Experience, however, has demonstrated otherwise. In a report written at the end of 2019 examining whether class actions had grown out of control over the past five years, Morabito noted that in the prior two years related and competing class actions were more prevalent.[146] As argued in Part IIIB, it is difficult to definitively link any increase in class actions with the removal of the necessity to undertake extensive book building. It therefore appears that, following *Money Max*, competition for large-scale class actions has strengthened and that more law firm and funder teams are initiating proceedings in respect of the same matters. Legal professional bodies making submissions to the ALRC described this as a 'race to the courthouse' to gain first mover advantage.[147]

Simultaneously, and consistently with the ALRC's views on a preference for single class proceedings, jurisprudence related to the stay of competing proceedings has therefore been building in response to the increased competition for lucrative large-scale claims. There have been several cases post *Money Max* where the Courts have been willing to evaluate the respective merits of competing class actions brought by diverse lawyer-funder teams and then choose which one of those teams ought to take carriage of the matter. Cases include *CJMcG Pty Ltd as Trustee for the CJMcG Superannuation Fund v Boral Ltd (No 2)*,[148] and *Perera v GetSwift*.[149] In *Wigmans v AMP Ltd*, a majority of the High Court confirmed the power of the New South Wales Supreme Court to stay competing class actions,[150]

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142 *Perera v GetSwift Limited* (2018) 263 FCR 92, 121 [122] (Middleton, Murphy and Beach JJ) ('*Perera Appeal*').
143 ALRC Final Report (n 5) 107 [4.63].
144 Ibid 109–10 [4.75].
145 *Money Max* (n 8) 196–7 [14] (Murphy, Gleeson and Beach JJ).
146 Morabito (n 67) 13–14. Similar findings were made by the PJC: PJC Report (n 1) 118 [9.93].
147 ALRC Final Report (n 5) 98 [4.32]–[4.33].
148 [2021] FCA 350.
149 *Perera Appeal* (n 142).
150 [2021] 95 ALJR 305, 322–4 [72]–[83] (Gageler, Gordon and Edelman JJ).

and endorsed a multifactorial approach to this question, which included a comparison of competing funding proposals, costs estimates and proposed net return to members.[151] While CFOs may have been the catalyst for increasing judicial activism and creativity in finding solutions when responding to the long-running problem of parallel class proceedings, the use of powers such as consolidation, collaboration orders, declassing, and stays of proceedings is not contingent upon the continued validity of CFOs.

IV Equalisation Orders vs CFOs

As a result of the PJC's recommendation that legislation be enacted to explicitly empower the courts to make a CFO at settlement or judgment,[152] this part of the article considers the advantages such a power might provide. Plainly, issues such as the elimination of book building and the efficient management of parallel proceedings are not raised when proceedings are nearing termination. Further, as we have noted, issues related to the control of legal costs and funder fees can be addressed using other powers, which may themselves require additional legislative mandate. Rather, in this context it has been suggested that making provision for CFOs will provide the Court with greater flexibility to do justice. The position taken by the PJC may contradict the plurality of the High Court in *Brewster*, which was of the view that FEOs were sufficient to ensure that all those who benefitted from the class action contributed to the costs incurred.

Prior to the *Money Max* decision, FEOs were made more frequently than CFOs.[153] This was partly because FEOs do not compel involuntary payments to litigation funders but merely ensure parity between funded and non-funded class members. However, as Murphy J pointed out in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*,[154] notwithstanding the pro rata redistribution of funding commissions, complete parity might not apply if the funding agreement allows the funder to subsequently charge a commission based on the 'grossed up' amount redistributed to funded class members from unfunded class members' recoveries. If the funding agreement so allowed, funded parties would be paying the funder a larger proportion of their settlement entitlement than non-funded parties. Accordingly, Murphy J opined that a contribution or CFO was 'a simpler and more transparent mechanism … for fairly apportioning funding charges across the class'.[155]

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151 Ibid 330–1 [109]–[112] (Gageler, Gordon and Edelman JJ).
152 PJC Report (n 1) [9.124].
153 See Part II C above.
154 *Petersen* (n 44) 307 [222]. See further Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 *Australian Law Journal* 655, 660.
155 Ibid.

The issue of whether funding commissions might operate unequally because of their application to redistributed funds was not discussed in *Brewster.* However, provided the courts' powers to review and fix funder commissions and fees at settlement remains intact, the court could ensure greater parity by limiting funder commissions to the amounts net of redistributed funds.

Another pragmatic problem associated with FEOs relates to their administration where parallel class proceedings have been consolidated. The circumstances that arose in *Southernwood v Brambles Ltd* illustrate.[156] This case involved two overlapping securities class actions against the same respondent, Brambles Ltd. One of the proceedings had been instigated by William Kidd and Mary Collum as trustees for the Magness-Bennett Superannuation Fund (the 'Kidd proceedings') and the other by Holly Southernwood (the 'Southernwood proceedings'). The applicants in the Kidd proceedings were represented by class law firm Maurice Blackburn and were funded by Harbour Fund III LP, whereas the applicants in the Southernwood proceedings were represented by class law firm Slater & Gordon and were funded by IMF Bentham Ltd. Both proceedings were open class actions — that is, proceedings comprised of members who had entered funding agreements and those who had not. Each of the retainer and funding agreements in the two proceedings had different terms and conditions, including different rates of funding commission. To advance judicial efficiency and lower transaction costs, an order was made to consolidate the two proceedings. Murphy J also made a CFO, reasoning that a CFO allowed a single funding fee to be applied across the consolidated proceedings and also ameliorated the conflicts of interest that might arise between funded and non-funded members and between the Harbour versus the IMF funded members.[157]

This practical problem could be addressed in similar fashion to the parity problem outlined above. Provided the court's power to review and fix funder commissions and fees at settlement continues, when making an FEO order the court could reduce the potential disparity between class members subject to different funding regimes by also fixing a funder fee common to all funders in the consolidated proceedings.

Nevertheless, it is unlikely that FEOs will operate in a comparable manner to some of the more creative approaches to CFOs and orders related to parallel class proceedings that emerged post *Money Max*. One of these, discussed in *Wigmans v AMP Ltd*,[158] concerned orders proposed by Hammerschlag J in the *RCR Tomlinson*

156 *Southernwood* (n 139).
157 Ibid, [73].
158 (2019) 103 NSWLR 543, 547 [10] (Bell P).

Ltd matter.[159] Hammerschlag J proposed that only one of three competing class proceedings involving different teams of class law firms and funders should be permitted to proceed, and that the funders of each of the stayed proceedings should be given the option of financing the surviving proceedings at one third each. Clearly, such an approach would not be practically feasible except at the outset of proceedings and where the Court was empowered to fix the share of each funder's commission.

V Power to Review Pre-Existing Funding Agreements

As noted at Part IIIE, the protection of class members from disproportionate funding commissions has been a subject of concern.[160] Courts can certainly refrain from approving a settlement that may give de facto power to force funders to set their commission within a specified range.[161] However, as well as fixing funding rates pursuant to CFOs, post *Money Max*, and on similar policy grounds,[162] the court's power at settlement has been extended by some judges to overriding a contractually agreed commission rate.[163]

In *Money Max*, the Full Federal Court set out a list of non-exhaustive considerations to approve a funding fee in a class action as follows:

> (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. ...
>
> (b) the information provided to class members as to the funding commission. ...
>
> (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. ...
>
> (d) the litigation risks of providing funding in the proceeding. ...
>
> (e) the quantum of adverse costs exposure that the funder assumed. ...
>
> (f) the legal costs expended and to be expended, and the security for costs provided, by the funder.

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159 No reference for this case was provided in the judgment of Bell P other than a date of a motion hearing of 5 August 2019. This would appear however to be a reference to transcript of that date before Hammerschlag J in the proceedings of *Ashita Tomi Pty Ltd ATF Esskay Super Fund v RCR Tomlinson Ltd* 2018/003-53304, *Barry Jones v RCR Tomlinson Ltd* 2010/000-94443 and *CIMCG Superannuation Fund v Tomlinson Ltd* 2019/001-78541 (see schedules of class action cases in Peter Cashman and Amelia Simpson, 'The Problem of Delay in Class Actions' [2020] UNSW Law Research Paper No 20-86, Faculty of Law, University of New South Wales, 13 January 2021), 128, 131, 133).

160 See, eg, *Lenthall v Westpac* (n 108) 706 [22] (Lee J); *Petersen* (n 44) 286 [129] (Murphy J).

161 See, eg, *Botsman* (n 92).

162 See further Samuel J Hickey, 'Oversight or Interference? Judicial Intervention in Litigation Funding: *Earglow Pty Ltd v Newcrest Mining Ltd*' (2017) 36(4) *Civil Justice Quarterly* 420, 423–6.

163 See, eg, *Rushleigh* (n 60); *Petersen* (n 44)**;** *Blairgowrie Trading Ltd* (n 44); *Earglow (n 42)*; *Camping Warehouse Pty Ltd v Downer EDI Ltd* [2016] VSC 784.

> (g) the amount of any settlement or judgment. …
>
> (h) any substantial objections made by class members in relation to any litigation funding charges. …
>
> (i) class members' likely recovery 'in hand' under any pre-existing funding arrangements.[164]

Other possible considerations that have been raised in cases include appropriateness in general;[165] the level of outlays undertaken by the funder[166] (which may overlap with (f) but could, it is submitted, also include expenditures in the nature of borrowing costs); proportionality (or at least, lack of disproportionality);[167] reference to rates in foreign jurisdictions;[168] the risks faced by litigation funders in investing in litigation generally and in the case in question; and whether a funder has a diversified spread of litigation investments.[169] The public interest or social utility of the proceeding might also be a factor, though generally the connection between public interest and the quantum of funder's remuneration is not readily apparent.[170] It is submitted that a last general consideration might be the effects on encouraging access to justice[171] for meritorious (but not unmeritorious)[172] claims.

However, not all judges are of the view that a power to set commission rates exists.[173] In terms of precedent, it is notable that there is already an approval process for the reasonableness of funding agreements in certain types of funded (non–class action) claims brought by corporate and personal insolvency administrators pursuant to relevant insolvency legislation.[174] Nonetheless, legislative intervention may ultimately be required as the High Court has previously indicated unwillingness to review funding agreements.[175] Consistently with this, *Brewster* has cast doubt upon the reasoning in *Money Max* and the

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164 *Money Max* (n 8) 209–10 [80].

165 Ibid 211–13 [92], [94], [96], referring to *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277, [38], [42] (Flick J).

166 *Blairgowrie Trading* (n 8) 511 [131] (Beach J).

167 *Money Max* (n 8) 210 [82], 212 [94].

168 *Blairgowrie Trading* (n 8) 508 [122] (Beach J).

169 Ibid 508 [122] (Beach J).

170 As to public interest litigation, see Damian Grave, Ken Adams, Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed, 2012) 754–61; Peter Cashman, *Class Action Law and Practice* (Federation Press, 2007) 459–61.

171 See Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399.

172 Victorian Law Reform Commission, *Civil Justice Review* (Report 14, May 2008) 182 [4.2].

173 See, eg, *Liverpool City Council v McGraw-Hill Financial Inc)* [2018] FCA 1289 [47], [52] (Lee J).

174 See *Re ACN 076 673 875 (rec and mgr apptd) (in liq)* (2002) 42 ACSR 296; *Stewart, In the Matter of Newtronics Pty Ltd* [2007] FCA 1375; *Fortress Credit Corp (Australia) Pty Ltd v Fletcher* (2015) 318 ALR 597; *Ascot Vale Self Storage Centre Pty Ltd v Wallace-Smith* [2013] VSC 519; *CBA Corporate Services (NSW) Pty Ltd Re ZYX Learning Centres Ltd (recs and mgrs apptd) (in liq) v Walker* [2013] FCA 243, [8]; *Young v Thomson* [2017] FCAFC 140.

175 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 434–435 [92] (Gummow, Hayne and Crennan JJ).

absence of criteria to guide the exercise of discretion by the Court to fix a commission.[176] To address the lack of certainty, both the ALRC and PJC proposed going one step further. Each recommended a statutory requirement that the court approve each funding agreement as a whole, including not only commission rates but the nature and scope of indemnity provided to the lead plaintiff, the degree of control that might be exerted by the funder, whether the funder had the power to unilaterally appoint class counsel and so on.[177] In addition, to support the courts' scrutiny of funding agreements, the PJC recommended that courts be free to appoint a funding fee assessor with market capital or finance expertise, the costs of which would be borne by the funder.[178]

Clearly, notions of contractual freedom and certainty deserve respect, though the notion of power to vary a contractual term for unfairness has been accepted by the federal legislature in the *Australian Consumer Law*.[179]

VI Constitutional Impediments

The common fund doctrine was challenged on constitutional and other grounds in the Full Federal Court, [180] the NSW Court of Appeal[181] and ultimately in the High Court in *Brewster*, where arguments included that the trial judges' decisions involved an acquisition of class members' property on other than constitutionally just terms and were beyond judicial power.[182] However, the High Court focused on the question of the statutory power to make a CFO and not on the two constitutional issues. Despite there being full submissions on the two constitutional questions, they were dealt with briefly by only two judges of the seven. This section therefore reviews the arguments put before the High Court and the Court's short consideration of those issues, and then provides some commentary.

A *Judicial Power*

The first of the constitutional issues raised in *Brewster* was whether, if the relevant statutory provisions empowered the Federal Court to make a CFO, this

176 *Brewster* (n 9) 66 [59] (Kiefel CJ, Bell and Keane JJ).
177 ALRC Final Report (n 5) 170 [6.66], 171 [6.72]; PJC Report (n 1) 158 [11.58].
178 PJC Report (n 1) 164–5 [11.92]–[11.95].
179 *Competition and Consumer Act 2010* (Cth) sch 2, ss 23–5.
180 *Westpac v Lenthall* (n 9).
181 *Brewster v BMW Australia Ltd* [2019] NSWCA 35.
182 The *Australian Constitution* s 51(xxxi) requires that acquisitions of property by the Commonwealth government take place on 'just terms'. Damages claims have been held to be property as choses in action: see Michael Duffy, 'Is a Cause of Action a Castle? Statutory Choses in Action as Property and s51(xxxi) of the *Constitution*' (2018) 42(1) *Melbourne University Law Review* 1.

would infringe the separation of powers by conferring on the Court power that was neither judicial nor incidental to the exercise of judicial power.[183] The appellants argued that:

1. If the power's object is not to determine what existing rights or obligations of the parties are, but 'to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power'.[184]
2. The 'power to determine what the future rights or liabilities of people in particular relationships should be was inherently non-judicial'[185] and in fact 'lay at the heart of the legislative function'.[186]
3. Any creation of rights by courts was strictly limited to using powers of a jurisprudential character historically or traditionally exercised by the courts.[187]
4. Where a law confers a discretion, an important indicium of judicial power is that the discretion is to be exercised according to legal principle or objective standard and not by reference to policy considerations or other matters not specified by the legislature.[188]

By contrast, the first to fourth respondents ('the representative claimants') argued that the power to make a CFO was both incidental to[189] and an exercise of judicial power.[190] They suggested that the notion that creation of rights could only be a judicial power if it had historic roots was a 'cramped conception of judicial power'.[191] They also argued that the fact that the power was given to a court was relevant to show it was judicial in nature.[192]

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183 Westpac Banking Corporation, 'Appellant's Submissions', Submission in *Westpac v Lenthall*, No S154 of 2019, 19 June 2019 [2] ('Appellant's Submissions').

184 Ibid 14 [36], citing *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 ('*Precision Data Holdings*').

185 Appellant's Submissions (n 183), citing *Sue v Hill* (1999) 199 CLR 462, 515 [132] (Gaudron J).

186 Appellant's Submissions (n 183), citing *South Australia v Totani* (2010) 242 CLR 1, 86 [220] (Hayne J).

187 Appellant's Submissions (n 183) 14 [38], citing *R v Davison* (1954) 353, 369; *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries* (1970) 123 CLR 361, 373, 387, 394; *Cominos v Cominos* (1972) 127 CLR 588, 591, 600, 605, 606, 607, 608; *Dalton v NSW Crime Commission* (2006) 227 CLR 490, 507–8 [45]; *Thomas v Mowbray* (2007) 233 CLR 307 328–9 [16]–[17], 331–3 [20]–[26], 345–7 [73]–[79], 352–3 [100]–[102], 356–7 [116]–[121]; *Palmer v Ayres* (2017) 259 CLR 478, 494–5 [37]–[40]; 495 [42].

188 Appellant's Submissions (n 183) 16 [42], citing *Precision Data Holdings* (n 184) 191.

189 Gregory Lenthall et al, 'Submissions of the First to Fourth Respondents', Submission in *Westpac v Lenthall*, No S154 of 2019, 23 July 2019 14 [37] ('First to Fourth Respondents' Submissions'), citing *Cominos v Cominos* (187), where the High Court found a power to make any other order necessary to do justice was ancillary to the court's jurisdiction in matrimonial causes matters.

190 First to Fourth Respondents' Submissions (n 189) 15 [40].

191 Ibid.

192 Ibid 15 [41].

The fifth respondent (the funder) argued that CFOs set 'a regime which enables the orderly progression of the litigation in service of the ultimate quelling of the controversy' in the same manner as validly judicial interlocutory orders such as asset preservation, search and mediation.[193]

The Commonwealth and Queensland, as interveners, also emphasised the judicial nature of any orders necessary or appropriate to quell the controversy.[194] The Commonwealth went further and submitted that 'effectuation of Commonwealth judicial power' may require provision of legal services to a party.[195] It also submitted that a power or function may take its character as judicial or administrative from the body in which Parliament has located it.[196]

The question of the 'creation of new rights' raised the perennial debate about how the separation of powers squares with the concept of the development of the common law. Judges do not and cannot legislate, yet the common law develops, generally through the application of existing legal principle to new situations. In Edelman J's words:

> [I]t is entirely within judicial power for courts to create new rights, in the sense of recognising and giving effect to rights that differ from a previously settled understanding. That is often how the common law develops.[197]

In relation to the second submission, Edelman J noted that, although the calculation of the rate of remuneration for a CFO would be a difficult exercise on which minds may differ, it involved a process of balancing interests that was 'quintessentially judicial'.[198] He also found that a CFO made on an interlocutory basis would aid the exercise of judicial power and was therefore a permissible incident of the exercise of judicial power.[199]

The other judge who dealt with this question, Gageler J, found that it was sufficient to bring s33ZF(1) within judicial power that it conferred power on the Federal Court as an incident of a strictly judicial proceeding to be exercised by reference to the Court's assessment of the interests of justice in that proceeding.[200] He approved the observation of the Full Court that 'considering and

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193 JustKapital Litigation Pty Ltd, 'Fifth Respondent's Submissions', Submission in *Westpac v Lenthall*, No S154 of 2019, 23 July 2019 8 [32]–[33] ('Fifth Respondent's Submissions').

194 Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (intervening)', Submission in *Westpac v Lenthall* No S154 of 2019, 29 July 2019 7 [22] ('Commonwealth's Submissions'); Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (intervening), Submission in *Westpac v Lenthall* No S154 of 2019, 29 July 2019 4 [12] ('Queensland's Submissions').

195 Commonwealth's Submissions (n 194) 8 [24], citing *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J).

196 Commonwealth's Submissions (n 194) 8 [25], citing *White v Director of Military Prosecutions* (2007) 231 CLR 570, 595 [48] (Gummow, Hayne and Crennan JJ).

197 *Brewster* (n 9) 98 [225].

198 Ibid 98 [226].

199 Ibid 98 [227].

200 Ibid 77 [119].

deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding' was clearly within the judicial mandate.[201]

In the authors' view, whether resort to the common fund doctrine creates new laws and thus exceeds the bounds of judicial power would depend to a degree upon the extent that the same are consistent or inconsistent with existing legal principle, which might include principles as to unjust enrichment, maritime salvage, quantum meruit and even equitable rights to indemnity.[202]

The argument that CFOs are judicial because they aid the quelling of a controversy was also dealt a possible blow by the plurality's finding that CFOs do not assist in determining any issue in dispute between the parties.[203] On the other hand, arguments that the assessment of a funding fee involves non-judicial policy questions could be met by reference to the frequent role of courts as valuers.[204] Lastly, the suggestion that a power is likely to be judicial because it is given to a judicial body (or administrative because it is given to an administrative body) appears to be a reference to the 'chameleon doctrine', which has received some support from the High Court where a power is given that contains both a judicial element and an administrative element.[205] That doctrine can nevertheless be somewhat circular and it has been suggested that its scope should be limited.[206]

Given the focus of this article on legislative intervention, a distinction should be drawn between possible future legislation to allow courts to make CFOs on the one hand, and the judicial interpretation of existing laws to the effect that those laws allow courts to create CFOs on the other. The submissions to the High Court did not generally focus on the issue of the separation of legislative and judicial power (though, as we have seen above, it did discuss at some length separation of judicial and executive or administrative power) or suggest that the latter judicial interpretation might in some way intrude into the legislative function. However, to the extent that any such argument was in the background, actual legislation would seemingly negate any particular problem of that nature. Further, insofar as

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201 Ibid 77 [119].

202 Though Edelman J was the only judge to give these issues any detailed consideration: *Brewster* (n 9) 90–2 [191]–[200]. Nettle J did not consider the separation of powers question but expressly doubted the relevance of salvage law to interpreting the power given by s33ZF (1): 78 [125].

203 Ibid 65 [51] (Kiefel CJ, Bell and Keane JJ).

204 Indeed, the plurality seemed open to the idea of the court determining a value for the service provided by funders: *Brewster* (n 9) 63 [41], 67–8 [68] (Kiefel CJ, Bell and Keane JJ).

205 This is a so called 'double function' power as first identified in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. In R*e Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360, Gaudron J noted that some powers were essentially judicial and could only be conferred on courts under ch III of the *Constitution*, while other powers took their character from the tribunal in which they were reposed and the way in which they were to be exercised and thus could be conferred on courts or other tribunals as the Parliament chose.

