THE UNIVERSITY OF QUEENSLAND LAW JOURNAL

The University of Queensland Law Journal

Volume 42 2023 Number 1

The University of Queensland Law Journal is published by the TC Beirne School of Law. The Journal is controlled by an Editorial Board of academics drawn from within the School.

This issue may be cited as
(2023) 42(1) *University of Queensland Law Journal*

ISSN 0083–4041

The University of Queensland Law Journal

Volume 42 2023 Number 1

Information for Contributors

The University of Queensland Law Journal is issued three times a year. It aims to publish significant works of scholarship that make an original contribution to different fields of law. This includes all areas of domestic, international and comparative law, as well as jurisprudence, legal history and the intersection of law with other disciplines. Every article, comment and case note submitted for publication is subjected to a formal process of blind peer review.

A manuscript should not ordinarily exceed 10,000 words, exclusive of footnotes (which should not be excessive), and must be an unpublished work not submitted for publication elsewhere. Submissions should be typed, doublespaced and on A4-sized paper. Contributors must supply a copy of their manuscript in Microsoft Word format. Style and referencing of submissions should conform to the current edition of the Australian Guide to Legal Citation, available electronically at <https://law.unimelb.edu.au/mulr/aglc>.

Submissions are dealt with on a rolling basis and should be submitted online at <https://journal.law.uq.edu.au>.

General queries about submissions may submitted by email to:

Dr Rebecca Ananian-Welsh
rebecca.aw@law.uq.edu.au

Dr Iain Field
i.field@uq.edu.au

Dr Enshen Li
e.li@uq.edu.au

Subscription Rates

Australia	
Institutions/Libraries/Individuals	AUD$105.00
Overseas Airmail	AUD$165.00
Back issues per single issue (Aust)	AUD$60.00

Subscriptions, orders and general inquiries by email to:

operations@law.uq.edu.au

Or by ordinary mail to:

TC Beirne School of Law
The University of Queensland
Forgan Smith Building
University Drive
St Lucia
Queensland 4072
Australia.

The University of Queensland Law Journal

Volume 42 2023 Number 1

Contents

Does It Exist? *LibertyWorks* and Australia's Shrinking Implied Freedom of Political Communication

Sarah Sorial* and Shireen Morris†

In this article we examine the recent High Court decision in LibertyWorks Inc v Commonwealth of Australia (*'*LibertyWorks*'). We argue that this decision fails to properly apply the implied freedom of political communication (the 'implied freedom') in four principle ways. First, the majority judgments do not properly grapple with the complexities of legislative purpose. The* Foreign Influence Transparency Scheme Act 2018 *(Cth) (*'FITS Act*') targets foreign influence rather than just covert and corrupt foreign interference, yet the judgements blur this important distinction throughout. If the true legislative purpose of the* FITS Act *is to increase transparency to prevent foreign influence, this purpose is illegitimate and incompatible with Australia's representative government, so the* FITS Act *should fail on this basis. Alternatively, if the true purpose is to increase transparency to prevent foreign interference, that legislative purpose is not served by the scheme, because it is ineffective in achieving its aim. Second, the majority in* LibertyWorks *do not properly assess the legislative breadth of the* FITS Act*, including the wide range of actors to which the obligations to register relate. This, we suggest, imposes a broad and, arguably, unbalanced burden on free debate. Third, the majority do not pay sufficient regard to the different tiers of registration, which create not only public, but also private (and therefore unjustified) catalogues of information. Finally, Steward J's constitutionally conservative (yet paradoxically activist) claim that the implied freedom may not exist appears to invite a future constitutional challenge to the implied freedom. We argue his Honour may be right, but not for the reasons he elucidates. In our view, the implied freedom was essentially non-existent in this case because it was not robustly applied by the High Court.*

I Introduction

LibertyWorks Inc v Commonwealth of Australia ('*LibertyWorks*') is the latest High Court judgment to examine the implied freedom of political communication.[1] The question on appeal was whether the registration scheme in the *Foreign Influence*

* Professor of Law, School of Law, Macquarie University. Sarah.sorial@mq.edu.au
† Senior Lecturer, School of Law, Macquarie University. Shireen.Morris@mq.edu.au.
1 (2021) 391 ALR 188 ('*LibertyWorks*').

DOI: 10.38127/uqlj.v42i1.6479

Transparency Scheme Act 2018 (Cth) ('*FITS Act*') impermissibly burdens the implied freedom of political communication (the 'implied freedom'). Like the analogous legislative scheme in the United States — the *Foreign Agents Registration Act* ('*FARA*') — the *FITS Act*'s aim was to address growing concerns about foreign interference in Australian political affairs, without curtailing productive foreign influence.[2] It requires those who undertake various activities on behalf of foreign governments or principals to register details about themselves with the aim of improving transparency. In a 5:2 judgment,[3] the Court upheld the *FITS Act* provisions as valid, finding that the burden imposed on the implied freedom is justified by, and proportionate to, the policy objectives of the legislation.

We argue that this judgment failed to properly apply the implied freedom in primarily four ways. First, the majority judgments do not properly identify the legislative purpose of the Act, which targets foreign *influence* rather than just covert and corrupt foreign *interference*. The judgments note the important difference between the two terms. Foreign interference is understood as the use of 'covert, deceptive, corrupting or threatening means to damage or destabilise the government or political processes of a country'.[4] In contrast, foreign influence involves benign and open international engagement and persuasion. Only influence that is covert, deceptive or corrupting should constitute interference.[5] However, the Court's assessment of legislative purpose fails to fully identify with the fact that the Act's title and legislative content casts a much wider net, regulating and potentially deterring much 'softer' foreign influence. One possibility is that the actual legislative purpose is to prevent foreign influence, which, in our view, is not legitimate and arguably incompatible with representative government. On these grounds, the scheme should fail. Alternatively, if the legislative purpose is construed as addressing only foreign interference, then it is ineffective in achieving this aim. The legislation is disproportionate and should be invalidated on this basis.

Second, and relatedly, the breadth of the Act is under-analysed by the majority. The wide range of actors to which the obligations to register relate imposes a broad and, arguably, unbalanced burden on free debate. Similar concerns have been raised in relation to the analogous *FARA* in the United States.[6] While the Australian government claimed at the time of enactment that its

---

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13146 (Malcolm Turnbull, Prime Minister) ('Turnbull, *Second Reading Speech*').

3 *LibertyWorks* (n 1). Kiefel CJ, Keane, Gleeson, Stewart and Edelam JJ in the majority; Gageler and Gordon JJ dissenting.

4 Australian Security Intelligence Organisation, *ASIO Annual Report 2017–18* (Report, 25 September 2018) 25 ('ASIO *Annual Report 2017–18*'); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (Report, June 2018) 2–5 ('PJCIS, *FITS Advisory Report*').

5 *LibertyWorks* (n 1) 192 [9].

6 Nick Robinson, '"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency' (2020) 69(5) *Duke Law Journal* 1075, 1081.

version was an improvement on *FARA*,[7] an assessment of the Australian public register suggests that the problem of unwarranted breadth remains.

Third, the majority do not pay sufficient regard to the different tiers of registration articulated under the scheme, which create not only public, but also private (and therefore unjustified), catalogues of information, presumably for use by government. This runs counter to the narrowly stated objective of the *FITS Act*, which is to promote transparency or 'sunlight' with respect to foreign interference.[8] The private registration requirements, in our view, impose an unjustified burden on free political communication.

Finally, Steward J's constitutionally conservative (yet paradoxically activist) claim that the implied freedom may not exist and is not supported by the text and structure of the *Constitution*, appears to invite a future constitutional challenge to the implied freedom, calling into question over three decades of established precedent and more recent analysis confirming the existence of the implied freedom in cases like *Brown v Tasmania* ('*Brown*'),[9] and *Comcare v Banerji* ('*Banerji*').[10] Steward J's provocative judgment exemplifies the shaky footing of the implied freedom, the existence of which may indeed rely on changeable judicial attitudes to, and interpretations of, the *Constitution*. However, in our view, for these plaintiffs at least, his Honour is right: the implied freedom was largely illusory in this case, because it was not robustly applied by the High Court.

In Part II, we explain the facts of *LibertyWorks* and the relevant features of the *FITS Act*. In Part III, we examine the majority and dissenting judgments, drawing attention to the Court's analysis of the difference between foreign influence and interference, the private and public registers, the broadness of the burden on the implied freedom, and Steward J's provocation in relation to the existence of the implied freedom.

In Part IV, we offer a critique of the judgment. First, we critique the Court's failure to fully grapple with the complexities arising in their analysis of the purpose of the *FITS Act*. There was no analysis of the ostensible mismatch between the Act's politically-stated objective, which is to target foreign interference, and its execution, which regulates and, arguably, criminalises foreign influence. We apply ordinary principles of statutory interpretation and draw on parliamentary debates and other framing materials to elucidate two possible interpretations: (1) to prevent foreign influence; or (2) to prevent foreign interference. If the true purpose of *FITS* is to prevent foreign influence, then this purpose is arguably not legitimate or compatible with Australian representative government, so the scheme should fail. Alternatively, if the true purpose is to prevent foreign

---

7 See Foreign Influence Transparency Scheme Amendment Bill 2019 (Cth).

8 *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*') s 3. See also Turnbull, *Second Reading Speech* (n 2), where Turnbull defended the Counter Foreign Interference Strategy on the basis of 'four pillars: sunlight, enforcement, deterrence and capability. Of these, sunlight is at the very centre.'

9 (2017) 261 CLR 328 ('*Brown*').

10 (2019) 267 CLR 373 ('*Banerji*').

interference, then we argue that the scheme is ineffective in achieving this aim and disproportionate in the means deployed, and so it should fail.

Second, we bolster our assessment of the Act's proportionality through an examination of the public register and consider specific examples of notable submissions by former Prime Ministers Kevin Rudd and Tony Abbott in dealing with the scheme. Based on this evidence, we agree with the dissenting judgments that the Act is not fit for purpose.

Third, we consider Steward J's assessment that the implied freedom may not exist. We conclude that the last resort judicial protection of free speech in Australia failed in this case, because the High Court did not robustly apply the implied freedom.

II Background

A *Facts*

The plaintiff, LibertyWorks Inc, is a private Australian think-tank that promotes 'individual rights and freedoms in public policy, including the promotion of freedom of speech and political communication'.[11] Since its incorporation in 2015, LibertyWorks has organised political conferences in Australia and made submissions to parliamentary inquiries on freedom of political speech.[12] In 2018, the President of LibertyWorks entered into an agreement with the American Conservative Union ('ACU') to collaborate on an ACU event to be held in Australia in 2019. The ACU is a US corporation that aims to promote political freedom and to influence US politics and politicians with dissemination of 'conservative/classical liberal' ideas.[13] The ACU agreed to provide LibertyWorks with the names of speakers and to ensure the event was a success, and the two organisations were referred to as 'co-hosts' in promotional material.

The President of LibertyWorks was subsequently contacted by a Deputy Secretary of the Attorney-General's Department. The Deputy Secretary drew attention to the *FITS Act* and notified LibertyWorks that the ACU appeared to fall within the definition of a 'foreign political organisation'. The Deputy Secretary also noted that the event would constitute a 'communications activity' under the Act. Notice was therefore given under s 45 of the *FITS Act* to LibertyWorks requiring LibertyWorks to provide documents to enable the Deputy Secretary to assess whether it was liable to register. LibertyWorks did not comply,[14] and did not register. On 20 February 2020, LibertyWorks filed an action in the High Court,

---

11 *LibertyWorks* (n 1) 190 [1].
12 Ibid.
13 Ibid 191 [2].
14 Ibid [5].

arguing that the registration provisions unjustifiably burdened the implied freedom, and were therefore invalid.[15]

B *Legislative Scheme*

The political context for enactment of the *FITS Act* was the growing threat of foreign interference to liberal democracies, including Australia. While Russian interference in the 2016 US election focussed global attention on the threat of foreign interference in the democratic sovereignty of nation-states, the Sam Dastyari saga in Australia (which prompted the Senator to resign after his financial dealings with businesses connected to the Chinese Communist Party came to light) energised domestic attention on foreign interference through political donations.[16] It has been similarly well established that foreign actors, including foreign intelligence services, have attempted to interfere with Australian decisionmakers at all levels of government and across a range of sectors, including democratic institutions, education and research, media and communications, culturally and linguistically diverse communities, and critical infrastructure.[17]

Part of the response to this threat was the introduction in 2018 of a suite of interlocking and overlapping legislation, as part of the Counter Foreign Interference strategy. The package of reforms included the *FITS Act*, the *National Security Legislation Amendment (Espionage and Foreign Interference) Act* 2018 (Cth), and the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).[18] In 2020, the government passed a further piece of legislation, *Australia's Foreign Relations (State and Territory Arrangements) Act* 2020 (Cth), to protect and manage Australia's foreign relations more broadly, including arrangements entered into by Australian universities. This legislation is scaffolded by various governance and risk frameworks, guidelines to counter foreign interference in the Australian university sector, including strengthening

---

15 Ibid [6].

16 Fergus Hunter, 'Sam Dastyari Contradicted Labor Policy, Backed China's Position in Sea Dispute at Event with Donor', *Sydney Morning Herald* (online, 1 September 2016); 'Sam Dastyari Resignation: How We Got Here' *ABC News* (Online, 12 December 2017); Nick McKenzie, James Massola and Richard Baker, 'Labor Senator Sam Dastyari Warned Wealthy Chinese Donor Huang Xiangmo His Phone Was Bugged' *Sydney Morning Herald* (online, 29 November 2017).

17 'National Security: Countering Foreign Interference' *Australian Government: Department of Home Affairs* (Web Page, 16 February 2023) <https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/countering-foreign-interference>.

18 Other parts of this package include the Security Legislation Amendment (Critical Infrastructure) Bill 2021 (Cth), *Australia's Foreign Relations (State and Territory Arrangements) Act* 2020 (Cth) and the *Defence Trade Controls Act* 2012 (Cth). While these are all relevant to countering Foreign Interference, we will only examine the legislation that potentially impacts on speech.

cybersecurity, and the establishment of a University Foreign Interference Taskforce in 2019 ('UFIT').[19]

The *FITS Act* therefore intersects with other laws through 'interlocking components',[20] each designed to address the risk of foreign interference.[21] The *FITS Act*'s breadth is evident in its framing language. While part of a 'Counter Foreign Interference Strategy', the Act in fact seems to regulate 'foreign influence' rather than just 'foreign interference'. This is reflected in the Act's title and content. Foreign influence suggests a much wider net and a lower bar than foreign interference. Foreign interference is understood in the framing material as the use of 'covert, deceptive, corrupting or threatening means to damage or destabilise the government or political processes of a country'.[22] This is different from foreign influence, which is defined as involving benign activities of a foreign principal that seek to influence government and political systems. Only influence which is covert, deceptive or corrupting should constitute interference.[23]

The objective of the Act is stated narrowly in s 3 as being to 'provide for a scheme for the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals, in order to improve the transparency of their activities on behalf of those foreign principals.'[24] The Act defines 'foreign principal' as either a foreign government, a foreign government related entity, a foreign political organisation or foreign government related individuals.[25] It requires individuals or organisations[26] to register details about themselves and their foreign principal with the Secretary if the person will communicate or distribute information or material to the Australian public or sections of it under an arrangement with, or in the service of, a foreign principal.[27] The type of communication captured is political communication, the sole or substantial purpose of which is to influence government or the public at large.[28] The type of communications caught under the Act is broad. Section 13(1) defines

---

19 'University Foreign Interference Taskforce' *Australian Government: Department of Education* (Web Page, 14 March 2023) <https://www.education.gov.au/guidelines-counter-foreign-interference-australian-university-sector/resources/guidelines-counter-foreign-interference-australian-university-sector>.

20 Turnbull, *Second Reading Speech* (n 2) 13149.

21 The *FITS* Act (n 3) was part of the Counter Foreign Interference Strategy which included the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), the Foreign Influence Transparency Scheme Bill 2017 (Cth), the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), and the Foreign Influence Transparency Scheme Bill 2018 (Cth). See also Michael Head, 'Australia's Anti-Democratic "Foreign interference" Bills' (2018) 43(3) *Alternative Law Journal* 160.

22 *ASIO Annual Report 2017–18* (n 4); PJCIS, *FITS Advisory Report* (n 4).

23 *LibertyWorks* (n 1) 192 [9].

24 *FITS Act* (n 3) s 3.

25 Ibid s 10.

26 'Person' is defined broadly to include an individual, a body corporate, a body politic, any association or organisation (both incorporated and unincorporated), or any combinations of individuals: ibid.

27 Ibid s 18.

28 Ibid s 12.

'communications activity' as circumstances where a person 'communicates or distributes information or material to the public or a section of the public' or 'produces information or material for the purpose of the information or material being communicated or distributed to the public or a section of the public.' Information can take any form, and as noted, influence is broadly conceived as to 'affect in any way'.[29]

Persons exempt from registration include those engaged in humanitarian aid or assistance, the provision of legal advice or representation, religious activities, registered charities, artistic purposes, diplomatic and consular officials, and the members of certain professions, such as tax agents, customs brokers and liquidators and receivers, and members of Parliament and government officials.[30] The latter exemptions seem odd; a politician acting as an agent of foreign interference is presumably precisely the kind of foreign manipulation of democracy such a law should capture. Notably absent from the list of exemptions are academics, universities and schools, media organisations, and think tanks. Those who are registered under the Act have onerous reporting responsibilities, including the reporting of information or other communications distributed to the public in Australia on behalf of a foreign principal,[31] reporting material changes in circumstances,[32] annually renewing registration[33] and keeping records.[34] There are also notification requirements to cease to be registered.[35] Penalties for failing to register or acquit responsibilities under the Act include imprisonment on conviction for terms ranging for six months to five years.[36]

III *LIBERTYWORKS INC V COMMONWEALTH OF AUSTRALIA*

The question before the High Court was whether the *FITS Act* is constitutionally invalid with respect to the registration requirements regarding communications activities — that is, whether the registration scheme unjustifiably burdens the implied freedom. To resolve this, the High Court had to apply the well-established test for determining invalidity with respect to the implied freedom. Initially

29 Ibid s 10.
30 Ibid pt 2 div 4.
31 Ibid ss 16, 38.
32 Ibid s 34.
33 Ibid s 39.
34 Ibid s 40.
35 Ibid ss 19, 31.
36 Ibid s 56.

articulated as a two-part test in *Lange v Australian Broadcasting Corporation*,[37] the approach was revised in subsequent cases[38] and now includes three limbs:[39]

1. Does the law effectively burden freedom of communication about government or political matters?
2. If 'yes', is the purpose of the law legitimate and compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes', is the law reasonably appropriate and adapted to advance that aim in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

If the first question is answered 'yes' and the second or third 'no', the law is invalid.

Courts' approaches have evolved to protect communication necessary to facilitate free and informed federal voting choices and to enable effective functioning of responsible government.[40] Decisions since *Lange* have arguably sought to constrain the implied freedom, probably due to faltering judicial support,[41] which is in turn perhaps explicable as a reaction to the freedom's judicially 'implied' nature. As Edelman J explained in *Banerji*:

> unlike the United States, in Australia the boundaries of freedom of speech are generally the province of parliament; the judiciary can constrain the choices of a parliament only at the outer margins for reasons of systemic protection. The freedom of political communication that is implied in the Commonwealth *Constitution* is highly constrained.[42]

However, Stone has shown how the Court's categorisation of the implied freedom as a structural limitation based on institutional justifications, rather than a

---

37 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 ('*Lange*').

38 *Coleman v Power* (2004) 220 CLR 1, 77–8 [196] (Gummow and Hayne JJ), 50 [92]–[93] (McHugh J), 82 [210]–[213] (Kirby J) ('*Coleman*'); *McCloy v New South Wales* (2015) 257 CLR 178, 193 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Brown* 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 418–25 [281]–[295] (Nettle J).

39 See generally Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication' (2018) 40(3) *Sydney Law Review* 395, 397.

40 *Lange* (n 37) 566–7. The sections of the Constitution usually cited as giving rise to the freedom are ss 7, 24, 64 and 128. See Adrienne Stone and Simon Evans 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677; Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 467.

41 Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 417 ('Rights, Personal Rights and Freedoms').

42 *Banerji* (n 10) 441–2 [164]. See also 394–6 [19]–[21], 407–8 [50], 422–3 [99] (Gageler J); *Wotton v Queensland* (2012) 246 CLR 1, 31 [80]; *Unions NSW v New South Wales* (2013) 252 CLR 530, 553–4 [35]–[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J) ('*Unions NSW*'); *Brown* (n 9) 360 [90], 373–4 [150] (Kiefel CJ, Bell and Keane JJ).

personal right, may be conceptually overstated, because the basic reasoning underlying the freedom of political communication is consistent with some level of concern for individual autonomy. Personal autonomy is relevant to the idea of a 'free choice' in voting, arising from the text and structure of the *Constitution* and 'democratic government presupposes or logically implies the autonomy of citizens'.[43] Further, the conceptual distinction is minimal in practice. Whether the freedom is construed as a personal right akin to the US First Amendment or a narrower structural limitation, judges are inevitably drawn into an evaluation and balancing of competing values,[44] as evidenced by the proportionality analysis that is usually associated with rights guarantees.

In *LibertyWorks*, the Court undertook this proportionality analysis to find that the burden imposed on political communication by the registration scheme was justified by the policy objective of controlling and minimising foreign interference through increased transparency. This is a conclusion we find unpersuasive, for reasons we explain in Part III.

A *Majority Judgments*

Kiefel CJ, Keane J and Gleeson J in their joint judgment noted that the basis of the implied freedom rests on the understanding that 'a free flow of communication is necessary to the maintenance of the system of representative government for which the *Constitution* provides.'[45] They also emphasised that the freedom operates as a restriction on legislative power, not as a personal right, in line with precedent.[46] The defendant conceded that the registration scheme imposes a burden on political communication, a concession the judges said was 'properly made'.[47] Likewise, there was 'no dispute that [the] purpose of the *FITS Act* ... to promote transparency in political discourse by requiring or facilitating disclosure of the relationship between a person and their foreign principal ... was legitimate'.[48] The judgments nonetheless discuss the question of legislative purpose, and find the purpose of increasing transparency in foreign engagement to be a 'powerful public, protective purpose',[49] which is legitimate and important for safeguarding democracy.[50] (As we articulate below, this issue should, in our view, have been more strongly interrogated.) The major issue in contention for

---

43 Stone, Rights, Personal Rights and Freedoms (n 41) 393.

44 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *UNSW Law Journal* 842.

45 *LibertyWorks* (n 1) 199 [44].