206 Kirby J noted in *Thomas v Mowbray* (2007) 233 CLR 307, 343 that while the nature of the body in which a function is reposed may assist in determining the 'judicial character' of that function, it could not eliminate the judicial duty to characterise the function. Hayne J also noted, at 462, that this limitation analogizing that a grant of statutory power to a federal court did not conclude the question whether the power thus given was a federal judicial power.

there were a problem of lack of criteria to guide the exercise of discretion by the court, legislation could also go a long way towards dealing with this by providing such criteria and also to give effect to rights and obligations 'for which the statute provides'.[207] Likewise, a specific statute conferring power to make CFOs should seemingly be able to be characterised as a judicial power provided that it was 'to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to (unspecified) policy considerations'.[208]

Nevertheless, even if CFOs, a law empowering the making of them, or both, can be seen as falling within judicial and, therefore, constitutional power, other constitutional issues might arise, as we shall see.

B *Acquisition of Property on Just Terms*

The second constitutional issue that arose in *Brewster* was whether a law allowing common funds provided for acquisitions of property other than on just terms. It was submitted by the appellants that a CFO 'has the effect of taking from group members a valuable part of their rights relating to their causes of action, which rights are proprietary in nature'.[209] The rights taken were said to be 'property' within the meaning of s 5l(xxxi) of the *Constitution*,[210] and there was said to be a corresponding acquisition on the funder's part. The CFO conferred on the funder a priority interest in any resolution sum, which was an identifiable benefit or advantage corresponding to class members' rights to any fruits of their choses in action.[211]

The appellants thus submitted that Parliament may not empower the Court to take property rights from one party and confer them on a non-party, without complying with the requirement of just terms under s 51 (xxxi).[212] It should not achieve indirectly, through the conferral of judicial powers to acquire property, what it could not achieve directly by legislation or through the exercise of administrative power.[213]

In response, the representative party claimants argued that a CFO did not *take away* a portion of the fruits of the class members' choses in action, but put in

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207 See *Precision Data Holdings* (n 184) 191, referring to the discussion by Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165.

208 Ibid.

209 Appellant's Submissions (n 183) 17 [45].

210 Ibid, citing *Georgiadis v Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297 ('*Georgiadis*'), 303, 312, 320; *JT International SA v Commonwealth* (2012) 250 CLR 1, 33 [41], 67–8 [169], 74–5 [193], 95–6 [263]; *Smith v ANL* (2000) 204 CLR 493, 500–1 [7]–[8], 504–5 [22]–[23] ('*Smith*'); *Minister for Army v Dalziel* (1944) 68 CLR 261, 290.

211 Appellant's Submissions (n 183) 18 [45].

212 Ibid 18 [46].

213 Ibid, citing *Cth v WMC Resources Ltd* (1998) 194 CLR 1, 90; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 199 [139] ('*ICM Agriculture*').

place a regime to *realise* those fruits.[214] They also noted that, in any event, Part IVA of the *Federal Court of Australia Act* 1976 (Cth) already interfered with such choses by allowing them to be litigated without group members' consent, and that this had been found not to be an acquisition of property by the Full Federal Court in *Femcare v Bright*.[215] Finally, the claimants placed weight, as the Full Court had,[216] on the High Court's finding in *Airservices Australia v Canadian International Airlines Ltd* ('*Airservices Australia*'),[217] that statutory lien provisions over aircraft securing payments to the Commonwealth Civil Aviation Authority for services benefitting persons who had not contractually consented to those services did not effect an acquisition of property.[218]

The Commonwealth as intervener noted that s 51(xxxi) was primarily a grant of legislative power rather than a constitutional guarantee; that the relevant law had to be a law with respect to the acquisition of property for the just terms requirement to operate;[219] and that s 33ZF could not be so characterised.[220] It also suggested that the right acquired by the funder was not property, as it lacked permanence and stability.[221]

However, in *Georgiadis v Australia and Overseas Telecommunications Corporation*,[222] a vested cause of action for workers compensation was found by a majority of the High Court decision to be a piece of property capable of acquisition. This case would appear to be strong authority for the proposition that an accrued cause of action is property as a chose in action.[223] It is not clear what a court would make of the argument that the cost or risk of realising the same affects its proprietary status. It seems more likely that this cost might be relevant only to the value of that property.

1 *Acquisition by Someone Other than the Commonwealth*

None of the parties appeared to dispute the point that s 51(xxxi) applies to laws that facilitate acquisitions to the benefit of someone other than the Commonwealth (in this case, private funders). The point appears to be well-

214 First to Fourth Respondents Submissions (n 189) 17 [47].

215 (2000) 100 FCR 331. The Court found that where enforcement of a chose in action is for the benefit of the owner of the chose in action, the grant of authority to enforce it was not an alienation of the chose: [109] 356–7 (Black CJ, Sackville and Emmett JJ).

216 *Westpac v Lenthall* (n 9) 52–5 [122]–[127].

217 (1999) 202 CLR 133 ('*Airservices Australia*').

218 First to Fourth Respondents Submissions (n 189) 19–20 [52].

219 Commonwealth's Submissions (n 194) [37]–[38], 13–14.

220 Ibid 14–17 [38]–[47].

221 Ibid 18–19 [50].

222 *Georgiadis* (n 210).

223 *Brewster* (n 9) involved claims for damages as a result of the national recall of motor vehicles. *Georgiadis* (n 210) did make some points as to possible differences between choses in action arising under the general law and arising under statute [see generally Duffy (n 182)] but this issue — to the extent it was an issue — was not ventilated in *Brewster*.

settled.[224] The Attorney-General for Western Australia noted that extinguishment or modification of a chose of action was ordinarily an acquisition of property, though he suggested a CFO was not such an acquisition as it was more in the nature of a 'pre-emptive costs order'.[225]

2 *Court Decision as an Acquisition of Property?*

The appellants further argued that the CFO went beyond being an interlocutory step in the process of realising disputed choses in action or simply managing 'the procedural course of the litigation' and in itself was said to alter substantive proprietary rights'.[226] The Full Court had been careful to note that what would otherwise be an acquisition of property is not 'immunised because the power to acquire is conferred on a court'.[227] Yet the funder argued that the exercise of the power by a court, where the property was to be 'realised' by a court process, meant it was unconstrained by the just terms requirement.[228] The funder argued that the 'managerial or supervisory powers of a court which are apt to extinguish a chose in action to the benefit of a defendant' do not attract the operation of s 51(xxxi)'.[229]

As set out below, Edelman J suggested that a court order is unlikely to be characterised as an acquisition of property where a court makes an order for 'compensation for a wrong done or damages for an injury inflicted'.[230] In the authors' view this finding appears to turn on an analysis of causes of actions for damages as restoring a pre-existing position rather than 'acquiring' anything new (the concept of 'corrective' justice) [231]. To apply this to a funder, however, might again necessitate the enquiry of whether the funder would have a

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224 The argument that it applies to acquisitions to the benefit of someone other than the Commonwealth first received support from Williams J in *McClintock v Commonwealth* (1947) 75 CLR 1. See also *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382, 401–2 (Latham CJ) ('*PJ Magennis*'); *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 ('*Tooth & Co*'), 407 (Gibbs J), 407 (Mason J); *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, 510–11 (Mason CJ, Brennan, Gaudron JJ), 526 (Dawson and Toohey JJ) ('*Australian Tape Manufacturers*'); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 172 [23] (Mason CJ) ('*Mutual Pools*'); *Smith* (n 210) 506 [27] (Gaudron and Gummow JJ). A notable dissentient from these views appeared to be Sir Owen Dixon: see *Andrews v Howell* (1941) 65 CLR 255, 281–2 (Dixon J); *W Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501, 521 (Dixon CJ); *Attorney-General v Schmidt* (1961) 105 CLR 361, 372–3 (Dixon CJ) ('*Schmidt*'). See also Duffy (n 182), 30–4.

225 Attorney General (WA), 'Submissions for the Attorney-General of the State of Western Australia (intervening)', Submission in *Westpac v Lenthall* No S154 of 2019, 29 July 2019, 4 [12] ('WA's Submissions').

226 Ibid 19 [47].

227 *Westpac v Lenthall* (n 9) 50–1 [114].

228 Fifth Respondent's submissions (n 193) 11 [42]–[43].

229 Ibid [47] 13.

230 *Brewster* (n 9) 98–9 [230].

231 That is, where damages correct the unjust position, restoring it to the just position. This is known as '*diorthotikos*' or 'making straight'. See Richard Posner, 'The Concept of Corrective justice in Recent Theories of Tort Law' (1981) 10(1) *Journal of Legal Studies* 187.

theoretical right of action against unfunded group members in the general law. If so, the court's discussion of unjust enrichment, analogies from admiralty law and other claims would again become relevant.

3 *Genuine Adjustment*

The appellants noted the Full Court's reliance on the doctrine that a law can fall outside the just terms requirement of s 5l(xxxi) if it is a 'genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity' in circumstances where that relationship needs to be regulated 'in the common interest'.[232] However, the appellants argued that Part IVA of the *Federal Court of Australia Act 1976* (Cth) was a regime for the determination of existing legal rights, not their adjustment. They argued that s 5l(xxxi) was a guarantee that 'prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest'[233] and suggested that 'the Full Court's overbroad application of the adjustment of rights cases is apt to reduce that guarantee to an empty shell'.[234] The Commonwealth reviewed the varying claims and rights in the proceeding and found an adjustment effected as 'necessary and appropriate for doing justice in the proceeding'.[235]

This was the only argument on s 51(xxxi) that was really dealt with by the High Court, and only by two judges. Edelman J noted:

> A court order is unlikely to be characterised as an acquisition of property where a court makes an order for 'compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity'. The expression 'adjustment of the competing rights, claims or obligations' is a loose description that encapsulates a wide range of orders that are made for principled reasons independently of any purpose of acquiring property. One example is an order that requires a defendant to make restitution of a payment made to them by mistake. That order is plainly not an acquisition of property. Another example is a CFO that provides for the reasonable remuneration of a service provider from a common fund, ensuring that remuneration is made for a non-gratuitous service and that the cost of the remuneration is spread across all group members whose common fund was obtained as a result of the service.[236]

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232 *Westpac v Lenthall* (n 9) 52–5 [119]–[130]. The Full Court referred to the decision of *Australian Tape Manufacturers* (n 224) 510 (Mason CJ, Brennan, Deane and Gaudron JJ), where their Honours indicated that 'where an obligation to make a payment is imposed as … a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity it is unlikely that there will be any acquisition of property within s 51(xxxi) of the *Constitution*'.

233 Appellants' Submissions (n 183) 19 [48], citing *Smith* (n 210) 501 [9].

234 Ibid.

235 Commonwealth Submissions (n 194), 20 [51].

236 *Brewster* (n 9) 98 [230].

Gageler J also dealt with the matter briefly, and in similar terms:

> As to the suggested intrusion of s 33ZF(1) into the forbidden territory of s 51(xxxi) of the *Constitution*, it is sufficient to keep s 33ZF(1) outside the scope of the operation of s 51(xxxi) that the subject-matter of s 33ZF(1) is 'the adjustment of the competing rights, claims or obligations of persons in a particular relationship' through an exercise of such a judicial power.[237]

It is important to note that resort has been had to the genuine adjustment formula in several cases.[238] For example, the Full Court of the Federal Court in *Westpac Banking Corporation v Lenthall* had cited *Australian Tape Manufacturers v Commonwealth*,[239] which was a case involving a levy on blank tape to be used to compensate copyright owners. In that case, Mason CJ, Brennan, Deane and Gaudron JJ stated:

> In a case where an obligation to make a payment is imposed as ... a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any 'acquisition of property' within s 51(xxxi) of the *Constitution*.[240]

This passage is sometimes cited as authority for the genuine adjustment doctrine,[241] though the passage itself refers to earlier authority from the judgment of Dixon CJ in *Attorney-General (Cth) v Schmidt*.[242] An 'adjustment of competing claims between citizens in a field which needs to be regulated in the common interest' was also referred to by Deane J in *Commonwealth v Tasmania*.[243] His Honour in that case in turn made reference to *Trade Practices Commission v Tooth & Co Ltd*,[244] where Stephen J discussed the distinction between 'taking' property and 'regulating' property — a distinction developed in American law.[245] In *Mutual Pools & Staff Pty Ltd v Commonwealth*,[246] a law restricted government refunds of invalidly levied tax. Mason CJ discussed cases where the transfer was incidental to the principal purpose sought to be achieved by a law[247] and thus lacked a recognizable independent character of acquisition;[248] it merely 'provided a means

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237 Ibid 77 [120], quoting *Schmidt* (n 224) 372–3 (Dixon CJ).
238 See generally Duffy (n 182) 41–4.
239 *Australian Tape Manufacturers* (n 224).
240 Ibid 510.
241 *Westpac v Lenthall* (n 9) 52 [119].
242 *Schmidt* (n 224) 372–3. That case involved the acquisition by the Commonwealth of, inter alia, German property under the *Trading with the Enemy Act 1952* (Cth). While obviously dealing with regulation in the national public interest, the Court did not use the expression 'genuine adjustment' in its judgment.
243 (1983) 158 CLR 1, 283–4.
244 *Tooth & Co* (n 224).
245 Ibid 414–15.
246 *Mutual Pools* (n 224).
247 Ibid 171.
248 Ibid.

of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship'.[249]

The genuine adjustment notion was discussed again in *Health Insurance Commission v Peverill*,[250] where the extinguishment of the earlier right to receive payment from Medicare of a larger amount was effected as a genuine adjustment of competing claims, rights and obligations in the common interests between parties who stood in a particular relationship, and as an element in a regulatory scheme for the provision of welfare benefits from public funds.[251]

The doctrine is not, however, without uncertainties. In *Airservices Australia,*[252] Gummow J noted that the doctrine involved the notion that when private property is affected with a public interest it may be subject to regulatory control by the state,[253] but pointed out that 'many laws which affect property rights are in some sense made by the legislature in an attempt to resolve competing claims with respect to that property and its use'.[254] The result was that 'it may not be easy to draw a line between a law to which s 51(xxxi) applies and one which resolves competing claims or specifies criteria for some general regulation of conduct which is "needed" in the sense used in *Australian Tape Manufacturers*'.[255] The doctrine was subject to considerable analysis and some mild criticism in *ICM Agriculture Pty Ltd v The Commonwealth*,[256] with Hayne, Kiefel and Bell JJ noting that 'the vague and undeveloped character of the doctrine does call for caution in considering its application'.[257]

Nonetheless, the notion that requiring non-funded members to contribute to the costs of attaining the benefits they received is a genuine adjustment appears consistent with the plurality's view in *Brewster* that FEOs made at settlement are valid.

In relation to third-party litigation funding, for the exception to apply, the case may need to be made that third-party litigation funders' activities are in the public interest — presumably relying on the arguments about access to justice. As noted by Stephen J in *Trade Practices Commission v Tooth & Co Ltd*, a court would then need to consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest.[258]

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249 Ibid.
250 (1994) 179 CLR 226.
251 Ibid 236 (Mason CJ, Deane and Gaudron JJ).
252 *Airservices Australia* (n 217).
253 Ibid 299 [498].
254 Ibid 299 [500].
255 Ibid 300 [500].
256 *ICM Agriculture* (n 213).
257 Ibid 226 [218].
258 *Tooth & Co* (n 224) 414–15.

4 Just Terms

Lastly, the appellants argued that s 33ZF did not make provision for the acquisition of property (through the making of a CFO) to occur on 'just terms', and to that extent was invalid.[259] It was argued that 'just terms' entailed 'full compensation' for what was taken,[260] and that such a law must also 'affirmatively provide just terms' for that appropriation as an essential element.[261] Yet, s 33ZF did not do this as it did not require the Court to secure for each group member a compensatory benefit which equated to the value of what was taken.[262] In the authors' view, if 'just terms' were required, this would involve demonstrating both: (a) the reasonable value of the service provided by the funder in return for receiving the fee and; (b) procedural fairness in the treatment of class members — most particularly unrepresented class members who had not signed fee agreements but would be charged fees. Demonstrating the former may require no more than evidence of reasonable valuation of the litigation funding service.[263] In order to demonstrate the latter, reasonable notice to class members whose choses are being affected seems a minimum requirement and might be achieved via comprehensive opt-out notice requirements.

What constitutes reasonable notice was discussed by the ALRC in their Report on Grouped Proceedings, which formed the backdrop to the enactment of Part IVA of the *Federal Court Act 1976* (Cth).[264] The ALRC was concerned that the costs to plaintiffs and their lawyers of funding individual notice to group members 'may mean that the action cannot proceed'.[265] It thus recommended that the Court should not order that notice be given personally to each group member unless satisfied that it was reasonably practicable, and not unduly expensive to do so.[266] This recommendation was reproduced verbatim in s 33Y(5) of the *Federal Court of Australia Act 1976* (Cth). Procedural fairness considerations were therefore somewhat overridden by a strong policy bias that it was always better for actions to proceed — presumably on the basis of the access to justice argument.

In the CFO debate, and following *Haselhurst*,[267] it may be that 'just terms' for an acquisition of property might necessitate procedural fairness elevated from

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259 Appellants' Submissions (n 183) [49] 19.
260 Ibid, citing *Georgiadis* (n 210) 311 and *Smith* (n 210) 501 [10].
261 Ibid, citing *PJ Magennis* (n 224) 402.
262 Appellants' Submissions (n 183) 20 [49].
263 The plurality of the High Court in *Brewster* (n 9) seemed open to the idea of the court ascribing a value to the funder's services: see 63 [41], 67–8 [68] (Kiefel CJ, Bell and Keane JJ). It has previously been pointed out that courts should be able to *value* a service such as litigation funding: see Honourable Ray Finkelstein, 'Class actions: The Good, the Bad and the Ugly' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre, 2017), 432.
264 Australian Law Reform Commission (n 126).
265 Ibid.
266 Ibid 83 [192].
267 *Haselhurst* (n 130).

the somewhat cursory notice requirements of s 33Y(5).[268] This is a constitutional question in relation to just terms but it is also likely to be a policy question, given the call by the PJC and others for a legislative approach to common funds.[269]

Lastly, any legislative 'fix' by the Commonwealth to reinstate common funds can obviously only occur if it is within Commonwealth constitutional power.[270] The silence by the majority in *Brewster* on the constitutional question means that this may remain a live issue for a future legislature.

VII Conclusion

The common fund doctrine, allowing an advance order for ultimate deduction of funding fees from all group members' damages, was found by the High Court in *Brewster* to go beyond the legislative provisions relied upon by courts to date. Yet common funds have certain advantages for plaintiffs in reducing book building costs in class proceedings. They may also allow greater court control of funding fees and discourage closed classes. Admittedly, they may also somewhat attenuate the legal relationship between funders and lawyers on the one hand and class members on the other, which is something that also needs to be considered. The recent PJC Report accepts that legislative intervention may be desirable to clarify matters, though the constitutional power of the Commonwealth to legislate in this manner was not definitively examined in *Brewster*. Constitutional impediments may arguably not arise, however, if any legislative intervention is careful to provide just terms to litigants. This may involve both procedural fairness through real notice and fair valuation of the funding benefit. Ironically, these are matters that courts have generally strived to achieve with CFOs.

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268 It is worth noting that in the largest categories of class actions, shareholder and investor actions, the email addresses of shareholders are generally available from defendants or through share registries and that the costs of notification by this means would be negligible.

269 Christine Caulfield 'Judge Calls for Legislative Fix in Wake of High Court's Common Fund Ruling' (9 April 2020) *Lawyerly* <https://www-lawyerly-com-au.ap1.proxy.openathens.net/judge-calls-for-legislative-fix-in-wake-of-high-courts-common-fund-ruling/>.

270 Action by state legislatures is generally unconstrained by s51(xxxi). See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

EXAMINING THE CRIMINAL REGIME IN CHAPTER 7 OF THE *CORPORATIONS ACT*

STEPHEN SPEIRS*

The criminal regime in ch 7 of the Corporations Act 2001 *(Cth) contains 299 separate offences and is extremely complex. This article undertakes the first detailed examination of the criminal regime in ch 7 in anticipation of an increase in criminal prosecutions of financial services misconduct following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This examination uncovers a number of drafting anomalies and inconsistencies in the criminal regime. In the light of these issues, the article advocates simplification of the criminal regime and puts forward reform proposals aimed at fostering compliance and observance of the law.*

I INTRODUCTION

The criminal regime in ch 7 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') — the chapter primarily responsible for the regulation of financial services — is pervasive. It comprises 299 separate offences splintered across 991 pages.[1] Despite its reach, in the 10 year period leading up to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Royal Commission'), the Australian Securities and Investment Commission ('ASIC') secured only one criminal conviction against an Australian Financial Services Licensee ('AFSL') holder.[2] As the criminal regime in ch 7 of the *Corporations Act* had been left largely unused, it remained largely unexamined.

Following the Royal Commission, however, the criminal regime in ch 7 appears set to finally bare its teeth. Responding to criticisms of its perceived failure to litigate serious corporate wrongdoing in the Royal Commission's *Interim Report*[3] and *Final Report*,[4] ASIC recalibrated its enforcement strategy by adopting a 'Why Not Litigate?' approach.[5] This new enforcement strategy gives

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1 *Corporations Act 2001* (Cth) ('*Corporations Act*'). The analysis in this article of the *Corporations Act* is based on Compilation No 98, registered on 22 April 2020.

2 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 276 [2.4] ('*Interim Report*').

3 Ibid, xix.

4 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 ('*Final Report*'), 433 [3.4].

5 Michael Legg and Stephen Speirs, '"Why Not Litigate?" — The Royal Commission, ASIC and the Future of the Enforcement Pyramid' (2019) 47(4) *Australian Business Law Review* 244.