46 Ibid [44]

47 Ibid 202 [54], 205 [68].

48 Ibid 201 [53].

49 Ibid 209 [85].

50 Ibid 204 [61]–[62]; Gageler J accepted this as a legitimate purpose at 213 [101] and Gordon J agreed at 221 [127].

the High Court, therefore, arose at the latter stages of the test as articulated in *Lange*,[51] *McCloy*[52] and *Clubb v Edwards*.[53] Proportionality analysis required the Court to assess whether the law is suitable, necessary, and adequately balanced in achieving its aims, and, therefore, whether the law is justified.

The Justices found the law to be proportionate. Though it was accepted that the registration requirements might deter a small number of people from engaging in political communication,[54] they disagreed that the scheme created a 'chilling effect'[55] and characterised the burden as modest. Their Honours held that the scheme was rationally connected and therefore suitable to the stated purpose of the Act.[56] They further found that the scheme was reasonably necessary to achieve the stated purpose of promoting transparency in political discourse because '[r]egistration enables both the relationship between the person and their foreign principal and a description of the political communication undertaken by the person … to be matters of public record.'[57] More specifically, they explained that registration requirements enable:

> the commentariat to be alerted to the presence of foreign influencers in public affairs, thereby allowing public debate to be informed in a way that would not be achieved by source disclosure to the recipients of a particular communication at the time of the communication.[58]

Citing *Banerji*,[59] the joint-judgment confirmed that 'a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom.'[60] On this standard, it was held that the Act's 'important purpose' was not outweighed by the modest burden it imposed on the freedom.

Edelman J came to the same conclusion as Kiefel CJ, Keane J and Gleeson J but adopted different reasoning. His Honour found that, while the burden imposed by the registration provisions is not excessive, it is nevertheless burdensome. While it seems to only cover a narrow class of persons (those who have a connection to a foreign principal),[61] it will, in fact, cover a broader class, and within that class, the 'burden is deep'[62] and ongoing,[63] though 'should not be over-stated'.[64] Edelman J noted that the Act targets speakers as well as their

---

51 *Lange* (n 37) 569, 575.
52 *McCloy* (n 38) 214–15 [71].
53 (2019) 267 CLR 171, 200 [67].
54 *LibertyWorks* (n 1) 206 [74].
55 Ibid 205 [68].
56 Ibid 207 [77].
57 Ibid 208 [82].
58 Ibid [83].
59 *Banerji* (n 10) 402–3 [38].
60 *LibertyWorks* (n 1) 209 [86].
61 Ibid 245 [211].
62 Ibid 240 [195].
63 Ibid 249 [223].
64 Ibid 247 [219], 248 [221].

speech, and imposes constraints prior to communication, at the time of communication and after communication through the requirement of record keeping for up to ten years. Despite this, Edelman J found that the burden is justified. Using his structured proportionality approach, his Honour found the impugned provisions to satisfy the three limbs of structured proportionality: suitability; reasonable necessity; and adequacy in balance.

Edelman J found the provisions to be suitable because the purpose of the communicative activity provisions is to make transparent — to government, decision-makers, and members of the public — the nature and interests of the political communication. According to Edelman J, this is not only consistent with the implied freedom but reinforces it.[65] His Honour noted that the breadth of the provisions is extensive, and potentially covers both academic researchers and the communications activities of multinational companies operating in Australia.[66] Academic researchers were excluded from the exemptions contained in pt 2 div 4 of the Act. However, because the scope of these provisions was not at issue in this case, his Honour said it was not the Court's role to decide whether the effect of such breadth was a reason for invalidity.[67] While his Honour found the depth of the burden on the implied freedom to be significant, he noted that the registration requirements do not *prohibit*, but merely constrain and deter, communications.[68]

Edelman J also cautioned against overstating the gap between the public and private registers, arguing that if the provisions are to serve the function of improving transparency, the public register cannot simply be an 'information dump'.[69] An administrative process is therefore necessary to filter the relevant information to enable clear and accessible information, consistent with the purpose of transparency. This filtering process will necessarily exclude various categories of information, including information that is commercially sensitive or involves matters of national security.[70] It would therefore not result in a 'large private dossier' of personal information being held on a government register.[71]

Edelman J distinguished the scheme from the US legislation, noting that the *FITS Act* does not engage in content-based discrimination.[72] Rather, the scheme is 'generally facially neutral in its application to political communication' and the registration provisions 'are expressed as duties that apply to all affected persons, independent of the content of the political communication.'[73] With respect to suitability, Edelman J found there was no alternative policy that would impose

---

65 Ibid 244 [208], 254–5 [244].
66 Ibid 246–7 [215]–[216].
67 Ibid 247 [217].
68 Ibid [219], 254–5 [244].
69 Ibid 251 [230].
70 Ibid.
71 Ibid 250 [227].
72 Justice Gageler held in *Brown* that such discriminatory laws warrant closer scrutiny because of the risk 'political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded': *Brown* (n 9) 443 [202], 446 [220], 395 [223].
73 *LibertyWorks* (n 1) 253 [236].

less of a burden on the implied freedom while achieving the stated aim. Since the provisions do not prohibit political communication, his Honour found them adequate in their balance.[74]

Steward J agreed with the answers and reasons given by Kiefel CJ, Keane J and Gleeson J, but expressed slightly different views in relation to adequacy of balance.[75] His Honour held that a law found to be suitable and necessary may nevertheless impermissibly burden the implied freedom if there is an extreme 'overreach of means over ends'.[76] Steward J felt the law does overreach because of the breadth of the definition of 'arrangement', which, contrary to the Commonwealth's submissions, does not just describe the unique position of the plaintiff, but can capture many other individuals. For instance, it captured the former Prime Minister, Tony Abbot, and NSW politician Mark Latham, both of whom were to be speakers at the LibertyWorks event.[77] It could also capture any other person who might organise a conference with a foreign principal, a collaboration between a local and overseas academic in relation to any political communication, or international law and accounting firms who might lobby government. In these examples, the individual 'may not in any way be acting as an intermediary for a foreign principal' but may nevertheless be required to register.[78] In the light of the legislation's breadth, which requires those engaged in innocent foreign influence to register, Steward J made the following noteworthy observations:

> It follows that it is arguable that the extension of the *FITS Act* to those with nothing relevantly to disclose, to those who have nothing relevantly to hide, and to those who act only for themselves, but who, in each case, are nonetheless associated with a foreign principal by participation in an arrangement, is a manifestly disproportionate legislative solution to the aim of minimising undisclosed foreign political influence. The disproportion may be said to be manifest because it treats the innocent as if they are guilty of being undisclosed intermediaries for a foreign principal. That conclusion may well be strengthened when one considers the obligations imposed, on pain of potential imprisonment, on registrants, potential registrants and those who undertake registrable communications activities. The disproportion here is arguably so stark that it overcomes any necessary judicial deference concerning matters of national security.[79]

After making these pointed remarks about the Act's overreach, however, Steward J backtracked and narrowed his conclusion. His Honour said he could express 'no final view' on the matter because the plaintiff did not contend for invalidity on

---

74 Ibid 254–5 [244].
75 Ibid 255 [247].
76 Ibid 265–6 [292].
77 Paul Karp, 'Tony Abbott Was Asked to Register as Agent of Foreign Influence after Migration Speech in Hungary', *The Guardian*, 20 February 2020.
78 *LibertyWorks* (n 1) 266–7 [295].
79 Ibid 267 [296].

this basis[80] — an apparent criticism of the way the case was argued before the Court. Because LibertyWorks had limited its attack to item 3 of the table in s 21(1) of the *FITS Act*, it was not open to the Court to make a finding in relation to whether other sections, such as s 11(1)(a)(i), burden the implied freedom.

B *Dissenting Judgments*

Gageler J and Gordon J dissented, finding that the registration requirements impermissibly burden the implied freedom and that the two tiers of registration meant that the legislation failed to achieve its stated purpose of achieving transparency.

Gageler J observed that the registration requirements operate as a precondition to engaging in political communication. This was seen as incompatible with the implied freedom because it burdens the registrant much more than is necessary to achieve the legislative intent.[81] The registration system restricts communication at the outset by forcing the relevant entity or person to register, under pain of criminal sanction, before political communications can occur. Gageler J is correct that any system of prior constraint is more prohibitive than a system of subsequent punishment because it shuts off communication before it has occurred.[82] This may not so much 'chill' speech as freeze some speech altogether.

For Gageler J, the registration requirements were therefore not 'reasonably appropriate and adapted' to advance the Act's purpose in a way that is consistent with the maintenance of the constitutionally prescribed system of government. To be compatible with the implied freedom, his Honour explained, the prior restraint must withstand 'close scrutiny', consistent with a search for a 'compelling justification.'[83] This means it must meet two conditions. First, it must be compatible with a system of representative government. Second, the constraint must be narrowly tailored to achieve that objective in a manner that minimally impairs the implied freedom. While the *FITS Act* meets the first of these conditions, it does not meet the second. It meets the first condition because its primary aim is to improve transparency by requiring registration on a publicly accessible register. However, its broadness, both in the way it imposes a burden prior to communication and the range of communication captured by it, means that it is not narrowly tailored to achieve its objective. It is not proportionate.

Gordon J similarly found that, because the impugned provisions regulate political communication, they require a compelling justification. I n relation to the first limb of the test, Gordon J found the impugned provisions impose a

---

80 Ibid 267 [297].
81 Ibid 210 [92].
82 Ibid 211 [95].
83 Ibid.

substantial burden on the implied freedom. Her Honour drew attention to the breadth of 'communications activity', noting that a federal government decision includes a 'decision of any kind in relation to any matter, including administrative, legislative and policy matters', that information or material includes 'information or material in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms', and would include (among other things) verbal or silent protests, media campaigns and academic work. These provisions regulate political communications of 'the broadest kind'.[84] Nor are these provisions limited to circumstances where a person is acting in the service of, or at the request of, a foreign government or a foreign government entity; they apply to any person who has an arrangement with a foreign organisation whose purpose is to pursue political objectives, irrespective of whether their views align with those of the foreign principal.[85]

The burden on the implied freedom does not end there. Gordon J argues that the *FITS Act* imposes 'burden upon burden'.[86] The cumulative burdens include the registration requirements, obligations to provide information and documents to the Secretary, obligations to maintain documents, criminal consequences of failing to do so, the effect of the non-public register, and the possibility that obtained information could be shared with law enforcement agencies. We agree with Gordon J that these layers of regulation create a significant deterrent to individuals who 'would otherwise engage in legitimate and lawful political communication'. Echoing Gageler J's concerns, Gordon J notes this 'is not just a burden on political communication, but a burden imposed *before* a person communicates.'[87]

Further, the fact that the *FITS Act* gives the Secretary wide discretion to collect information from the registrants and share it with other agencies creates a fundamental problem with the scheme: the problem is not simply that it confers wide discretionary powers, but that this kind of discretion exists at all.[88] For Gordon J, the secret register poses a particular problem:

> Put bluntly, the scheme of registration established by the *FITS* Act is not fit for purpose. A scheme of registration narrowly tailored to improve transparency of political communication undertaken on behalf of foreign principles with the public or sections of the public in a manner that minimally impaired freedom of political communication would have no place for a secret register at all … there would be no occasion for the discretionary collection and discretionary dissemination of information for other governmental purposes.[89]

---

84 Ibid 226–7 [146].
85 Ibid 234 [176].
86 Ibid 235 [178].
87 Ibid 235–6 [178]–[179].
88 Ibid 217–18 [116].
89 Ibid 218 [117].

This renders the provisions of the *FITS Act* 'unsuitable' because there is no rational connection between the aim of improving transparency and the existence of a secret register that can be shared with the relevant Commonwealth enforcement bodies. Nor is the scheme 'necessary' because the alternative means of achieving the objective of improving transparency is not to have a two-tiered scheme of registration. Because the two-tier system of registration — one publicly accessible, the other private — does not improve transparency, it cannot be justified. This not only deters communication but 'does nothing to minimise the risk of an *undisclosed influence*. It does the opposite. A non-public register is in darkness, not sunlight.'[90] Her Honour, therefore, found that the impugned provisions go beyond the purpose of the Act. The purpose of the Act is to increase transparency, and a non-public register does not serve this purpose. As such, the provisions overreach any legitimate purpose and are not necessary. We agree with this conclusion and elaborate below.

IV Critiques and Observations

A *Foreign Influence v Foreign Interference: Grappling with Legislative Purpose*

A key weakness pervading all the judgments is a failure to fully grapple with the mismatch between the politically stated purpose of the *FITS Act* as preventing foreign interference, and the execution, effect, and perhaps even the intent, of the legislation itself which, in our view, regulates and discourages foreign influence. That the High Court let this mismatch go largely unnoticed and unanalysed — and at times employs unclear and confusing language in construction of purpose — may be a result of the fact that the parties did not dispute the legitimacy of legislative purpose. As Gordon J noted, '[n]o other or wider purpose was said to be pursued',[91] which may be a weakness in how the case was argued. The majority Justices provide views on legislative purpose and agreed it was legitimate and compatible with Australian constitutional democracy.[92] However, fundamental complexities with respect to legislative purpose were not explored.

A proper understanding of legislative purpose is crucial to the implied freedom test. As Gordon J made clear, ascertaining legislative purpose to apply the implied freedom should utilise ordinary methods of statutory interpretation,[93] having regard to 'the text, the context and, if relevant, the

---

90 Ibid 222 [130].

91 Ibid 221 [127].

92 Ibid 201 [53], 203–4 [60]–[62] (Kiefel CJ, Keane and Gleeson JJ), 213 [101] (Gageler J), 221 [127], 237 [183]–[184] (Gordon J), 240 [194], 241 [198], 243–4 [203]–[208], 267 [297] (Steward J).

93 Ibid 237 [183], citing *Brown* (n 9) 362 [96] (Kiefel CJ, Bell and Keane JJ). See also *Unions NSW* (n 42) 557 [50].

history of the law'.[94] The identified purpose should speak to 'not what the law does in its terms but what the law is designed to achieve in fact'.[95] Further, '[i]t should be identified at a higher level of generality than the meaning of the words of the provisions, focussing instead on the "mischief" to which the provisions are directed'.[96] The text of the Act is, therefore, the starting point.

As noted, s 3 states that the object of the Act is to provide for a scheme of registration to improve the transparency of activities undertaken on behalf of foreign principals. Apart from the helpful reference to 'transparency', however, this provision does not get to the heart of the 'mischief' the legislation intends to address. As Edelman J notes, 'the objects of the Act cannot be conclusive of the purpose, nor are they necessarily at the appropriate level of generality'.[97] The provision's narrow articulation creates a sense of circularity: the legislatively stated purpose of the transparency-creating scheme of registration is to set up a transparency-creating scheme of registration. But what actual problem does the scheme seek to address? To use Gordon J's language, what is the law designed to achieve in fact? There are other clues in the text. The title refers to transparency in relation to 'foreign influence' and substantive provisions regulate foreign influence,[98] which is defined broadly in s 10 as to 'affect in any way'. Section 21 provides that registrable activities of foreign influence include political lobbying and other 'communications activities'. Notably, there is no reference in the Act to 'foreign interference', which is accordingly not defined.

Construction of the text, therefore, suggests that the legislative purpose of the Act is to establish a registration scheme to mandate greater transparency through regulation of foreign *influence* activities, presumably (we must extrapolate by reference to the extrinsic materials, discussed further below) to weed out or deter covert and corrupt foreign interference. The joint judgment seems to agree, but its reasoning is imprecise. Rather than starting with the text, the majority appears mainly guided by the extrinsic materials, including the Second Reading Speech and explanatory documents.[99] Indeed, the text of the Act is sometimes avoided. For example, the Justices muddy the issue when, referring not to the *FITS Act*, but to the *National Security Legislation Amendment (Espionage and Foreign Interference) Act* 2018 (Cth), they observe that 'the name of the latter Act implies it is addressed to the risk of foreign interference.'[100] Yet, they do not point out the obvious corresponding observation, that the name of the *FITS Act* —

---

94 *LibertyWorks* (n 1) 237 [183], citing *Brown* (n 9) 432 [321] (Gordon J).

95 Ibid, citing *Brown* (n 9) 392 [209] (Gageler J). See also *Brown* (n 9) 432–3 [322] (Gordon J). See also *McCloy* (n 38) 232 [132] (Gageler J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J) ('*Unions No 2*').

96 *LibertyWorks* (n 1) 237 [183], citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 394 [178] (Gummow J); *McCloy* (n 38) 232 [132] (Gageler J); *Brown* (n 9) 363 [101] (Kiefel CJ, Bell and Keane JJ), 391–2 [208] (Gageler J), 432 [321]; *Unions No 2* (n 95) 657 [171] (Edelman J).

97 *LibertyWorks* (n 1) 243 [204].

98 *FITS Act* (n 3) ss 12, 21.

99 *LibertyWorks* (n 1) 203 [58] (Kiefel CJ, Keane and Gleeson JJ).

100 Ibid 193 [12] (Kiefel CJ, Keane and Gleeson JJ).

the Act under contention in this case — demonstrates it is addressed at preventing benign foreign influence.

To add to the ambiguity, the joint judgment understands the Act's purpose as being to improve transparency in foreign influence activities, because 'improper influence is most likely to succeed and amount to an interference in those (political) processes if its source remains undisclosed', indicating covert foreign interference is the true mischief being addressed. However, and confusingly, the joint reasons also state that the scheme will facilitate 'exposure of foreign influence, as a means of preventing or minimising the risk that … foreign principals will exert *influence* on the integrity of Australia's political or electoral processes, as has occurred elsewhere.'[101] On face value, this asserts that the purpose of the registration scheme in creating transparency in foreign influence activities could be to prevent foreign *influence*, not foreign interference. Yet influence can be positive. It might even increase the integrity of Australia's democracy. Consider a foreign thinktank engaging with Australians to relay advice on how Australia might guard against democratic decline. That would be a productive foreign influence on the integrity of Australian democracy. Why would we want to prevent or deter it?

Nevertheless, preventing foreign influence may be a plausible interpretation of the purpose of the Act, based on its text and operation (see part 3.2 discussion of the register). This is, arguably, not a legitimate purpose compatible with Australia's representative government. If the reasoning is intended to state this purpose, then it has failed to account for the fact that this contradicts the politically stated policy intent (which is relevant because it forms part of the legislative context which should inform purpose — discussed more below) as well as Australian democratic and constitutional values. How can a multicultural, globalised democracy like Australia — indeed, a nation with a continuing constitutional relationship and engagement with a foreign power in the UK — legitimately intend to prevent and discourage benign and productive foreign influence? Yet, this is arguably what the Act does.

Turning now to extrinsic context, in his Second Reading Speech with respect to a related Act in the same package of reforms, former Prime Minister Malcolm Turnbull drew out the distinction between foreign interference and benign foreign influence to argue that foreign 'interference is unacceptable from any country' and that Australia would therefore 'not tolerate foreign influence activities that are in any way covert, coercive or corrupt. That is the line that separates legitimate influence from unacceptable interference.'[102] Turnbull therefore clarified that the package of reforms being proposed was 'not concerned with soft power', which is 'an attractive force' because '[i]f another nation has cultural or economic gravitational pull then it suggests they are doing something

---

101 Ibid (emphasis added). See also ibid 237 [184] (Gordon J).

102 Turnbull, *Second Reading Speech* (n 2) 13146.

right and we would all benefit from being involved'.[103] In other words, influence arising from persuasive argument, lobbying, and debate in the free marketplace of ideas should not be restricted, even if it flows across international borders, which, in an age of globalisation and digital connectivity, is inevitable. The government's factsheet makes this same delineation, explaining that 'foreign influence is not a bad thing' and that governments and a broad range of other actors engage in this influence all the time:

> This type of 'foreign influence', when conducted in an open, lawful and transparent manner, contributes to our vibrant and robust democracy by ensuring that decision makers and the public are exposed to diverse opinions and voices from all sectors of society.[104]

Foreign interference, however, was described as going 'beyond the routine diplomatic influence that is commonly practised by governments' to include 'covert, deceptive and coercive activities' by foreign nationals to 'advance their interests or objectives'.[105] After making this careful distinction, the government enacted the *FITS Act,* which indeed regulates the 'soft' and 'attractive force' of 'foreign influence'.[106] The practical result is that softer forms of foreign influence are registrable and failure to comply is a criminal offence. As Steward J correctly notes, the Act targets people who are not guilty of 'undisclosed foreign influence' (foreign interference).[107] It treats people engaged in positive and productive international engagement as if they are up to no good. So much for foreign influence being positive.

There is repeated imprecision in the judgments with respect to the distinction between foreign influence and interference. While the majority apparently agree that only foreign interference is a mischief,[108] they also reference problematic global trends in 'foreign influence',[109] which contradicts the former Prime Minister's directive and the Explanatory Memorandum's advice that such influence is productive. The majority further state that '[t]he mischief identified in the Second Reading Speech to which the *FITS Act* is directed is the risk that foreign states and individuals may seek to influence Australia's political processes and public debates.'[110] However, this is a sloppy interpretation of the speech, which, as noted, identifies the mischief as illegitimate foreign interference not legitimate foreign influence. The Justices repeatedly refer to

---

103 Ibid.

104 Commonwealth Attorney-General's Department, *Foreign Influence Transparency Scheme* (Factsheet No 2, February 2019) 1 <https://www.ag.gov.au/sites/default/files/2020-03/influence-versus-interference.pdf>.

105 Ibid.

106 See, eg, *FITS Act* (n 3) s 12.

107 *LibertyWorks* (n 1) 267 [296].

108 Ibid 192 [9] (Kiefel CJ, Keane and Gleeson JJ).

109 Ibid [7] (Kiefel CJ, Keane and Gleeson JJ).

110 Ibid 203 [58] (Kiefel CJ, Keane and Gleeson JJ).

foreign influence as if it is automatically nefarious.[111] This conceptual fudging may help explain the Justices' failure to question why the *FITS Act* in fact regulates foreign influence in contradiction to the politically stated policy intent and Australian democratic and constitutional values. It suggests confusion susceptible to xenophobic interpretations or carelessness arising from automatic deference to Parliament on national security issues.[112] If this was a 'slip-up' and the High Court meant that regulating foreign influence would deter covert and corrupt foreign interference (which seems more likely), then, at the very least, this indicates conceptual confusion and lack of precise attention to this crucial issue.

We think there are two possible explanations for this conceptual confusion. The first is that, perhaps, the High Court has inadvertently identified the true purpose of the Act, which is to regulate foreign influence. If so, we contend that the purpose of increasing transparency to prevent mere foreign influence — which is no threat to national security — is not legitimate or compatible with Australian constitutional democracy. After all, the *Constitution* and convention require domestic representatives of the British King to engage with and advise domestic government ministers,[113] providing a legitimate foreign influence and engagement on Australian democratic processes. This demonstrates that our system of representative government condones and, indeed, incorporates foreign influence, which is by no means automatically untoward. While that specific foreign engagement is obviously exempt from registration under the Act,[114] the point about legitimacy and overall constitutional compatibility of such a legislative purpose remains. The legislative context, explanatory materials, the *Constitution*, and longstanding convention all demonstrate that benign foreign influence is part and parcel of Australian democracy. If the purpose of the Act is to prevent mere foreign influence, this is an illegitimate purpose incompatible with our representative government and the scheme should fail.