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greater prominence to criminal enforcement. ASIC has stated publicly that it will refer matters to the Commonwealth Department of Public Prosecutions ('CDPP') whenever there is 'sufficient evidence to support the view that a criminal offence has been committed and that the circumstances of the matter warrant a criminal prosecution',[6] an approach that ASIC has predicted would result in referrals to the CDPP increasing by a staggering 82 per cent in the two-year period following the Royal Commission.[7] In other words, ASIC now appears set to leverage the criminal regime in ch 7 to sanction misconduct that, prior to the Royal Commission, it would likely have addressed through non-criminal enforcement options such as an administrative or civil penalty.

Results of this changed emphasis are already emerging. In the second half of 2019 alone, ASIC laid 279 charges, 'an almost fourfold increase' on the number of charges laid in the first half of 2019, and an even greater increase on the number of charges laid prior to the Royal Commission.[8] With respect to financial services misconduct specifically, as at 1 January 2020, there were 16 active criminal matters before the courts waiting determination, and since the publication of the Royal Commission's *Final Report* in February 2019, ASIC has run three criminal cases against AFSL holders to a resolution, securing convictions in all three cases.[9] Relevantly, each of these three prosecutions was brought against large financial services institutions and tested offence provisions in ch 7 that had never previously been enforced. However, with the onset of COVID-19, and changes to ASIC's leadership team in 2021,[10] it remains to be seen whether this new reliance on the criminal law will become a permanent feature of ASIC's enforcement approach.

If ASIC needed further motivation, the passing of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* (Cth) ('*Strengthening Penalties Bill*') — just 18 days after the Royal Commission's *Final*

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6 Commissioner Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, Banking and Financial Services Law Association, 30 August 2019).

7 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Oversight of the Australian Securities and Investments Commission* (Transcript, 19 October 2018) 33 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commjnt/5a873144-a31e-466d-ae0e-338d6937b796/0001%22>.

8 Joyce Moullakis, 'ASIC on Criminal Charging Spree as Hayne Criticism Bites', *The Australian* (online, 29 April 2020) <https://www.theaustralian.com.au/business/asic-on-criminal-charging-spree-as-hayne-criticism-bites/news-story/7af68522a5b339782d5788dc507df182>.

9 See, ASIC, 'CommInsure Sentenced for Hawking Offences' (Media Release 19-344MR, 28 November 2019); ASIC, 'Pershing Sentenced for Breaching Client Money Offences' (Media Release 20-178MR, 5 August 2020); ASIC, 'Societe Generale Securities Australia Pty Ltd Receives $30,000 Penalty for Breaching Client Money Rules' (Media Release 20-252MR, 21 October 2020).

10 On 29 April 2021, Joseph Longo was appointed Chairman of ASIC, replacing James Shipton, and Sarah Court was appointed Deputy Chairperson, replacing Daniel Crennan QC. They were both appointed for a 5-year term, commencing on 1 June 2021. See, Treasury, 'Appointment of New Chairperson and Deputy Chairperson to the Australian Securities and Investments Commission' (Media Release, 29 April 2021).

Report was handed down — has provided it.[11] The *Strengthening Penalties Bill* dramatically increased the maximum penalties attaching to offence provisions in the *Corporations Act*. An individual defendant now faces a maximum prison term of 15 years, and a body corporate faces a maximum pecuniary penalty, the greater of: (1) $9,990,000; (2) three times the value of the benefit derived or the detriment avoided by the contravention; or (3) 10 per cent of the annual turnover of the corporation for the 12 month period at the end of the month in which the company committed or began committing the offence.[12] ASIC, unsurprisingly, has embraced these reforms. Its former Chair, James Shipton, remarked that 'these new powers and penalties will be of greater deterrence value and will make a meaningful difference'.[13]

Against this background, it is appropriate to conduct a detailed review of the criminal regime — that is, the substantive criminal offences — contained in ch 7 of the *Corporations Act.* This article undertakes this review in Part II. What emerges is a very complex regime in urgent need of simplification. This complexity derives predominately from the way the regime has been drafted and is structured. Three major issues appear. First, as offence provisions have been inserted into ch 7 by amendment over time, they have not been drafted consistently. The review examines the different drafting formulae used by the legislature and their implications on enforcement. Secondly, in order to 'find' an offence provision in ch 7 (or to know that a provision constitutes an offence) it is necessary to understand how an offence provision interacts with provisions in other parts of the *Corporations Act*, especially pt 9.4 (which generally regulates 'offences') and sch 3 (which lists a large majority, but not all, of the criminal penalties that attach to the offence provisions in the *Corporations Act*). This article will provide guidance on how to navigate this complex network of provisions. Thirdly, issues arise from the interactions of the offence provisions in ch 7 with provisions in the *Crimes Act 1914* (Cth) ('*Crimes Act*') and *Criminal Code Act 1995*

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11 See, *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* (Cth) ('*Strengthening Penalties Bill*'). Although the swiftness of this reform following the issuance of the *Final Report* of the Royal Commission is notable, it should be observed that the legislation actually implements a recommendation of the ASIC Enforcement Review Taskforce of 2017, which held that the penalty regime was inadequate to address the severity of misconduct, with penalties being 'too low' to act as a 'credible deterrent': see Department of Treasury and Finance (Cth), ASIC Enforcement Review Taskforce, *ASIC Enforcement Review Taskforce Report*, 18 December 2017, 71, 94-95 ('*ASIC Taskforce Final Report*').

12 *Corporations Act* (n 1) s 1311C(3). Previously, with limited exceptions, the maximum penalty for a body corporate was five times the maximum penalty that applied to an individual (see former s 1312 of the *Corporations Act*), with the maximum penalty for an individual being, immediately before the amendments, capped at $420,000.

13 James Shipton, 'The Fairness Imperative' (Speech, AFR Banking and Wealth Summit, 27 March 2019) <https://asic.gov.au/about-asic/news-centre/speeches/the-fairness-imperative/>.

(Cth) ('*Criminal Code*'), both of which contain matters of general application that apply to all federal offences, including those in the *Corporations Act*.[14]

Having identified these issues, Part III puts forward specific proposals for legislative reform aimed at simplifying the criminal regime in ch 7. The objective driving these proposals is straightforward: to make clear when conduct regulated by ch 7 constitutes an offence and may attract criminal consequences. Although the proposals put forward are ambitious, in the post-Royal Commission world there is renewed appetite for reform. In September 2020, the Commonwealth Attorney-General asked the Australian Law Reform Commission ('ALRC') to conduct a review into the laws that regulate financial services in Australia, and to consider 'what changes to the Corporations Act 2001 … could be made to simplify and rationalise the law'.[15] The ALRC is due to publish its final report by 30 November 2023. One may hope that the ALRC's inquiry will catalyse government action on the matters discussed in this article.

II The Criminal Regime in Chapter 7

Chapter 7 contains 299 separate criminal offence provisions.[16] Cataloguing these provisions is no simple task. As will be shown, the offence provisions are drafted

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14 Note, the carving out of the corporate attribution model in pt 2.5 of the *Criminal Code* by s 769A of the *Corporations Act* falls outside the scope of this article. The corporate attribution model that applies to the offence provisions in ch 7 sits in s 769A and was recently examined by the Australian Law Reform Commission ('ALRC') as part of its review into Australia's corporate criminal responsibility regime. See generally, ALRC, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) ('*ALRC Final Report*').

15 Christian Porter, Attorney-General, 'Terms of Reference', *Australian Law Reform Commission: Review of the Legislative Framework for Corporations and Financial Services Regulation* (Web Page, 11 September 2020) <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>.

16 See *Corporations Act* (n 1) ss 791A(1), 791B, 792B(1), 792B(2), 792B(3), 792B(4), 792B(5), 792C(1), 792D(1), 792E, 792F(1), 792F(2), 792F(3), 792G(1), 792G(2), 792I, 793D(3), 794B(3), 798C(3), 798C(6), 794D(3), 794E(2), 798D(4), 798DA(4), 820A(1), 820B, 821B(1), 821B(2), 821B(3), 821B(4), 821BA(1), 821C(1), 821C(3), 821D, 821E(1), 821E(2), 821E(3), 822D(3), 823B(3), 823D(5), 823E(3), 850C, 851D(8), 852B(2), 853F(1), 853F(2), 854A(4), 892B(1), 892B(3), 892H(1), 892H(2), 892H(3), 892H(6), 892H(7), 892K(2), 904B(1), 904B(5), 904C(1), 904C(3), 904D(2), 904E, 904G(5), 904H(3), 904K(4), 905A(2), 907A, 911A(1), 911B(1), 911C, 912C(3), 912D(1B), 912D(2), 912E(1), 912F(1), 916A(3A), 916B(2A), 916B(5A), 916C(3), 916D(2A), 916F(1), 916F(1A), 916F(3), 916G(2), 916G(3), 920C(3), 922M(3), 923A(1), 923B(1), 923C(1), 923C(2), 942B(8), 942C(8), 942E, 943F, 946AA(4), 946B(3A), 946B(9), 949A(2), 949A(5), 949B(2), 949B(4), 952C(1), 952C(3), 952D(1), 952D(2), 952E(6), 952F(2), 952F(3), 952F(4), 952G(2), 952G(4), 952G(6), 952H(2), 952I(1), 952I(2), 952I(3), 952I(4), 952J(1), 952K, 952L(1), 952L(2), 952L(3), 952M, 982C(1), 982C(2), 982D, 983C, 984B(1), 985D(1), 985J(1), 985J(2), 985J(4), 985K(1), 988A(1), 989B(1), 989B(2), 989B(3), 989CA(3), 989CA(4), 990B(1), 990B(2), 990B(6), 990D(1), 990D(2), 990F(a), 990I(3), 990K(1), 991B(2), 991E(1), 991E(3), 991F(1), 991F(2), 991F(3), 992A(1), 992A(3), 992AA(1), 993B(1), 993B(3), 993C(1), 993C(3), 993D(2), 993D(3), 1012DA(9), 1012DAA(10), 1012H(2), 1013I(4), 1013IA(5), 1013K(1), 1013K(2), 1015B(1), 1015D(2), 1015D(3), 1015D(4), 1015E(1),

in several different ways. Adding to the complexity of this task, it is also necessary to understand how these provisions interact with provisions elsewhere in the *Corporations Act*, as well as provisions in the *Crimes Act* and *Criminal Code*.[17] To provide some order and coherence to the criminal regime in ch 7, this Part organises the offence provisions by reference to: (A) how the offences are drafted; (B) the 'type' of offences (ie, whether an offence provision contains 'fault elements' or is a continuing offence); and (C) the seriousness of the offences.

A *How Offences are Drafted in Chapter 7*

A fundamental distinction is drawn in ch 7 between 'specific' offences and 'general' offences. This terminology, referring to the offence provisions in ch 7 as 'general' or 'specific' offences, was coined by Bird and Gilligan.[18] Broadly, the two terms denote how the offence provisions in ch 7 are drafted. That is, 'specific' offences are provisions in which an offence is *specifically* or expressly provided for in the provision itself.[19] This is to be contrasted with 'general' offence provisions, which are not offences per se (the provisions containing no express indicia of an offence), and which are only made offences by virtue of s 1311 (see, pt II(A)(e)(3)).

It is important to observe that the terms general and specific, as defined by Bird and Gilligan, apply only to offence provisions in the *Corporations Act*, and that the same terms hold different meanings when used elsewhere in the criminal law. Whereas the terms when used by Bird and Gilligan reflect the 'form' of the offence provision in ch 7, the same terms when used more generally in the criminal law depict the content or substance of an offence.

One way to understand the general criminal law meaning of the terms is by reference to the distinction between rule-based and principle-based offences. The former are highly prescriptive and specifically identify the precise conduct that is prohibited (hence, 'specific' offences), whereas the latter are drafted more

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1016A(2), 1016A(3), 1016B(1), 1016C, 1016D(1), 1016D(2)(d), 1016E(2), 1017B(1), 1017C(2), 1017C(2A), 1017C(3), 1017C(3A), 1017C(5), 1017D(1), 1017DA(3), 1017E(3), 1017E(4), 1017F(2), 1017G(1), 1018A(1), 1018A(2), 1018B(1), 1020A(4), 1020AB(3), 1020AC(2), 1020AD(2), 1020AE, 1020AI(3), 1020AI(5), 1020AI(7), 1020AJ, 1020B(2), 1020BAA(1), 1020E(8), 1020E(9), 1021C(1), 1021C(3), 1021D(1), 1021D(2), 1021E(5), 1021F(1), 1021FA(1), 1021FA(2), 1021FB(1), 1021FB(2), 1021FB(3), 1021FB(6), 1021G(2), 1021H(1), 1021I(1), 1021J(1), 1021J(2), 1021J(3), 1021K(1), 1021L(1), 1021L(2), 1021M(1), 1021M(3), 1021N, 1021NA(1), 1021NA(2), 1021NA(3), 1021NB(1), 1021NB(2), 1021NB(3), 1021O(1), 1021O(3), 1021P(1), 1021P(2), 1021P(3), 1021P(4), 1021P(5), 1021P(6), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G, 1043A(1), 1043A(2), 1052B(3), 1052BA(4), 1052C(6), 1070B(1), 1070C(1), 1070D(3), 1071B(2), 1071E, 1072E(11), 1072H(1), 1072H(3), 1072H(4), 1072H(5), 1072H(6), 1101B(10), 1101C(1), 1101C(2), 1101C(3), 1101E(1), 1101F(1), 1101F(1A), 1101G, 908BA(1), 908BB, 908BQ(1), 908BR(2), 908BS, 908BV(4), 908DA(3), 908DB(3), 921L(7), 921M(1), 921M(2), 921M(3), 921P(2), 922HC(3), 1054A(3), 1054B(4), 1054BA(4), 1058(1).

17 Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2nd ed, 2018) 3.

18 Helen Bird and George Gilligan, 'Financial Services Misconduct and the Corporations Act 2001' (Working Paper No 2/2015, Centre for International Finance and Regulation, July 2015) 7.

19 Ibid.

broadly, are usually outcome-focused, and are capable of capturing new conduct that is not currently contemplated by the law (hence, 'general' offences). It is worth observing that the Royal Commission cautioned against an overly prescriptive approach to financial services regulation,[20] and it has been argued that principle-based offences, as opposed to prescriptive *ex ante* rules, are particularly suited to the area of white-collar crime, where the 'type' of conduct that is rendered 'criminal' shifts over time in response to new technologies and evolving social norms.[21] This preference is evident by the insertion of new, broadly drafted 'omnibus' provisions in the *Criminal Code* with respect to the offences of foreign bribery[22] and general dishonesty.[23]

Given the dual meanings of the terms 'general' and 'specific', it follows that a 'specific' offence in its *Corporations Act* meaning (being an offence that is expressly provided for in a legislative provision), can also be a broadly drafted, norm-based provision (and thus, a 'general' offence as understood in its general criminal law meaning). Equally, a 'general' offence in its *Corporations Act* meaning (being an offence that is enlivened by s 1311 and is drafted without any express reference to it being an offence), can be narrowly tailored and specifically drafted (and hence, a 'specific' offence in its general criminal meaning). The potential confusion that may arise from the dual meaning of the terms may ultimately give weight to the adoption of alternative terms to describe the offences in the *Corporations Act*. However, for the purposes of this article the terms as defined by Bird and Gilligan are adopted.

This Part examines in detail the differences between a 'general' and 'specific' offence as defined by Bird and Gilligan. Although approaching an analysis of the offence provisions in ch 7 is assisted by dividing the offences into these two broad categories, as will be seen, even within this specific/general offence dichotomy, the legislature has failed to adopt a single or consistent drafting formula when inserting 'specific' or 'general' offences into ch 7.

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20 See Australian Law Reform Commission, *Review of the Legislative Framework for Corporations and Financial Services Regulation* (Preliminary Analysis, December 2020) <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/inquiry-approach/2-preliminary-analysis/> ('*ALRC Preliminary Analysis*'). See also *Final Report* (n 4) 16 [1.5.3].

21 On norm-setting and the response of the criminal law in a white-collar setting, see generally Samuel Buell, '"White Collar" Crimes' in Markus Dubber and Tatjana Hornle (eds), Oxford Handbook of Criminal Law (Oxford University Press, 2014) 837–50.

22 *Criminal Code Act 1995* (Cth) ('*Criminal Code*') s 141.1 (Bribery of a Commonwealth Public Official).

23 Ibid s 135.1. Note, broad omnibus offences have been gradually inserted into federal statutes, including the *Criminal Code*, following the recommendation made in the Final Report of the Review of Commonwealth Criminal Law (the Gibbs Committee), handed down in December 1991. see Sir Harry Gibbs, Justice Raymond Watson and Archibald Menzies, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (Interim Report, 1990), cited in *ALRC Final Report* (n 14) 50 [2.6]

1 *Specific Offence Provisions*

Specific offences in the *Corporations Act* are offences committed directly under legislative provisions.[24] That is, specific offence provisions expressly provide that the doing, or not doing, of an act or thing forbidden or required is an offence.[25] Of the 299 offences in ch 7, 94 are specific offence provisions.[26]

Every specific offence in ch 7 contains the phrase 'commits an offence if'. The phrase is preceded by the relevant actor or 'wrongdoer', which, for the large majority of specific offences is 'a person', broadly defined to include a body corporate,[27] partnership and multiple trustees.[28] However, it can also be a 'a regulated person',[29] 'the responsible person',[30] 'the issuer of a financial product',[31] 'an issuer or seller of financial products',[32] a 'financial services licensee',[33] an 'authorised representative of a financial services licensee',[34] or 'the providing entity'.[35] Each of these different terms is the subject of separate and qualified definitions, a comprehensive analysis of which is beyond the scope of this article.[36]

The taxonomy of specific offences has not been satisfactorily documented or explained. Although all specific offences contain the phrase 'commits an offence if', a review of the specific offences in ch 7 reveals that the legislature has used two different drafting formulas. Distinguishing between these two drafting formulas is critical to locating specific offences in ch 7 as well as to identifying the penalties that attach to them. This section defines these formulas and examines their application throughout ch 7.

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24 Bird and Gilligan (n 18) 7.

25 Ibid. Specific offences are to be contrasted with general offences, which are not offences per se and are only made offences by virtue of the operation of s 1311. See below Part II(A)(3).

26 See *Corporations Act* (n 1) ss 952C(1), 952C(3), 952D(1), 952D(2), 952E(6), 952F(2), 952F(3), 952F(4), 952G(2), 952G(4), 952G(6), 952H(2), 952I(1), 952I(2), 952I(3), 952I(4), 952J(1), 952K, 952L(1), 952L(2), 952L(3), 952M, 989CA(3), 989CA(4), 993B(1), 993B(3), 993C(1), 993C(3), 993D(2), 993D(3), 1020AI(3), 1020AI(5), 1020AI(7), 1020AJ, 1020B(2), 1021C(1), 1021C(3), 1021D(1), 1021D(2), 1021E(5), 1021F(1), 1021FA(1), 1021FA(2), 1021FB(1), 1021FB(2), 1021FB(3), 1021FB(6), 1021G(2), 1021H(1), 1021I(1), 1021J(1), 1021J(2), 1021J(3), 1021K(1), 1021L(1), 1021L(2), 1021M(1), 1021M(3), 1021N, 1021NA(1), 1021NA(2), 1021NA(3), 1021NB(1), 1021NB(2), 1021NB(3), 1021O(1), 1021O(3), 1021P(1), 1021P(2), 1021P(3), 1021P(4), 1021P(5), 1021P(6), 908BA(1), 908BB, 908BQ(1), 908BR(2), 908BS, 908BV(4), 908DA(3), 908DB(3), 921L(7), 921M(1), 921M(2), 921M(3), 921P(2), 922HC(3), 1054A(3), 1054B(4), 1054BA(4), 1058(1).

27 *Acts Interpretation Act 1901* (Cth) s 2C.

28 See *Corporations Act* (n 1) ss 761A, 761F, 761FA.

29 See, eg, ibid ss 1020AI(3), 1020AI(5).

30 See, eg, ibid s 1021N.

31 See, eg, ibid s 1021FB(1).

32 See, eg, ibid s 1021O(1).

33 See, eg, ibid s 952D(1).

34 See, eg, ibid s 952K.

35 See, eg, ibid s 952C.

36 Joe Longo, 'Market Misconduct Provisions of the Financial Services Reform Act: Challenges for Market Regulation' (Conference Paper, Centre for Corporate Law and Securities Regulation Seminar, 25 July 2001) 7.

(a) Formula One: Specific Offence with Penalty Specified

The first formula ('formula one') contains the phrase 'commits an offence if', and the penalty attaching to the offence is specified in a provision of the *Corporations Act*. There are 18 formula-one specific offences in ch 7.[37]

While formula-one specific offences are clearly drafted on the face of the provision, they are the hardest to find. This is because formula-one specific offences are the only offences in ch 7 that are *not* listed in sch 3 (sch 3 being a consolidated list of 'penalties' that attach to offence provisions in the *Corporations Act*). As a result, the only way to 'find' a formula-one specific offence is to locate the provision itself, which, given the size and scope of the *Corporations Act*, is not an easy task. In contrast, the 281 other offences in ch 7 (comprising formula-two specific offences and general offences, on which more below) can be immediately identified by scanning sch 3. Due to the convenience of sch 3, it is often used as a proxy list, or reference sheet, to identify offences in the *Corporations Act*. This reliance on sch 3 as a proxy list, however, means that formula-one specific offences can be (and often are) overlooked.