The second and more charitable interpretation is that, notwithstanding imprecise language, the Justices were intending to argue that the *FITS Act* promotes sunlight or transparency by regulating foreign influence, with the aim of rooting out and, thus, minimising the risk of foreign interference (foreign influence that is undisclosed or corrupt). As Edelman J describes, the scheme:

> acts as a prophylactic to any sinister foreign influence on Australian political processes in circumstances of a growing global trend of foreign influence operations occurring

---

111 Ibid 192–3 [10] (Kiefel CJ, Keane and Gleeson JJ).

112 Rebecca Ananian-Welsh and Nicola McGarrity, 'National Security: A Hegemonic Constitutional Value?' in Ros Dixon (ed) *Australian Constitutional Values* (Hart Publishing, 2018) 267–86.

113 *Sue v Hill* (1999) 199 CLR 462 confirmed that the UK is now considered a 'foreign power' for the purposes of s 44 of the *Australian Constitution*.

114 *FITS Act* (n 3) s 25A(c).

> at what the Australian Security Intelligence Organisation described as 'an unprecedented scale'.[115]

Though Edelman J is also imprecise in his use of 'influence' rather than 'interference' in this passage, his Honour's incorporation of 'sinister' conveys the intended meaning. Prevention of sinister foreign interference seems a legitimate legislative purpose, in line with the politically stated policy intent, particularly given judicial deference to policy discretion in matters of national security.[116] However, this purpose is not served by the legislative execution. We believe the scheme is ineffective in achieving this purpose and disproportionate in the means employed. If the true purpose is prevention of covert and corrupt foreign interference, the scheme should fail the proportionality analysis for reasons explained below.

B *Two-Tier Registration: Investigating the Public Register*

The majority judgments do not properly address the legislative breadth of the legislation and the wide range of actors to which the obligations to register relate, which imposes a broad and, arguably, unbalanced burden on free debate. Steward J notes that '[n]o list of currently registered individuals or entities was before the Court'.[117] To help fill this gap in analysis, we have undertaken a review of the publicly accessible register, which demonstrates the wide range of actors captured by the legislation and the kinds of communicative activity in which they are engaged. There are currently 76 entries under the category of 'communications activity.'[118] The other categories are: parliamentary lobbying, general political lobbying, disbursement activity, and 'other activity.' We focus on the categories of communications activity and 'other activity' in this paper, as they both relate to our concerns in relation to the implied freedom.

The legislation captures a wide range of organisations and institutions, including companies such as South32 Limited, API Management Pty Ltd., Domestic Consulting and Woodside Petroleum, media organisations such as SEC Newsgate Pty Limited and Global CAMG Media Group, organisations such as Change.org Australia, the Australian Institute of International Affairs, Australian Strategic Policy Institute, Institute for Regional Security, Griffith Asia Institute, and the Perth USAsia Centre. It also captures various individuals, including prominent individuals like former Prime Minister Kevin Rudd.[119] The kind of

---

115 *LibertyWorks* (n 1) 254–55 [244].
116 Ananian-Welsh and McGarrity (n 112) 267–86.
117 *LibertyWorks* (n 1) 266 [295].
118 Commonwealth Attorney-General's Department, 'Communications Activity' *Transparency Register* (Web Page, 23 September 2022) <https://transparency.ag.gov.au/Activities>.
119 Ibid 'Other Activity (Former Cabinet Minister or Recent Designated Position Holder)' *Transparency Register* (Web Page, 20 March 2023) <https://transparency.ag.gov.au/Activities/Details/79a0bf1a-959e-ec11-a985-0050569fe6ca>.

communications activity captured is equally broad. In the case of many of the companies, they have registered because of communications activity, broadly defined, which relates to joint ventures with foreign companies. For example, API Management describes its communications activities in these terms:

> API Management Pty Ltd is the manager of the joint venture known as the Australian Premium Iron Ore Joint Venture under which the West Pilbara Iron Ore Project in Western Australia is held. As manager, API may engage in communications activities, on behalf of the joint venture, including in connection with applications for licenses, approvals and other authorisations under federal law relevant to the Project.[120]

Change.org, which hosts petitions on its website that are initiated by members of the public, has registered its activity because it is an indirect subsidiary of the same organisation in the United States.[121] The Australian Institute of Public Affairs has registered because it was contacted by the Chinese Embassy to host a discussion with three Chinese scholars about the Belt and Road initiative.[122] The Australian Strategic Policy Institute registered because it had received funding for a research project from the Embassy of Japan and grant funding from NATO Strategic Communications Centre of Excellence for an independent research project in popular social media platforms.[123] The Australian Academy of Science has registered because:

> The Academy engages with Chinese audiences by operating an official account on social media platform Weibo. English content is translated into Chinese by a certified-NAATI translator before being reviewed by a panel of respected Chinese-speaking Australian academics. The content is impartial and aims to promote the advances of Australian science.[124]

Individuals have even registered for email communications with foreign political organisations, media and academic engagements, solitary protest activity and leaflet distribution. Kevin Rudd, for example, has registered for invited interviews about international relations hosted by public universities in the US, and webinars with the former Prime Minister of New Zealand, Helen Clarke, among many other speaking engagements, with a total of 53 registrations.[125]

As is evident from this review of the public register, the reach of the Act is excessively broad, capturing many activities and individuals for engaging in

---

120 Ibid '*Communications Activity*' *Transparency Register* (Web Page, 15 May 2019) <https://transparency.ag.gov.au/Activities>.

121 Ibid (Web Page, 4 September 2020) <https://transparency.ag.gov.au/Activities/Details/5222e30a-edce-e911-812b-0050569d2348>.

122 Ibid (Web Page, 27 September 2019) <https://transparency.ag.gov.au/Activities/Details/915bf43d-b5e0-e911-812e-0050569d617d>.

123 Ibid (Web Page, 10 March 2020) <https://transparency.ag.gov.au/Activities/Details/e9326e96-ca4b-ea11-8132-0050569d2348>.

124 Ibid 'General Political Lobbying' (Web Page, 26 March 2019) <https://transparency.ag.gov.au/Activities/Details/d5ea47a2-f745-e911-8121-0050569d2348>.

125 Ibid 'Other Activity (Former Cabinet Minister or Recent Designated Position Holder)' (Web Page, 20 March 2023) <https://transparency.ag.gov.au/Activities>.

routine communications activities that are part of living in a democratic and globalised society, and for conducting independent peer-reviewed research. This is an unjustified burden on the implied freedom because most of these entries do not appear to be engaging in untoward foreign interference, and if they were, this would not be evident from the information presented on the register, which undermines the policy purpose of preventing foreign interference. An assessment of the public register supports the conclusion that the requirements are not 'reasonably appropriate and adapted to advance that purpose' in a way that is consistent with the maintenance of the constitutionally prescribed system of government.

Indeed, it is not clear what is achieved by requiring these organisations and individuals to register. We are none the wiser about the nature of the international interactions or their relevance to the threat of foreign interference. Rather, the scheme imposes a heavy burden on international collaboration and free communication, including on organisations such as thinktanks and universities that typically have vast and international research networks which they are now required to register . As noted, this does not achieve the stated purpose of facilitating transparency, because the register does not inform the reader about untoward activities. If the registration requirements alone are deterring corrupt foreign interference (which seems unlikely), this is unprovable. The net result is that citizens are paying for this scheme with a heavy regulation of free speech and international engagement, with no visible payoff.

One counterargument is that the reporting requirements are not overly onerous, because all that is required is the submission of the relevant information. Admittedly, for larger organisations and wealthier individuals, the complex reporting requirements may not be an issue. However, for individuals without the resources to secure expensive legal advice to elucidate their obligations under the Act, it may cause them to err on the side of caution and not engage in the communications activity at all. The administrative burden is onerous. We are even aware of universities that have had to create new teams of experts dedicated to determining whether academics are required to register under the scheme for their international research activities.[126] When the authors sought advice from these teams as to our own liabilities under the Act, the answers were not easy to ascertain.

The confusing and combative nature of registration requirements is demonstrated by the various lawyer-drafted submissions to the register, and in the fact that even former Prime Ministers like Tony Abbott and Kevin Rudd have needed expert support to understand their obligations under the scheme. Rudd's multiple submissions to the register show how much work this creates for

---

[126] See Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (Inquiry, March 2022).

lawyers, which may be lucrative for the lawyers involved but unfair on ordinary citizens trying to participate in democratic engagement while negotiating this law. Rudd's multiple entries duplicate the same lawyerly words, demonstrating ongoing legal disagreement with the Department about the registration obligations:

> I refer to Acting Secretary Anderson's letter of 12 January 2021. In it, Mr Anderson expressed a much narrower interpretation of my obligations under this scheme's special requirements for former cabinet ministers than was expressed by his predecessor, Mr Moraitis, less than two months earlier on 25 November 2020. My lawyer first contacted the Department in September 2019 to clarify my obligations. He did so at my initiative, despite his advice that I had nothing to register. I am not an agent of foreign influence and any such suggestion is forcefully rejected. I engage internationally as an individual, a scholar, a commentator, a former leader and in my roles with non-government and UN-affiliated institutions — never as an agent on behalf of any foreign government …[127]

Rudd's emphatic denial that he is an 'agent of foreign influence' perpetuates misunderstanding about what foreign influence is: according to Prime Minister Turnbull who oversaw the enactment of this legislation, foreign influence is positive, but in regulating and potentially criminalising benign foreign influence (if registration requirement are not fulfilled), this scheme has perpetuated the misconception that foreign influence is automatically nefarious.

In his international engagement, Rudd is presumably undertaking in legitimate foreign influence but not corrupt foreign interference. Nonetheless, the scheme creates scope for Rudd to argue about whether the Act requires him to register 'discussions of current issues … with international public broadcasters, such as the BBC or Radio New Zealand', leading him to question whether '[t]his defies the Attorney-General's public statement that this law would be interpreted with "common sense"'. Rudd contends:

> It is ridiculous to imagine that being interviewed by the BBC could make someone an agent of UK Government influence, especially if they use that platform to criticise the UK Government, as I often do. Given such interviews are already publicly transparent when they are broadcast or published, disclosing them here seems redundant.,… the Department's sweeping interpretation will result in the waste of both officials' time and taxpayer funds. Australia must have dozens, if not hundreds, of living former cabinet ministers, all of whom must now be chased by the Department to register engagements that, by their nature, are already on the public record …[128]

These submissions demonstrate the incomprehensible, changing, disputed and indeed 'ridiculous' interpretations arising from the legislated registration requirements. Strangely, Rudd's submissions also note that he 'wholly supports'

---

127 Australian Government, Attorney-General's Department, Transparency Register: <https://transparency.ag.gov.au/SearchItemDetail/74ad18fe-0c7c-ed11-a994-0050569fe6ca>.

128 Ibid.

the Act, which he thinks has 'potential to help safeguard Australia's core interests by highlighting potential agents of foreign influence.' We disagree. If the registration requirements cannot be easily apprehended even by former prime ministers without expert assistance and extensive disagreement with the department, the scheme is unfit for purpose.

The political furore over whether Tony Abbott needed to register further demonstrates the point.[129] The Act is easily and regularly misunderstood, including by members of the elected government that created the legislation. Under freedom of information laws relating to why Abbott was asked to register under the Act, it was revealed that a public servant had advised Abbott that it was 'reasonable' to hold off on registering until the question of his actual liability to register had been resolved. On later finding out that he did need to register, Abbott labelled the decision 'absurd', angering the then Attorney-General, Chris Porter.[130] If the bureaucrats administering the Act cannot give quick advice as to whether someone is liable to register, this is indeed absurd. It is a breach of a fundamental tenet of the rule of law: the requirement that the law be comprehensible and accessible, so rules can be followed. In our view, the registration requirements are extremely difficult to understand and follow without legal advice. An ordinary person would not bother dealing with the bureaucracy and red tape or the requirements will just be ignored.

The registration requirements can also be used for political ends. Rudd weaponises the legislation in his longstanding crusade against NewsCorp,[131] demonstrating the propensity of the registration scheme to be wielded against ideological opponents, by burdening them with inconvenient and expensive paperwork. Legal advice obtained by Rudd from Brett Walker SC advises that NewCorp may be liable to register under the scheme:

> If News Corp therefore communicates or distributes information on behalf of a foreign principal to the public through its media outlets or platforms, the identity of the foreign principal must be apparent or disclosed in the communication to ensure that it is not 'communications activity' which is required to be registered under section 22 of the Act. Relevantly, if News Corp through its journalists were to make an arrangement with a foreign principal to communicate information to the public, for the purpose of political or governmental influence, the activity would be registrable unless the identity of the foreign principal is apparent in the information published.[132]

Walker further notes that 'the registration and disclosure of communications activity undertaken on behalf of a foreign principal, required by the Act for the

---

129 Karp (n 77).

130 Ibid.

131 Amanda Meade, 'Kevin Rudd Petition Seeking Royal Commission into Murdoch Media Nears 500,000 Signatures', *The Guardian,* 2 November 2020.

132 Brett Walker SC, 'Memorandum of Advice' (23 December 2020) 2 [15]–[16] <https://www.aph.gov.au/DocumentStore.ashx?id=5fede6b0-912d-4881-82c2-b5b8e135be43>.

purpose of transparency or "sunlight", would appear to override the protection provided to confidential sources.'[133]

Walker's advice confirms the potential chilling effect of the registration scheme, including on journalism, that is essential for free and informed voting choices. The poorly drafted Act fails to protect journalists' confidential sources. When viewed alongside other recent attempted incursions into free speech via legislation[134] and government action,[135] including press raids which saw Australia's Freedom House score for press freedom decline,[136] this scheme adds to concerns that Australian journalistic freedom and free speech is diminishing.

C *Eroding the Implied Freedom of Political Communication*

Perhaps the most striking aspect of the *LibertyWorks* judgments is Steward J's declaration that the implied freedom may not exist. His Honour's comments appear to invite a future constitutional challenge and are worth recounting in full:

> Thirdly, for my part, and with the greatest of respect, it is arguable that the implied freedom does not exist. It may not be sufficiently supported by the text, structure and context of the *Constitution* and, because of the continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law. The division within the Court over so important an issue may justify a reconsideration of the implication itself. In that respect, it is one thing to proclaim the necessity of a freedom of political discourse given the type of representative and responsible government created by the *Constitution*; it is another thing entirely to make an implication about when and how that freedom may be legitimately limited. The continued division in this Court about how that latter task is to be undertaken is telling. It may suggest that the implied freedom cannot be adequately defined. However, no party submitted that the implied freedom did not exist. In such circumstances, it is my current duty to continue to apply it faithfully. Any consideration of the existence of the implied freedom should, if necessary, be a matter for full argument on another occasion.[137]

While the implied freedom has been interpreted in different ways over time, depending on the composition of the High Court and changing judicial

---

133 Ibid 3 [18].

134 See the other statutes in this package of reforms. See also Social Media (Anti-Trolling) Bill 2021 (Cth) (Exposure Draft).

135 *Dutton v Bazzi* [2021] FCA 1474; Michael Douglas, 'Defamation Actions and Australian Politics' (2021) 5 *University of New South Wales Law Journal Forum* 1; Sophie Elsworth, 'MP Andrew Laming Received Several Apologies Over Defamatory Tweets', *The Australian* (31 October 2021); Samantha Maiden, 'Peter Dutton Suggests Public-Funded Legal Fund for MPs to Sue for Defamation', *News.com.au* (21 October 2021).

136 Freedom House, 'Freedom in the World 2020: Australia' *Freedom House* (2023) <https://freedomhouse.org/country/australia/freedom-world/2020>.

137 *LibertyWorks* (n 1) 255–6 [249] (Steward J).

approaches,[138] its existence has never been doubted, including in more recent judgments. For example, the implied freedom was recently affirmed in *Brown*, where the High Court found that aspects of the *Workplaces (Protection from Protestors) Act* 2014 (Cth) unduly burdened the implied freedom because it prevented political protest, which is a form of political communication.[139] While the Court upheld the *Public Service Act* 1999 (Cth) in *Banerji*, the existence of the implied freedom was confirmed. This changed with Steward J's suggestion that the Court's ongoing division on the issue means the implied freedom cannot be adequately defined. His Honour further argued that the implied freedom may never have been justified, citing Dawson J's rejection of the freedom in *Theophanous v The Herald and Weekly Times Limited*.[140] The contention is that, while it may be legitimate for the Court to protect the means by which representatives are 'directly chosen' by the people for the purposes of ss 7 and 24 of the *Constitution*, for example by declaring invalid legislation denying electors access to information necessary for them to exercise 'true choice' in an election,[141] it is a stretch to say that this creates an implied freedom in relation to political communication. However, because the parties did not submit that the implied freedom did not exist, the freedom's non-existence was not a question to be determined in this case. Nevertheless, Steward J's judgment seems to invite a future challenge. While his Honour's provocation is constitutionally conservative in its aversion to judicial creativity and overreach, it is also paradoxically activist in its advocacy and encouragement of litigation to overturn decades of established precedent.

If, for Steward J, overturning a law that impedes a 'true choice' in elections is potentially legitimate under the *Constitution*, whereas creating an implied freedom of political communication is not, perhaps his Honour's argument is more about appropriate legal labels than the substance of the law. After all, the purpose of the implied freedom, as currently conceived, is to ensure that electors have the necessary information to make informed voting choices, as required by the *Constitution*. The 'implied freedom of political communication' is the trigger for judicial examination of where the boundaries of legislative power lie with respect to the free voting choices of citizens. This question hinges on the correct meaning of the word 'choice'. Like it or not, the *Constitution* does protect the idea of a 'choice' in federal electoral voting. The duty of High Court judges to discern what this means in practice with respect to Parliament's legislative power unavoidably entails uncertainty that must be ordered, as much as possible, by an appropriate legal test. If Steward J disagrees with the present test or tests, his

---

138 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

139 *Brown*.

140 (1994) 182 CLR 104.

141 *LibertyWorks* (n 1) 268 [301] (Steward J).

Honour should articulate a better mechanism — including a more appropriate label for this mechanism — for determining the constitutional meaning of an electoral choice under ss 7, 24 and 128 of the *Constitution*. Without this, Steward J's judgment raises more questions than it answers.

V Conclusion

Steward J may be partially right to conclude that the implied freedom may not exist, but not for the reasons that his Honour elucidates. The implied freedom, in practice, did not exist for these plaintiffs because it was not robustly applied by the High Court. Free speech in Australia is at risk of being surreptitiously smothered by layer upon layer of dense and incomprehensible legislation. This creeping legislative incursion into free speech is going largely unscrutinised and unchallenged in the political realm. The High Court's adjudication of the implied freedom is the citizenry's last defence against state incursions into free speech. For the plaintiffs in *LibertyWorks*, this last defence turned out to be largely illusory.

'Embarrassing and Even Ridiculous': The Short-Lived Rise and Fall of Chief Justice Pope Cooper's Two Act Entrenchment Thesis in Early 20th-Century Queensland

Ian Loveland*

This paper examines the brief lifespan (1907–20) of 'Two Act' entrenchment, a curious constitutional law idea which emerged in Queensland in the early 1900s. Its origins lay in an argument formulated by Queensland's then Chief Justice, Pope Cooper, qua defendant in criminal proceedings arising from his refusal to pay income tax on his judicial salary. That argument was that the Constitution Act 1867 *(Qld) was a form of 'fundamental' or 'organic' law which could not be altered by legislation passed in the ordinary way, but which could be changed only by a Two Act legislative process in which the Legislature in Act 1 expressly empowered itself to alter the relevant provision and then in Act 2, again expressly, enacted the relevant alteration. The article considers how it was that an idea which had no textual basis in either Imperial or colonial legislation, for which there was no supportive judicial authority, and which had no precedent in Queensland's legislative practice, was repeatedly upheld by Queensland's Supreme Court and Australia's High Court before being dismissed as wholly without merit by the Privy Council in* McCawley v The King*; but dismissed in terms which laid the foundation for the Privy Council's subsequent approval of the proposition (in* Trethowan v Attorney-General of New South Wales*) that Australia's State legislatures did indeed possess the legislative competence to enact judicially enforceable entrenchment devices to prevent certain laws being enacted through the ordinary lawmaking process.*

I Introduction

As judicial dismissals of counsel's submissions go, Lord Chancellor Lord Birkenhead's criticism in the Privy Council judgment *McCawley v The King* ('*McCawley*')[1] of the argument advanced by one of his (in 1938) successors, Frederick Maugham KC, must rank among the most withering. Maugham's case was in Lord Birkenhead's view 'embarrassing and even ridiculous'.[2] Yet this

* School of Law, City, University of London

1 [1920] AC 691 ('*McCawley*').

2 Ibid 705.

DOI: 10.38127/uqlj.v42i1.6679

argument had, two years earlier, commended itself to three members of Australia's High Court, including the Court's first Chief Justice, Samuel Griffith. Chief Justice Griffith was upholding a unanimous 1907 High Court judgment — *Cooper v Commissioner of Income Tax (Qld)* ('*Cooper*')[3] — which forcefully approved the (then newly minted) principle which Lord Birkenhead and his colleagues so disparaged, a judgment which, prior to *McCawley*, had subsequently been endorsed several times by the High Court.

That principle might best be described as 'Two Act' entrenchment. It asserted that the provisions of the *Constitution Act 1867* (Qld) ('*Constitution Act*') were protected from repeal or amendment (whether express or implied) through the ordinary method of legislating (that is by a bare majority in each house of the Legislature[4] and the royal assent given by the Governor, hereafter referred to as the 'ordinary way' of legislating) by a dual form of entrenchment. These provisions, Maugham contended, could be amended or repealed only by a lawmaking process with two distinct phases. First, the Queensland Legislature would have to enact a statute which expressly stated (but otherwise enacted in the 'ordinary way') that a provision of the *Constitution Act* was to be repealed or amended. Secondly, that repeal or amendment would then have to be expressly effected (but again otherwise in the 'ordinary way') by a second, separate Act. The *Constitution Act* could not be repealed or amended by a single statute, irrespective of how explicit that statute might be as to its intended effect.

The *Constitution Act* provisions in issue in *McCawley* were ss 15 and 16. These provided that Queensland Supreme Court judges held office during good behaviour and could only be dismissed by the Governor consequent upon an address from both houses. Thomas McCawley was a civil servant and barrister appointed (de jure) by the State's Governor (de facto by the State Premier, Tom Ryan)[5] as a judge in Queensland's Industrial and Arbitration Court. Under s 6 of the *Industrial Arbitration Act 1916* (Qld), Industrial Court judges sat for renewable seven-year terms. However, s 6(6) further provided that an Industrial Court judge

---

3 (1907) 4 CLR 1304 ('*Cooper*').

4 Comprised in 1867 of an elected (on a restrictive franchise) Legislative Assembly and appointed (by the Governor) Legislative Council.

5 Ryan, born to illiterate Irish immigrant parents in 1876, worked as a teacher before undertaking a law degree at Melbourne University and entering practice at the Queensland Bar. He was elected as a Labor Assembly member in 1909. He became party leader in 1912 and Premier in 1915. Ryan frequently appeared as counsel on his governments' behalf in major constitutional matters: see especially *Taylor v Attorney General* (1917) 23 CLR 457; *Duncan v Theodore* (1917) 23 CLR 510; *Theodore v Duncan* [1919] AC 696; *Lennon v Gibson* [1919] AC 709. Ryan entered national politics in 1919, and was on the cusp of becoming the national Labor party leader when he died of pneumonia in 1921. See Denis Murphy, *TJ Ryan: A Political Biography* (University of Queensland Press, 1975). For insightful discussions of McCawley's personality and politics, see M Cope, 'The Political Appointment of TW McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland' (1976) 9(2) *University of Queensland Law Journal* 224; Nicholas Aroney, 'Politics, Law and the Constitution in McCawley's Case' (2006) 30(3) *Melbourne University Law Review* 605.

might also be appointed to the State Supreme Court. Ryan exercised that power regarding McCawley in October 1917.

The challenge to McCawley's appointment in the Queensland courts, the High Court and the Privy Council rested squarely on *Cooper*. The central argument was that, since McCawley's presence on the Supreme Court was a parasitic consequence of his seat on the Industrial Court, his Supreme Court tenure was just for seven years rather than — as s 15 of the *Constitution Act* provided — during good behaviour. *Cooper*, therefore, required that the Legislature enact legislation expressly empowering itself to amend s 15 and, thereafter, a second statute expressly amending that provision to allow Supreme Court judges to sit for time-limited terms.

The initiative for the challenge came from two Queensland King's Counsel, Arthur Feez and Charles Stumm. Both men had acquired considerable legal and political prominence by appearing frequently in litigation challenging the lawfulness of actions taken by Ryan's government,[6] and Feez had previously fought (unsuccessfully) an Assembly seat on a conservative platform.[7] There was likely some sincere attachment on Feez's and Stumm's parts to the *Cooper* principle. They also professed a 'constitutional' concern that a renewable time-limited judicial tenure would compromise the independence of the judges concerned, who might succumb to political pressure in discharging their judicial functions for fear that their terms of office would not be renewed.

We return (briefly) to *McCawley*, and to the (valuable) role played by *Cooper* as an exemplar of 'bad law' in shaping subsequent political practice and judicial doctrine in respect of the question of whether Australia's State legislatures had the power to enact judicially enforceable entrenchment devices, in the final section of this paper. The initial sections explore how this 'ridiculous and even embarrassing' argument acquired such currency in Australian legal circles.

II The 'Origins' of Two Act Entrenchment

Queensland was created by an 1859 Order in Council, issued by the Crown per s 7 of the *New South Wales Constitution Act 1855* (UK) 18 & 19 Vict ('*1855 NSW Act*'), which provided, inter alia, that Queensland would have a governmental system '[i]n manner as nearly resembling the form of Government and Legislature which shall be at such time established in New South Wales, as the circumstances of such

---

6 Ryan's administration pursued an aggressively social democratic economic program. Much of the legislation was largely McCawley's creation, and his role as President of the Industrial Court was a vital element of its enforcement. See Denis Murphy, 'The Establishment of State Enterprises in Queensland, 1915–1918' (1968) 14 (May) *Labour History* 13; Murphy (n 5) ch. 12; Shawn Sherlock, '"Good-bye the State's Progress": State Enterprise and Labor's Plan for a North Queensland Steel Industry, 1915–20' (2006) 90 (May) *Labour History* 61.

7 Michael White and Pieter Wessells, 'The Australian Feez Family: Its Contribution to the Law' (1998) 17(2) *Journal of the Royal Historical Society of Queensland* 76.

Colony will allow'. The 1859 Order created a legislature, comprising an elected Legislative Assembly and an appointive (de jure by the Governor) Legislative Council and the Governor qua the Queen granting the royal assent. Clause 2 empowered the Queen with the advice and assent of the Assembly and Council 'to make laws for the peace, welfare and good government of the Colony in all cases whatsoever'. Clause 8 provided that the Queensland Legislature would in terms of its 'constitution, function and mode of proceedings' be a carbon copy of the New South Wales Legislature. The presumptive default mode of lawmaking in that Legislature was bicameral bare majoritarianism plus the royal assent given by the Governor, with the enacted statutes having either explicit or implicit effect on previously enacted legislation.[8]

However, Imperial statutes creating the Australian colonies also identified several issues for which different manners of lawmaking were required. The early 1860s produced a steady stream of incidents in which Queensland's and South Australia's legislatures failed to respect such statutory conditions, and a steady stream of Imperial legislation retrospectively validating the *ultra vires* colonial statutes.[9]

Such departures from the 'ordinary way' took various forms. One constraint required bills dealing with certain subjects to be reserved for the Monarch's personal assent. That constraint was sometimes coupled with a proviso that such assent could not be given until the relevant bill was laid before the Lords and Commons for 30 days. These restrictions functioned primarily to enable the Imperial government to prevent enactment of colonial laws conflicting with Imperial interests and provided a pre-emptive alternative to the power of post-enactment disallowance which the Imperial government was generally granted in colonial constitutions.[10]

A second type of constraint, found in New South Wales' (and by extension Queensland's) initial constitutional orders, imposed enhanced majority requirements. Section 36 of the *1855 NSW Act* provided that any bill altering that Act's provisions concerning the Legislative Council could not be presented to the Governor unless approved by a two-thirds majority of eligible members in each house at second and third readings. Section 36 then further provided that such bills be reserved for the Queen's assent and be laid before the Commons and Lords for 30 days before assent. Section 15 imposed less onerous restrictions on any bill altering the composition of the Assembly — a two thirds majority of eligible members at Assembly second and third reading was required, coupled with a bare majority of eligible Council members.[11]

---

8 The relevant provisions in the *1855 NSW Act* are ss 23 (Assembly) and 8 (Council).

9 Discussed in Ian Loveland, *McCawley and Trethowan: the Chaos of Politics and the Integrity of Law: Volume 1 — McCawley* (Hart Publishing, 2021) ch 3.

10 The *1855 NSW Act* expressly preserved (in s 3) such formerly granted powers. The provision was reproduced in cl 14 of the 1859 Order.

11 Section 15 did not require reservation or laying before.

That colonial courts might invalidate colonial 'legislation' not passed in accordance with the requirements of Imperial legislation was not a contentious proposition within Imperial governmental circles in the mid-to-late nineteenth century.[12] Of more interest — generally and for present purposes — was the presumption that Australia's colonial legislatures, acting in 'the ordinary way', were created by Imperial legislation with the power to place judicially enforceable process-based restrictions of their own devising on their future lawmaking competence. In Queensland, that power seemingly derived from cl 22 of the 1859 Order, which provided that the Legislature would have: 'full power to and authority from time to time to make laws altering or repealing *all or any of the provisions of the Order in Council* in the same manner as any other laws for the good government of the colony'.[13]

That presumption was seemingly confirmed and reinforced by s 5 of the *Colonial Laws Validity Act 1865* (UK) ('*CLVA 1865*'), which provided (inter alia), with both prospective and retrospective effect, that a colonial legislature that was (per s 1) 'representative'[14] could alter its own 'constitution, powers and procedures,' provided that any such alteration was enacted 'in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony'. The *CLVA 1865* was introduced in part to address difficulties created in South Australia by the predilection of two of the colony's three Supreme Court judges to invalidate colonial legislation on various grounds,[15] but similar difficulties in Queensland had also informed that process.[16]

Clause 22 prima facie extended to 'all laws' (other than those expressly excepted) while the apparent reach of the *CLVA 1865* s 5 was limited to the compositional and procedural identity of a colony's legislature. Neither the *CLVA 1865* itself, nor its legislative history, cast any light on s 5's intended impact on such generally framed powers as clause 22. And as events in Queensland soon suggested, the *CLVA 1865* had not firmly fastened itself in the constitutional consciousness of the colony's lawmakers.

---

12 See especially Enid Campbell, 'Colonial Legislation and the Laws of England' (1965) 2(2) *University of Tasmania Law Review* 148; Dudley McGovney, 'The British Origin of Judicial Review of Legislation' (1944) 93(1) *University of Pennsylvania Law Review* 1; Roundell Palmer and Robert Collier, *The Law Officers to Mr Cardwell: Colonial Laws Validity Report* (1864).

13 Emphasis added. Despite its 'all or any' proviso, cl 22 expressly placed some matters beyond the Legislature's substantive competence, notably removing the Crown's powers of disallowance and the reservation and laying before provisos. The obvious inferences were that the list of exceptions was exhaustive and that the exceptions element of cl 22 could not be amended at all by the Queensland Legislature until the Imperial Parliament empowered it to do so.

14 This seemingly meant that, in a unicameral legislature, at least half the members were elected and, in a bicameral legislature, at least one House was wholly elected.

15 See John Williams, 'Justice Boothby: A Disaster that Happened' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2007) 21.

16 Discussed in Loveland (n 9), 67-80.

A *Pope Cooper's Tax Bill and Enactment of the Constitution Act 1867*

'Two Act entrenchment' was an idea fashioned in 1907 by Queensland's then Chief Justice, Pope Cooper, not as a judge, but as a defendant in criminal proceedings. In 1907, Cooper was prosecuted for non-payment of his State income tax. Income tax in Queensland was introduced in 1902 by a 'Conservative' government.[17] That government was subsequently defeated in the 1904 election and replaced by a coalition of centrists and the Labor party. Although Labor's Assembly representation was larger than its coalition partner's (34 to 21 of the Assembly's 72 members), the party's then leader, William Kidston, considered it strategically prudent to have the coalition headed formally by an electorally more familiar and (small 'c') conservative politician.[18] Kidston took office as Treasurer and was manifestly the coalition's driving force on both policy and presentational matters.

Cooper denied that his salary as Chief Justice (£4,000) was assessable income for these purposes. The root for this argument was claimed to lie in s 17 of the *Constitution Act*:[19]

> Such salaries as are settled upon the judges for the time being by Act of Parliament or otherwise and all such salaries as shall or may in future granted by Her Majesty her heirs and successors or otherwise to any future judge or judges of the said Supreme Court shall in all time coming be paid and payable to every such judge and judges for the time being so long as the patents or commissions of them or any of them respectively shall continue and remain in force.[20]

Cooper's submission was that taxing his salary meant his full salary was no longer 'paid and payable', and so the income tax legislation insofar as it applied to Supreme Court judges contradicted s 17. His primary contention was that the provisions of the *Constitution Act* could only be amended by Imperial legislation. The argument that amendment could only be effected by a Two Act legislative process in Queensland emerged as an alternative and secondary proposition.

Cooper's defence at trial was the first time that the Two Act entrenchment thesis had been placed before a Queensland court. It had never previously been raised in New South Wales. It had no express textual basis in either Queensland or Imperial legislation. There was nothing in the enactment history of the *Constitution Act* to suggest it was regarded by legislators as having any elevated legal status. Indeed, that Act was just one of 30 measures passed with virtually no

---

17 Generally referred to as a 'Ministerialist' government, then led by Robert Philp.

18 This being Arthur Morgan, a former Ministerialist who broke with Philp in 1902.

19 Section 17 repeated clause 16 of the 1859 Order, which itself repeated sch 1 s 40 of the *1855 NSW Act*.

20 Section 17 verbatim repeated s 3 of a 1760 British statute: *Commission and Salaries of Judges Act 1760* (UK) 1 Geo 3, c 23.

discussion in either House; all passed Assembly second reading in a single afternoon.[21]

The bulky package of bills emerged from a consolidation exercise by a Royal Commission led by the colony's then Chief Justice, James Cockle,[22] and the Attorney-General, Charles Lilley.[23] The *Constitution Act* itself was one of four measures then referred to as 'the political Acts' by Lilley at second readings.[24] The three others were, respectively, the *Legislative Assembly Act 1867* (Qld), the *Electoral Districts Act 1867* (Qld) and the *Elections Act 1867* (Qld). These three Acts all dealt with issues of obvious constitutional significance (that all featured in the *1855 NSW Act*) but which — for no reason that Lilley made clear during the Acts' passage — evidently did not need to be identified with a 'constitutional' label.

There is no reference to Two Act entrenchment in the text of the *Constitution Act*. No allusion was made to the principle by Lilley or any other member during the Act's legislative passage. The statute did, however, expressly identify several exceptions to the 'ordinary way' of legislating. Sections 9 and 10 of the *Constitution Act* replicated the enhanced majority provisions in sch 1 ss 15 and 36 of the *1855 NSW Act*. Such provisions seem obviously to fall within the scope of the *CLVA 1865* s 5, but no reference was made to s 5 during the bill's passage. The preamble of the *Constitution Act* roots the Legislature's power to enact it in cl 22 of the 1859 Order, but does not mention the *CLVA 1865*. Nor does the *Constitution Act* contain any provision textually identical to cl 22. Section 2 reproduced cl 2 of the Order, which stated:

> Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace, welfare, and good government of the colony in all cases whatsoever: Provided that all Bills for appropriating any part of the public revenue, for imposing any new rate, tax, or impost, subject always to the limitations hereinafter provided, shall originate in the Legislative Assembly of the said Colony.

Section 2 might have been intended by legislators to have absorbed cl 22, but since there was no discussion of the point during the bill's enactment any such conclusion would be purely speculative.

---

21 Queensland, *Parliamentary Debates*, Legislative Assembly, 22 October 1867, 542.

22 Cockle's life and career are recounted in J.M. Bennet, *Sir James Cockle: First Chief Jjustice of Queensland 1863–1879*, (Federation Press, 2003). Cockle came to Queensland with the reputation of being a meticulously thoughtful judge who had no partisan political affiliations.

23 Lilley, a Scots emigree, ran a dual career in electoral politics and at the bar as a champion of liberal causes. He subsequently held office (briefly) as Queensland's Premier and then (for 10 years) as Chief Justice. See JM Bennet, *Sir Charles Lilley: Premier and Chief Justice of Queensland* (Federation Press, 2014); Allan A Morrison, 'Charles Lilley' (1959) 45(1) *Journal of the Royal Australian Historical Society* 45; HJ Gibbney, 'Charles Lilley: An Uncertain Democrat' in Denis Murphy and Roger Joyce (eds), *Queensland Political Portraits 1859–1952* (University of Queensland Press, 1978) 71.

24 Queensland, *Parliamentary Debates*, Legislative Assembly, 22 October 1867, 542. Lilley *strictu sensu* was an opposition backbencher when moving the bills. The episode proceeded on a non-partisan basis.

Any hypothesis that Two Act entrenchment was an unspoken assumption within the Legislature in 1867 might be tested by consideration of events which occurred in 1871, when the Legislature enacted the *Constitution Act Amendment Act* 1871 (Qld) ('*1871 Amendment Act*'), which purported to repeal the s 10 enhanced majority provisions. Lilley moved the bill, which was opposed by the then government. None of the members who spoke suggested that a Two Act process was required. On Cooper's argument, that *1871 Amendment Act* should have been preceded by a first Act empowering the Legislature to enact it. That this was not done would render the *1871 Amendment Act* invalid, an invalidity which would presumably then attach to any subsequently enacted reapportionment legislation.

By 1907, there were other clear instances of *Constitution Act* matters being altered through the ordinary legislative process. These instances included Acts which modified the composition of the Supreme Court. Schedule A of the *Constitution Act* made provision for only two Supreme Court judges and specified their respective salaries. On the same day as that statute received royal assent, assent was also given to the *Supreme Court Act 1867* (Qld), which made provision for appointment of a third judge. Subsequently, the *Supreme Court Acts Amendment Act 1903* (Qld) raised the permissible number of judges to five. More pertinently for present purposes, s 33 of the *Supreme Court Act 1867* (Qld), s 1 of the *Acting Judges Act* 1873 (Qld), and s 12 of the *Supreme Court Act 1892* (Qld) allowed for the appointment of temporary judges to the Court (who would obviously serve for only time limited periods). None of these measures had been enacted in accordance with the Two Act process. If Cooper's thesis accurately stated the constitutional position then presumably any judgments delivered by a Supreme Court bench containing such additional or temporary judges would have been nullities.[25]

Furthermore, the Two Act process was not followed on other matters of obvious constitutional significance. In 1890, the Legislature enacted the *Constitution Act Amendment Act 1890* (Qld) (the '*1890 Amendment Act*'), where s 2 fixed the maximum term between Assembly elections at three years. This modified s 29 of the *Constitution Act*, which had specified a five-year period. The *1890 Amendment Act* made no express reference to s 29 and purported to make the alteration in a single statute. If the Two Act analysis was correct, the *1890 Amendment Act* was invalid with the consequence that Queensland would not have had a lawfully constituted legislature for some 15 years and *every statute* passed in that period would have been (at least presumptively) invalid. Assembly debate on the *1890 Amendment Act* had been lively and extensive. The then Premier, Boyd Morehead, observed at second reading that the bill proposed 'an important

[25] The nullity point had recent historical precedent. In 1888, the Legislature had passed the *Judges Validating Act 1888* (Qld) retrospectively to validate all Supreme Court judgments in which Charles Mein had sat when it was discovered after his (1885) appointment that he did not satisfy the statutory appointment criteria.

alteration in the constitution of the Colony'.[26] The then leader of the opposition, Sir Samuel Griffith, echoed that point, describing the bill as 'dealing with a great public question involving the rights of the people of the colony to be duly represented in this House'.[27] However, neither Morehead nor Griffith, nor anyone else, indicated that a Two Act legislative process was required.

Similarly, in 1896, the Legislature enacted the *Constitution Act Amendment Act 1896* (Qld), which provided explicitly for payment of Assembly members. This had been a fiercely contested political matter for some years. The Act's preamble expressly stated that it was amending the *Constitution Act* and made express provision for the payments. However, this was all done in a single Act. There was no suggestion from any member that the ordinary way of legislating was constitutionally inadequate for this purpose.

Cooper's argument, therefore, lacked a textual basis in either Imperial or Queensland legislation and an historical pedigree in previous legislative practice. This seemed not to deter Cooper, and he continued to make his constitutional objections to paying income tax sufficiently clear for the then coalition government to bring a test case before the State Supreme Court in May 1905.[28] This plan promptly collapsed when it transpired that none of the judges were prepared to sit and offer a reasoned judgment in such a case because of their obvious (if slight) financial interest in the outcome.

Agreement was then apparently reached that the Supreme Court would issue summary judgment in Cooper's favour[29] and that the matter would promptly go to appeal. It soon transpired that the parties were not of one mind as to the appeal forum.[30] Cooper assumed that the matter would go to the High Court, the government that it would go to the Privy Council.

Cooper's preference was likely influenced by the fact that the High Court had recently held, in *D'Emden v Pedder* ('*D'Emden*')[31] and *Deakin v Webb* ('*Deakin*'),[32] that a State could not impose a stamp duty or income tax, respectively, on the salary of a federal government official. *D'Emden* and *Deakin* were decided on the basis of an implication subsequently known as the inter-governmental immunities doctrine[33] — of such a prohibition into the *Australian Constitution*, there being no express provision to that effect. The reasoning behind the

---

26 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 July 1890, 277.

27 Ibid 279.

28 The Telegraph, 'Judges' Salaries. Liability to Income Tax. Judgment Pro Forma. Tax Commissioner Will Appeal', *The Telegraph* (Brisbane, 5 May 1905) 2.

29 See the speech of then Attorney-General William Blair in Queensland, *Parliamentary Debates*, Legislative Assembly, 15 December 1905, 2193.

30 There are reports in, eg: 'Supreme Court. Full Court Sittings. Judges and Income Tax' *Telegraph* (Brisbane, 20 July 1905) 2; 'Judges and Income Tax' *Brisbane Courier* (Brisbane, 22 July 1905, 10.

31 (1904) 1 CLR 91 ('*D'Emden*').

32 (1904) 1 CLR 585 ('*Deakin*').

33 A helpful overview is provided in Ronald Sackville, 'The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis' (1969) 7(1) *Melbourne University Law Review* 15.

implication, which drew heavily on United States Supreme Court authority,[34] was that such taxes 'diminished' the official's salary and were thus an unjustifiable State interference with the federal government's activities.

While Cooper's case did not raise any Federal–State issues, *D'Emden* and *Deakin* assisted him in two senses. The first, narrowly, was the High Court's conclusion that taxing a salary equated to a diminution of that salary. The second, broadly, was that the High Court's methodology rejected the proposition that the meaning of a 'constitutional' statute fell to be determined only from its express textual provisions. Rather, the High Court accepted that it was legitimate to draw on both the Act's general scheme of governance and the intentions of the Act's framers *and* the jurisprudence of the United States Supreme Court as aids to determining its meaning. The Privy Council presented a less friendly forum; in part because English (and Scots) judges were used to paying income tax on their judicial salaries,[35] and in part because there was well-known Privy Council authority (dealing both with India and Canada) which firmly disapproved the use, in the colonial constitutional law context, of the American-inspired methodology used by the High Court in *D'Emden* and *Deakin*.[36]

This confusion as to the locus of any appeal — if confusion it really was — is more surprising given the eminence of the counsel which each party had instructed. Feez stood as senior counsel for the government, assisted by William Shand (who was himself appointed to the Court in 1908). Edwyn Lilley (the son of Charles Lilley) led for Cooper. But with there being no immediate prospect of the matter being resolved in a judicial forum, Morgan's government then took a different and ostensibly bizarre tack.

One way forward would have been for the government to accept the propriety of Cooper's constitutional reasoning and then promote a Two Act solution. Act One, styled as a Constitution Act Amendment Act, would have provided simply: 'The Legislature may modify s 17 of the *Constitution Act* to provide that the salaries of Supreme Court judges be subject to any generally applicable system of income tax'. Act Two, again styled as a Constitution Act Amendment Act, need only have provided that: 'Section 17 of the *Constitution Act* is hereby amended to include as section 17A the following provision: 17A The salaries of Judges of the Supreme Court shall be subject to any generally applicable income tax.'