Although all formula-one specific offences are alike in that the penalty for the offence is *not* listed in sch 3, formula-one specific offences can be further divided into two sub-species by reference to where the penalty is *otherwise* specified. Section 1311E provides that when a penalty is *not* specified in sch 3, it may be specified either in the offence provision itself, or 'any other provision of the Act'. Of the 18 formula-one specific offences in ch 7, the penalty for 16 of them is articulated in the offence provision itself. Section 908BA is an example of a formula-one specific offence with the penalty specified in the offence provision itself. Relevantly, it provides:

> **908BA Administrators of significant financial benchmarks must be licensed**
>
> (1) *A person commits an offence if*:
>
> (a) the person:
>
> (i) administers a significant financial benchmark; or
>
> (ii) holds out that the person administers a significant financial benchmark; and
>
> (b) the person does not hold a benchmark administrator licence that specifies the financial benchmark; and
>
> (c) the period applying under subsection (2) for the financial benchmark has ended.
>
> *Penalty: 5 years imprisonment*.[38]

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37 *Corporations Act* (n 1) ss 908BA(1), 908BB, 908BQ(1), 908BR(2), 908BS, 908BV(4), 908DA(3), 908DB(3), 921L(7), 921M(1), 921M(2), 921M(3), 921P(2), 922HC(3), 1054A(3), 1054B(4), 1054BA(4), 1058(1).

38 Emphasis added.

For the remaining two formula-one specific offences — those being ss 908DA(3) and 908DB(3) — the penalty is specified in a provision of the Act *other* than the offence provision itself. For both of those provisions, the penalty is specified in s 908DC, which appears directly beneath those two offence provisions in the *Corporations Act.* Relevantly, s 908DC provides as follows:

> **908DC Penalties for offences against this Division**
>
> The penalty for an offence against this Division is 15 years imprisonment.

Evidently, s 908DC specifies the penalty for all offences 'against this Division', that being ch 7 pt 7.5B div 4 of the Act. No other division of ch 7 is structured in this way. The effect of s 908DC is that all of the offences in the division (those being ss 908DA(3) and 908DB(3)) are dealt with as a single 'scheme'.

The offences in ss 908DA(3) and 908DB(3) were introduced as part of the *Treasury Laws Amendment (2017 Measures No 5) Act 2018* (Cth), which received royal assent on 11 April 2018. Apart from being new offence provisions added to ch 7 on an ad hoc basis, there appears to be no policy justification for why the penalties for those two formula-one specific offences are not specified in the two offence provisions themselves, as is the case for the 16 other formula-one specific offences. It is unclear why this inconsistency in structure was introduced and whether it will continue in further amendments to the *Corporations Act.*

(b) Formula Two: Specific Offence with No Penalty Specified

The second formula ('formula two') also contains the phrase 'commits an offence if', but the penalty attaching to the offence is neither specified in the offence provision itself nor in any other provision of the *Corporations Act*. Rather, for formula-two specific offences, the penalty is specified in sch 3.[39] There are 76 formula-two specific offences in ch 7.[40] An example of a formula-two specific offence in ch 7 is s 1021N:

> **1021N Offence of failing to provide additional information requested under section 1017A**
>
> A person (the *responsible person*) commits an offence if:

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39 Ibid s 1311E(1)(a).

40 Ibid ss 920C(3), 922M(3), 952C(1), 952C(3), 952D(1), 952D(2), 952E(6), 952F(2), 952F(3), 952F(4), 952G(2), 952G(4), 952G(6), 952H(2), 952I(1), 952I(2), 952I(3), 952I(4), 952J(1), 952K; 952L(1), 952L(2), 952L(3), 952M, 989CA(3), 989CA(4), 993B(1), 993B(3), 993C(1), 993C(3), 993D(2), 993D(3), 1020AI(3), 1020AI(5), 1020AI(7), 1020AJ, 1020A(4), 1020B(2), 1021C(1), 1021(C)(3),1021D(1), 1021D(2), 1021E(5), 1021F(1), 1021FA(1), 1021FA(2), 1021FB(1), 1021FB(2), 1021FB(3), 1021FB(6), 1021G(2), 1021H(1), 1021I(1), 1021J(1), 1021J(2), 1021J(3), 1021K(1), 1021L(1), 1021L(2), 1021M(1), 1021M(3), 1021N, 1021NA(1), 1021NA(2), 1021NA(3), 1021NB(1), 1021NB(2), 1021NB(3), 1021O(1), 1021O(3), 1021P(1), 1021P(2), 1021P(3), 1021P(4), 1021P(5), 1021P(6).

(a) a request is made to them by another person, in accordance with subsection 1017A(1), to provide further information about a financial product; and

(b) the responsible person is required by subsection 1017A(2) to give the other person the information; and

(c) the other person has paid any charge in respect of the request, being a charge that is in accordance with subsections 1017A(5) and (6); and

(d) the responsible person does not take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, the information is provided to the other person in accordance with subsection 1017A(4).

Many of the formula-two specific offences appear under sub-headings, which label the offence as being either a 'strict liability offence', 'fault-based offence' or 'ordinary offence'.[41] As discussed further below,[42] the formula-two specific offences that contain these 'labels' sit on enforcement tracks.[43] The remaining formula-two specific offences, which contain no 'labels' and do not sit on an enforcement track, are, for want of a better term, 'basic' formula-two specific offences (see for example, s 1021N, extracted above).[44]

2 *General Offence Provisions*

General offence provisions are quite different machines to specific offences. Rather than the prohibited conduct being expressly classified as an offence by the provision itself (as is the case with specific offences), general offences are made offences 'by virtue of' s 1311(1) of the *Corporations Act*. Section 1311(1) provides that a person who either (a) does an act or thing that is forbidden by a provision of the Act; (b) does not do an act or thing that the person is required to do by a provision of the Act; or (c) otherwise contravenes a provision of the Act, is guilty of an offence.

Accordingly, unlike specific offence provisions, general offence provisions do not, on their face, make plain that they are indeed an offence provision. There are a total of 205 general offences in ch 7.[45] An example is s 911A(1):

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41 See, eg, ibid s 952C(1) (offence of strict liability), s 952C(3) (ordinary offence) and s 920C(3) (fault-based offence).

42 See below Part II(A)(3).

43 See, eg, s 1021O, extracted in Part II(b)(i) below and accompanying discussion.

44 Note that a 'basic' formula-two specific offence is intended to be a reference to a formula-two specific offence without a label of either 'strict liability offence', 'ordinary offence' or 'fault-based offence'.

45 *Corporations Act* (n 1) ss 791A(1), 791B, 792B(1), 792B(2), 792B(3), 792B(4), 792B(5), 792C(1), 792D(1), 792E, 792F(1), 792F(2), 792F(3), 792G(1), 792G(2), 792I, 793D(3), 794B(3), 798C(3), 798C(6), 794D(3), 794E(2), 798D(4), 798DA(4), 820A(1), 820B, 821B(1), 821B(2), 821B(3),

> **911A Need for an Australian financial services licence**
>
> (1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.
>
> …
>
> Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Evidently, s 911A(1) does not exhibit the structural attributes of an offence provision (ie, fault elements or criminal penalty). That is because s 911A(1) merely specifies the 'conduct' that a financial services business is required to do — the criminal offence only arises by operation of s 1311(1) in combination with that specified conduct. Anderson comments that '[m]any of the "offences" in the *Corporations Act* are not "offences" per se, but rather the offence comes about by virtue of s 1311(1)'.[46] Similarly, the Full Federal Court, in *Australian Securities and Investment Commission v Whitebox Trading Pty Ltd*,[47] held that provisions like 911A(1), when construed independently of s 1311(1), have the effect of merely 'creating statutory norms which prohibit particular conduct, but do not themselves specify any … criminal consequences for a breach'.[48]

Some assistance in identifying general offences is provided by notations. For example, the notation, '[f]ailure to comply with this subsection is an offence (see subsection 1311(1))', appears underneath s 911A(1). However, such notations do not always appear under a provision that is made a general offence by the operation of s 1311(1). For example, notations do not appear under ss 1012DA(9) or 1012DAA(10),[49] notwithstanding that both provisions are made general offences by virtue of s 1311(1). It is likely that the omission of notations in these two

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821B(4), 821BA(1), 821C(1), 821C(3), 821D, 821E(1), 821E(2), 821E(3), 822D(3), 823B(3), 823D(5), 823E(3), 850C, 851D(8), 852B(2), 853F(1), 853F(2), 854A(4), 892B(1), 892B(3), 892H(1), 892H(2), 892H(3), 892H(6), 892H(7), 892K(2), 904B(1), 904B(5), 904C(1), 904C(3), 904D(2), 904E, 904G(5), 904H(3), 904K(4), 905A(2), 907A, 911A(1), 911B(1), 911C, 912C(3), 912D(1B), 912D(2), 912E(1), 912F(1), 916A(3A), 916B(2A), 916B(5A), 916C(3), 916D(2A), 916F(1), 916F(1A), 916F(3), 916G(2), 916G(3), 923A(1), 923B(1), 923C(1), 923C(2), 942B(8), 942C(8), 942E, 943F, 946AA(4), 946B(3A), 946B(9), 949A(2), 949A(5), 949B(2), 949B(4), 982C(1), 982C(2), 982D, 983C, 984B(1), 985D(1), 985J(1), 985J(2), 985J(4), 985K(1), 988A(1), 989B(1), 989B(2), 989B(3), 990B(1), 990B(2), 990B(6), 990D(1), 990D(2), 990F(a), 990I(3), 990K(1), 991B(2), 991E(1), 991E(3), 991F(1), 991F(2), 991F(3), 992A(1), 992A(3), 992AA(1), 1012DA(9), 1012DAA(10), 1012H(2), 1013I(4), 1013IA(5), 1013K(1), 1013K(2), 1015B(1), 1015D(2), 1015D(3), 1015D(4), 1015E(1), 1016A(2), 1016A(3), 1016B(1), 1016C, 1016D(1), 1016D(2)(d), 1016E(2), 1017B(1), 1017C(2), 1017C(2A), 1017C(3), 1017C(3A), 1017C(5), 1017D(1), 1017DA(3), 1017E(3), 1017E(4), 1017F(2), 1017G(1), 1018A(1), 1018A(2), 1018B(1), 1020AB(3), 1020AC(2), 1020AD(2), 1020AE, 1020BAA(1), 1020E(8), 1020E(9), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G, 1043A(1), 1043A(2), 1052B(3), 1052BA(4), 1052C(6), 1070B(1), 1070C(1), 1070D(3), 1071B(2), 1071E, 1072E(11), 1072H(1), 1072H(3), 1072H(4), 1072H(5), 1072H(6), 1101B(10), 1101C(1), 1101C(2), 1101C(3), 1101E(1), 1101F(1), 1101F(1A). 1101G.

46 Anderson (n 17) 104.

47 (2017) 251 FCR 448.

48 *ASIC v Whitebox Trading Pty Ltd* (2017) 251 FCR 448, 457 (Allsop CJ, Middleton and Bromwich JJ).

49 Other examples in the *Corporations Act* outside of ch 7 include ss 142(1) and 142(2).

instances was inadvertent, given that the Explanatory Memorandum introducing the *Financial Services Reform Bill 2001 (Cth)* asserted that 'to ensure that it is clear when a provision is subject to a criminal penalty … [n]otes have been placed under *all* provisions where offences are created through subsection 1311(1)'.[50] The oversight, however, is a significant one, when considering that both provisions constitute indictable offences with maximum penalties of up to two years imprisonment (or 2,400 penalty units for a body corporate).[51]

3 *Specific and General Offences on Enforcement Tracks*

'Enforcement tracks' provide a regulator with multiple options to sanction the same contravening conduct. They are designed to ensure that the regulatory response is proportionate to the severity of the misconduct being sanctioned. Enforcement tracks were recently endorsed by the ASIC Enforcement Taskforce Review, which concluded that 'it is important that ASIC have a range of options for enforcement to enable it to respond adequately in circumstances of individual cases'.[52] Enforcement tracks appear regularly throughout ch 7. The most common 'track' is one that makes the same contravening conduct sanctionable by either a civil penalty or a criminal offence;[53] however, as explored below, other types of enforcement tracks (even if they have not previously been defined as such) also appear in ch 7.

The inclusion of enforcement tracks in ch 7 compounds the complexity that results from the inconsistent way in which offence provisions in ch 7 have been drafted. To demonstrate, because there is no single drafting formula for an offence provision in ch 7, the legislature has inserted different types of enforcement tracks to fit the drafting style of each type of offence. Accordingly, as shown in Table 1 below, there are three different types of enforcement tracks: (1) 'dual-track provisions' on which general offences sit; (2) 'scheme dual track' provisions on which formula-one specific offences sit; and (3) 'multiple-track provisions' on which formula-two specific offences sit.

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50 Explanatory Memorandum, *Financial Services Reform Bill 2001* (Cth) 46 [6.111] ('*EM Financial Reform Bill*').

51 Maximum penalty in penalty units applicable to a body corporate obtained using conversion formula specified in s 311C(2)(b) of the *Corporations Act 2001* (Cth). See also below at Part II(C)(1).

52 ASIC Enforcement Review Taskforce, Department of Treasury and Finance (Cth), *Positions Paper 7 — Strengthening Penalties for Corporate and Financial Misconduct* (2017) 8 [12] ('*ASIC Taskforce*'). Enforcement tracks were also examined in some detail by the ALRC as part of its review into Australia's corporate criminal responsibility regime. See *ALRC Final Report* (n 14) 175–7 [5.24]; Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) 92 [4.20] ('*ALRC Discussion Paper*').

53 Dual-track provisions are not unique to the *Corporations Act* and also appear, for example, in ss 45AF, 45AJ, 45AG and 45AK of the *Competition and Consumer Act 2010* (Cth).

Table 1: Enforcement Tracks in Chapter 7

Offence Type	Enforcement Mechanism
General	Dual track
Specific (Formula one)	Scheme dual track
Specific (Formula two)	Multiple track

The following section examines the key features of each enforcement track. These different tracks have never previously been examined.

(a) General Offence: Dual Track

It is easiest to start with general offence 'dual-track' provisions. Of the 205 general offences in ch 7,[54] 13 sit on what are described as dual-track provisions.[55] These specify that a breach can constitute either an offence (by virtue of s 1311(1) operating), or a civil penalty (by virtue of s 1317E attaching), or both. For these dual-track provisions, the conduct that is prohibited is the same for both the civil penalty and the criminal offence. Dual-track provisions are marked by notations as exemplified by s 1023P(1):

> **1023P Enforcement of product intervention orders**
>
> (1) A person must not engage in conduct contrary to a product intervention order that is in force in relation to the person.

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54 See *Corporations Act* (n 1) ss 791A(1), 791B, 792B(1), 792B(2), 792B(3), 792B(4), 792B(5), 792C(1), 792D(1), 792E, 792F(1), 792F(2), 792F(3), 792G(1), 792G(2), 792I, 793D(3), 794B(3), 798C(3), 798C(6), 794D(3), 794E(2), 798D(4), 798DA(4), 820A(1), 820B, 821B(1), 821B(2), 821B(3), 821B(4), 821BA(1), 821C(1), 821C(3), 821D, 821E(1), 821E(2), 821E(3), 822D(3), 823B(3), 823D(5), 823E(3), 850C, 851D(8), 852B(2), 853F(1), 853F(2), 854A(4), 892B(1), 892B(3), 892H(1), 892H(2), 892H(3), 892H(6), 892H(7), 892K(2), 904B(1), 904B(5), 904C(1), 904C(3), 904D(2), 904E, 904G(5), 904H(3), 904K(4), 905A(2), 907A, 911A(1), 911B(1), 911C, 912C(3), 912D(1B), 912D(2), 912E(1), 912F(1), 916A(3A), 916B(2A), 916B(5A), 916C(3), 916D(2A), 916F(1), 916F(1A), 916F(3), 916G(2), 916G(3), 923A(1), 923B(1), 923C(1), 923C(2), 942B(8), 942C(8), 942E, 943F, 946AA(4), 946B(3A), 946B(9), 949A(2), 949A(5), 949B(2), 949B(4), 982C(1), 982C(2), 982D, 983C, 984B(1), 985D(1), 985J(1), 985J(2), 985J(4), 985K(1), 988A(1), 989B(1), 989B(2), 989B(3), 990B(1), 990B(2), 990B(6), 990D(1), 990D(2), 990F(a), 990I(3), 990K(1), 991B(2), 991E(1), 991E(3), 991F(1), 991F(2), 991F(3), 992A(1), 992A(3), 992AA(1), 1012DA(9), 1012DAA(10), 1012H(2), 1013I(4), 1013IA(5), 1013K(1), 1013K(2), 1015B(1), 1015D(2), 1015D(3), 1015D(4), 1015E(1), 1016A(2), 1016A(3), 1016B(1), 1016C, 1016D(1), 1016D(2)(d), 1016E(2), 1017B(1), 1017C(2), 1017C(2A), 1017C(3), 1017C(3A), 1017C(5), 1017D(1), 1017DA(3), 1017E(3), 1017E(4), 1017F(2), 1017G(1), 1018A(1), 1018A(2), 1018B(1), 1020AB(3), 1020AC(2), 1020AD(2), 1020AE, 1020BAA(1), 1020E(8), 1020E(9), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G, 1043A(1), 1043A(2), 1052B(3), 1052BA(4), 1052C(6), 1070B(1), 1070C(1), 1070D(3), 1071B(2), 1071E, 1072E(11), 1072H(1), 1072H(3), 1072H(4), 1072H(5), 1072H(6), 1101B(10), 1101C(1), 1101C(2), 1101C(3), 1101E(1), 1101F(1), 1101F(1A), 1101G.

55 Ibid ss 985J(1), 985J(2), 985J(4), 985K(1), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B, 1041C(1), 1041D, 1043A(1), 1043A(2).

> Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).
>
> Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Of the 13 dual-track provisions in ch 7, 10 provide the regulator with a choice between a fault-based criminal offence or a civil penalty provision.[56] The remaining three, specifically ss 985J(1), (2) and (4), provide options of a strict liability criminal offence or a civil penalty provision. As such, it may be said that there are two 'types' of dual-track provisions, those which contain fault based offences and those which contain strict liability offences.

(b) Formula-Two Specific Offences: Multiple-Track Provisions

The enforcement tracks that formula-two specific offences sit on may be described as 'multiple-track' provisions. They differ to the dual tracks on which general offence provisions sit in two main ways. First, these multiple tracks are expressly drafted into the provision. That is, the different sanctions that may attach to a contravention of the provision (ie, strict liability, civil penalty, etc) are drafted into separate subsections of the provision. This is to be contrasted to a 'dual-track' provision (like s 1023P above), which either operates as a general offence provision or as a civil penalty provision by virtue of its interaction with either s 1311(1) or s 1317E. Secondly, multiple tracks are not limited to two (or dual) tracks but offer the regulator multiple different combinations of enforcement options. Specifically, there are four different combinations of enforcement options provided to regulators in ch 7 by virtue of these multiple-track provisions.

In specifying these four different multiple tracks, drafters of the legislation have inserted formula-two specific offences into ch 7 under various different 'labels', each denoting a different *type* of criminal offence. As noted above,[57] whenever a formula-two specific offence sits on a multiple track the offence has a sub-heading labelling the offence as either a 'strict liability offence', 'ordinary offence', or 'fault-based offence'. Whereas the term 'strict liability offence' appears throughout the *Corporations Act*, the terms 'fault-based offence' and 'ordinary offence' are unique to formula-two specific offences. Although neither term is defined in the *Corporations Act*, both are forms of *mens rea* offences (that is offences which contain a fault element),[58] and appear only to be distinguishable by the 'type' of enforcement track on which they sit.

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56 Ibid ss 985K(1), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B, 1041C(1), 1041D, 1043A(1), 1043A(2).

57 See above Part II(A)(1)(b).

58 The *Criminal Code* uses the term 'fault elements' in s 5.1 as opposed to the common law concept of 'mens rea'. The term 'fault elements' was adopted to 'displace … the uncertainties of common law references to 'mens rea.' It is equivalent in meaning to the commonly employed textbook reference

The four categories of multiple-track provisions, each being defined by the type of formula-two specific offences that fall within the category, are summarised below.

Table 2: Formula-Two Specific Offence Multiple Tracks

Multiple-Track Provisions	Options
Criminal / criminal	Strict liability offence Ordinary offence
Criminal / civil	Fault-based offence Civil liability
Criminal / criminal / civil	Fault-based offence Strict liability offence Civil liability
Criminal / criminal	Strict liability offence Fault-based offence

(i) Criminal/Criminal Multiple Track

The criminal/criminal multiple track creates alternatives between a 'strict liability offence' and an 'ordinary offence' for the same prohibited conduct. The provisions for each offence are identical, except that the default fault elements in s 5.6 of the *Criminal Code* (intention or recklessness) apply to the 'ordinary offence', and the maximum penalty that attaches to an 'ordinary offence' is greater than the maximum penalty that attaches to a 'strict liability offence'.[59] There are seven criminal/criminal multiple tracks in ch 7 (creating 14 separate offences).[60]

The criminal/criminal multiple track applies to provisions regulating complex regulatory regimes. They enable technical contraventions to be sanctioned by way of a strict liability offence (which has no fault elements and is therefore easier to establish), while still allowing for intentional and egregious breaches to be punished with the full force of the criminal law. An example of the criminal/criminal multiple track is found in the stipulation of two formula-two specific offences — one a 'strict liability offence' and the other an 'ordinary offence' — in s 1021O(1) and (3):

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to the 'mental element' in crime though 'fault' is more accurately descriptive': see Attorney-General's Department (Cth), *The Commonwealth Criminal Code: A Guide For Practitioners* (Report, March 2002) 13 ('*Criminal Code Pracitioners Guide*').

59 See Anderson (n 17) 46.

60 See *Corporations Act* (n 1) ss 952C(2), 993B(1), 993C(1), 1020AI(3), 1021C(1), 1021M(1), 1021O(1); 952C(3), 993B(3), 993C(3), 1020AI(5), 1021C(3), 1021M(3), 1021O(3).

1021O Offences of issuer or seller of financial product failing to pay money into an account as required

Strict liability offence

(1) An issuer or seller of financial products commits an offence if:

(a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and

(b) the issuer or seller does not pay the money into an account in accordance with that subsection.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) An issuer or seller of financial products commits an offence if:

(a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and

(b) the issuer or seller does not pay the money into an account in accordance with that subsection.

(ii) Criminal/Civil Multiple Track

The criminal/civil multiple track creates alternatives between a 'fault-based offence' and a civil penalty provision for the same prohibited conduct. There are seven criminal/civil multiple-track provisions in ch 7.[61] For these provisions, the content of the prohibition is the same for both the civil contravention and the criminal offence, except that s 5.6 of the *Criminal Code* operates to import the fault elements contained in the *Criminal Code* with respect to the 'fault-based offence'. 'Fault-based offences' operate in the same way as 'ordinary offences', the only distinction appearing to be that the legislature has opted to use 'fault-based offences' in conjunction with civil contraventions (on criminal/civil multiple-tracks), and to have placed 'ordinary offences' with 'strict liability offences' (on criminal/criminal multiple tracks, as above). An example of a criminal/civil multiple-track provision is s 1021G:

1021G Financial services licensee failing to ensure authorised representative gives etc. disclosure documents or statements as required

Financial services licensee must ensure authorised representative gives etc. disclosure documents or statements as required

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[61] Ibid ss 920C, 922M, 952E, 952H, 1020A, 1021E, 1021G.

(1) A financial services licensee contravenes this subsection if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee complies with their obligations under this Part to give or communicate disclosure documents or statements as and when required by this Part.

Fault-based offence

(2) A person commits an offence if the person contravenes subsection (1).

Civil liability

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

Criminal/civil multiple tracks were introduced by amendments to existing provisions in the *Corporations Act* following the ASIC Taskforce Enforcement Review.[62]

(iii) Criminal/Criminal/Civil Multiple Track

The criminal/criminal/civil multiple track includes, in order of severity, a 'fault-based offence', a 'strict liability offence', and a civil penalty provision, to sanction the same prohibited conduct. There is only one example of this multiple track in ch 7, and that is s 993D, which regulates failures to pay loan monies into 'an account' as required by the rules set out in s 982B(1). In this sense, s 993D provides the regulator with the most complete suite of civil and criminal enforcement options. Section 993D provides as follows:

993D Failing to pay loan money into an account as required

Failing to pay loan money into account as required

(1) A financial services licensee contravenes this subsection if:

(a) the licensee is required by subsection 982B(1) to pay particular money into an account in accordance with that subsection; and

(b) the licensee does not pay the money into an account in accordance with that subsection.

Fault-based offence

(2) A person commits an offence if the person contravenes subsection (1).

Strict liability offence

(3) A person commits an offence of strict liability if the person contravenes subsection (1).

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62 These amendments were introduced by the *Strengthening Penalties Bill* (n 11), which received royal assent on 13 March 2019. See, *ASIC Taskforce Final Report* (n 11) 90.

Civil liability

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

(iv) A Drafting Error or Interchangeable Tracks?

Section 989CA gives rise to a possible fourth multiple track on which formula-two specific offences may sit. It provides as follows:

989CA Audit to be conducted in accordance with auditing standards

(1) If an individual auditor, or an audit company, conducts an audit of a profit and loss statement and balance sheet for the purposes of this Subdivision, the individual auditor or audit company must:

(a) conduct the audit in accordance with the auditing standards; and

(b) include in the audit report on the profit and loss statement, and balance sheet, any statements or disclosures required by the auditing standards.

(2) If an audit firm, or an audit company, conducts an audit of a profit and loss statement and balance sheet for the purposes of this Subdivision, the lead auditor for the audit or review must ensure that:

(a) the audit is conducted in accordance with the auditing standards; and

(b) the audit report on the profit and loss statement, and balance sheet, includes any statements or disclosures required by the auditing standards.

Fault-based offence

(3) A person commits an offence if the person contravenes subsection (1) or (2).

Strict liability offence

(4) A person commits an offence of strict liability if the person contravenes subsection (1) or (2).

Section 989CA is anomalous, in that it combines both a 'fault-based offence' and a 'strict liability offence' on the same track. Although the substantive effect is to create another criminal/criminal multiple track (by providing the regulator with the choice between a full *mens rea* or a strict liability offence), it is an outlier in that the criminal/criminal multiple tracks in ch 7 (such as s 1021O extracted above) have been drafted such that the *mens rea* offence is defined as an 'ordinary offence'. As noted above,[63] if the only way to differentiate a 'fault-based offence' from an 'ordinary offence' is by reference to the type of multiple track on which each type of *mens rea* offence sits, then s 989CA breaks down that distinction.

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63 See above Part II(A)(3)(b).

It is unclear what to make of s 989CA. It may be an example of a drafting error. Alternatively, it could be a sign that going forwards the legislature intends to use the 'fault-based offence' terminology interchangeably with, or in place of, 'ordinary offence' language. Relevantly, s 989CA was amended recently as part of the reforms introduced in February 2019 under the *Strengthening Corporate Penalties Bill.*

(c) Formula-One: Specific Offence Scheme Dual Track

As set out above at Part II(A)(1)(a), there are only 18 formula-one specific offences in ch 7. Relevantly, of these 18 offences, only two of them — ss 908DA(3) and 908DB(3) — sit on an enforcement track. Incidentally, these two formula-one specific offences are the only formula-one specific offences for which the penalty attaching to the offence are specified in a provision *other* than the actual offence provision itself. The enforcement track that these two offences sit on may be described as a 'scheme dual track'.

The scheme dual track provides the regulator with a choice between a *mens* rea criminal offence and a civil penalty provision. Although the enforcement options provided to a regulator by the scheme dual track are the same as the options provided by a 'dual-track provision' (on which general offences sit, see above at Part II(A)(3)(a)) and a 'criminal/civil multiple track' (on which formula-two specific offences sit, see above at Part II(A)(3)(b)(ii)), the scheme dual track differs because the penalty that attaches to each of the offences in ss 908DA(3) and 908DB(3) (which is *all* of the offences in that Division of ch 7) is specified in a separate provision, being s 908DC. It is for this reason that the enforcement track is characterized as a '*scheme* dual track'. Relevantly, s 908DC provides:

> **908DC Penalties for offences against this Division**
>
> The penalty for an offence against this Division is 15 years imprisonment.
>
> Note: However, sections 1311A to 1311E will apply in relation to the penalty in the usual way.

As observed in Part II(A)(1)(a) above, no adequate policy reason exists to explain why the offences in ss 908DA(3) and 908DB(3) are drafted differently to the other 16 formula-one specific offences in ch 7. Relevantly, the fact that ss 908DA(3) and 908DB(3) are the only two formula-one specific offences to sit on an enforcement track, also fails to explain the drafting formula adopted. This is because there is no logical reason why the enforcement track on which ss 908DA(3) and 908DB(3) sit could not have been achieved by drafting the provisions consistently with the other 16 formula-one specific offences (ie, by specifying the penalty for the offences expressly under the respective provision). Alternatively, rather than creating the anomaly of a 'scheme dual track', the same enforcement options could have been achieved by drafting ss 908DA(3) and

908DB(3) as formula-two specific offences, which sit on a criminal/civil multiple track as described in Part II(A)(3)(b)(ii).

4 How to Find Specific and General Offences in Chapter 7

There is no quick way to find the offence provisions in ch 7. There is a tendency (at least amongst practitioners) to rely on sch 3, but that is an incomplete list — it contains only 281 of the 299 offence provisions in ch 7. This is because sch 3 lists the 'penalties' that attach to offence provisions (as opposed to listing 'offences'), and because the penalties for some offences, namely formula-one specific offences, are specified in the main body of the *Corporations Act* (as opposed to sch 3), and because offences can (although none do in ch 7) arise by default when there is no penalty specified for an offence provision at all.[64]

The key to finding offence provisions in ch 7 turns on where the penalty for an offence provision lies. There are three sections of the *Corporations Act* that are relevant to this exercise. The first is s 1311E, which holds that a penalty is either specified in a provision of the *Corporations Act* or listed in sch 3. The next is s 1311(1A), which holds that for 'general offences' in ch 7, penalties *must* be specified in sch 3. The third is s 1311F, which holds that, where *no* penalty is specified, the offence is an offence of strict liability and a penalty of 20 penalty units applies. As set out below, the operation of these provisions differs depending on whether the offence is a specific or a general offence.

(a) Finding Specific Offences

Sections 1311E and 1311F state that the penalty attaching to a specific offence can be listed in sch 3, in a provision of the *Corporations Act* (including the specific offence provision), or not listed at all. As the penalty for a formula-one specific offence is specified in a provision of the *Corporations Act*, only formula-two specific offences are listed in sch 3. These formula-two specific offences can be found by reviewing sch 3 (although sch 3 does not differentiate between the specific and general offences that it lists).

Specific offences that are *not* listed in sch 3 may constitute formula-one specific offences, which specify the penalty in a provision of the *Corporations Act*, or they may be default strict liability offences, which arise by virtue of the operation of s 1311F (if there is no penalty specified for the offence in either a provision of the *Corporations Act* or in sch 3).[65] There are 18 formula-one specific offences in ch 7, and *no* default strict liability specific offences arising by virtue of

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64 See *Corporations Act* (n 1) s 1311F.

65 Section 1311F provides that specific offences in respect of which a penalty is not specified in either sch 3 or a provision of the *Corporations Act* is a strict liability offence carrying a default penalty of 20 penalty units.

s 1311F. As the penalty that attaches to a formula-one specific offence or a s 1311F default offence is not listed in sch 3, the only way to find these offences (or to confirm they do not exist, as is the case with the operation of s 1311F), is to search ch 7 of the *Corporations Act.* Given the size of ch 7, this is not an easy task.

(b) Finding General Offences

Penalties for general offences in ch 7 *must* be listed in sch 3. Section 1311(1A) holds that, for ch 7, a general offence can only be enlivened by s 1311(1) 'if a penalty, pecuniary or otherwise, is set out in Schedule 3'. As such, there is no need to examine ch 7 for general obligations that may be enlivened by s 1311(1). Further, as s 1311(1A) requires that all general offences in ch 7 be listed in sch 3, and noting that sch 3 comprises a list of 'penalties' for the provisions that it lists, s 1311(1A) has the effect of excluding the operation of s 1311F from applying to any 'general offence' in ch 7. In other words, there cannot be a general offence in ch 7 unless there is a penalty for the offence specified in sch 3.

B *Different 'Types' of Specific and General Offences*

Although every offence in ch 7 is either a specific or a general offence, there are different 'types' of specific and general offences in ch 7. Specific and general offences may also be delineated along temporal lines, ie, between substantial (or 'static') and continuing offences on the one hand, or according to whether offences require the proof of fault elements, including full and partial strict and absolute liability offences, on the other hand. These *alternative* classifications are not mutually exclusive. For example, a fault-based offence may be either static or continuing. Key distinctions are considered below.

1 *Continuing Offences*

A continuing offence is a *further* offence that, in prescribed circumstances, attaches to a substantive offence provision (ie, a specific or general offence considered above), which contains a continuing obligation. An obligation in a substantive offence provision 'continues' if it falls within one of the two circumstances set out in s 1314(1) and (2) (which are considered further below).[66] The objective of continuing offences is to incentivise compliance with a continuing obligation (or to ensure one is not relieved from complying with a continuing obligation) following an initial contravention.[67]

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66 See below Part II(B)(1)(a).

67 Attorney-General' Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (3rd ed, 2011) 43 ('*Framing Federal Offences*').

Like general offences, which are governed by s 1311(1), continuing offences are not offences per se, but arise by virtue of the interaction between s 1314(3) and the relevant substantive offence provision in which the continuing obligation exists. The penalty that attaches to a continuing offence is calculated at a per diem rate, being half a penalty unit multiplied by the number of days in the period for which the continuing act was not done.[68]

There are no notations under any of the substantive offence provisions in ch 7 to indicate when s 1314(3) applies (as there are when s 1311(1) attaches), nor is there a schedule or index, like sch 3, which lists the offence provisions which contain continuing obligations to which s 1314(3) attaches. As such, the only way to determine whether s 1314(3) applies is to review the offence provisions and to identify a continuing obligation where it exists. This is notwithstanding the Commonwealth Attorney-General Department's *Guide to Framing Federal Offences*, which states that '[a] continuing offence should be clearly expressed so that a person is aware that a continued failure to comply will lead to further offences being committed'.[69]

(a) Components of Section 1314 Continuing Offences

There are two key components to continuing offences. The first component is timing, that is, 'when' s 1314(3) is enlivened. Section 1314(3) is not enlivened until *after* an initial conviction for the principal contravention of the substantive offence has been secured. Section 1314(3) makes this express, stating that a continuing offence occurs only if 'a person is or was *first* convicted of a substantive offence, or is or was convicted of a second or subsequent offence, in relation to failure to do the act'.[70] Therefore, if a person is convicted for failing to do an act the subject of a continuing obligation (and the act remains undone), liability for a further continuing offence only runs from the time an initial conviction has been secured.[71]

The second component relates to the substantive offence provisions to which s 1314(3) attaches. Section 1314(3) only attaches to a substantive offence provision that contains a continuing obligation. There are two types of continuing obligations, which are set out in ss 1314(1) and (2) as follows:

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68 *Corporations Act* (n 1) s 1314(5). It is interesting to observe that the penalties for a continuing offence are measured at a per diem rate whereas the penalties attaching to civil continuing contraventions (ie, continuing civil penalty breaches) pursuant to s 1317QA are not.

69 *Framing Federal Offences* (n 67) 43.

70 *Corporations Act* (n 1) s 1314(3) (emphasis added).

71 Ibid s 1314(3)(c)). Note that, to the extent that s 1314(1)(d) may appear to be inconsistent with this reading — that a conviction of a substantive offence must first be secured before a continuing offence is enlivened — s 1314(1)(e) makes express that s 1314(3) applies and that it must be read in that context.

(1) Where:

(a) by or under a provision, an act is or was required to be done within a particular period or before a particular time; and

(b) failure to do the act within that period or before that time constitutes an offence; and

(c) the act is not done within that period or before that time;

then:

(d) the obligation to do the act continues, after that period has ended or that time has passed, and whether or not a person is or has been convicted of a primary substantive offence in relation to failure to do the act, until the act is done; and

(e) subsections (3) and (4) apply.

(2) Where:

(a) by or under a provision, an act is or was required to be done but neither a period nor a time for the doing of the Act is or was specified; and

(b) failure to do the act constitutes an offence; and

(c) a person is or has been convicted of a primary substantive offence in relation to failure to do the act;

then:

(d) the obligation to do the act continues, despite the conviction, until the act is done; and

(e) subsections (3) and (4) apply.

While both ss 1314(1) and (2) have the same objective — to make an obligation to do an act that is required to be done by a substantive offence provision 'continue' — they attach to different types of acts. That is, sub-s (1) operates to ensure that an obligation to do an act that is or was required to be done 'within a particular period or before a particular time' continues, whereas sub-s (2) attaches to an obligation to do an act that is required to be done, but for which 'neither a period nor a time for the doing of the Act is or was specified'. In other words, sub-s (1) relates to obligations to do acts that are time-specified in an offence provision, and sub-s (2) attaches to obligations to do acts that are not time-specified in an offence provision.

There is a further observation to be made with respect to these two continuing obligations, and that relates to the extent to which a conviction for an initial contravention of the substantive offence provision is required first *before* the act continues. As noted above, s 1314(3) specifies that a continuing offence is not enlivened until *after* an initial conviction for a contravention of the substantive offence provision has been secured. This, however, relates to when *liability* for a failure to do a an act is enlivened (or when s 1314(3) attaches), and is

to be distinguished from when a 'continuing obligation' to do the 'act' begins to run. Relevantly, only continuing obligations that fall into s 1314(2) require that a conviction be secured for an initial contravention of the offence provision *before* the obligation to do the act continues (see s 1314(2)(e)). This is because the acts caught by s 1314(2) are not time-specified, causing the legislature to use the event of an initial conviction as the marker (or event) that triggers the *continuing* of the obligation to perform the act. In contrast, the obligation to do an act regulated by s 1314(1) continues '*whether or not* a person is or has been conviction of a primary substantive offence in relation to failure to do the act' (see s 1314(1)(d)). This is because, an obligation to do an act that is caught by s 1314(1) *continues* as soon as the 'particular period' specified for the doing of the act in the substantive offence provision lapses.

(b) Intersection Between Section 1314 of the Corporations Act *and Section 4K of the Crimes Act*

Section 1314 is not to be confused with continuing offences under s 4K of the *Crimes Act*. Relevantly, s 4K provides as follows:

> **4K Continuing and multiple offences**
>
> (1) Where, under a law of the Commonwealth, an act or thing is required to be done within a particular period or before a particular time, then, unless the contrary intention appears, the obligation to do that act or thing continues, notwithstanding that the period has expired or the time has passed, until the act or thing is done.
>
> (2) Where a refusal or failure to comply with a requirement referred to in subsection (1) is an offence against a law of the Commonwealth, a person commits an offence in respect of each day during which the person refuses or fails to comply with that requirement, including the day of a conviction for any such offence or any later day.

When s 4K is compared to s 1314, three observations may be made. First, s 4K(1) defines a continuing obligation in almost identical terms to s 1314(1). That is, s 4K(1), like s 1314(1), provides that where an 'act or thing is required to be done within a particular period or before a particular time' and that act is not done, then the 'obligation to do the act continues'. Secondly, s 4K contains no equivalent continuing obligation to s 1314(2). That is, s 4K does not attach to offence provisions which require an act to be done, but which do not specify a particular period in which the act must be done. As a result, s 4K attaches *only* to offences that require acts to be done within a particular period and is therefore narrower in its scope than s 1314. Thirdly, liability for a continuing offence arises sooner and more frequently under s 4K(2) than it does under s 1314. This is measurable in two ways:

1. A continuing offence under s 4K(2) arises as soon as the period in which the act is required to be done lapses and the act remains undone (ie, as soon as the act commences to continue). In contrast, under s 1314(3), liability does not arise until *after* an initial conviction with respect to the substantive offence provision has been secured; and
2. A separate continuing offence under s 4K(2) arises for 'each day' that the obligation to do the act after the particular period has expired remains undone. In contrast, s 1314(3) creates a *single* further offence (or one continuing offence) for the entire continuing contravention period.[72]

It is necessary to draw out the differences between s 4K and s 1314 continuing offences because they both potentially attach to a substantive offence provision in ch 7. Relevantly, s 4K of the *Crimes Act* applies to all federal offences unless a contrary intention appears. Although on one view it may be thought that s 1314 carves out the application of s 4K to the *Corporations Act*, a closer review of the *Corporations Act* supports a different interpretation. Of the 299 offences in ch 7, only one offence — that being s 922M(3) — contains an express notation that 'section 4K(2) does not apply'. The inclusion of this notation under s 922M(3) suggests that s 4K(2) otherwise applies to all other offence provisions in ch 7 that contain a continuing obligation.

However, given how a 'continuing obligation' in s 4K is defined, s 4K(2) only applies to the offence provisions in ch 7 that contain a time-specified obligation to do an act. In other words, s 4K attaches to the offences in ch 7 containing a s 1314(1)-type continuing obligation, but not the offences containing a s 1314(2)-type continuing obligation. This means that s 1314(1)- and (2)-type breaches are treated differently under the law, as a s 1314(1)-type continuing breach may constitute an offence under s 4K(2) and s 1314(3), whereas a s 1314(2)-type continuing breach can only constitute a continuing offence by virtue of s 1314(3). This is a difference that matters, given that a s 4K(2) continuing offence arises immediately after the specified period lapses, with a separate continuing offence accruing for 'each day' the act remains undone; whereas a s 1314(3) continuing offence only arises after a conviction of the substantive offence provision has been secured (and even then, only one continuing offence arises for the entire period of the continuing breach).[73]

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72 Ibid s 1314(5).

73 The effect of s 4K(2), as compared to s 1314(3), is drawn out by example. Take the case of the offence provided for by s 912D(1B), which requires a breach report to be lodged 'as soon as practicable and in any case within 10 business days'. If a regulated entity has failed to lodge a breach report after 20 days and there is a 10 day period of non-compliance, under s 1314(3) there is only a continuing offence *after* a conviction for the initial contravention has been secured. If a conviction is secured after day one of the breach period, ASIC could charge the defendant with a further offence for the

2 *Different Types of Fault-Based Offences*

All criminal offences require proof of one or more physical elements. However, not all offences require proof of a fault element (such as intention, knowledge, recklessness or negligence).[74] As a result, there are various different types of offences in ch 7, including full *mens rea* offences (this term is used to encapsulate both 'ordinary' and 'fault-based' offences – two terms used in the *Corporations Act* to denote offences *with* fault elements), which require proof of fault for every physical element of an offence, as well as strict and absolute liability offences (which dispose of the requirement to prove fault for all, or some, of the physical elements of an offence).

The starting position when interpreting the *Corporations Act* is that all criminal offences are presumed to be full *mens rea* offences. Therefore, when no fault elements are included in the drafting of an offence, so-called 'default' fault elements are imported by virtue of s 5.6 of the *Criminal Code*.[75] The default elements are: 'intention', if the physical element of the offence consists of only conduct; or 'recklessness', if the physical element of the offence consists of a circumstance or a result.

The operation of s 5.6 must be kept front of mind when analysing the offence provisions in ch 7. As evident from the review undertaken above, many of the offence provisions in ch 7 are drafted as broad statutory norms without fault elements expressly drafted into the provision. This is demonstrated by general offences,[76] but also formula-two specific offences, with so-called 'ordinary' and 'fault-based' offences sitting on multiple tracks alongside identically worded civil liability and strict liability provisions.[77]

However, the presumption that an offence in the *Corporations Act* is fault based can be rebutted in two ways: if the provision establishing the offence contains no penalty, or if the offence is otherwise expressly specified to be an offence without fault elements (such that it is a strict liability or absolute liability offence).

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nine-day period for which the obligation continues and the act remains undone. In contrast, under s 4K(2), because there is no requirement that a primary conviction be obtained first, and each day of non-compliance constitutes a separate offence, ASIC can charge the defendant with 11 separate offences immediately (a charge for the primary offence and 10 further 'continuing' offences, one for each day).