This strategy would not have availed if Cooper's contention that the *Constitution Act* could not be amended *at all* by the Queensland Legislature was correct. But again, there was neither an express legal root for that proposition, nor any precedent for it in political practice. *CLVA 1865* s 2 certainly precluded enactment of colonial legislation inconsistent with Imperial legislation applicable

---

34 Primarily the Marshall Court's judgment in *M'Culloch v Maryland* 17 US 316 (1819) ('*M'Culloch*').
35 See (n 42) below.
36 *R v Burah* (1878) 3 App Cas 889 ('*Burah*'); *Bank of Toronto v Lambe* [1887] AC 575.

to the colony concerned,[37] but since the *Constitution Act* was a Queensland, rather than Imperial, statute that argument had no obvious relevance to the s 17 issue.

B *A Declaratory Act*

Rather than accept the Two Act argument, Kidston (then still Treasurer in the coalition government) promoted, and the Legislature enacted, the *Income Tax Declaratory Act 1905* (Qld). This provided simply that:

> It is hereby declared that each of the persons for the time being holding the following offices in the State of Queensland, namely, the office of -
>
> Chief Justice,
>
> Judge of the Supreme Court,
>
> Judge of District Courts ...
>
> is and always has been chargeable with and liable to pay income tax in respect of his official salary under and in accordance with the provisions of the laws imposing a tax on income.

At second reading in December 1905,[38] Kidston informed the Assembly that: 'while the great majority of the officers mentioned here have paid their income tax like other citizens, some of them refused to pay'.[39] Noting that the Supreme Court judges had declined to hear the case, Kidston continued: 'the only thing to do was to come to the High Court of Parliament who have made the law and ask them to declare what the law is'.[40] Kidston criticised the moral basis of Cooper's position by ostensibly declining to do so: 'I will not refer to the question of good taste'.[41] On the legal question of what Kidston referred to as Cooper's 'sheltering behind the constitution', Kidston bluntly asserted that if there was any

---

37 Section 2 Memorandum from Chief Justice Sir Pope Cooper to Frederic John Napier Thesiger, Baron Chelmsford, provides that:

> 2. Colonial law when void for repugnancy.
> Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise be and remain.

Section 2 was intended to confirm that colonial judges could not invalidate colonial legislation because it was 'repugnant' to rules and principles of common law or more abstract presumptions about constitutionalism. This point becomes clearer when s 2 is read alongside s 3:

> 3. Colonial law when not void for repugnancy.
> No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order or regulation as aforesaid.

38 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 December 1905, 2186.

39 Ibid.

40 Ibid.

41 Ibid.

constitutional objection to subjecting judges' salaries to income tax, then the Declaratory Act would remove it.

Attorney-General William Blair addressed the objection that subjecting the judges to income tax contradicted 'English' constitutional traditions by citing the Imperial Parliament's *Income Tax Act 1842* (UK) s 146:[42]

> The said Duties shall be paid on all public Offices and Employments of Profit of the Description herein-after mentioned within Great Britain; (videlicet,) any Office belonging to either House of Parliament, or to any Court of Justice.

Some of the bill's opponents seemed unaware of this legislation. Others suggested during debate that the Queensland and United Kingdom situations were not, in any event, comparable. This assertion rested on the premise that Queensland was such a small society that the Supreme Court judges were known to everyone, whereas English judges in England enjoyed an invisibility among the general public.[43] Quite what pertinence this point had was not explained. But the suggestion was perhaps exaggerated: Queensland's white male population in 1904 was some 270,000.

The bill's opponents also argued that the measure was improper because it had an essentially retrospective character. Objection was also made to the haste with which the bill was being pressed — 15 December was the session's penultimate day. Despite these objections, the bill passed second reading without division, and moved immediately into committee.[44] Committee proceedings occupy barely a page of Hansard. No amendments were made and third reading passed without division.

Suggestions were made in the Assembly that the bill might be blocked in the Council. Debate there was certainly fierce and occupied members for almost as long as in the Assembly.[45] Second reading was also forced to a division, which the government won by 16 votes to 5. Third reading passed without division.[46]

Cooper and his judicial colleagues then sent a memorandum to the Governor asking him to reserve the bill.[47] The memorandum was distinctly self-contradictory. It began by denying that the Legislature could alter s 17 at all but ended by accepting that the Legislature could do so — and in the ordinary way — and couching its criticism in terms of morality rather than legality. The memorandum made no reference to Two Act entrenchment. On Blair's advice, the Governor declined to reserve the bill, albeit noting in a despatch to London that:

---

42 Ibid 2193.
43 Ibid 2188, 2191–2.
44 Ibid 2194.
45 Queensland, *Parliamentary Debates*, Legislative Council, 15 December 1905, 2175–84.
46 Ibid 2183–4.
47 Memorandum from Chief Justice Sir Pope Cooper to Frederic John Napier Thesiger, Baron Chelmsford, 18 December 1905, CO 418/47, 44.

'I felt some hesitation in disregarding the united representations of the judges of the State on a point of law'.[48]

If the government had expected Cooper to be cowed by the Declaratory Act initiative it was soon disappointed. Morgan's distaste for the day-to-day battles of party politics led him to resign as Premier in January 1906, at which point Kidston replaced him in what was still formally a coalition administration. Kidston's legislative program was a busy one, and expending political time and capital on resolving the issue of the judges' income tax liability was not a high priority. Cooper took the next step. He and his Supreme Court colleagues in February 1906 unsuccessfully petitioned the King to disallow the Act.

III *COOPER* IN THE QUEENSLAND COURTS

The test case strategy having collapsed, matters eventually proceeded when the government prosecuted Cooper. The prosecution occurred in the Brisbane Small Debts Court on 8 December 1906[49] before a police magistrate, William Yaldwyn. Both parties instructed eminent counsel. Kidston had briefed Lionel Lukin, then a leading junior and soon to be appointed by Kidston to the Supreme Court. Cooper was represented by Stumm.

Describing the prosecution as 'in the nature of a farce,'[50] Stumm argued that imposing income tax on Cooper's salary breached s 17, and seemed to submit, in the alternative, either that the Legislature could not do that *at all* or that it could only do so if it first amended the *Constitution Act*. Lukin is not recorded as having made submissions on the constitutional point. His apparently sole contention was that levying income tax did not raise a 'paid and payable' issue under s 17.

Mr Yaldwyn issued a prompt, wholly unreasoned judgment: 'The verdict will be for the defendant'. Lukin was evidently surprised:

> Mr. Lukin : What, your Worship ?
>
> Mr. Yaldwyn: Verdict for the defendant.
>
> Mr Lukin: I take it then that you are of opinion that the Act is unconstitutional?
>
> Mr. Yaldwyn: Yes, of course.
>
> Mr Lukin : It is a question of law.

---

48 Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 5 January 1906, CO 418/47, 29.

49 There are contemporaneous accounts in, eg: 'Income Tax. Liability of Judges. Chief Justice Opposes Claim', *The Telegraph* (Brisbane, 5 December 1906) 5; 'Income Tax. Claim Against Chief Justice', *The Week* (Brisbane, 14 December 1906) 15. For an indication that Cooper's position did not enjoy much popular support, see 'Metropolitan Notes' 'The Western Champion and General Advertiser for the Central Western Districts, , Queensland, 16 December) 4.

50 Records of submissions are in 'The Income Tax: Case Against the Chief Justice: Verdict for the Defendant', *Brisbane Courier* (Brisbane,10 December 1906) 5; 'Income Tax. Claim Against Chief Justice. Judgment for the Defendant', *The Telegraph* (Brisbane, 10 December 1906) 2.

> Mr. Yaldwyn: It is not the first time I have given a verdict on an ultra vires Act or regulation.

Two days previously, the Privy Council had dealt an apparently significant blow to Cooper's longer-term prospects of success. In *Webb v Outtrim* ('*Outtrim*'),[51] the Privy Council, with Lord Halsbury presiding, forcefully rejected both the High Court's result and reasoning in *D'Emden* and *Deakin.* Halsbury's judgment, echoing the Privy Council's decisions in *R v Burah* ('*Burah*') and *Bank of Toronto v Lambe* ('*Lambe*'),[52] stated bluntly that constitutional limitations on colonial legislative powers would have to be expressly stated in the relevant constitutional statute, and that it was relatedly quite inappropriate when construing such Acts for a court 'to consider the knowledge of those who framed the constitution and their supposed preferences for this or that model which might have been in their minds'.[53] Haldane also fiercely disapproved of the High Court's use of United States Supreme Court case law as a guide.

The government promptly appealed *Cooper* to a District Court. Edwyn Lilley replaced Schumm as Cooper's counsel.[54] Lilley was insistent that *D'Emden* and *Deakin* made it clear that the income tax was a diminution of Cooper's salary and, thus, inconsistent with the 'paid and payable' provision of s 17. He then entered more grandiose territory. The crux of Lilley's submission was that the *Constitution Act* was a form of law legally superior to other Queensland statutes:

> The Constitution Act was not an Act which could be repealed like a Brands Act or a Marsupial Act. It was something higher and more important. It was the Charter under which the people of Queensland wished to live and it could not be altered or repealed except as provided for by the statute itself.

The obvious difficulty this submission raised, but on which Lilley was not pressed by the judge, was that 'the statute itself' (and the preceding 1859 Order) expressly provided that some (a very few — notably ss 9 and 10) of its provisions could not be altered or repealed in 'the ordinary way'. However, s 17 did not fall into that category. Lilley buttressed his submission with a peculiar argument rooted in s 106 of the *Australian Constitution*. This section provides that:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be, until altered in accordance with the Constitution of the State.

Lilley submitted that s 106 had somehow endowed the constitutions of all the former colonies with the normative status of Imperial legislation and thereby

---

51 [1907] AC 81 ('*Outtrim*').
52 (n 36).
53 *Outtrim* (n 53) 90–1.
54 There are accounts of submissions at 'Income Tax. Chief Justice's Case. Appeal to District Court', *The Telegraph* (Brisbane, 9 February 1907), 13; 'Income Tax Case. Claim Against the Chief Justice. Appeal to the District Court. Judgment Reserved', *Brisbane Courier* (Brisbane, 9 February 1907) 11.

rendered those constitutions immune to alteration at all by State legislatures. Section 106 offers no express textual support for that argument, and the contention is flatly inconsistent with the express wording of the final clause. The 'continue as at the establishment' phraseology also strongly indicates that s 106 was not in any sense altering the pre-federation normative status of State constitutions nor the way those constitutions might be amended.[55]

The logic of Lilley's s 106 argument in a strict legal sense is elusive even if intended to raise a *CLVA 1865* s 2 point. If it were correct that the *Constitution Act* was normatively equivalent to an Imperial statute, it was an 'Imperial statute' which in express terms empowered the Legislature to alter or repeal almost all of its terms by legislation passed in 'the ordinary way'. Such legislation would, therefore, not be inconsistent with the *CLVA 1865* s 2.[56]

The Two Act entrenchment principle was evidently offered in the (much lesser) alternative to the stark proposition that s 17 could not be amended *at all* by Queensland legislation. Lilley did not engage with the point, and, again, was not pressed by Miller J, that the *Constitution Act* had often been amended by legislation passed in 'the ordinary way', none of which legislation had ever faced a legal challenge to its validity (and all of which, if Cooper was correct, would likely be a nullity).

Lukin also overlooked this historical issue. In brief submissions, Lukin described Lilley's contentions as 'a most extraordinary proposition. A proposition which will be very startling to Australia'.[57] Lukin continued by asserting that 'the Constitution Act was passed by the Parliament of Queensland, and the Parliament that passed it had the power to repeal it or to alter it'. Lukin did not engage with the Two Act submission, his submission presumably being that repeal or alteration could be effected by legislation passed in the ordinary way. But all such discussion was in any event, irrelevant, as no credible case could be made that subjecting judges to a generally applicable income tax contradicted s 17. Lukin made that latter argument only in general terms and did not engage with the High Court's treatment of that point in *Deakin*. Unlike Mr Yaldwyn, Miller J felt the

---

55 There is no obviously credible basis for thinking that s 106 endowed State constitutions with entrenchment mechanisms which they did not already possess. It is perfectly credible to assume that, if Two Act entrenchment had been an element of the *Constitution Act* before 1900, then s106 would have provided an additional, but unnecessary, buttress for the principle. See generally the discussion in Jeffrey Goldsworthy, 'Manner and Form in the Australian States' (1987) 16(2) *Melbourne University Law Review* 403 and especially his comment at 427–8: 'In other words, [s 106] does not make binding any restrictive procedure which is not already binding independently of it [s 106]'. See also C D Gilbert, 'Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council From State Supreme Courts' (1978) 9(3) *Federal Law Review* 348.

56 Cooper had raised s 106 with the Governor in a further memorandum on 24 May 1906, asserting, but like Lilley, without explaining how s 106 had prevented the Legislature from amending s 17. This later memorandum also made no reference to Two Act entrenchment: Memorandum from Chief Justice Sir Pope Cooper to Frederic John Napier Thesiger, Baron Chelmsford, 24 May 1906, CO 418/47, 218 .

57 If Cooper's argument was correct for Queensland, it was likely correct for other States as well.

matter could not be dealt with in an *ex tempore* decision and reserved his judgment.

Kidston then had weightier issues on his mind. He had left the Labor Party and formed, with Morgan's support, a new centrist grouping known as the Kidston party, and an Assembly election was scheduled for May 1907. Income tax reform featured prominently in his manifesto proposals. Cooper's liability to pay the income tax did not.

Judge Miller subsequently handed down a short, clearly reasoned opinion on 13 February.[58] Its ratio decidendi was that the income tax legislation did not engage s 17:

> I fail to see that [the income tax legislation] can be construed as a possible blow against the independence of the judges … They can only be dismissed according to law, on the petition of the two Houses of Parliament, by the King, and that assent would only be given on good cause being shown … The Income Tax Acts, making them subject to general taxation, does not in my opinion affect that independence in the slightest degree.[59]

Justice Miller dismissed *D'Emden* and *Deakin* as irrelevant to this case, as those judgments concerned only State competence to enact laws impinging on Commonwealth jurisdiction. Justice Miller's opinion did not accord any merit to Lilley's suggestions that *Constitution Act* provisions were either, per se, immune to amendment by the Legislature or alterable only by the Two Act method (his Honour noted, but did not address, the s 106 submission). It is not, however, clear if Miller J considered that conclusion a matter of general principle or if it was consequential upon his having already decided that the income tax legislation did not engage s 17. That latter inference has some force, given that, during submissions, Miller J suggested Lilley might be on firmer ground if the Income Tax Acts singled judges out for particularistic treatment.[60] Miller J, nonetheless, granted permission for appeal to the Supreme Court (whose judges had overcome their earlier unwillingness to sit), where argument resumed on 12 March 1907.

The official law reports do not record which judges sat,[61] nor do they record the parties' submissions.[62] Lilley and Lukin continued as leading counsel. Lilley was, however, joined by GW Power, who was well-connected in Philpite circles

---

58 The judgment is at fn 1 of the subsequent Supreme Court judgment: *In Re the Income Tax (Consolidated Acts, 1902–1904, and the Income Tax Declaratory Act of 1905* [1907] St R Qd 110.

59 Ibid 113.

60 *Brisbane Courier* (n 54).

61 Three judges sat. Patrick Real was appointed in 1890. He had come from very humble origins before building a successful practice at the bar. He had no overt political sympathies. Real was joined in Cooper's case by Charles Chubb, appointed in 1890 and previously an Assembly member (of conservative party disposition) and the colony's Attorney-General. The third judge, Virgil Power, appointed in 1895, had, like Real, no party political track record.

62 Submissions are recounted in 'Income Tax. Chief Justice's Case. Appeal to Supreme Court. Judgment Reserved', *The Telegraph* (Brisbane, 12 March 1907) 2; 'The Law Report', *The Brisbane Courier* (Brisbane, 12 March 1907) 9.

and had (unsuccessfully) contested an Assembly seat in 1907. Power took primary responsibility for submissions.

Power's main contention, as Lilley argued below, was still that s 17 could not be altered *at all* by the Queensland Legislature. His alternative submission was that, if the Legislature did have such a power, that power would have to be exercised in express terms. Press reports do not clearly indicate that Power or Lilley pressed a Two Act entrenchment argument. They relied again on *Deakin* as authority for the proposition that subjection to income tax worked a diminution on a judge's salary and so breached s 17's 'paid and payable' proviso. Lukin simply reiterated the points he made in the District Court on both the diminution and legislative competence questions. Judgment was reserved until the next day.

The sole opinion, given by Real J, was terse. Referring to *Outtrim*, Real J stated that the only issue was whether the income tax statutes were inconsistent with an Imperial Act and concluded that '[w]e cannot discover anything in the Income Tax Acts … repugnant to any Imperial Act extending to this State'.[63] By implication, the Court rejected any suggestion that the *Constitution Act* enjoyed an elevated normative status. However, the reasoning is so cursory that it raises an obvious inference that the judgment was a mere way station for appeal to the High Court, permission for which was granted on 5 April 1907.

IV *COOPER* IN THE HIGH COURT OF AUSTRALIA

When *Cooper* reached the High Court, the Court had increased in size from its original three members to five.[64] The three founding members were: Chief Justice Griffith, Sir Edmund Barton, and Richard O'Connor. All came to the Court after distinguished careers as politicians. Chief Justice Griffith had been Premier of Queensland; Barton J had served as Australia's first Prime Minister; O'Connor J was previously a minister in various New South Wales governments. Only Griffith CJ had previous judicial experience — 10 years as Queensland's Chief Justice.

The original Court had adopted in *D'Emden* and *Deakin* (from a traditional British perspective that courts should derive the meaning of a statute's provision primarily from that statute's text) a rather unusual — indeed adventurous — methodology in judgments construing the *Australian Constitution*. This methodology accepted that the intentions of the Australian famers of the text which the Imperial Parliament subsequently enacted, and the jurisprudence of the United States Supreme Court were appropriate aids to determining the Act's meaning. Chief Justice Griffith's attachment to those principles — personally and professionally — was strong. His Honour had played a major role in drafting the original version of the *Australian Constitution*. He had been heavily influenced by

---

63 *In Re the Income Tax (Consolidated Acts, 1902–1904, and the Income Tax Declaratory Act of 1905* [1907] St R Qd 110, 113.

64 Effected by the Judiciary Act 1906 (Cth).

American constitutional law and theory when doing so and borrowed wholesale from the letter of the *United States Constitution* in formulating his own text. His Honour's borrowing was much discussed and was substantially adopted.[65] Justices Barton and O'Connor had little difficulty in endorsing Griffith CJ's almost reverent approach to American constitutional law.

The two new appointees were Isaac Isaacs, a man of broadly liberal political sentiments who had previously held office as Attorney-General both in Victoria and in the national government, and Henry Higgins, also a career politician of liberal persuasion, who served as Attorney-General in Australia's first (short-lived) Labor government. Isaacs and Higgins appeared as opposing counsel in both *D'Emden* and *Deakin.* Quite where, as judges, they would stand in respect of both the outcome and methodology of those cases was a much-anticipated question in Australian legal circles.

A *Submissions and Questions*

Cooper opened in Melbourne on 22 April 1907. Lilley and Power appeared for Cooper, with Lilley taking prime responsibility for argument. Lukin again led for the government. The Commonwealth Law Reports contain a summary of submissions and questions from the bench.[66] These are difficult to reconcile, in some respects, with press accounts.

The *Telegraph* of 23 April[67] records an exchange which indicates that Cooper still asserted that the *Constitution Act* could not be amended by the Queensland Legislature *at all:*

> Mr Justice Isaacs: Do you go as far as to say that [Queensland's] Parliament could not repeal that section?
>
> Mr Lilley: Only with the assent of the Imperial Parliament.
>
> Mr Justice Isaacs: Where do you get the necessity for the assent of the Imperial Parliament? That means an Imperial Act.
>
> Mr Lilley: Practically so.[68]

Lilley could not identify a clear legal source for that necessity, although he alluded once again to the possibility that s 16 of the *Australian Constitution* created this effect.

---

65 See generally John Reynolds 'A.I. Clark's American Sympathies and His Influence on Australian Federation' (1958) 32(3) *Australian Law Journal* 62; John Williams 'The Emergence of the Commonwealth Constitution' in HP Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1.

66 *Cooper* (n 3) 1305–10.

67 'Income Tax Case. Sir P.A. Cooper's Appeal. High Court in Brisbane', *The Telegraph* (Brisbane, 23 April 1907) 5 .

68 This exchange does not feature in the Commonwealth Law Reports.

Apparently in the alternative, Lilley also suggested that if the Queensland Legislature could amend the *Constitution Act* it could only do so in what he termed 'the proper way'[69] as laid down in cl 22 of the Order and ss 2, 9 and 10 of the *Constitution Act* itself. This is a peculiar submission. Sections 9 and 10 had indeed specified 'a proper way' in which assembly reapportionment and Legislative Council reform had to be effected. Clause 22 certainly placed issues relating to the Crown's powers of reservation and disallowance beyond Queensland's legislative competence. But those matters aside, there was no expressly 'proper way' identified anywhere in the Order or Act which prevented the Legislature making laws on other matters in 'the ordinary way'.

Lilley submitted that Two Act entrenchment was a departure from 'the ordinary way' of lawmaking that arose impliedly, simply because the *Constitution Act* was 'the Constitution' and thus necessarily possessed an enhanced normative status relative to other Queensland Acts.[70] However, this submission, evidently very much the second string on Lilley's bow, seemed to morph at O'Connor J's instigation into the proposition that the previously referred to 'proper way' might only require express language in a *single Act*:

> Mr Justice O'Connor: That is what you have to argue — that you cannot have an implied repeal of a Constitution. It must be a direct repeal.[71]

Lukin's submissions[72] on the constitutional point largely[73] repeated his arguments below. The *Constitution Act* was an exercise of the power given to the Legislature in cl 22 to alter any Queensland law in the ordinary way (subject to specific and express exceptions requiring reservation of assent or special majorities). Once enacted, the *Constitution Act* was simply a statute like any other Queensland legislation. Its terms could be altered or repealed (expressly or impliedly) by any subsequent Act passed in 'the ordinary way'. Lukin obviously accepted that Queensland legislation which was inconsistent with Imperial legislation applicable to the colony was invalid to the extent of that inconsistency, alluding both to the common law concept of repugnancy and (presumably s 2 of) the *CLVA 1865*, but maintaining that no Imperial statutory restraint precluded amendment of the *Constitution Act* by a subsequent Queensland Act.

---

69 *Cooper* (n 3) 1306; 'Income Tax Appeal. Chief Justice's Case', *Brisbane Courier* (Brisbane, 23 April 1907) 3.

70 See especially the account in 'Income Tax. Chief Justice's Salary. Argument before High Court', *The Week* (Brisbane , 26 April 1907) 23.

71 'Income Tax Case. Sir P.A. Cooper's Appeal. High Court in Brisbane', *The Telegraph* (Brisbane, 23 April 1907) 5.

72 *Cooper* (n 3) 1310.