74 See *Criminal Code* s 5.1.

75 In *Gore v ASIC* (2017) 249 FCR 167, 221 [245], Rares J held, in relation to s 727(1) of the *Corporations Act*, that '[n]o physical or fault elements are specified … and, so, s 5.6 of the Code creates the relevant default fault elements for each of the physical elements constituting an offence against s 727(1)'.

76 The Parliament's intent, when introducing the general offences was that 'in most instances the default fault elements specified in the *Criminal Code* … will be implied into offences': see *EM Financial Reform Bill* (n 50) 48 [6.123]; see also, Longo (n 36) 16; and see above Part II(A)(2).

77 See above Part II(A)(3)(b)

Section 1311F deals with the first exception. As noted above,[78] s 1311F makes an offence provision that does not specify a penalty a 'strict liability offence' with a penalty of '20 penalty units'. Notably, there is no work for s 1311F to do in ch 7 as there is a penalty specified for all of the offence provisions. However, examples of s 1311F strict liability offences may arise in the future when/if amendments are made to ch 7.

The second exception is when the *Corporations Act* provides that the fault elements that would otherwise be supplied through s 5.6 of the *Criminal Code* do not apply. There are two examples of this in ch 7: (1) strict liability offences; and (2) absolute liability offences. Accordingly, s 5.6 of the *Criminal Code* must be read in context with s 6.1 (strict liability) and s 6.2 (absolute liability) of the *Criminal Code*.[79] The *Criminal Code* treats strict liability and absolute liability alike as instances of liability 'without fault'. That is, neither strict nor absolute liability offences require proof of intention, knowledge, recklessness or negligence.[80] The only difference between the two is that the defence of 'mistake of fact' under s 9.2 of the *Criminal Code* is available for a strict liability offence but not an absolute liability offence.[81] There is only one absolute liability offence in ch 7, that being section 908BA(1).[82] In contrast, strict liability offences are commonplace, there being 35 strict liability offences in total.[83]

There are two types of strict liability offences in ch 7, 'full' strict liability offences (there being no fault element for any of the physical elements of the offence) and 'partial' strict liability offences (there being no fault element for specified physical elements of the offence).[84] Of the 35 strict liability offences in ch 7, 19 are full strict liability offences.[85]

C *Seriousness of the Criminal Offences in Chapter 7*

Yet another way to analyse the offence provisions in ch 7 is by reference to their 'seriousness'. More often than not, the seriousness of an offence provision is measured by the maximum penalty that attaches to it. From the perspective of a corporate actor, the penalty sets the risk or 'cost' of not complying with the law.

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78 See above Part II(A)(4).

79 Stephen Odgers, *Principle of Federal Criminal Law* (Thomson Reuters, 2015) 80 [5.6.100].

80 *Criminal Code Practitioners Guide* (n 58) 7.

81 *Criminal Code* (n 22) ss 6.1, 6.2.

82 The offence in s 908BA(1) arises when an administrative of a significant financial benchmark does not hold a benchmark administrator licence.

83 *Corporations Act* (n 1) ss 791A(1), 820A(1), 912F(1), 916F(3), 952C(1), 952E(6), 952G(2), 952G(4), 952G(6), 952I(1), 952I(2), 952I(3), 952I(4), 952J(1), 985D(1), 985J(1), 985J(2), 985J(4), 989CA(4), 993B(1), 993C(1), 993D(3), 1020AI(3), 1021C(1), 1021FA(2), 1021FB(3), 1021FB(6), 1021H(1), 1021M(1), 1021NA(3), 1021NB(3), 1021O(1), 1041E(1), 1054A(3), 1058(1).

84 *Criminal Code* (n 22) s 6.1.

85 *Corporations Act* (n 1) ss 912F(1), 952C(1), 985D(1), 985J(1), 985J(2), 985J(4), 989CA(4), 993B(1), 993C(1), 993D(3), 1020AI(3), 1021C(1), 1021M(1), 1021O(1), 1058(1).

The penalty also expresses the legislators' view of the level of public condemnation and opprobrium attaching to the proscribed conduct. However, in addition to being the measurement or consequence of non-compliance with the law, the maximum penalty also shapes how a prosecution proceeds once an accused is charged. For example, the size of the maximum penalty determines whether an offence is classified as either a summary or an indictable offence (which informs in which court the offence is prosecuted) and whether an offence is subject to a limitation period. This section first analyses the maximum penalties applicable to the offence provisions in ch 7 before considering where the offences sit in the summary/indictable categorisation and whether they are subject to a limitation period.

1 *Size of Penalty Attaching*

The size of the maximum penalty attaching to the 299 offence provisions in ch 7 varies significantly. For an individual, a prison sentence attaches to 222, or 73 per cent, of the offence provisions in ch 7,[86] with the maximum term varying from six months to 15 years.[87] A fine, measured by a specified number of penalty units,

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[86] Ibid ss 791A(1), 791B, 792B(1), 792B(2), 792B(3), 792B(4), 792B(5), 792C(1), 792D(1), 792E, 792F(1), 792F(3), 792G(1), 792G(2), 793D(3), 794B(3), 798C(3), 798C(6), 798D(4), 798DA(4), 820A(1), 820B, 821B(1), 821B(2), 821B(3), 821B(4), 821BA(1), 821C(1), 821C(3), 821D, 821E(1), 821E(2), 821E(3), 822D(3), 823B(3), 850C, 851D(8), 852B(2), 853F(1), 853F(2), 854A(4), 892B(1), 892B(3), 892H(1), 892H(2), 892H(3), 892H(6), 892H(7), 892K(2), 907A, 911A(1), 911B(1), 911C, 912C(3), 912D(1B), 912D(2), 912E(1), 916A(3A), 916B(2A), 916B(5A), 916C(3), 916D(2A), 916F(1), 916F(1A), 916G(2), 916G(3), 920C(3), 942B(8), 942C(8), 942E, 943F, 949A(2), 949A(5), 949B(2), 949B(4), 952C(3), 952D(1), 952D(2), 952E(6), 952F(2), 952F(3), 952F(4), 952G(2), 952G(4), 952G(6), 952H(2), 952K, 952L(1), 952L(2), 952L(3), 952M, 982C(1), 982C(2), 982D, 983C, 985K(1), 988A(1), 989B(1), 989B(2), 989B(3), 989CA(3), 990B(1), 990B(2), 990B(6), 990D(1), 990D(2), 990F(a), 990I(3), 990K(1), 991B(2), 991E(1), 991E(3), 991F(1), 991F(2), 991F(3), 992A(1), 992A(3), 992AA(1), 993B(3), 993C(3), 993D(2), 1012DA(9), 1012DAA(10), 1012H(2), 1013I(4), 1013IA(5), 1013K(1), 1013K(2), 1015B(1), 1015D(2), 1015D(3), 1015D(4), 1015E(1), 1016A(2), 1016A(3), 1016B(1), 1016C, 1016D(1), 1016D(2)(d), 1016E(2), 1017B(1), 1017C(2), 1017C(2A), 1017C(3), 1017C(3A), 1017C(5), 1017D(1), 1017E(3), 1017E(4), 1017F(2), 1017G(1), 1018A(1), 1018A(2), 1018B(1), 1020A(4), 1020AB(3), 1020AC(2), 1020AD(2), 1020AE, 1020AI(5), 1020AI(7), 1020AJ, 1020BAA(1), 1020E(8), 1020E(9), 1021C(3), 1021D(1), 1021D(2), 1021E(5), 1021F(1), 1021FA(1), 1021FA(2), 1021FB(1), 1021FB(2), 1021FB(3), 1021FB(6), 1021G(2), 1021I(1), 1021J(1), 1021J(2), 1021J(3), 1021K(1), 1021L(1), 1021L(2), 1021M(3), 1021N, 1021NA(1), 1021NA(2), 1021NA(3), 1021NB(1), 1021NB(2), 1021NB(3), 1021O(3), 1021P(1), 1021P(2), 1021P(4), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G, 1043A(1), 1043A(2), 1101B(10), 1101C(1), 1101C(2), 1101C(3), 1101E(1), 1101F(1), 1101F(1A), 1101G, 908BA(1), 908BB, 908DA(3), 908DB(3), 984B(1) (although if the offence only relates to a contravention of the requirements in 984B(1)(a) the penalty is a fine only), 1020B(2) (although a first offence under s 1020B(2) is punishable by a fine only).

[87] Ibid. There are 15 offences carrying a maximum penalty of 15 years imprisonment: ss 952D(1), 952D(2), 952F(2), 952F(3), 952F(4), 952L(1), 993B(3), 1021D(1), 1021D(2), 1041A, 1031B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G, 1043A(1), 1043A(2), 908DA(3), 908DB(3).

attaches to the remaining 77 offences,[88] with the maximum penalty varying from 20 penalty units (or $4,440) to 1,000 penalty units (or $222,000).[89]

There are only 14 offence provisions in ch 7 that expressly specify the penalty that applies to a body corporate.[90] For the remaining 285 offences, in order to determine the maximum penalty applying to a body corporate, the penalty that applies to an individual must be converted using the 'body corporate formula' set out in s 1311C of the *Corporations Act.* Section 1311C sets out three different formulas by which the maximum penalty is calculated for a body corporate.

First, if the maximum penalty specified for an offence is 10 years imprisonment or more, then the maximum penalty is the greater of: (1) $9,990,000 (45,000 penalty units); (2) three times the value of the benefit derived or the detriment avoided by the contravention; or (3) 10 per cent of the annual turnover of the corporation for the 12 month period at the end of the month in which the company committed or began committing the offence.[91] Relevantly, ch 7 contains 20 offence provisions which fall into this category.[92]

Second, if the maximum penalty specified for an offence is a term of imprisonment of less than 10 years, the maximum penalty for a body corporate is calculated in two steps.[93] The first step converts the term of imprisonment into the fine that would apply to an individual, using the 'individual fine formula' in s 1311B. This multiplies the term of imprisonment expressed in months by 10 (the result expressed as penalty units).[94] The second step multiplies the fine that applies to an individual by 10. Accordingly, a specified penalty of one year imprisonment applicable to an individual converts to a maximum penalty of $266,400 for a body corporate, as follows:

Step 1: Calculating individual fine

- 12 months (prison term in months) x 10 = 120 penalty units

Step 2: Calculating body corporate fine

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88 Ibid ss 792F(2), 792I, 904B(1), 904B(5), 904C(1), 904C(3), 904D(2), 904E, 904H(3), 912F(1), 916F(3), 922M(3), 946AA(4), 946B(3A), 946B(9), 952C(1), 952I(1), 952I(2), 952I(3), 952I(4), 952J(1), 985D(1), 985J(1), 985J(2), 985J(4), 989CA(4), 993B(1), 993C(1), 993D(3), 1017DA(3), 1020AI(3), 1021C(1), 1021H(1), 1021M(1), 1021O(1), 1021P(3), 1021P(5), 1021P(6), 1070B(1), 1070C(1), 1070D(3), 1071B(2), 1071E, 1072E(11), 1072H(1), 1072H(3), 1072H(4), 1072H(5), 1072H(6), 908BQ(1), 908BR(2), 908BS, 908BV(4), 921L(7), 921M(1), 921M(2), 921M(3), 921P(2), 922HC(3), 1054A(3), 1054B(4), 1054BA(4), 1058(1), 794D(3), 794E(2), 823D(5), 823E(3), 904G(5), 904K(4), 905A(2), 923A(1), 923B(1), 923C(1), 923C(2), 1052B(3), 1052BA(4), 1052C(6).

89 As of 1 July 2020, the value of a penalty unit is $222. See, *Crimes Act 1914* (Cth) s 4AA ('*Crimes Act*').

90 *Corporations Act* (n 1) ss 794D(3), 794E(2), 823D(5), 823E(3), 904G(5), 904K(4), 905A(2), 923A(1), 923B(1), 923C(1), 923C(2), 1052B(3), 1053BA(4) and 1052C(6).

91 Ibid s 1311C(3).

92 Ibid ss 952D(1), 952D(2), 952F(2), 952F(3), 952F(4), 952L(1), 993B(3), 1021D(1), 1021D(2), 1041A, 1031B(1), 1031C(1), 1041D, 1041E(1), 1041F(1), 1041G, 1043A(1), 1043A(2), 908DA(3), 908DB(3).

93 Ibid s 1311C(2).

94 *Crimes Act* (n 89) s 4AA.

- 120 penalty units (individual fine expressed in penalty units) x 10 = 1,200 penalty units
- 1,200 penalty units x $222.00 = $266,400

There are 200 offences in ch 7 that contain prison terms of less than 10 years and require the above two-step calculation to determine the maximum penalty that applies to a body corporate.[95] The maximum penalty specified for these 200 offences ranges between six months and five years for an individual, which converts to fines ranging between 600 penalty units ($133,200) and 6,000 penalty units ($1,332,000) for a body corporate.

Third, if the maximum penalty specified for an offence is a fine, the penalty applicable to a body corporate is 'the fine specified multiplied by 10'.[96] Relevantly, the 10-times multiplier takes effect on the '*specified* fine',[97] which is expressed in penalty units, not the fine expressed as a monetary amount. Although a technical distinction, this has practical ramifications. For example, whether the prosecution of an offence is subject to a limitation period when brought against a body corporate turns on the size of the 'fine' as measured in penalty units, not as a monetary amount (see discussion below at Part II(C)(3)).

There are 63 offences in ch 7 that specify a fine as the penalty attaching and require the above calculation.[98] The maximum penalties attaching to these 63

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95 *Corporations Act* (n 1) ss 791A(1), 791B, 792B(1), 792B(2), 792B(3), 792B(4), 792B(5), 792C(1), 792D(1), 792E, 792F(1), 792F(3), 792G(1), 792G(2), 793D(3), 794B(3), 798C(3), 798C(6), 798D(4), 798DA(4), 820A(1), 820B, 821B(1), 821B(2), 821B(3), 821B(4), 821BA(1), 821C(1), 821C(3), 821D, 821E(1), 821E(2), 821E(3), 822D(3), 823B(3), 850C, 851D(8), 852B(2), 853F(1), 853F(2), 854A(4), 892B(1), 892B(3), 892H(1), 892H(2), 892H(3), 892H(6), 892H(7), 892K(2), 907A, 911A(1), 911B(1), 911C, 912C(3), 912D(1B), 912D(2), 912E(1), 916A(3A), 916B(2A), 916B(5A), 916C(3), 916D(2A), 916F(1), 916F(1A), 916G(2), 916G(3), 942B(8), 942C(8), 942E, 943F, 949A(2), 949A(5), 949B(2), 949B(4), 952C(3), 952E(6), 952G(2), 952G(4), 952G(6), 952H(2), 952K, 952L(2), 952L(3), 952M, 982C(1), 982C(2), 982D, 983C, 985K(1), 988A(1), 989B(1), 989B(2), 989B(3), 989CA(3), 990B(1), 990B(2), 990B(6), 990D(1), 990D(2), 990F(a), 990I(3), 990K(1), 991B(2), 991E(1), 991E(3), 991F(1), 991F(2), 991F(3), 992A(1), 992A(3), 992AA(1), 993C(3), 993D(2), 1012DA(9), 1012DAA(10), 1012H(2), 1013I(4), 1013IA(5), 1013K(1), 1013K(2), 1015B(1), 1015D(2), 1015D(3), 1015D(4), 1015E(1), 1016A(2), 1016A(3), 1016B(1), 1016C, 1016D(1), 1016D(2)(d), 1016E(2), 1017B(1), 1017C(2), 1017C(2A), 1017C(3), 1017C(3A), 1017C(5), 1017D(1), 1017E(3), 1017E(4), 1017F(2), 1017G(1), 1018A(1), 1018A(2), 1018B(1), 1020A(4), 1020AB(3), 1020AC(2), 1020AD(2), 1020AE, 1020AI(5), 1020AI(7), 1020AJ, 1020B(2), 1020BAA(1), 1020E(8), 1020E(9), 1021C(3), 1021E(5), 1021F(1), 1021FA(1), 1021FA(2), 1021FB(1), 1021FB(2), 1021FB(3), 1021FB(6), 1021G(2), 1021I(1), 1021J(1), 1021J(2), 1021J(3), 1021K(1), 1021L(1), 1021L(2), 1021M(3), 1021N, 1021NA(1), 1021NA(2), 1021NA(3), 1021NB(1), 1021NB(2), 1021NB(3), 1021O(3), 1021P(1), 1021P(2), 1021P(4), 1023P(1), 1023P(2), 1023P(4), 1101B(10), 1101C(1), 1101C(2), 1101C(3), 1101E(1), 1101F(1), 1101F(1A), 1101G, 908BA(1), 908BB.

96 Ibid s 1311C(1)(a).

97 Emphasis added.

98 Ibid ss 792F(2), 792I, 904B(1), 904B(5), 904C(1), 904C(3), 904D(2), 904E, 904H(3), 912F(1), 916F(3), 922M(3), 946AA(4), 946B(3A), 946B(9), 952C(1), 952I(1), 952I(2), 952I(3), 952I(4), 952J(1), 984B(1), 985D(1), 985J(1), 985J(2), 985J(4), 989CA(4), 993B(1), 993C(1), 993D(3), 1017DA(3), 1020AI(3), 1021C(1), 1021H(1), 1021M(1), 1021O(1), 1021P(3), 1021P(5), 1021P(6),

offences for an individual range between 20 penalty units ($4,440) and 100 penalty units ($22,200). Once these fines are adjusted by the formula in s 1311C (ie, multiplied by 10), the maximum penalties that apply to a body corporate for these offences ranges between 200 penalty units ($44,400) and 1,000 penalty units ($222,000).

2 *Summary or Indictable*

The size of the maximum penalty attaching to an offence provision determines whether an offence is categorised as a summary or an indictable offence. The *Crimes Act* defines a summary offence as being any federal offence punishable by fewer than 12 months imprisonment,[99] and an indictable offence as being any federal offence punishment by at least 12 months imprisonment.[100]

The summary/indictable categorisation is significant as it impacts how the prosecution of an offence will progress. Summary offences are commenced and tried in a state local court (or magistrates' court) and are heard by a magistrate alone. In contrast, indictable offences are 'committed' for trial in a local court but tried in a superior court before a judge and jury.[101] Indeed, all federal indictable offences *must* proceed before a jury, as s 80 of the *Australian Constitution* forbids the waiver of a trial by jury in preference of trial by a judge alone, as may occur in state jurisdictions.[102]

The superior court to which a federal indictable matter is transferred once 'committed' turns on the offence. The presumptive position is that the prosecution of indictable offences in ch 7 are to be committed for trial in a state district court (or county court).[103] White-collar offences are only transferred to a state supreme court on application by one of the parties. This will occur if the case involves high-stakes or is particularly complex, a common example being insider

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1070B(1), 1070C(1), 1070D(3), 1071B(2), 1071E, 1072E(11), 1072H(1), 1072H(3), 1072H(4), 1072H(5), 1072H(6), 908BQ(1), 908BR(2), 908BS, 908BV(4), 921L(7), 921M(1), 921M(2), 921M(3), 921P(2), 922HC(3), 1054A(3), 1054B(4), 1054BA(4), 1058(1). Note, there are only 63 offence provisions and not 77, as 14 of the 77 offence provisions specify a separate 'fine' for a body corporate and individual and therefore do not require conversion under s 1311C. See above (n 90) and accompanying text.

99 *Crimes Act* (n 89) s 4H.

100 Ibid s 4G.

101 Ian Bolster and Stephen Speirs, 'Corporate and Criminal Law: Stepping Through the Stages of a Corporate Criminal Prosecution' (2019) 61 *Law Society of NSW Journal* 69. Note, the committal process for indictable offences differs from state to state. See *ALRC Final Report* (n 14) 46 [1.71].

102 *Alqudsi v The Queen* (2016) 258 CLR 203.

103 Bolster and Speirs (n 101) 69.

trading cases (but presumably this principle would apply to most indictable offences in ch 7, given the complexity of the offence provisions).[104]

The vast majority of the 299 offence provisions in ch 7 are indictable offences. When committed by individuals, 211 (or 70 per cent) of the offences are indictable and the remaining 88 are summary offences. For corporate defendants, 210 of the offences are indictable offences and 89 are summary offences. This unequal division of summary and indictable offences, which turns on whether the defendant is an individual or body corporate, arises by dint of s 905A(2).

Section 905A(2) is one of the 14 offence provisions in ch 7 that specifies a separate penalty for a body corporate and an individual, namely, two years imprisonment for an individual, which renders it an indictable offence (the penalty being more than 12 months imprisonment), and 5,000 penalty units for a body corporate, a summary offence (the penalty being less than 12 months imprisonment).[105] This concept of specifying a separate penalty for a body corporate and individual was introduced as part of the *Strengthening Penalties Bill* reforms in February 2019. Previously, all of the offences in ch 7 specified a single penalty (being the penalty that applied to an individual), with the penalty applying to a body corporate ascertained by converting the individual penalty pursuant to the former s 1312 (which itself was repealed and replaced by s 1311C). Of these 14 offences, s 905A(2) is the only offence that creates a summary or indictable categorisation problem because it is the only offence that specifies a penalty of imprisonment for an individual on the one hand, and a fine for a body corporate on the other. In contrast, the maximum penalty specified for each of the other 13 offences (for both an individual and body corporate) is expressed as a 'fine', ensuring that those offences are summary offences against *both* the individual and the body corporate.

It is apparent that the intention behind specifying a separate penalty for an individual and body corporate was to ensure that a body corporate defendant pay a *larger* fine than otherwise would apply if the penalty applicable to an individual were converted using the s 1311C formula. Taking s 905A(2) as the example, the specified maximum penalty against a body corporate of 5,000 penalty units equates to a monetary fine of $1,110,000, which is more than double the size of the financial penalty that would apply if the maximum penalty of two years imprisonment that applies to an individual is converted using s 1311C.

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104 See, eg, *R v Curtis (No 3)* [2016] NSWSC 866. Note, the Federal Government has recently announced that it intends to establish an indictable jurisdiction for serious corporate crimes in the Federal Court of Australia. See Attorney-General (Cth) and Minister for Industrial Relations, '$35 Million to Extend the Federal Court's Jurisdiction to Corporate Crime' (Media Release, 22 March 2019). This jurisdiction appears set to replicate the Federal Court's jurisdiction in relation to serious cartel offences. At the time of writing, this reform has not yet been instituted, although it is difficult to imagine it not applying to ch 7 offences.

105 *Crimes Act* (n 89 s 4H and 4G..

Understanding the objective of specifying separate penalties for a body corporate and individual for the same offence as being aimed at *increasing* the penalty that a body corporate pays, serves only to further highlight the perversity of the outcome when the offence in s 905A is translated into the summary/indictable categorisation. That is, by specifying a penalty for a body corporate that is greater than that which would apply if the individual prison term were converted using the formula in s 1311C, the offence, paradoxically, goes from being a serious indictable offence that is tried in a superior court before a judge and jury when enforced against an individual, to a less serious summary offence tried in a local court before a magistrate when enforced against a body corporate.

3 Limitation Periods

The size of the maximum penalty is also relevant to determining whether an offence is subject to a statutory limitation period. The limitation period in which proceedings must be commenced with respect to breaches of the offence provisions in the *Corporation Act* is set by s 15B of the *Crimes Act* and s 1316 of the *Corporations Act.*

Pursuant to s 15B of the *Crimes Act*, the prosecution of an offence must be commenced within one year of the alleged conduct occurring if the penalty attaching to the offence does not exceed six months imprisonment (if the defendant is an individual),[106] or 150 penalty units (if the defendant is a body corporate).[107] Section 1316 of the *Corporations Act* extends the one year limitation period specified by s 15B of the *Crimes Act* to five years (or longer with the Minister's consent).[108] Accordingly, s 15B of the *Crimes Act* and s 1316 of the *Corporations Act* combine to impose a limitation period of five years for all offences in ch 7 that carry a penalty of fewer than six months imprisonment (for an individual) or less than 150 penalty units (for a body corporate).

Of the 299 offence provisions in ch 7, 88 offence provisions contain a penalty of six months (or fewer) imprisonment and have a limitation period of five years when applied against an individual. Against a body corporate, however, none of the offence provisions have a penalty of less than 150 penalty units, meaning that the prosecution is free to commence proceedings against a body corporate at any time. This is because (as set out above in Part II(C)(1)), the smallest penalty specified for an offence provision in ch 7 — being 20 penalty units — converts to 200 penalty units for a body corporate once the formula in s 1311C is applied. Thus, notwithstanding the express intent of s 15B(1A)(a), to ensure that limitation periods apply for less serious offences for body corporates, s 1311C has the effect

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106 *Crimes Act* (n 89) s 15B(1)(a).
107 Ibid s 15B(1A)(a).
108 *Attorney General v Oates* (1999) 198 CLR 162.

of rendering s 15B(1A)(a) nugatory, disqualifying a body corporate from the protections afforded to a natural person accused of the same offence.

III A Simplification Project

The criminal regime in ch 7 is extremely complex. To find a criminal offence, one needs to weave through a web of complicated and interlocking provisions — both within the *Corporations Act* and across other federal statutes. This complexity is compounded by the fact that the exercise must be repeated no fewer than 299 times to completely analyse the regime — an effort that is hardly conducive to the promotion of compliance and observance of the law. From the review undertaken in Part II, it is evident that the legislature has neither charted nor followed a conventional route. As a result, urgent reform is required to forge clear and consistent paths through the criminal regime in ch 7.

The complexity in ch 7 is a topic that has attracted considerable attention recently. Commissioner Hayne made various observations to this effect during the Royal Commission. In the *Interim Report*, the *Corporations Act* was described as containing a 'blizzard of provisions' and as being 'labyrinthine and overly detailed'.[109] In the *Final Report*, Commissioner Hayne opined that the volume, complexity and deconstructed nature of much of the regime made compliance difficult.[110] Similarly, in 2019, the ALRC observed, following its examination of 25 separate federal statutes, that the complexity of criminal offences in federal law is a problem 'exemplified in the *Corporations Act*'.[111] And in September 2020, the Attorney-General commissioned the ALRC to conduct a review into Australia's financial services law in order to 'identify ways to make it more adaptive, efficient and navigable for consumers and regulated entities'.[112]

Having regard to these observations, and noting the drafting issues identified in Part II, a project to simplify the criminal regime in ch 7 ought to be undertaken. The aim of such a project would be straightforward: to make clear when conduct regulated by the *Corporations Act* constitutes an offence and may attract criminal consequences. The importance of these objectives cannot be overstated. The availability and accessibility of the laws by which a regulated entity or individual is expected to abide is fundamental to achieving a fair, equal and effective criminal justice regime. Speaking extra-curially in November 2018, Chief Justice Allsop remarked that:

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109 *Interim Report* (n 2) 290 [3.1].
110 *Final Report* (n 4) 16 [1.5.3].
111 *ALRC Discussion Paper* (n 52) 77 [3.22].
112 Christian Porter, Attorney-General (Cth), 'Reviews of Judicial Impartiality and the Legislative Framework for Corporations and Financial Services Regulation' (Media Release, 11 September 2020).

> The need to define, with clarity, the limits and content of criminal liability is clear, indeed, perhaps self-evident. The law as to criminal responsibility should be as certain as possible, with as little place for value judgment as is reasonably possible. This is so even though the criminal law is regulating human relationships and experience from where the substantive content of the rules of liability must be derived. If the rules of criminal responsibility do not conform to, and are not expressed by reference to, and in language conformable with, the relationally human and the experiential, they will lose community consent and respect.[113]

A simplification project is also likely to result in making the criminal regime more user-friendly for ASIC and the CDPP. As Commissioner Hayne observed in the *Interim Report* of the Royal Commission, simplicity assists the prosecution as well, because 'the more complicated the law, the easier it is to lose sight of them'.[114]

Despite being straightforward in its objective, legislative simplification is often difficult to achieve.[115] Australia's corporate law and regulations have been the subject of a number of 'simplification' reforms since the 1980s with varying degrees of success.[116] However, none of these prior attempts at simplification have focused solely on the criminal regime in ch 7, as is proposed here.[117] Given the size and complexity of the criminal regime in ch 7, any attempt at simplification would be a significant undertaking, demanding considerable resources. The ALRC's current review into Australia's financial services regime may yet provide that opportunity. Although the terms of reference do not specifically call into focus the criminal regime in ch 7, the regime clearly falls within the broader ambit of the review, and the ALRC has been granted considerable resources and more than three years to conduct its review.

The remainder of this Part sets out reform proposals aimed at simplifying the criminal regime in ch 7. There are three main objectives to this project: (1) to ensure the offence provisions in ch 7 are clearly drafted, consistent, and easy to 'find'; (2) to reconcile the interaction between the offence provisions in ch 7 and other federal statutes, especially the *Crimes Act*;[118] and (3) to consider whether

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113 Chief Justice James Allsop, 'The Rule of Law is not a Law of Rules' (Speech, Annual Quayside Oration, 1 November 2018) 9.

114 *Interim Report* (n 2) 290 [3.1].

115 *Final Report* (n 4) 16 [1.5.3]

116 For example, the *First Corporate Law Simplification Act 1995* (Cth) was passed to amend the corporations legislation in force at the time. A subsequent, *Second Corporate Law Simplification Bill* was introduced to the Commonwealth Parliament in 1996, but never passed. It was largely incorporated into the *Company Law Review Act 1998* (Cth). In March 1997, the 'Corporate Law Economic Reform Programme' (CLERP) was introduced to replace the simplification taskforce.

117 See *ASIC Taskforce* (n 52) 24 [51]. The ASIC Enforcement Review Taskforce did propose some amendments to criminal provisions and the penalties attaching. However, these proposals were piecemeal and did not consider the criminal regime as a whole.

118 The reform proposals will not focus on the intersection between the *Corporations Act* and the *Criminal Code*, including the operation of ss 769A and 769B. This is because these provisions have recently been examined by the ALRC in its review of Australia's corporate criminal responsibility regime (see generally, *ALRC Final Report* (n 14)), and also because it falls outside the scope of this article.

there is scope for removing offence provisions in ch 7 so as to address concerns of over-criminalisation.[119]

A *Objective 1 — Offence Provisions to be Clear, Consistent and Easy to Find*

Much of the complexity of the criminal regime in ch 7 is due to the difficulty in finding offence provisions. This difficulty results from there being a lack of consistency in how the offence provisions have been drafted. As canvassed in Part II of this article, ch 7 comprises general offences, and formula-one and formula-two specific offences. In addition, each of these offences sits on a distinct 'enforcement track' crafted to fit the drafting style of each offence. Unfortunately, there is no 'quick fix' to this problem, and a comprehensive redrafting of the relevant provisions with simplification and consistency as the ultimate objectives is necessary in order to make each the offence provisions more easily locatable. There are three main reforms required to achieve this objective.

1 Make All Offence Provisions Formula-Two Specific Offences

The obvious solution to this problem is to adopt a single drafting style for all offence provisions in ch 7. Given the number of offence provisions, consolidation to a single style is no small task. As the vast majority of the offence provisions in ch 7 (205 of 299) are general offences, conforming all of the offence provisions to general offences would require amendment to the least number of provisions. This approach is problematic for at least two reasons.

First, general offences are not 'clearly' drafted and thus fail to meet the stated objectives of the proposed simplification project. As discussed in Part II, general offences are drafted as broad 'statutory norms' and are not offences per se. Due to the difficulty in identifying general offences on their face, the legislature has inserted notations referring to s 1311(1); however, this has resulted in further inconsistencies as notations have been omitted (perhaps by mistake) for some of the general offences.[120]

Second, general offences are not as dynamic as formula-two specific offences, which allow for multiple-track provisions, such as criminal/criminal/civil tracks (providing the regulator with a choice between a 'fault-based offence', 'strict liability offence', or a civil penalty provision, to enforce the prohibited conduct). General offences have only been drafted to facilitate dual tracks (being a choice between a criminal offence — either a *mens*

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119 Some proposals to address over-criminalisation were made by the ALRC as part of its review in Australia's corporate criminal responsibility regime. See *ALRC Final Report* (n 14) 167–215.

120 See (n 50) above and accompanying text.

rea or strict liability offence, but not both — and a civil penalty provision). To maintain the flexibility provided by the multiple tracks on which formula-two specific offences sit, the general offence provisions would need to be amended to provide for multiple alternatives.

In Part II, this article described formula-one specific offences as being the most clearly drafted offence provisions in ch 7. At first blush, then, that formula might appear to be the most obvious candidate for the simplification project. However, while formula-one specific offences are notable in reflecting clear and express drafting, they fail when it comes to ensuring the offences in ch 7 are easy to find. As explained in Part II(A)(1)(a), because the penalty attaching to a formula-one specific offence is listed in a provision of the *Corporations Act* and not sch 3, the only way to identify a formula-one specific offence is to locate the provision in the body of the *Corporations Act.* Without some impetus to search, one could be forgiven (though not by any court) for not realising that an offence existed.

Given these drawbacks, this article advocates for all offences in ch 7 to be drafted as formula-two specific offences. Formula-two specific offences do away with the problematic features of general and formula-one specific offences, while retaining the best features of both. A formula-two specific offence is clear and express on its face (like a formula-one specific offence), but easy to identify because the penalty is listed in sch 3 (like a general offence). Thus, formula-two specific offences achieve the objectives of the simplification project proposed in this article, as they are clearly drafted and easy to find. Formula-two specific offences are also preferred as they provide regulators with the broadest suite of enforcement options to the extent that they can sit on 'multiple tracks'.[121]

It should be observed that, notwithstanding their description as formula-two 'specific' offences, those offences are not inconsistent with the recommendations of the Royal Commission, or the stated preference by the ALRC in its 'preliminary analysis' as part of its financial services review, which cautions against an overly prescriptive approach to financial services regulation.[122] As discussed above in Part II(A), despite their namesake, 'specific offences' in ch 7 can also be (and often are) broadly drafted so-called 'omnibus' provisions. In this sense, the name 'specific offence' in the vernacular of the *Corporations Act* (as defined by Bird and Gilligan) is reflective of the form of the offence only.

In order to make all of the offences in ch 7 formula-two specific offences, the following amendments are required:

1. Section 1311E(1)(b) should be repealed, so that penalties can *only* be specified in sch 3.

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121 See above Part II(A)(3)(b).

122 See *ALRC Preliminary Analysis* (n 20). See also *Final Report* (n 4) 492, recommendations 7.3 and 7.4.

2. The 18 formula-one specific offences in ch 7 should be redrafted as formula-two specific offences, with the penalty specified in sch 3. The two provisions sitting on the 'scheme' track (being ss 908DA(3) and 908DB(3)) should be redrafted as criminal/civil mutiple-track provisions.
3. The 205 general offences in ch 7 should be re-drafted as formula-two specific offences. The 13 general offences which sit on dual-track provisions should be re-drafted as criminal/civil mutiple-track provisions.
4. Section 1311F, which creates default strict liability offences for offence provisions with no specified penalty, should be repealed. The idea that an offence can arise by 'default' when no penalty is specified is inconsistent with the objectives of the simplification project that all offences in ch 7 be clearly drafted and easily identifiable by being located in sch 3.

2 *Amendments to Formula-Two Specific Offences*

Although this article argues that formula-two specific offences best achieve the objectives of the simplification project, one amendment to formula-two specific offences is required. This amendment relates to the co-existence of 'ordinary offences' and 'fault-based offences'. As explored in Part II(A)(1)(b), apart from the fact that an 'ordinary offence' sits on a criminal/criminal multiple-track provision (ie, it is the *mens rea* offence alternative to a strict liability offence) and a 'fault-based offence' sits on a criminal/civil multiple-track provision (ie, it is the *mens rea* offence alternative to a civil penalty), these offences seem to be identical. The co-existence of these two terms (neither of which is defined in the *Corporations Act*) for the same type of offence is unnecessary, and appears to have confused the drafters themselves (as is demonstrated by s 989CA).[123]

To address this confusion, this article proposes that only one term be used, and that the preferred term be defined in the dictionary in s 9 of the *Corporations Act.*

3 *Inserting Notations Under Offence Provisions to which Section 1314(3) Attaches*

Consistently with the objective of making offences easier to identify, a notation under all substantive offence provisions that contain a continuing obligation and enliven s 1314(3) ought to be inserted. The notation will serve a similar function to the notations that currently attach to most general offence provisions (ie,

[123] See above Part II(A)(3)(b)(iv).

providing notice when s 1311(1) applies). Drawing attention to continuing offences is consistent with their objective: to incentivise compliance with a provision (so that the act is done) after an initial contravention has been committed.

B *Objective 2 — Reconciling the Offence Provisions with the Crimes Act*

The *Crimes Act* contains matters of general application to all federal offences including those in ch 7 of the *Corporations Act.* The review in Part II identified three sources of tension, where the criminal regime in ch 7 is either inconsistent, or otherwise in direct conflict with, matters specified in the *Crimes Act.* These three situations are: (1) the way the *Corporations Act* criminalises continuing obligations as compared to the approach taken in the *Crimes Act*; (2) the categorisation of the offence provisions in ch 7 into summary and indictable offences; and (3) whether the offence provisions in ch 7 are subject to limitation periods.

This Part proposes reforms to address these three situations so that the criminal regime in ch 7 sits in harmony with the *Crimes Act.*

1 *Continuing Offences*

The intersection between s 4K of the *Crimes Act* and s 1314 of the *Corporations Act* is one of the real mysteries of the criminal regime in the *Corporations Act*. As outlined above in Part II(B)(1)(b), a continuing obligation caught by s 1314(1) is also caught by s 4K(2) of the *Crimes Act*; however, the continuing obligation regulated by s 1314(2) is not. The result of this inconsistency is that a failure to do an act caught by s 1314(1) can also be charged under s 4K(2), whereas a failure to do an act regulated by s 1314(2) cannot.

This discrepancy is considerable when noting the differences between s 1314(3) and s 4K(2). Section 1314(3) requires that a conviction be secured *first* before a continuing offence can arise and, even then, the continuing offence is charged as a single 'course of conduct' offence. In contrast, s 4K(2) does not depend on an initial conviction being secured and creates a further offence for each day that the continuing obligation remains undone.

The simplest way to resolve this inconsistency would be to either expressly carve out s 4K from applying to ch 7 of the *Corporations Act* or, alternatively, repeal s 1314 and rely on s 4K in its place. Neither approach, however, is satisfactory. It is clear that the legislature intended to insert s 1314 in order to expand the types of acts which continue. This is evidenced by the inclusion of the continuing obligation in s 1314(2), which regulates acts that are *not* time-specified and which is not regulated by s 4K of the *Crimes Act.* The issue with s 1314 as it currently operates, however, is that an offence under s 1314(3) is not enlivened until *after* an initial conviction of the substantive offence provision

has been secured. Delaying liability for a continuing breach until after an initial conviction for a breach of the substantive offence provision has been secured removes any incentive for a person or regulated entity to comply with the act (even if the act continues under s 1314(1)) until a conviction has, or is about to be, secured, (which can take a number of years). This is clearly inconsistent with the policy basis of a continuing offence.

Accordingly, while s 1314 must remain in order for both s 1314(1) and (2) continuing obligations to be regulated, it requires amendment so that an offence for a continued breach of a s 1314(1)-type obligation arises as soon as the relevant period lapses. This can be achieved by amending s 1314(3) to reflect the language of s 4K(2), so that it applies as follows:

> Where a refusal or failure to comply with a requirement in subsection (1) and (2) is an offence against a law of the Commonwealth, a person commits an offence in respect of each day during which the person refuses or fails to comply with that requirement, including the day of a conviction for any such offence or any later day.[124]

Further, in order to make express that only s 1314 applies to the offences in ch 7, a notation should be inserted which states expressly that s 4K of the *Crimes Act* has no application.

2 *Summary/Indictable Categorisation*

As set out in Part II(C)(2) above, s 905A(2) is either a summary or an indictable offence, depending on whether the offence is prosecuted against a body corporate or an individual. This outcome is clearly unintended, especially when it is noted that the separate penalty imposed for a body corporate (5,000 penalty units) is larger than the fine that would apply to a body corporate if the maximum fine applicable to an individual (two years imprisonment) were converted using the formula in s 1311C.

There are two ways that this inconsistency can be addressed. The first approach is to make the same maximum penalty apply to a body corporate as applies to an individual and rely on s 1311C to convert the individual penalty to a body corporate penalty. This approach, however, would be in conflict with the clear legislative intent that the financial penalty applicable to a body corporate for the conduct regulated by s 905A(2) be *more* substantial than a fine that otherwise

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[124] If this amendment to s 1314 were to be adopted, the legislature may be minded to incorporate sub-ss (3) and (4) of s 4K of the *Crimes Act* as well, which allow the prosecution to join charges and empowers the Court to impose an aggregate sentence.

applies to a body corporate after a two year prison term has been converted using s 1311C.[125]

The second, and perhaps, preferable approach is to keep separate penalties for a body corporate and individual, but make it express that the offence against a body corporate (even if specified as a fine) is an indictable offence. Although departures from the summary/indictable distinction as defined by ss 4G and 4H of the *Crimes Act* are rare, the Commonwealth Attorney-General Department's *Guide to Framing Federal Offences* expressly recognises that departures should be made 'where there is a clear and cogent reason for such a departure', including 'where an offence is punishable by a large fine or where prosecution of an offence will involve the proof of complex issues'.[126] Section 905A(2) fits both of these criteria. The amendment required is straightforward and could be achieved by inserting a notation which specifies that 'an offence against section 905A(2) when enforced against a body corporate is an indictable offence'. Similar notations have been inserted in the *Competition and Consumer Act 2010* (Cth) with respect to the cartel offences at ss 45AF and 45AG.

3 *Limitation Periods*

As set out in Part II(C)(3) above, the interaction between s 15B(1A)(a) of the *Crimes Act*, which expressly provides that the initiation of criminal proceedings with respect to less serious federal offences against a body corporate should be subject to time limits, has been rendered nugatory by the effect of s 1311C of the *Corporations Act,* which calculates the penalty that applies to a body corporate, by multiplying the maximum penalty which applies to an individual by 10.

It would appear that this result is unintended. Supporting this inference, when introducing s 1311C, the Federal Government made no reference to limitation periods and was focused solely on increasing the *monetary* penalty applicable to a body corporate. In other words, the objective driving s 1311C was to *increase* the monetary or financial penalty that a corporation should pay, not removing protections that are afforded to a body corporate (which just so happen to be based on the size of the penalty attaching to the offence). If this reading is correct, s 1311C should be amended so that the maximum fine applicable to a body corporate may be calculated without interfering with the operation of s

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125 Section 1311C of the *Corporations Act* expressly recognises that the legislature may insert separate penalties for a body corporate and individual for the same offence thus mitigating the operation of s 1311C.

126 *Framing Federal Offences* (n 67) 43.

15B(1A)(a).[127] Alternatively, if this reading is incorrect, and the intention was to remove s 15B(1A)(a) from having any application to ch 7 offences, that intention should be made clear.

C *Objective 3 — Addressing Concerns of Over-Criminalisation*

There are 299 offence provisions in ch 7. Although the number of offences in ch 7 is not a problem in itself, the offences should be reviewed to ensure that only appropriately serious conduct is criminalised. Offence provisions that do not regulate the most serious conduct — in particular, those that regulate what may be described as 'trivial' misconduct — should be repealed. An example is s 912F, which makes it a criminal offence when an AFSL holder fails to cite its licensee number on certain documents.