73 Lukin, with evident reluctance, accepted that there were parts of cl 22 (the reservation and disallowance provisos) that the Legislature could not repeal nor amend. However, these he characterised as but 'very faint recognition' of 'fundamental law' status: ibid 1309. He seemed not to appreciate that these provisos had an explicit textual basis in the 1859 Order and so were really not 'faint' at all.

The hearing concluded with three distinct constitutional law propositions aired on Cooper's behalf. All assumed that the *Constitution Act* was normatively superior to 'ordinary' Queensland legislation. (Lilley had indeed styled the Act as 'fundamental' or 'organic' law, as distinct from 'ordinary' law).

The first, most extreme, proposition was that such alteration was wholly beyond the competence of the Queensland Legislature. Only the Imperial Parliament could achieve that effect. The second proposition was that changes to the *Constitution Act* could be effected only by a Two Act process, within which, in Act 1, the Legislature expressly empowered itself to amend or repeal part(s) of the *Constitution Act* and then, in Act 2, the provided for alteration was enacted. The third proposition was that modifying the *Constitution Act* could be achieved in a single statute expressly stating that the *Constitution Act* was being altered. The first proposition stood consistently at the forefront of Cooper's submissions throughout the litigation. The second proposition appeared with less consistency and was more faintly argued. The third proposition was offered by Power in the State Supreme Court, but in the High Court seemed to owe more to O'Connor J's prompting than Lilley, Power or Cooper's design.

Strictu sensu, these 'constitutional' points would be relevant only if Lilley surmounted the initial hurdle of persuading the Court to accept that subjecting Cooper's judicial salary to income tax breached s 17. On that issue, Lukin and Lilley rehearsed the submissions made below.

Regardless of the case's outcome, the proceedings imposed some personal and political costs on Cooper. In September 1907, Governor Chelmsford had explained to the Secretary of State that, in the light of the litigation, he did not feel that he could appoint Cooper as Lieutenant Governor because to do so 'would be distasteful to my Ministers'.[74] Morgan was appointed instead. In May, Chelmsford had passed Cooper over as Deputy Governor, lamenting in a despatch to the Colonial Office that: 'It is unfortunate for me that [Cooper] is a gentleman to whom grave exception can be taken on various grounds for the position …'[75]

B *Judgments*

Judgment was issued on 28 June 1907. (In the interim, Kidston successfully fought and won the May 1907 Assembly election.) Four judges offered reasoned opinions. Justice Isaacs simply concurred with Griffith CJ.

For the purposes of resolving Cooper's case on its merits, the question of whether subjection to income tax raised a s 17 issue was the predominant

---

74 Memorandum from Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 30 September 1907 CO 418/54, 117.

75 Memorandum from Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 4 May 1907, CO 418/54, 87.

question. Chief Justice Griffith, like all of his colleagues, had no difficulty in finding in the government's favour:

> The tax is not ... a deduction from the salary at the source and before payment. I think that the inclusion of a Judge's salary with the rest of his income in an aggregated fund, upon the balance of which, after specified deductions, an income tax is charged in common with the incomes of all other citizens of the State, is different in principle from a direct diminution of his salary *quâ* salary.[76]

While that might seem, in the abstract, a prima facie credible decision, it is in context a remarkable conclusion. Three years earlier in *Deakin*,[77] Griffith CJ had addressed the question of whether a State's attempt to bring the governmental salaries paid to federal government officials within a generally applicable income tax regime was a 'diminution' of that salary. His Honour's conclusion was this:

> [T]he substance of the [tax] is the exaction of a fixed sum from the taxpayer, computed according to the value or quantity of the thing in respect of which the tax is payable. Nor can it make any difference in substance whether, in the case of an income tax, the tax is deducted 'at the source'... or collected from the taxpayer after the receipt of the income. In either case the effect, if any, of the imposition as a diminution of the net emoluments of the taxpayer is identical ... This is the accepted view in the United States[78]

Chief Justice Griffith made no attempt in *Cooper* to reconcile the obvious inconsistency of his conclusion on the diminution issue with his decision in *Deakin*. Indeed, he did not mention *Deakin* at all.

More notably, Griffith CJ took the diminution point as the second, subsidiary, part of his opinion. The first part addressed what was, to him, the more important question — whether the *Constitution Act* could be altered by Queensland legislation passed in 'the ordinary way'. The answer was 'no'.

Griffith CJ ignored Cooper's primary submission, that an Imperial statute was required to amend the *Constitution Act*. Nor did he evaluate the suggestion that the *Constitution Act* could be amended by a single Queensland statute drafted in express terms. His 'no' rested entirely on the proposition that the Queensland Legislature could alter the *Constitution Act* only by an express Two Act process.

Chief Justice Griffith identified an important political purpose — to enhance legislative transparency and accountability — for such a principle.[79] What his judgment did not offer was any remotely credible legal or historical basis to support the existence of Two Act entrenchment. Chief Justice Griffith did not acknowledge that there was no explicit textual basis at all in the *Constitution Act* itself, in the 1859 Order, or in any other Imperial or Queensland legislation for Two Act entrenchment. He did not identify a single judicial authority from any

---

76 *Cooper* (n 3) 1316.
77 (n 32).
78 Ibid 612. The 'Constitution' reference is to ch 1 s 3 of the *Australian Constitution*.
79 *Cooper* (n 3) 1315.

British colonial constitution in which Two Act entrenchment, or indeed any other departure from the presumptive 'ordinary way' of legislation, could be *implied* into a statutory constitutional text. He made no reference to the fact that Lilley, in promoting the *Constitution Act*, gave no indication that a Two Act amendment process would be required. Nor did Griffith CJ acknowledge that the *Constitution Act* had, many times, been amended — including when he sat in the Assembly — by legislation passed in the 'ordinary way' without any allusion having been made by any member of either House that a Two Act process was required.

The Chief Justice apparently did not see these lacunae as obstacles to accepting Cooper's assertion as correct. The crux of Griffith CJ's 'reasoning' — the term is used guardedly — was simply that it was an inherent or implicit characteristic of the *Constitution Act* that its terms could not be changed by a Queensland statute enacted in the 'ordinary way'. This quality evidently existed because the *Constitution Act* was in substance the 1859 Order, and the 1859 Order was in turn Queensland's 'fundamental' or 'organic' law. That cls 2 and 22 of the Order empowered the Legislature to make law, including laws amending the Order itself, in the 'ordinary way' apparently did not detract from the Order's 'fundamental' status, since the text of those specific provisions had to be read with the 'rest of the Order'. And 'the 'rest of the Order', Griffith CJ did not specify which bits, precluded the Legislature altering the Order (which now on Griffith CJ's view existed in form as the *Constitution Act*) without first legislating to give itself the power to do so:

> I think that the mere re-enactment of the provisions of the original Constitution *totidem verbis* did not alter the fundamental character of the provisions themselves, which still took effect as substituted in, and, so to say, forming part of, the Order in Council. In my opinion therefore, the legislature could not alter the Act of 1867, any more than before, disregard the provisions of the Constitution as existing for the time being, so as to be able to pass a law inconsistent with them, without first altering the Constitution itself.[80]

And then Griffith CJ announced that the *Constitution Act* was in substantive terms not just the Order, but: 'I am of opinion that the Constitution of Queensland for the time being has the force of an Act of the Imperial Parliament extending to the colony'.[81]

Griffith CJ's judgment makes little legal sense. The objections to his conclusion are both obvious and profound.

First, the *Constitution Act* was not a 'mere re-enactment' of the 1859 Order. The Act added to, subtracted from, and altered the 1859 Order in significant ways. Griffith CJ must have been perfectly well aware that his assertion was inaccurate.

Secondly, Griffith CJ also failed to appreciate the point (or failed to acknowledge) that the 'logic' of his conclusion was internally not just

---

[80] Ibid 1314.
[81] Ibid 1315.

contradictory but self-destructive. For if the *Constitution Act* was the Order in Council in another form, and if the Act could be amended in Queensland only by a Two Act process, then *a fortiori* the Order could only have been amended by Queensland's Parliament through a Two Act process. Since the *Constitution Act* purported to do so in a single Act, it must itself have been *ultra vires*. The *Constitution Act*, on Griffith CJ's reasoning, could only have been valid if it had been preceded by another Act expressly providing for its own enactment.

Thirdly, Griffith CJ offered no explicit explanation of how the Order — an element of the Monarch's common law prerogative powers — acquired the normative status of an Imperial Act. That it was issued under s 7 of the *1855 NSW Act* could not give it that status per se.[82] While Parliament could have expressly provided for this in the *1855 NSW Act*, it did not do so. Griffith CJ did not cite any authority to suggest such a consequence could arise as a matter of implication. Cooper had submitted at various stages of the litigation that s 106 of the *Australian Constitution* had created this consequence. Although Griffith CJ's judgment quoted s 106 verbatim, it appears there as an isolated passage, separated by several pages from his 'force of an Imperial Act' conclusion, and without any explanation as to why it had this effect. It may be that the unexpressed rationale informing Griffith CJ's reasoning was informed by or derived from the *CLVA 1865* s 2. This applied the repugnancy doctrine to Imperial Acts and/or orders or regulation made under such Acts and/or such orders or regulations (ie, exercises of the prerogative or statutory instruments) which had, in the colony, the 'force or effect' of an Imperial Act. The 1859 Order would certainly fall within s 2. The *Constitution Act* would, however, be a 'colonial law' per s 2 and could only acquire the 'force' (per s 2) of an Imperial Act if the Imperial Parliament gave it such 'force'. Griffith CJ did not identify any Imperial statute expressly so doing (and nor is there any such provision in the Order) and offered no authority to sustain the conclusion that such 'force' could arise as a matter of implication.

Fourthly, even assuming Griffith CJ's 'force' argument to be correct, cl 22's plain words empowered the Queensland Legislature to alter the provisions of the Order (other than those expressly excepted) in the same manner as it might alter any other law. Griffith CJ's less than compelling rebuttal of that proposition was that cl 22 did not mean what it plainly said but that it had to be read in conjunction with the (unidentified) 'rest' of the Order. Once so read, it would have to be seen as meaning that the Legislature could not alter *any* of the terms of the Order (and consequently of the *Constitution Act*) without first empowering itself by an expressly framed statute to do so.

Fifthly, even if the Order/*Constitution Act* indeed had somehow acquired the force of an Imperial Act, then, absent an express grant of power from the Imperial

---

[82] The authorisation in s 7 was required because Queensland was carved out of colonial territory (New South Wales) delineated by statute.

Parliament to the Queensland Legislature to amend the Order/*Constitution Act*, the Legislature could not alter it *at all.* This was, of course, Cooper's primary submission throughout the litigation. Griffith CJ manifestly did not accept this argument. However, once again, he offered no authority whatsoever for the proposition that a colonial legislature could amend a colonial law which had 'the force' of an 'Imperial Act' by a Two Act process.

Justice Barton's brief judgment endorsing the Two Act entrenchment principle[83] replicated the ordering of Griffith CJ's opinion: the 'constitutional' point issue was addressed first; whether the income tax Acts impinged on s 17 (Barton J agreeing that they did not) was the second(ary) matter.

On the constitutional question, Barton J rested his conclusion on some abstract musings of general 'principle'. According to Barton J, no lawmaking body 'created by and acting under a written constitution'[84] could make laws inconsistent with that constitution without first empowering itself to do so. This principle applied even if (and this is presumably a nod to cl 22 of the Order): 'the authority conferred by that instrument includes a power to alter or repeal any part of it'. The enactment of the first empowering Act was evidently a condition precedent to enacting the amending or repealing Act. Applied to the Queensland Legislature, this principle meant that:

> Legislation, which could not be undertaken at all without the antecedent authority of the fundamental law, cannot overstep the bounds set for it by that law and yet stand good. Before it can avail, the bounds must have been lawfully extended. That is a condition precedent, even if the makers of the disputed law had power to make the extension themselves. They cannot omit to make it, and at the same time proceed as if it had been made.[85]

Like Griffith CJ, Barton J was evidently not troubled that his conclusion was not supported by any legislative text, judicial authority, nor Queensland legislative history. Neither did Barton J seem to realise that if his Honour's reasoning were correct, then all the amendments ever made to the various States's constitutions would be void if they had not been preceded by an anterior enabling statute.

In contrast to Barton J and Griffith CJ, O'Connor JJ devoted the first (and larger)[86] part of his judgment to addressing and resolving, in the government's favour, the issue of whether the income tax Acts were inconsistent with s 17. Answering the constitutional question was, therefore, not essential but 'as the question is one of far-reaching importance, I think it right to state my view of the law'.[87]

---

83 Like Griffith CJ, Barton J did not address (but by omission must surely be taken implicitly to have rejected) Lilley's submission that only the Imperial Parliament could amend the *Constitution Act*. He also rejected the possibility that express amendment in a single Act was adequate.

84 *Cooper* (n 3) 1317.

85 Ibid.

86 Ibid 1320–6.

87 Ibid 1326.

Justice O'Connor followed his colleagues in ignoring Cooper's primary submission — that only an Imperial statute could amend the *Constitution Act*. The question was simply whether the Act could be amended in the ordinary way or only by a Two Act process. Justice O'Connor concurred with Griffith CJ's suggestion that the *Constitution Act* was normatively equivalent to an Imperial statute, but then took that argument rather further than the Chief Justice had by expressly reasoning that any Queensland statute which purported to repeal or amend a provision of the *Constitution Act* would be invalid by virtue of the *CLVA 1865* s 2. The obvious objection to that analysis was outlined above. It may be that in developing the s 2 argument expressly, O'Connor J was seeking to root responsibility for his judgment in Imperial legislation to forestall any criticism that the High Court was engaging in inappropriate judicial activism. To put it kindly, the imaginative judicial reasoning required to sustain that conclusion would, however, make any such attempted transfer of responsibility difficult to sustain. Like Griffith CJ, O'Connor J could not identify any statutory source (whether Imperial or colonial) which expressly identified a Two Act lawmaking process as required to amend the *Constitution Act*; and, again like Griffith CJ, his Honour did not identify any supportive judicial authority.

Justice Higgins' brief judgment merely assumed, without deciding, that the Two Act entrenchment thesis was correct. He saw no need to explore the point as it was as obvious to him as it was to his colleagues that subjecting judges to generally applicable income tax could did not contradict s 17.

It is ostensibly surprising that neither the judgments nor the submissions considered whether Two Act entrenchment was a 'manner and form' of legislating within *CLVA* 1865 s 5. Insofar as a provision of the *Constitution Act* fell within the substantive reach of s 5, the special method of legislating which the Court concluded was required to amend or repeal that provision would obviously seem to have that character. Two Act entrenchment would therefore be a 'colonial law' in this sense.[88] The explanation for the omission may be that the income tax legislation was universally seen as not raising an issue within s 5(1).[89] That does, however, seem unlikely given the substantive significance Cooper accorded to s 17 and the very imaginative nature of the Two Act principle itself. A more likely explanation is that it never actually occurred to any of the parties or judges that s 5 might be relevant to this matter;[90] which is in itself surprising given the

---

88 Collier and Palmer's 1864 report, on which the *CLVA* 1865 was seemingly based, asserted that that there was no reason to prevent the doctrine of implied repeal applying to all colonial statutes, including those defining the identity and powers of colonial legislatures themselves: see Loveland (n 9)103–5). Requiring express repeal or amendment in a single Act would be a 'manner and form' proviso, as would requiring Two such Acts.

89 Section 5(1) relates to a colonial legislature's power to 'establish courts of justice, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein …' The '(1)' is my own addition as s 5 contains multiple concepts not textually demarcated by any sub-divisional lettering or numbering.

90 The Commonwealth Law Report does not record Lilley mentioning the *CLVA 1865* at all. Lukin's one allusion to it is to s 2: *Cooper* (n 3) 1309.

intensity of the problems (in which Queensland was very much involved) that led to the *CLVA* 1865's passage just forty years earlier.

Nor did the judges appear alert to the potential significance of their conclusion on the Two Act entrenchment point. The judgment cast a pall of potential invalidity over every amendment made to the *Constitution Act* since 1867, since none of those amendments had been made through the Two Act process. Furthermore, the principle that applied in Queensland presumably would also apply in the other Australian states. In 1902, the New South Wales Legislature had, acting in the ordinary way, significantly amended its original 1855 Constitution (which had itself been amended piecemeal many times since 1855). That a Two Act process might be required was a point notable only for its absence from the relevant parliamentary debates.[91] But if *Cooper* was correct, important elements of New South Wales' constitutional architecture — such as a recent reduction in the number of Assembly members and the introduction of a referendum mechanism — would lack a legal base.[92]

The judgment attracted considerable press attention in Queensland and the other States.[93] Much coverage expressed incredulity at the inconsistency of the Court's reasoning on the diminution point in *Deakin* and *Cooper*.[94] But newspaper reports did not question, nor appreciate the implications of, the Two Act entrenchment point. *The Argus*, a leading Melbourne paper, considered it uncontentious:

> Queensland, like other Australian States, has a Constitution Act which determines, in general, the frame of government, legislative, executive and judicial. This Act can be altered only by a special method — a method distinct form that used in the case of ordinary legislation … The Constitution Act is a 'fundamental law' and any ordinary Act of Parliament which is inconsistent with it, to the extent of the inconsistency, invalid and inoperative.[95]

V An Explanation for the *Cooper* conclusion?

The High Court's judgment is so weak in terms of its doctrinal base, of its roots in legislative practice, and of its appreciation of its possible impact on the validity of much State law, that it is initially difficult to see it as anything other than, in a purely legal sense, an aberration. An article in *The Age*, looking at *Cooper* alongside *Deakin*, had concluded that '[t]here may be, probably there is, a good answer to

---

91 The Act's passage is discussed in Loveland (n 9) 202–6.

92 The *Electorates Redistribution Act 1904* (NSW) and the *Reduction of Members Referendum Act 1903* (NSW).

93 A search on the *Trove* newspaper website (search terms: 'high court income tax queensland'; date range 27 June to 31 July) produces 263 hits.

94 See, eg, 'Melbourne, Wednesday, 3rd July, 1907', *The Age* (Melbourne, 3 July 1907) 6: '[a] perusal of those judgments leaves the reader amazed at the reasons assigned by the learned judges for their decision'.

95 'Contradictory Judgments. High Court and Income Tax', *The Argus* (Melbourne, 5 July 1907) 9.

these seeming inconsistencies, but we confess that at present we cannot find it'.[96] That all five High Court judges concurred in the result might suggest a 'good answer' could be uncovered by some mildly diligent searching, but deeper digging may be required to explain why the Court produced a decision more readily categorised as an exercise in politics than in law.

An initial clue might be found in the Court's terminology. The case turned on the legal status of Queensland's *Constitution Act*. On *three* occasions, Griffith CJ referred in his judgment to that measure as the 'Constitution Act'. On *19* occasions Griffith CJ referred to it as 'the Constitution'. Barton J's opinion references the statute as 'The Constitution' seven times and 'The Constitution Act' five times. O'Connor J's terminology is more evenly split: 17 mentions of 'the *Constitution Act*' and 23 of 'the Constitution'.[97] In Higgins J's judgment, the statute is described as 'the Constitution' 19 times and as the '*Constitution Act*' just once. If language is any guide, the judges did not see themselves as conducting an ordinary process of statutory construction.

That this should be so is perhaps unsurprising. All five judges had significant experience of practice at the bar. However, all five judges also had very substantial track records as legislators and ministers. Of the five, only Griffith CJ had any noteworthy experience as a judge before being appointed to the Court. All were as much as, if not more than, politicians as judges in their professional personas. During the 1890s, all had devoted much of their respective political energies to arguing the merits of creation for Australia qua nation a 'constitution' whose provisions would stand in normative terms above legislation passed in 'the ordinary way' by the national Parliament, which that constitution would create. Griffith CJ, in particular, in doing so, had steeped himself deeply in the constitutional jurisprudence of the United States Supreme Court and the judicial methodology of John Marshall. That methodology embraced, inter alia, the suppositions that the *Australian Constitution's* text provided only a starting point for judicial attempts to discern its meaning, that judges had been entrusted with an authority to fill in the myriad detailed gaps in the country's governmental system, a system which the *Australian Constitution's* text had sketched out only in broad principles, and that in filling those gaps, it was legitimate for judges to take account of moral or political factors which could not defensibly be invoked within traditional British understandings of statutory interpretation. As Marshall memorably put it in *M'Culloch v Maryland*, '[w]e must never forget it is a constitution [as opposed to an ordinary statute] that we are expounding'.[98] In cases such as *D'Emden* and *Deakin*, Griffith CJ made it abundantly clear that he

---

96 'Melbourne, Wednesday, 3rd July, 1907', *The Age* (Melbourne, 3 July 1907) 6.

97 The count excludes references to the Constitution directed at the pre-1867 period.

98 (n 34) 407.

considered that methodology entirely appropriate when searching for the meaning of provisions of the *Australian Constitution*.[99]

However, Marshall's methodology was not a distinctively American (in the sense of counterposed to British) phenomenon. Writing in 1899,[100] the future Lord Chancellor, Richard Haldane (then a backbench Liberal MP and QC with a well-established practice in colonial constitutional law matters),[101] had suggested, in respect of the Privy Council's colonial constitutional jurisprudence, that judges frequently found themselves occupying a dual role — perhaps more precisely, alternate roles — as either 'jurists' or 'statesmen'. Haldane suggested that Imperial legislation was often drafted in terms that necessarily required Privy Council judges to adopt interpretive techniques quite different from those applied in ordinary cases of statutory construction:

> His function is to be a statesman as well as a jurist, to fill in the gaps which Parliament has deliberately left in the skeleton constitutions and laws that it has provided for the British colonies. The Imperial Legislature has taken the view that these constitutions and laws must, if they are to be acceptable, be in a large measure unwritten, elastic, and capable of being silently developed and even altered as the colony develops and alters …[102]

Although Haldane did not expressly make the link, the Privy Council judge qua 'statesman' was snugly shod in Marshall's shoes.

Lord Halsbury qua Privy Council judge in *Outtrim* (judgment was given on 6 December 1906) had forcefully disapproved this approach being adopted by Australia's High Court in constitutional matters. In Halsbury's view, it seemed Privy Council judges might properly function as statesmen; colonial judges had to content themselves with being jurists. Griffith CJ manifestly disagreed with and refused to bow to such strictures. Reports of the *Cooper* submissions record Griffith CJ announcing (to laughter), 'you might say *Deakin v Webb* has been overruled by the Privy Council'.[103]

Several weeks before *Cooper* was decided and six months after *Outtrim* was handed down, the High Court decided *Baxter v Commissioners of Taxation* ('*Baxter*').[104] *Baxter* was the latest instalment in the, by then, multi-part dispute between the High Court and the Privy Council over – in the narrow sense – the

---

99 Justice Barton also played a substantial role throughout the 1890s, both in keeping the idea of creating a 'national' constitution in the forefront of political debate, and then in making the case that the text which Griffith CJ had been so influential in drafting was eventually adopted. Isaacs J had also played a prominent role in the constitution-making process.

100 Richard Haldane, 'Lord Watson' (1899) 11(3) *Juridical Review* 278.

101 Lord Haldane's constitutional law practice is described and analysed in Jonathan Robinson, 'Lord Haldane and the British North America Act' (1970) 20(1) *University of Toronto Law Journal* 55; Stephen Wexler, 'The Urge to Idealise: Viscount Haldane and the Constitution of Canada' (1984) 29(4) *McGill Law Journal* 608.

102 Haldane (n 100) 279.

103 'Income Tax. Chief Justice's Salary. Argument before High Court', *The Week* (Brisbane 26 April 1907) 23.

104 (1907) 4 CLR 1087 ('*Baxter*').

inter-governmental immunities doctrine and, more broadly, the 'correct' approach to be taken to the construction of Australian constitutional law. For present purposes, a passage in Griffith CJ's opinion in *Baxter*, relating to an episode in Queensland's pre-confederation constitutional history, has particular significance because it suggests that his Honour saw no difficulty applying his Marshall-inspired approach to interpreting the *Australian Constitution* to the High Court's role in determining the meaning of State Constitutions.

The passage relates to a fierce dispute in the 1880s between Queensland's Legislative Assembly and Council.[105] The then government, led by Griffith, had clear Assembly support for a bill providing for payment of expenses to Assembly members. The Council blocked the bill, which led the government to tack the sum concerned to a general appropriations bill. The Council then refused to pass the appropriations bill unless the tack was removed. Griffith CJ regarded that refusal as 'unconstitutional' on the basis that the Council was, in such matters, politically subordinate to the Assembly just as the House of Lords was (albeit as a matter of convention and not law) vis-à-vis the Commons in Britain. The Assembly and Council subsequently referred the matter to the Privy Council, asking firstly, '[w]hether the *Constitution Act* confers on the Legislative Council powers coordinate with those of the Legislative Assembly in the amendment of all bills, including money bills?', and secondly, whether the Assembly was correct in asserting that the Council had no power to amend money bills.

As a question of law, the answers to those questions would seem obviously to be 'yes' and, therefore, 'no'. Construed in the ordinary way, the text of the *Constitution Act* placed the two Houses on a footing of perfect equality, save for a caveat in s 2 that appropriations bills should originate in the Assembly.

Unbeknown to either House, Griffith CJ covertly sent his own commentary to the Privy Council:

> I think I am right in saying that the literal interpretation of the words of the Constitution Act is regarded as a matter of small importance as compared with the larger question, Whether, on a true construction of the written and *unwritten constitution* of the colony, the two Houses of the legislature should be regarded as holding and discharging, relatively to one another, positions and functions analogous to those of the House of Lords and House of Commons.[106]

The Privy Council answered the questions in a fashion[107] which Haldane (in 1899) would surely have characterised as that of the statesman rather than the jurist: 'no' to question one, and 'yes' to question two.

Twenty years later in *Baxter*, Griffith CJ presented this as an 'excellent illustration' of how the content of Queensland's constitution should be discovered by a court:

---

105 Discussed in Loveland (n 9) 135–40.
106 Ibid 138 (emphasis added).
107 Such questions were then merely answered without accompanying explanation.

> No formal reasons were given for the report, but the ground on which it proceeded is sufficiently apparent. The arguments of the Legislative Assembly were accepted, and it was held that, the legislature of Queensland having been constituted on a basis analogous to that of the United Kingdom, the express limitation of the power to originate supply to the elective House carried with it by implication a limitation of the power of the Legislative Council analogous to that which is recognized as imposed on the House of Lords. If the Queensland Constitution had been technically construed without regard to its subject matter the result must have been different.[108]

In *Cooper*, it might be suggested that the absence of Two Act entrenchment in the text of the *Constitution Act* text was 'a matter of small importance' and, 'by implication' (construing the Act with 'regard to its subject matter'), it was necessarily the case that its terms could not be amended by legislation passed in the ordinary way. This explanation is tentative, but, perhaps, gains some strength from the absence of any obvious alternative.

One might wonder, however, what useful purpose *Cooper* served. Whether Two Act entrenchment was a departure from 'the ordinary way' of legislating, which presented any significant political obstacles to amendment or repeal of the provisions of the *Constitution Act* is obviously doubtful. The principle did not demand even slightly enhanced majorities in either House, it did not insert an extra-parliamentary stage (such as a referendum) into the lawmaking process, and it placed no time delays on the interval between the two necessary Acts.[109] The requirement that the Legislature use language which (twice) made clear in express terms that the *Constitution Act* was being amended might prompt press and public opposition to proposed changes, or deter governments even from embarking on such projects. However, it seems unlikely that Two Act entrenchment would meaningfully alter the balance of political forces attending any such future reforms.

Cooper would likely have been reversed if appealed to the Privy Council. Although, in a narrow legal sense, Kidston's government had won the case; the High Court's conclusion on the meaning of 'paid and payable' within s 17 was strictu sensu the ratio. Despite their presentation as the point of primary significance in Griffith CJ's opinion, the Court's views on Two Act entrenchment were just *obiter*. They were not something against which the government could appeal. Cooper did not press the matter to the Privy Council, presumably, in part, because he regarded 'victory' on Two Act entrenchment as much more important than shaving a few pounds off his annual tax bill, and in part, because the implications of the Privy Council's judgment in *Outtrim* were very unfavourable for his prospects of succeeding on the broad constitutional issue.

However, Cooper's constitutional victory did not impress itself with much weight on Queensland's political landscape. The Legislature's 1907 session began

---

108 (n 104) 1107.

109 The Houses frequently suspended standing orders to take bills through their entire passage in a day. Presumably, the required two Acts could be passed on successive days or even the same day.

on 23 July and ran to late November. The major event was the resignation of Kidston's government. This consequent upon the refusal of the then Governor, Lord Chelmsford, to accept Kidston's advice to appoint sufficient government supporting members to the Legislative Council and overcome the Council's refusal to pass Kidston's electoral reform and old age pension bills. *Cooper* did not feature at all in debate or questions in either House during the 1907 session. The Colonial Office records for 1907[110] do not contain a single mention of the case either in Chelmsford's despatches to London nor in any memorandum from Kidston. A brief interregnum of a Philp ministry was ended by an Assembly election early in 1908, which returned Kidston to power leading de jure, a minority government but which enjoyed a substantial de facto majority, consequent on informal Labor support, and which promptly pursued a constitutional reform alongside which subjecting judges' salaries to income tax seemed very small beer indeed.

VI Aftermath — the 1908 Reforms, the *Taylor* Litigation and *McCawley*

Kidston's primary constitutional concern was to remove the Legislative Council's power to block bills passed in the Assembly. The first step was to repeal the special majority proviso in s 9 of the *Constitution Act*. The 1871 repeal of s 10 suggested that only a bicameral bare majority required to repeal s 9. However, *Cooper* obviously required the repeal be effected by two separate bicameral bare majority Acts — the first, expressly empowering the Legislature to repeal s 9 and, the second Act expressly doing so. Kidston's government proceeded, however, with a single bill. This was expressly titled the *Constitution Act Amendment Act 1890* (Qld), and provided simply in s 2 that s 9 was repealed.

If *Cooper* was indeed 'correct', the 1908 Act could not have repealed s 9. However, even though *Cooper* had been decided just months earlier, that point was not taken by any member of either House during the bill's passage. Chelmsford had asked the Colonial Office if a two-thirds majority was required. His inquiry made no reference to *Cooper* Two Act entrenchment,[111] nor did the Act (the bill was assented to on 3 April 1908) face any immediate legal challenge in Queensland's courts.[112]

---

110 The 1907 records are held in the United Kingdom National Archives as CO 418/54.

111 Telegram from Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 19 March 1908, CO 418/63, 144. The answer was 'no'.

112 Any presumption that *Cooper* would apply to all the States had little traction. In 1912, the New South Wales Legislature enacted the *Parliamentary Representatives Allowance Act 1912* (NSW), which expressly amended the *Constitution Act 1902* (NSW) s 28. No anterior enabling statute was passed. Similarly, the *Constitution Amendment Act 1914* (NSW) was enacted as a single statute. In Victoria, the *Adult Suffrage Act 1908* (Vic) (which began its parliamentary passage shortly after *Cooper* was decided) expressly amended the State's Constitution Act, again in a single statute.

Shortly afterwards, Kidston promoted a measure enacted as the *Parliamentary Bills Referendum Act 1908* (Qld) ('*PBRA 1908*'). His objective was to create an alternative legislative process. A bill twice passed in the Assembly, but twice blocked in the Council, could, thereafter, be submitted to a referendum, and, if approved by a bare majority of voters, would become an Act on receiving the royal assent. Section 1 did expressly state that the Act should be read as amending the *Constitution Act*; although it did not identify which parts and did not take the form of an insertion into the *Constitution Act*. As with the first 1908 Act, this measure was enacted as a single statute. Per *Cooper*, the Act was undoubtedly invalid. Again, the point was not taken by legislators during its passage. Nor did anyone immediately initiate any legal proceedings to challenge the *PBRA 1908*'s validity. That challenge eventually emerged in 1917, when Tom Ryan's Labor government invoked the Act to abolish the Legislative Council.

A *The* Taylor *Litigation*

Cooper was still Chief Justice when *Taylor v Attorney-General* ('*Taylor*')[113] came before the Supreme Court on 25 April 1917. Justices Chubb and Real remained in situ, and had been joined, since 1910, by Lukin J. Ryan led for the government, Feez and Stumm led for Dr Taylor.

Taylor's case had three alternative strands, all rooted in the assumption that the Council's existence was a matter of 'organic' rather than 'ordinary' law. The first strand was that only the Imperial Parliament could abolish the Legislative Council. Secondly, if the Queensland Legislature had such power, then that 'Legislature' had to take the form identified in the *Constitution Act*: the Legislature created by the *PBRA 1908* was a mere delegate of the *Constitution Act* Legislature and had no power to alter 'organic' law. Thirdly, applying *Cooper*, the original Legislature could only alter organic law through the Two Act process.

Ryan's significant innovation in *Taylor* was to argue that *CLVA 1865* s 5 controlled Queensland legislation relating to the powers and composition of the Colony's courts and Legislature and that s 5 should be seen as a narrowly focused alternative to a more general competence created in cl 22. Under s 5, the Queensland Legislature *could create* judicially enforceable entrenchment devices regulating what s 5 termed the 'manner and form' of the legislative process. And it could do so through the 'ordinary way' of legislating. But since the Legislature *had not done so* in respect of its capacity to alter its own powers and composition, the alterations effected by the *PBRA 1908* could properly have been enacted in the 'ordinary way'. A departure from the 'ordinary way' of legislating could not arise as a matter of inference or implication as had been held in *Cooper*. Alternatively, Ryan also contended that if *Cooper* Two Act entrenchment was indeed a 'manner

[113] [1917] St R Qd 208 ('*Taylor*'). Taylor was a member of the Legislative Council.

and form' proviso per *CLVA 1865* s 5, it could be satisfied by a single, expressly framed Act.

Ryan's ingenuity did not avail however. Justice Lukin, evidently unpersuaded by his own submissions in *Cooper*, authored a majority (including Cooper J) judgment which approved all of Taylor's contentions, rejected all of Ryan's, and expressly approved the Two Act entrenchment principle.[114]

On further appeal to the High Court,[115] Ryan persuaded the bench, which included Barton and Isaacs JJ of the *Cooper* judges,[116] that the *CLVA 1865* s 5 provided a legal root for the *PBRA* 1908 which overrode the Two Act entrenchment principle. Nonetheless, Barton and Isaacs JJ both held that *Cooper* was correctly decided: 'organic' law which fell beyond the scope of the *CLVA 1865* s 5 could be altered only through the Two Act process.[117] None of the other judges demurred from that conclusion.

Taylor's subsequent permission application to the Privy Council in March 1918[118] was dismissed, in part because, given the referendum result, the issue was temporarily moot, but primarily because the Court (with Lord Haldane presiding) considered that Ryan's reliance on the *CLVA 1865* s 5 raised questions of such general Imperial importance that they ought to be resolved only in litigation in which many colonies were represented. However, by then, *McCawley* was awaiting argument before Australia's High Court.

B McCawley

The *McCawley* litigation was, in essence, initiated by Feez and Stumm. Queensland's Supreme Court — Cooper J still presiding — had concluded that the *Industrial Arbitration Act* 1916 (Qld) s 6 was invalid on the basis that it purported to amend ss 15 and 16 of the *Constitution Act* without having been preceded, as *Cooper* required, by an enabling statute.[119] The Court saw no merit in Ryan's submissions that this was a matter falling, as in *Taylor*, within the *CLVA 1865* s 5. Therefore, since no specific 'manner and form' of legislating had been introduced in Queensland to control the issue, judicial tenure was amenable to change through legislation passed in the ordinary way.

---

114 Ibid 241.

115 The Court allowed the referendum to take place pending the appeal. The electorate voted against the bill.

116 Chief Justice Griffith was ill. Justice O'Connor died in 1912. Justice Higgins did not sit. The *Taylor* bench included three judges appointed by the Commonwealth Labor government in 1913: Charles Gavan Duffy, George Rich and Charles Powers. Only Powers had had a significant party political career (of liberal inclination).

117 *Cooper* (n 3) 469, 476. Justice Isaacs had also expressly confirmed *Cooper* was correct in *Baxter v Ah Wey* (1909) 8 CLR 626, 643.

118 *Taylor v Attorney-General* [1918] St R Qd 194.

119 *In Re McCawley* [1918] St R Qd 62.

The High Court appeal was heard by a seven-judge bench.[120] The Court divided three to three on the correctness of the *Cooper* principle. Griffith and Barton JJ, joined by Powers J, maintained the position they adopted in *Cooper*, dismissing the *CLVA 1865* s 5 argument accepted in *Taylor* as irrelevant. The seventh judge, Gavan Duffy J, decided against McCawley without addressing the Two Act entrenchment point.

Isaacs J, in a joint opinion with Rich J, dissented, casting the *Cooper* principle as wholly indefensible. The opinion has no clear explanation of why Isaacs J changed his mind, nor any candid admission that he had done so. The thrust of the judgment was that both cl 22 and s 2 of the *Constitution Act*, and also the *CLVA 1865* s 5, empowered the Legislature to create a great variety of entrenchment devices. Sections 9 and 10 were examples of such devices which a court would enforce. However, Two Act entrenchment had no textual legislative basis. The mere fact that the *Constitution Act* was styled as a Constitution Act did not and could not, per se, lend any of its terms a normative status which rendered them immune to repeal or amendment by Acts passed in the ordinary way. Neither the Queensland courts nor the High Court had the power to 'insert' any such device — as Isaacs and Rich JJ considered had occurred in *Cooper* — into the Act.[121] Justice Higgins produced a similar judgment.

The Privy Council appeal was not heard until March 1920.[122] The assembled bench was notably strong, comprised of Lords Birkenhead, Haldane, Dunedin, Buckmaster and Atkinson. As noted above, its opinion, authored by Birkenhead, scathingly dismissed the *Cooper* principle. But Feez and Stumm did not lose the case because the Queensland Legislature *did not have the power* to subject legislation affecting judicial tenure to a Two Act entrenchment process. They lost it because the Legislature *had not exercised* that power. The Privy Council's judgment clearly accepts that such power did exist, and that the power derived both from cl 22 and the *CLVA 1865* s 5. The power to enact legally enforceable departures from the 'ordinary way' of lawmaking had been exercised, unwittingly perhaps, by Queensland legislators in ss 9 and 10 of the *Constitution Act*. But such legislative devices could not be inserted by judges into legislative texts. If *Cooper* was indeed correct, if Two Act entrenchment was indeed a feature of Queensland's constitution, then Feez and Stumm:

> would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the constitution, prescribing with meticulous precision the methods by which, and by which alone it could be altered. The respondents to this appeal are wholly unable to reinforce their arguments by any such demonstration. And

---

120 *McCawley v The King* (1918) 26 CLR 9.

121 There is an obvious parallel here with Isaacs J's near contemporaneous judgment in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, in which he led the High Court — now without either Griffith or Barton JJ in its ranks — towards a much more textually driven construction of the *Australian Constitution* in respect of the intergovernmental immunities doctrine. I have developed this analysis more fully: Loveland (n 9) 288–96, 330–3.

122 *McCawley v The King* [1920] AC 691.

> their inability has involved them in dialectical difficulties which are embarrassing and even ridiculous.[123]

VII Conclusion

Despite being so strongly disapproved by the Privy Council in *McCawley*, *Cooper* was, in a negative sense, a significant judgment. Shortly afterwards, relying on *McCawley* to do so through legislation passed 'in the ordinary way', the Queensland Legislature abolished the State's Legislative Council. In 1929, following Birkenhead's 'meticulous precision' proviso, the then Dean of the University of Sydney Law School, Sir John Peden, accepted an invitation from the New South Wales Premier, Sir Thomas Bavin, to draft a 'meticulously precise' entrenching provision for the New South Wales constitution which would prevent abolition of the State's Legislative Council unless the relevant bill was approved in a referendum as well as by the Legislature's two Houses. Bavin's initiative was undertaken in (well-founded) anticipation of his conservative administration losing the next Assembly election to a Labor party committed to abolishing the Council. Peden's formulae, enacted as s 7A in the *Constitution Act 1929* (NSW), was subsequently upheld as a valid, judicially enforceable entrenchment device by the High Court and the Privy Council in *Trethowan v Attorney General for New South Wales* ('*Trethowan*').[124]

Trethowan, in turn, immediately prompted the Queensland Legislature to entrench the abolition of the Legislative Council by requiring its reinstatement to be approved by a referendum. And *Trethowan* has since stimulated vigorous, continued debate about the possibility of such entrenching legislation being effective in the United Kingdom context.[125] Pope Cooper's role in this ongoing matter has rarely attracted considered attention, presumably because the argument he advanced was so unceremoniously dismissed in the Privy Council. Insofar as the rise and fall of Two Act entrenchment merits more attention than it has hitherto received, it is because the episode illustrates rather nicely the value of bad legal arguments, and bad appellate court judgments, as contributors to the eventual production of more defensible legal principles.

---

123 Ibid 705.

124 (1931) 44 CLR 394; [1932] AC 526 ('*Trethowan*').

125 See especially HRW Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) *Cambridge Law Journal* 172; Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959)144–77; Michael Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' (2009) July (3) *Public Law* 519.

Evaluating the Merits of Queensland's New Shield Law: Reform Lessons for the Rest of Australia

Adam Lukacs*

This article provides the first comprehensive analysis of Queensland's new 'journalist privilege' provisions (or 'shield law'), introduced into div 2B of the Evidence Act 1977 (Qld) in 2022, and evaluates the merits of these provisions against comparable legislation in other jurisdictions. This article aims to inform law reform to protect press freedom by recommending that shield laws across Australia be amended to adopt the favourable aspects of Queensland's new shield law. Conversely, the article also argues that the shortfalls in Queensland's own shield law, and the shield laws of other jurisdictions, can be rectified by incorporating into them the beneficial features of shield laws nationwide. Doing so would produce a uniform and exemplar shield law which provides uniform protections in all Australian jurisdictions.

I Introduction

In the course of acting as a public watchdog and gathering news, journalists occasionally guarantee anonymity to sources to preclude them from being 'subject to retribution for exposing matters of public [interest] to the media'.[1] Source confidentiality is a core ethical obligation for journalists and an essential feature of the operation of a free press.[2] Failing to respect source confidentiality would risk deterring sources from assisting the press, resulting in a chilling effect that undermines the free flow of information that would otherwise be in the

* BA/LLB(Hons) candidate at the University of Queensland. I would like to express sincere thanks and gratitude to Associate Professor Rebecca Ananian-Welsh for her helpful comments on a draft of this article, and for all the support she has provided me. I would also like to thank the anonymous reviewers, and the UQLJ's editorial team, for their constructive feedback on this article. All views and errors are entirely my own.

1 Sanette Nel, 'Journalistic Privilege: Does it Merit Legal Protection?' (2005) 38(1) *Comparative and International Law Journal of South Africa* 99, 100.

2 Rebecca Ananian-Welsh, 'Journalistic Confidentiality in an Age of Data Surveillance' (2019) 41(2) *Australian Journalism Review* 225, 225; *Mahon Tribunal v Keena* [2009] IESC 64, [23] (Fennelly J). See also Human Rights Committee, *General Comment No 34: Article 19, Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [13], [45].

DOI: 10.38127/uqlj.v42i1.6549

public interest.[3] The importance of the media's unimpeded ability to provide accurate and reliable information as a public watchdog cannot be overstated, and this sentiment is succinctly encapsulated by the notion that the media are the 'eyes and ears' of the public.[4]

As has been expressed elsewhere, '[p]ublic interest journalism is essential to democracy: it informs public debate, exposes [wrongdoing], and drives [positive] changes'.[5] Although the exact content of 'public interest journalism' remains difficult to define, a general understanding of the concept is that it entails journalists pursuing information that the public has the right to know which, but for such journalism, would remain hidden by governments and other powerful interests.[6] It is a 'step above' ordinary journalism because it involves journalists exercising investigative or watchdog functions, as opposed to 'ordinary' journalism which generally entails publishing stories that are merely 'interesting to the public' or 'entertaining, but with no civic value'.[7] The characteristics of public interest journalism include (and are aimed at) publishing reliable information upon which citizens may base political, economic, and social choices, enhancing government accountability, and ensuring transparency of activities impacting the public.[8]

Despite serious legal, financial, and reputational risks, sources continue to provide information to journalists on conditions of confidentiality about issues that those in power would have otherwise preferred to sweep under the rug. The ability of journalists to maintain confidentiality, even in the face of legal proceedings, is therefore crucial to enable the free exchange of information between journalists and sources which facilitates public interest journalism. To this end, legislation exists in all Australian jurisdictions providing that if a journalist has promised to a source not to disclose their identity, neither the journalist nor their employer is compellable in court proceedings to answer questions or produce documents that would disclose the source's identity or enable their identity to be ascertained.[9] These statutory provisions are widely known as 'shield laws'. Despite the fact that shield laws had been progressively

---

3 *Goodwin v United Kingdom* (1996) 22 EHRR 123 [39]; Joseph Fernandez, 'Pass the Source: Journalism's Confidentiality Bane in the Face of Legislative Onslaughts' (2017) 27(2) *Asia Pacific Media Educator* 202, 203; Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 497.

4 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 183 (Sir Donaldson MR).

5 Human Rights Law Centre, Submission to Department of Justice and Attorney-General (Qld), *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (13 July 2021) 4 ('HRLC Submission').

6 Andrea Carson, 'Explainer: What is Public Interest Journalism?', *The Conversation* (online, 15 June 2017) <https://theconversation.com/explainer-what-is-public-interest-journalism-78996>.