This proposal is consistent with a recent recommendation by the ALRC as part of its review of Australia's corporate criminal responsibility regime. The ALRC concluded that there is an over-proliferation of criminal offences in federal law and recommended that 'the majority of minor regulatory contraventions that are currently criminal offences … become [civil penalty notice] provisions and be removed from the court system'.[128] In relation to the regulation of body corporates in particular, the ALRC concluded that the criminal law should be reserved for only the most serious misconduct to preserve the condemnatory force of the criminal law.[129]

IV Conclusion

This article has undertaken the first detailed examination of the criminal regime in ch 7 of the *Corporations Act.* The aim was to identify and organise the criminal regime in ch 7, in preparation for an expected uptick in the enforcement of the

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127 This could be achieved by amending s 1311C, such that the 10-times multiplier is applied to the fine which applies to an individual (expressed as a monetary amount), as opposed to the penalty (expressed in penalty units). This is a technical distinction but is drawn out by the following example. Assuming a penalty of 20 penalty units applies to an individual, the effect of s 1311C as it currently operates calculates the penalty applicable to a body corporate in two steps as follows: (1): 20 penalty units x 10 = 200 penalty units; and (2) 200 penalty units x $222.00 = $44,400. However, if the 10-times multiplier under s 1311C were to apply to the penalty applicable to an individual (expressed as a monetary amount rather than in penalty units), the two-step calculation would operate as follows: (1) 20 penalty units x $222.00 = $4,440 (individual fine); and (2) $4,440 x 10 = $44,400. The above calculation has the effect of multiplying the fine that applies to an individual (when expressed as a monetary amount) by 10, such that the fine is increased and the legislature's 'cost of doing business' concerns are addressed. However, the size of the penalty measured in penalty units remains 20 penalty units, meaning that the offence remains subject to a limitation period under s 15B(1A)(a).

128 *ALRC Discussion Paper* (n 52) 91 [4.18].

129 Ibid 89 [4.16].

offence provisions in ch 7 following the Royal Commission. In the process of conducting this review, a number of issues and inconsistencies were identified — primarily with respect to how the offence provisions have been drafted, but also with respect to how the offence provisions in ch 7 interact with provisions in the *Crimes Act* and *Criminal Code.*

In response to these issues, this article has advocated for the simplification of the criminal regime in ch 7, to make it clearer and easier to comply with. With the announcement in September 2020 that the ALRC is to conduct a detailed review into Australia's financial services laws and regulations, there is hope yet that the complexity of the criminal regime will be borne out and a movement to simplify it will gather momentum.

BOOK REVIEWS

CONSTITUTIONAL IDOLATRY AND DEMOCRACY: CHALLENGING THE INFATUATION WITH WRITTENNESS
(EDWARD ELGAR, 2020) ISBN 9781788971102 E-BOOK, 210 PP

BY BRIAN CHRISTOPHER JONES

This thought-provoking book by Brian Christopher Jones entitled *Constitutional Idolatry and Democracy* begins by retelling the moment when, during the highly disputed election period of 2016 in the United States of America, an elector waived his pocket-sized *United States Constitution* before Donald Trump. The gesture was a symbol. A silent but taunting manifestation against the president-to-be, and his supposed lack of understanding of the Nation's 'most sacred values and principles'.[1] The whole scene and the events that followed (including the spike in sales of pocket Constitutions) were an expression of a deeper sentiment common, but not exclusive, to the United States: *constitutional idolatry*.

Constitutional idolatry is defined in the book's first pages as 'drastically or persistently over-selling the importance and effects of written constitutions'.[2] The broad definition is intentional. It recognises a plurality of forms of idolatry, worship or veneration of written constitutions. From the definition onwards, what follows is an analysis of why societies have worshipped written constitutions, the motives that first led citizens to use written constitutions as political truncheons, the justifications people have found for venerating the text of the constitutions, and why we must end this idolatry.

The book, albeit written with the context of the United Kingdom's unwritten constitution in mind, is neatly transplanted into the reality of any modern nation-state that claims to be a constitutional democracy. Constitutions cited throughout the book include the written constitutions of the United States, Australia, Germany, Taiwan, South Africa, and Brazil, and the unwritten constitutions of Israel and New Zealand, just to name a few. In fact, to say that the author is merely promoting a defence of the 'unwrittenness' of the United Kingdom constitution would be to miss the point. The main argument presented is that constitutional idolatry has turned the veneration of the text of the constitution and its interpretation by the courts into the ultimate representation of a genuine constitutional democracy when, in fact, the Westminster system provides for

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1 Brian Christopher Jones, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness* (Edward Elgar, 2020) 1.

2 Ibid 2.

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more effective use of public powers coupled with a more complete political accountability. What Jones does in this book is to make a bold statement: written constitutions have become idols, and the time is past due for us to put aside the false faith that they are the saviours of society.

In Chapter 1, the author invites us to acknowledge that constitutions have become the rule in Western societies today. The written constitution phenomenon occurs not only because of the symbolic side of constitutions in representing certain values and aims of a particular political community, but also because they simply look good. Constitutions have a sort of 'aura of magic' that allure the citizenry.[3] They have a political and cultural significance that often supersedes their legal relevance. Whereas written constitutions have become associated with modernity and innovation, their absence is now taken as indicating antiquity and staleness. But this is an unfounded belief. Thus, the quasi-sacred role of constitutions in society forms the essence of constitutional idolatry.

Notwithstanding their high regard, constitutions are not easy to define. There are still controversies about the nature of constitutions, particularly of the unwritten ones (a controversy that the author refers to throughout the book in terms of constitutions with or without a capital 'C'). Moreover, Jones draws an analogy between constitutions and complex cog machines (such as the one on the book cover): one can understand the importance of the machine's individual pieces, but one cannot fully comprehend the complexity of the whole system by consulting those pieces alone.

Constitutional idolatry serves, at least, to inspire the citizenry to pursue a better society. That is the main point of Chapter 2. Although the veneration of constitutions is generally deleterious, the author argues that some benefits are still identifiable in certain tenets of constitutional idolatry. For him, the community's engagement with the political process as a unified body, a will to understand democracy and its effects, and a growth in interest and participation of the individuals in the common life of the state are all possible good effects of worshipping the text of the constitution. These benefits, however, only exist to a limited extent: the negative side-effects of constitutional idolatry far outweigh its benefits.

Written constitutions can be regarded as educative tools, but they do not determine the overall knowledge of a society's public power mechanisms and political institutions. As Jones argues in Chapter 3, constitutional idolatry does not produce a deeper civic education in the people. The veneration of the text of the constitution is incapable of guaranteeing an advanced knowledge of the political structures of society. On the contrary, the author draws our attention to research that demonstrates how individuals in countries with written constitutions may have a worse understanding of their constitutional apparel

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3 Ibid 7.

than those in countries with non-codified constitutions. Indeed, the idea that written constitutions serve as a significant educational device is misleading. As the author says, 'idolisation does not equal knowledge'.[4]

In Chapter 4, Jones demonstrates that the reproduction of the expression 'We the People' has also contributed to the widespread idolatry of written constitutions. Whereas individuals in countries with written constitutions with a 'We the People' articulation tend to think they have more political influence and authority than others, the author argues that a genuine instantiation of popular sovereignty is, for example, more genuinely seen in the notion of the United Kingdom parliamentary sovereignty. All in all, enacting a constitution with a 'We the People' articulation as a means of increasing popular sovereignty is a fiction. At most, the expression 'We the People' serves to sell to the citizenry the notion of constitutional supremacy.

The author argues that constitutional idolatry devalues politics and the political process, bringing the true expression of popular sovereignty to its knees. The worship of the constitution subjugates the political realm to the constitutional realm, ultimately rendering the text of the constitution supreme over the sovereignty allocated to the people. In this sense, the 'We the People' articulation seems like a Trojan horse.

Furthermore, Jones argues that, with the lower ranking of statutes and legislation to the detriment of the supremacy of the constitution, comes an infatuation with the role of judges and the judiciary. The result is a perpetuation of some sort of 'juristocracy' — an overvaluing of the text of the written constitution, and diminished powers of the people. Consequently, we seem to be treading a nefarious path: the 'We the People' articulation increases the veneration of the constitution; which leads to regarding the constitution as supreme; which, in its turn, strengthens juristocracy; and that, finally, reinforces the idolatrous stance. Thus, it is a vicious cycle.

Another question raised by the author is whether written constitutions and bills of rights can inspire and invigorate democracies. The answer is quite surprising. Although it is possible that constitutions and bills of rights might enhance a citizenry's perception of democracy, in some cases they are hindering factors. Chapter 5 explains how Jones has arrives at that conclusion. The author identifies a number of cases that make the reader question the widespread feeling that written constitutions are bulwarks of individual rights.

Perhaps one of the biggest myths arising from the conception of constitutional idolatry is the belief that having a 'good' constitution is essential for society. Jones does not deny the significance of written constitutions in directing the political community, and he is clear in saying that he will not

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4 Ibid 44.

propose a full-fledged challenge to that thought. However, what he does criticise in Chapter 6 is the suggestion that not having a constitution would make a country unprosperous or unable to pursue democratic ends.

The worship of constitutional texts has led to the impression that a 'good' constitution has a good balance of powers or a list of rights. But history tells us that 'poor' constitutions have also thrived. Why? Jones presents us with the reasons for such a distorted perception about 'good' and 'bad' constitutions. While constitutional scholarship has focused on identifying the elements of 'good' constitutions, 'the single most important factor that determines whether a constitution succeeds or fails is a human element: the degree of commitment to the bargain'.[5] In touching on the legitimacy aspect of constitutions, the author reminds us that legitimacy is not something that simply leads to an enhanced commitment of the citizenry to the constitution.

One of the examples in Chapter 6 is the protection of rights in Australia. As the author says, 'by contemporary standards Australia's Constitution is deficient' because it 'remains the only democratic nation without an entrenched bill of rights or human rights statute at the federal level'.[6] Jones, however, shows that this 'poor' constitution is not insufficient at all. According to research, Australia is among the top three countries in the world in achieving the highest standards on freedom, political rights, and civil liberties. This is not to say that Australia is immune from difficulties. On the contrary, it is clear that Australia has mismanaged the rights and freedoms of groups of people, especially First Nations peoples. Nonetheless, Australia provides more rights and freedoms than many countries with 'good' constitutions. The argument of an Australian exceptionality is taken into consideration but rejected by the author when he analyses the case of Australia against those of the United Kingdom and New Zealand. In sum, he demonstrates that 'unwritten, partially written, and un-entrenched constitutions can still succeed, even thrive, in contemporary times'.[7]

In Chapter 7, Jones makes a case against the use of the term 'constitutional guardian'. This is, in his opinion, one of the forms of constitutional worship. As he argues, this is a factional, overly paternalistic way of shielding the citizenry from participating in genuine constitutional ownership. He takes a strong position against the juristocracy that flows from an unconditional veneration of the constitution's text. Jones is sceptical about empowering the judiciary, even if by the continuous use of the language of 'constitutional guardianship' so present in today's legal environment. Ultimately, the judiciary as 'constitutional guardian' becomes solely responsible for upholding the values and norms of society. The people, as the true benefactors of the political community, delegate

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5 Ibid 114.
6 Ibid 125.
7 Ibid 129.

their responsibility to the courts. Instead of potentializing democracy, societies with a 'constitutional guardian' discourse may subject their people to a purely judicial interpretation of their constitutions.

The book's final proposition is that constitutional idolatry puts too much weight on historical modes of interpreting the constitution. Consequently, there is a devaluing of the need for constitutional maintenance through constitutional amendments. In Chapter 8, the author posits that one should value regular, practical constitutional change over the 'constitutional moments' (an idea that views constitution-making as superior to the realm of ordinary politics). This is another of the author's position against the conception of constitutional idolatry. The constitution is not an untouchable, sacred instrument: 'no part of a constitution is too delicate, too special or too integral to the constitutional system, to be changed'.[8]

One does not have to agree with all of Jones's arguments to recognise the relevance of this work. The author uses interdisciplinary research, case law analysis, historical investigation, knowledge of contemporary sources of constitutional law scholarship, and comparative constitutional methodologies to arrive at his conclusions. Overall, he prompts us to question whether written constitutions matter, and if they really shape people's lives, as much as we think they do. Perhaps even more importantly, he makes us wonder: 'do written constitutions fulfil the lofty promises provided by many of their advocates, or are they more akin to being the false gods of the legal and political realms?'.[9] As Jones observes, there are many substantive reasons not to put one's faith entirely in the written constitution. That should be the case for all, unless the conventional wisdom is so tempting that one cannot help but fall into the sin of constitutional idolatry.

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8 Ibid 172.
9 Ibid 11.

AUTHORITY TO DECIDE: THE LAW OF JURISDICTION IN AUSTRALIA (FEDERATION PRESS, 2ND ED, 2020) ISBN 9781760022075, 323 PP

BY MARK LEEMING

As Gleeson CJ and McHugh J said in Minister for Immigration and Multicultural and Indigenous Affairs v B:

> In a legal context the primary meaning of jurisdiction is 'authority to decide'. It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction. [With respect to] a federal court created by the Parliament of the Commonwealth, its jurisdiction — its authority to decide — must be defined in accordance with ss 75, 76 and 77 of the *Constitution*.[1]

To realise that there is no court in Australia with unlimited jurisdiction is at one stroke to recognise the continuing importance of Justice Leeming's standard work, and the relevance of this second edition. The 'autochthonous expedient', as Sir Owen Dixon named it, has much to answer for: it leads inexorably to a bifurcated system of state and federal courts, which has many toils and snares for the unwary. To compound the problem, the state courts enjoy a large amount of 'invested' federal jurisdiction, which means that on many occasions they exercise it without appreciating the fact that they have done so.

Justice Leeming is uniquely qualified to examine such problems, since he has the double advantage of a profound understanding of the theoretical issues involved, and the daily task of deciding cases that raise those very issues in a practical context.[2] He is almost in the position of Chief Justice Bryan five hundred and fifty years ago, who responded to counsel: 'You do not have to tell me the law. I wrote the law. I know what it is about.'[3]

In Professor Geoffrey Lindell's book, *Cowen and Zines' Federal Jurisdiction in Australia*,[4] which is the ideal bookshelf companion to the work under review, Sir Anthony Mason describes how '[t]he very mention of "federal jurisdiction" is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand arcane mysteries'.[5]

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1 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377 [6] ('*MIMIA v B*'), citing *Ah Yick v Lehmert* (1905) 2 CLR 593, 603; *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087, 1142; *Harris v Caladine* (1991) 172 CLR 84, 136.

2 See, for a recent example, his discussion of the jurisdiction of the District Court of NSW in *Great Northern Developments Pty Ltd v Lane* [2021] NSWCA 150, [84], and following where he discusses 'that slippery term jurisdiction', quoting *MIMIA v B* (n 1) 405–8 [106]-[113] (Gummow, Hayne and Hayden JJ).

3 As cited in Canada, *Parliamentary Debates*, House of Commons, October 26, 1999, 1634 (Ted McWhinney).

4 Geoffrey Lindell, *Cowen and Zines' Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016).

5 Ibid v.

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This new edition of *Authority to Decide* goes a long way to lightening such fears and should be on the shelf of every barrister, and in the library of all law firms. (It would be too much to hope that it might also find its way onto a law school reading list. In the author's teaching experience, the very existence of federal jurisdiction is seldom taught in the law school curriculum, or even adverted to).

As Justice Leeming notes in the Preface to the Second Edition, 'much has occurred' since the first edition of this work in 2012. This new edition includes additional discussion of the NSW Court of Criminal Appeal (pp 297–309) and the scope of appeals under cross-vesting legislation from the State and Territory courts (pp 165–74).

Several issues continue to bedevil the operation of federal jurisdiction. What is a relevant 'matter'? If there is no federal 'matter' to attract jurisdiction, the federal courts are powerless. What is the extent of the 'federal jurisdiction' that is exercised by the courts of the self-governing territories?[6] In what contexts may the Federal Court grant declaratory relief? What aspect of federal jurisdiction is attracted if a State administrative tribunal determines a matter arising between residents of different states?

Federal jurisdiction may be found in the most unlikely places. This means that those advising a client must always be alert to the possibility that such federal jurisdiction might have been attracted because of the nature of the parties, the remedy, or the source of the law that the trial court is relying on. Thus, if the Commonwealth is a party, or the parties reside in different states, then federal jurisdiction is attracted.

Who, for example, would have thought that the Federal Court could hear a defamation case?[7] Yet, in jurisdictional battles reminiscent of the ancient fight between the Court of Admiralty and the King's Bench, the Federal Court (*semble*) has become the preferred venue for hearing defamation. The ample reach of the ACT's defamation jurisdiction has now led to the anomalous position that most defamation actions (often driven by considerations of the damages available) are heard by a judge alone in the Federal Court.[8] In *Crosby v Kelly*,[9] the Full Federal

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6 Discussed in detail in *Authority to Decide: the Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 23–7.

7 For a very detailed discussion see Richard Leder and Conor O'Beirne, 'Defamation Trials: Why the Plaintiffs are Rush(ing) to File in the Federal Court', *corrs.com.au* (Online Article, 2 November 2018) <https://corrs.com.au/insights/defamation-trials-why-plaintiffs-are-rushing-to-file-in-the-federal-court>.

8 At the time of writing this review, a defendant in a Federal Court defamation case was seeking to have it heard by jury. This parallels developments in which a jury trial is likely to be required in a large cartel case in the Federal Court because any trial on indictment against a law of the Commonwealth must be by jury: *Federal Constitution* s 80.

9 [2012] FCAFC 96, confirmed by *Wing v Fairfax* [2017] FCAFC 191.

Court concluded that the Federal Court might exercise as a cross-vested matter original jurisdiction of the ACT Supreme Court over defamation claims. This development gives the go-by to the possibility of a trial by jury before a representative group drawn from the citizenry as a whole, a consideration which seems otherwise to be in the forefront of the uniform Defamation Acts.[10]

The dangers of overlooking the distinction between state and federal jurisdiction are easily demonstrated. Take, for example, the recent decision in *Page v Sydney Sea Planes.*[11] Tragically, a sea plane on a pleasure flight crashed shortly after taking off, and all on board were killed. A claim in commenced very late on the last day for filing within the two-year limitation period in the Federal Court of Australia. But as Griffiths J explained, that Court lacked jurisdiction because there was no element of intra-state travel involved,[12] and thus no federal 'matter' to adjudicate. As his Honour observed,

> The terms 'matter' or 'matters' appear in ss 75 and 76 of the Constitution, which deal with the original jurisdiction of the High Court, as well as s 77 regarding the power to define jurisdiction. The term 'matters' also appears in various relevant provisions of the Judiciary Act 1903 (Cth), including in ss 38 and 39. Section 39(2) invests State Courts with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, subject to various exceptions and restrictions.[13]

The work has eleven chapters. The first three address the meaning of 'jurisdiction' generally, the way in which it may be invoked curially, and the scope of jurisdictional error. As to the last, what is 'jurisdictional error' has proven to be a devilishly difficult question; as Leeming J observes: 'At a high level jurisdictional error identifies that the limitations upon the exercise of power have not been observed'.[14] Of particular interest in this context is the ability to restrict the availability of review for jurisdictional error.[15] Chapter 4 looks at a fundamental question: the scope and meaning of 'matter' as the term to demarcate the jurisdiction conferred by ch III of the *Constitution*. 'Matter' has a protean quality that seems, in essence, to require a genuine and substantial dispute between opposing parties. Lurking here are problems of 'associated jurisdiction' and that

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10 See *Defamation Act 2005* (NSW) s 21; *Defamation Act 2005* (Qld) s 21; *Defamation Act 2005* (Tas) s 21; *Defamation Act 2005* (Vic) s 21; *Defamation Act 2005* (WA) s 21; *Civil Law (Wrongs) Amendment Act 2006* (ACT) (amending the *Civil Law (Wrongs) Act 2002* (ACT)) s 21; *Defamation Act 2006* (NT) s 21. The *Defamation Act 2005* (SA) is an exception.

11 [2020] FCA 537. Griffiths J's judgment contains, with respect, a detailed and useful analysis of the whole topic. Subsequently, leave was sought successfully to cross-vest the claim to the Supreme Court of NSW, which could exercise State jurisdiction and extend the time for making it: see [2020] NSWC 1502 (Adamson J). It is understood that her Honour's decision is under appeal.

12 [2020] FCA 537, [32].

13 Ibid [25].

14 *Authority to Decide* (n 4) 60.

15 Ibid 86–7.

disfavoured concept, 'accrued' jurisdiction, which arises when a similar substratum of facts gives rise as a discretionary question to inextricably entwined issues.

Chapter 5 elucidates the vexed question of conferring and excluding federal jurisdiction. This is perhaps the most interesting chapter in the book since it explores the limits of federal jurisdiction, and the way in which its exercise can become entangled with the omnipresent jurisdiction of the States. As Leeming J notes,[16] it is possible for the Parliament to legislate to restrict the scope of a relevant federal 'matter' to part only of the dispute. Such a limitation may extend to the remedies a Court could give. One assumes that this must, of course, be subject to the entrenchment of constitutional writs provided in s 75(v) of the *Constitution*.

Of particular importance is the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and the related concept of a 'special federal matter'. As Justice Leeming concludes, the 'present baroquely complex'[17] system has worked well enough in practice, despite the intricate theoretical problems that his Honour explores in great detail.

Chapter 6 examines service on a defendant as a means of establishing jurisdiction. It is the chapter that most commends itself to the practitioner on a day-to-day basis, although as the author notes, the relevant analysis is 'very straightforward in most cases'.[18]

Chapters 7 and 8 discuss the law relating to the scope of 'matters' in the context of private, and governmental litigation respectively while Chapter 9 considers the law relating to appeals.

A close reading revealed that the editing and referencing maintains the exemplary standard that is a hallmark of the publisher.

This book is the inevitable starting point for any advocate confronted by a thorny question of federal jurisdiction. Long may it not be a work of authority (in the classical sense) so that the author may, in successive further editions, discuss and explicate the continuing complexities of federal jurisdiction as statute and cases upon them bring them to light.

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16 Ibid 132, referring to *Abebe v The Commonwealth* (1999) 197 CLR 510.
17 Ibid 174.
18 Ibid 176.

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