7 Ibid.

8 James Meehan, 'Protecting Public Interest Journalism in Australia: A Defence to Information Secrecy Offences' (2020) 23 *Media and Arts Law Review* 347, 351.

9 *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(1); *Evidence Act 2008* (Vic) s 126K(1); *Evidence Act 1929* (SA) s 72B(1); *Evidence Act 2001* (Tas) s 126B; *Evidence Act 1906* (WA) s 20I.

introduced nationwide since 2007 in all Australian jurisdictions (but for Queensland, which enacted them in 2022), journalists and their sources have nevertheless been the subject of attack. Newsrooms and journalists' homes have been raided, journalists' metadata has been accessed, and journalists have been threatened with prosecution for adhering to their confidentiality obligations.[10]

Queensland's historic lack of a shield law has long been criticised as undermining public interest journalism. So has the precariousness of common law protections for journalists who have given undertakings of confidentiality to sources, which Queensland journalists have been required to rely on in the absence of any statutory protections.[11] However, following longstanding criticisms of Queensland for being the only Australian jurisdiction to lack a shield law,[12] Queensland's parliament passed legislation on 26 May 2022 protecting journalists from having to reveal confidential sources in legal proceedings where certain conditions are met. The Evidence and Other Legislation Amendment Bill 2021 amended the *Evidence Act 1977* (Qld) to establish a statutory framework to better protect the identity of journalists' confidential informants.[13] It did this by creating a qualified privilege[14] preventing a journalist or other relevant person from being compelled to disclose the identity of an informant who has been promised confidentiality, unless a court considers that the balance of public interests requires disclosure.[15] The Bill's Explanatory Notes recognise the merits of this, noting that '[a] free, independent, and effective media, and well-informed citizens, are crucial for a strong democracy' while acknowledging that journalists 'may depend on confidential informants to access sensitive information to fulfil their role as facilitators of free communication and report on

---

10 See, eg, *Australian Broadcasting Corporation v Kane (No 2)* (2020) 377 ALR 711 ('*Kane*'); *Smethurst v Commissioner of Police* (2020) 376 ALR 575; Bevan Shields, 'Federal Police Accessed the Metadata of Journalists Nearly 60 Times', *Sydney Morning Herald* (online, 8 July 2019) <https://www.smh.com.au/politics/federal/federal-police-accessed-the-metadata-of-journalists-nearly-60-times-20190708-p52598.html>; Paul Karp, 'Australian Federal Police Ask Prosecutors to Consider Charges Against ABC Journalist', *The Guardian* (online, 2 July 2020) <https://www.theguardian.com/australia-news/2020/jul/02/australian-federal-police-ask-prosecutors-to-consider-charges-against-abc-journalist>.

11 Media, Entertainment & Arts Alliance, 'Queensland to Finally Get a Shield Law — But what about "Journalist F"?', *Press Freedom* (Web Page, 1 May 2021) <https://pressfreedom.org.au/queensland-to-finally-get-a-shield-law-but-what-about-journalist-f-bf6e62b9dd80>.

12 See, eg, Joseph M Fernandez, 'Chaos Reigns as Shields Fall' in Mike Dobbie (ed), *Secrecy and Surveillance: The Report into the State of Press Freedom in Australia in 2014* (MEAA, 2014) 24, 24.

13 The shield law framework is contained within *Evidence Act 1977* (Qld) Pt 2 Div 2B ('EAQ').

14 A 'privilege' is a 'right to resist disclosing information that would otherwise be required to be disclosed': Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, 2007) 77 [3.1] citing Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing, 2nd ed, 2004) 91. The relevant statutory provisions that will be discussed are a form of statutory privilege because they give journalists a right to withhold certain information in judicial proceedings where certain conditions are met despite that information's relevance to the issues to be determined.

15 Legal Affairs and Safety Committee, Parliament of Queensland, *Evidence and Other Legislation Amendment Bill 2021* (Report No 23, February 2022) 5 ('Committee Report').

matters of legitimate public concern.'[16] This brings Queensland into line with all other Australian jurisdictions, which all have a broadly similar qualified privilege in their respective Evidence Acts. However, several aspects of Queensland's protections are stronger than those provided by other jurisdictions, especially with respect to Queensland's definition of 'journalist' and 'news medium', the framing of the balancing exercise required to be undertaken when disclosure of a source is argued for, and the shield's applicability to police investigations.

As such, this article aims to inform law reform to protect press freedom and ongoing efforts to harmonise shield laws by highlighting the abovementioned protections in Queensland's shield law as providing ideal benchmarks which other jurisdictions should emulate. This article contends that deficiencies in other Australian shield laws can be ameliorated by implementing protections across Australia that are aligned with Queensland's approach to these provisions. It accordingly recommends that other jurisdictions should amend those deficient provisions to be more akin to Queensland's shield law. However, this article acknowledges that Queensland's shield law also faces numerous deficiencies, particularly with respect to the shield's inapplicability to circumstances where confidentiality can be expected or inferred, and its inapplicability to corruption and integrity body proceedings. Accordingly, this article suggests that in order to remedy these deficiencies, a proposed national approach to the harmonisation of shield laws would entail all jurisdictions adopting the positive features of certain jurisdictions' (particularly Queensland's) shield laws. Combining the efficacious characteristics of each of Australia's varied shield laws would not only rectify the Queensland law's shortfalls, but it would also provide a desirable and achievable framework that should be adopted in every Australian jurisdiction. Harmonising shield laws across Australia in line with this framework would further enhance press freedom by providing journalists with uniform and consistently strong protections nationwide, instead of the inconsistent protections currently available across Australian jurisdictions. Doing so would produce a uniform and exemplar shield law which provides the same strong protections in all Australian jurisdictions.

This article begins, in Section II, by examining the basis for and context of journalists' ethical obligations to maintain source confidentiality when this is promised. Section II also examines the historical position of 'journalists' privilege' at common law, which courts have consistently refused to recognise, and considers how this has been rectified by statutes across Australia in the form of shield laws. Section III then considers the primary positive features of Queensland's shield law, namely its functional definition of 'journalist', non-journalists it protects, its balancing exercise, and its applicability to warrants. It is argued in Section III that these features provide a solution to deficiencies in

[16] Explanatory Notes, Evidence and Other Legislation Amendment Bill 2021 (Qld) 1 ('Explanatory Notes').

shield laws nationally. Section III also argues in favour of additional provisions, which are present in other jurisdictions' shield laws, being included in Queensland's shield law, namely: the shield being applicable in circumstances where confidentiality can be expected or inferred, and the shield applying in corruption and integrity body proceedings.

II The Watchdog Muzzled?

A *Contextualising Journalists' Ethical Obligations*

Negative repercussions inevitably flow from journalists failing to abide by an agreement to ensure a source's confidentiality,[17] such as exposing the individual source to danger and generally eroding the trust between journalists and their sources.[18] Despite this, Australian law has historically provided limited protection for journalists who were faced with demands to reveal their sources.[19] One judgment went so far to suggest that if a journalist refuses to reveal a source and subjects themselves to the consequences of being held in contempt of court as a result, this is a matter of 'personal choice'.[20] Yet countless journalists have made that 'personal choice', even with the prospect of severe fines or imprisonment as a result of being held in contempt for refusing to disclose sources in court proceedings.[21] This refusal to disclose occurs because journalists have ethical obligations to preserve the confidentiality of a source where they have agreed to do so. Such an obligation is generally found in industry codes, such as cl 3 of the Media, Entertainment & Arts Alliance (MEAA) Journalist Code of Ethics.[22] Clause 3 relevantly provides that 'where confidences are accepted, respect them in all circumstances'.[23] This obligation underpins the journalist-source relationship.

---

17 Lawrence McNamara and Sam McIntosh, 'Confidential Sources and the Legal Rights of Journalists: Re-thinking Australian Approaches to Law Reform' (2010) 32(1) *Australian Journalism Review* 81, 81–2.

18 Media, Entertainment & Arts Alliance, Submission No 90 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014* (19 January 2015) 4 ('MEAA Submission'); *Kane* (n 10) 720 [36]–[37], 723 [46] (Abraham J); Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law: A Handbook for Communicators in a Digital World* (Routledge, 6th ed, 2019) 318.

19 Sally Walker, *The Law of Journalism in Australia* (Law Book Company, 1989) 87; McNamara and McIntosh (n 17) 81.

20 *Harvey v County Court of Victoria* (2006) 164 A Crim R 62, 79–80 [90] (Hollingworth J).

21 See, eg, *R v Kessing* (2008) 73 NSWLR 22, 35 [57] (Bell JA); *R v Barrass* (District Court of Western Australia, Judge Kennedy, 7 August 1990); *R v Budd* (Supreme Court of Queensland, Dowsett J, 20 March 1993). See also 'NPC Statement on the AFP Raids', *National Press Club of Australia* (online, 5 June 2019) <https://www.npc.org.au/article/freedom-of-the-press/2019/75-npc-statement-on-the-afp-raids>; MEAA Submission (n 18) 4; Wendy Bacon and Chris Nash, 'Confidential Sources and the Public Right to Know' (1999) 21(2) *Australian Journalism Review* 1, 1–2.

22 Pearson and Polden (n 18) 318.

23 'MEAA Journalist Code of Ethics', *Media, Entertainment & Arts Alliance* (online) <https://www.meaa.org/meaa-media/code-of-ethics/>.

Even where journalists are not obligated to follow industry code requirements, journalists remain interested to strictly abide by promises of confidentiality because doing so fosters trust between journalists and their sources, which allows journalists to obtain information from those sources, and by extension, keep the public informed on crucial issues.[24] As to that latter point, the fact that this 'personal choice' has consistently been made by journalists is also unsurprising given that sources remain the 'wellspring of a journalists' work'.[25] Source confidentiality encourages the free flow of information in a democratic society because confidential disclosures provide vital information that supports public interest journalism,[26] and such information is 'more readily supplied to journalists' when confidentiality is promised and respected.[27]

Nevertheless, journalists' ethical codes have no legal status and courts have consistently refused to recognise the existence of any 'journalists' privilege' at common law.[28] A journalist was historically required to reveal a source's identity in court proceedings if this was 'necessary in the interests of justice'[29] as there is a paramount public interest in securing the administration of justice which no undertaking of confidentiality can override.[30] The paramountcy given to considerations of the administration of justice therefore created a conflict between those considerations and the interests of a free press as expressed through maintaining journalistic confidentiality.[31]

B *Shield Laws*

Because of these limited protections historically, journalists in Australia were vulnerable to being compelled to disclose their sources in court proceedings. This historical lack of protections has now been remedied, and the entrenched heavy weighting given to the public interest in the administration of justice at common

---

24 Aaron Quinn, 'Respecting Sources' Confidentiality: Critical but Not Absolute' in Christopher Meyers (ed), *Journalism Ethics: A Philosophical Approach* (Oxford University Press, 2010) 278.

25 Butler and Rodrick (n 3) 687.

26 *McKenzie v Magistrates' Court of Victoria* (2013) 39 VR 311, 313 [3] (Harper JA).

27 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 354–5 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) ('*Cojuangco*').

28 *R v McManus* [2007] VCC 619, [34]–[35] (Chief Judge Rozenes) ('*McManus*'); *Kane* (n 10) 755 [197] (Abraham J); *Liu v The Age Company Pty Ltd* (2016) 92 NSWLR 679, 706 [123] (McColl JA); *Re Evening News* (1880) 1 LR (NSW) 211, 240 (Martin CJ). See Joseph Fernandez, 'Journalists' Confidential Sources: Reform Lessons from Recent Australian Shield Law Cases' (2014) 20(1) *Pacific Journalism Review* 117, 129.

29 *Cojuangco* (n 27) 354–5 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

30 *Nicholls v Director of Public Prosecutions (SA)* (1993) 61 SASR 31, 41 (Legoe ACJ), 51 (Perry J); *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 234 (Abadee J); *Von Doussa v Owens (No 3)* (1982) 31 SASR 116, 117 (King CJ); *Re Buchanan* (1964) 65 SR (NSW) 9.

31 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 87 (Rich J) ('*McGuinness*'). See also Department of Justice and Attorney-General (Queensland), *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (Discussion Paper, June 2021) 1 ('Discussion Paper').

law has been legislatively overridden in most jurisdictions for some time now.[32] This has been done through these jurisdictions providing statutory protections for journalists' confidential sources in the form of shield laws, which are a form of legislative privilege that protect a journalist or their employer from being compelled to disclose the identity of and communications with a confidential source in court.[33] They represent an attempt to mediate the conflict between the administration of justice and journalists' obligations to uphold source confidentiality.[34] Such laws are a legislative acknowledgement of the public interest in source confidentiality, which may outweigh other public interests in certain circumstances, and aim to foster freedom of the press by protecting journalists' anonymous sources.[35]

The need for shield laws was finally recognised following the case of journalists Gerard McManus and Michael Harvey, who wrote an article in 2004 about the Commonwealth government's planned cutbacks to veterans' entitlements.[36] They were each fined $7,000 for contempt of court after refusing to reveal the source of confidential communications on which the article was based.[37] The Commonwealth responded to this in 2007, and to recommendations from the Australian Law Reform Commission,[38] becoming the first jurisdiction in Australia to enact shield laws, which underwent further reform in 2011.[39] Subsequently, New South Wales also adopted a statutory shield, with the rest of Australia following suit.[40] Queensland was the last Australian jurisdiction to enact shield laws, doing so in 2022.

Under each of these regimes, a court may order that the shield law's protections do not apply if it is satisfied that 'the public interest in the disclosure of evidence of the identity of the informant' outweighs any likely adverse effect of the disclosure on the source and also outweighs the public interest in the communication of facts and opinion by the media and the ability of the media to

---

32 Fernandez (n 28) 119.

33 See, eg, *Evidence Act 1995* (Cth) s 126K; *Evidence Act 1995* (NSW) s 126K; *Evidence Act 2008* (Vic) s 126K; *Evidence Act 2011* (ACT) s 126K; *Evidence Act 1906* (WA) s 20I.

34 Georgia Price, '"Pack Your Toothbrush!" Journalists, Confidential Sources and Contempt of Court' (2003) 8(4) *Media & Arts Law Review* 259, 260.

35 *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, [174] (Pritchard J) ('*Hancock*'); Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2011 (Cth) [1] ('Commonwealth Explanatory Memorandum'); Joseph M Fernandez and Mark Pearson, 'Shield Laws in Australia: Legal and Ethical Implications for Journalists and their Confidential Sources' (2015) 21(1) *Pacific Journalism Review* 61, 67–8.

36 Fernandez (n 28) 119.

37 Matthew Tracey, 'Journalist Shield Laws' (2010) 29(2) *Communications Law Bulletin* 12, 12. See *McManus* (n 28).

38 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005) 510–11 [15.36] ('ALRC Evidence Report').

39 Tracey (n 37) 13.

40 Fernandez (n 28) 119.

access sources.[41] However, shield laws across Australian jurisdictions are inconsistent, meaning that journalists may be able to claim the shield law's protection in some jurisdictions but not in others, undermining the strength of these protections.[42] Ensuring clarity and certainty in the application of shield laws across Australia and facilitating the harmonisation of shield laws can be achieved in two ways. First, the strengths of Queensland's shield should be adopted by other jurisdictions. Secondly and alongside this, Queensland should adopt the favourable provisions found in other jurisdictions' shield laws that are missing from its own. Further, because shield laws are not uniform, all jurisdictions should also adopt those favourable provisions where they are missing from their respective shield laws in order to ensure that journalists receive uniform protections across Australia. This shall be considered now.

III A Patchwork of Protections — The Need For Harmonisation

A *Who is Protected and in What Circumstances?*

1 *Threshold Considerations*

The new sub-ss 14Q(a)–(b) of the *Evidence Act 1977* (Qld) provide that the shield law's provisions apply if an informant gives information to a 'journalist', in the normal course of the journalist's activities as a journalist, in the expectation that the information may be published in a news medium. Relevantly, it also requires that *the journalist promises not to disclose the informant's identity as the source of the information*. Therefore, for the privilege to apply, there must be 'a sufficient nexus between the promise to protect the person's identity and the provision of information for the purposes of journalistic work'.[43] This is similar to the requirement for a sufficient connection between certain communications and giving or obtaining legal advice for legal professional privilege to attach to such communications.[44] This is a threshold requirement for the privilege to apply, as

---

41 See, eg, *Evidence Act 1995* (Cth) ss 126K, 131A. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry Into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Final Report, August 2020) 130 [3.306] ('PJCIS Report'); Pearson and Fernandez (n 35) 64; Patrick George, 'Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act' (2017) 36(2) *Communications Law Bulletin* 24, 30.

42 Fernandez (n 27) 118, 130; Mike Dobbie, 'The Way Forward' in Mike Dobbie (ed), *The Public's Right to Know: The MEAA Report into the State of Press Freedom in Australia in 2019* (MEAA, 2019) 106, 107.

43 Department of Justice and Attorney-General (Queensland), *Results of Consultation: Shield Laws Discussion Paper* (Report, 29 November 2021) 16 ('Consultation').

44 Ibid 16. See *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49, 54 [2], 64 [35] (Gleeson CJ, Gaudron and Gummow JJ).

the privilege is necessarily premised on an assurance of confidentiality being made. A key purpose of shield laws is to allow journalists to access information that is otherwise unavailable in the absence of a confidentiality guarantee, so it is sensible that the guarantee 'be reasonably proximate to when the informant gives the journalist with information'.[45]

However, s 14Q presents a double-edged sword in that a journalist must positively *promise* not to disclose the informant's identity. Similar wording can be found in the equivalent provisions of most other Australian shield laws, which generally refer to a journalist 'promising an informant' not to disclose the informant's identity.[46] This requirement of a 'promise' has been interpreted restrictively in relation to the Commonwealth legislation, requiring there to be an 'express promise' made in respect of specific information that is given *prior* to disclosure, as opposed to a promise that may be inferred or implied by reference to the character of the information being disclosed.[47] The drafting of s 14Q, like the drafting of shield laws which adopt similar wording, therefore overlooks the potential for confidentiality to be implied from the circumstances or negotiated after disclosure.[48]

The South Australian shield law is drafted with greater nuance. The shield under that regime may apply even in the absence of an express promise, provided that 'the informant reasonably expected' that their identity would be kept confidential, whether because of an express undertaking or otherwise.[49] The public interest in protecting sources when assurances of confidentiality are made remains applicable regardless of whether confidentiality is express, or based on an unspoken understanding, or negotiated after information is imparted on a journalist.[50] As such, s 14Q limiting the shield's applicability to situations where an express promise is given fails to recognise the potential for more equitable outcomes by allowing more sources to be protected, which would be possible if the provision aligned with South Australia's drafting.[51] Jurisdictions requiring an express promise, which are all the jurisdictions except South Australia, should therefore adopt South Australia's position and amend their Evidence Acts to allow for the shield to apply where there is a 'reasonable expectation' of confidentiality.

---

45 Explanatory Notes (n 16) 4.

46 See *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(2); *Evidence Act 2008* (Vic) s 126K(1). Cf *Evidence Act 2001* (Tas) s 126B.

47 *Kumova v Davison* [2021] FCA 753, [49] (Flick J) ('*Kumova*'). Cf *Cowper v Fairfax Media Publications Pty Ltd* [2016] NSWSC 1614, [48] (Rothman J), where, by contrast to the judgment in *Kumova*, Justice Rothman commented in relation to s 126K of the *Evidence Act 1995* (NSW) that 'the understanding as to the non-disclosure of the identity of the person providing the information may be as *much custom or practice or derived from the terms of the conversation* than an express prior promise to an informant' (emphasis added).

48 HRLC Submission (n 5) 9.

49 *Evidence Act 1929* (SA) s 72B(1)(d).

50 South Australia, *Parliamentary Debates*, Legislative Council, 31 July 2018, 1059–60 (John Darley).

51 Ibid.

Harmonising shield laws nationwide in this way would better accommodate and recognise the realities of journalist-source interactions and relationships.

2 *Who is a 'Journalist'?*

Partly due to the absence of a uniform definition of 'journalist' between Australian Evidence Acts, the scope of the protection conferred by existing shield laws varies between different Australian jurisdictions, with the most common (near-uniform) definition appearing in the Evidence Acts of New South Wales, Western Australia, Victoria, and South Australia.[52] This definition effectively provides that a journalist is a person engaged in the *profession or occupation* of journalism in connection with the publication of information in a news medium.[53] Narrow conceptions such as these may not properly accommodate all journalists operating in the 'modern media environment', leaving their sources unprotected by shield laws.[54] For example, the definition of 'journalist' in the *Evidence Act 2008* (Vic) is expressly limited to persons engaged in the profession or occupation of journalism,[55] and accordingly was intended to exclude 'amateur bloggers' and social networking site users.[56] These matters are especially pertinent given the notoriously vexed question amongst academics and the judiciary of whether 'alternate' forms of content creation, such as YouTube and blogging,[57] can be considered 'journalism'.[58] Scarce judicial consideration has been devoted to these statutory definitions.[59]

A distinctive feature of the definition of 'journalist' in Queensland's s 14R is that it is function-based and focussed on whether the person's activities are journalistic in nature, rather than on their employment status or organisational

---

52 Anna Kretowicz, 'Reforming Australian Shield Laws' (Reform Briefing 2, 2021) 5.

53 *Evidence Act 1995* (NSW) s 126J; *Evidence Act 1929* (SA) s 72; *Evidence Act 2008* (Vic) s 126J; *Evidence Act 1906* (WA) s 20G.

54 Kretowicz (n 52) 5.

55 *Evidence Act 2008* (Vic) s 126J(1).

56 Explanatory Memorandum, Evidence Amendment (Journalist Privilege) Bill 2012 (Vic), 3–4.

57 Some Evidence Acts give broad definitions that include both traditional and non-traditional forms of journalism: see, eg, *Evidence Act 1995* (Cth) s 126J; *Evidence Act 2011* (ACT) s 126J. See also the parliamentary debate on the introduction of journalists' privilege in the *Evidence Act 1995* (Cth), where it was considered necessary for the definition of journalist to be broad enough to encompass content creators on Facebook, Twitter, YouTube and blogs due to the 'seismic shift' of technology driving changes in how news is consumed and delivered: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2011, 2393–4 (Andrew Wilkie).

58 See, eg, Jane Johnston and Anne Wallace, 'Who is a Journalist: Changing Legal Definitions in a De-Territorialised Media Space' (2017) 5(7) *Digital Journalism* 850, 855; Anne M Macrander, 'Bloggers as Newsmen: Expanding the Testimonial Privilege' (2008) 88(4) *Boston University Law Review* 1075; Randall D Eliason, 'Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege' (2006) 24(2) *Cardozo Arts and Entertainment Law Journal* 385; Linda L Berger, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371. See also *Obsidian Finance Group, LLC v Cox*, 740 F 3d 1284 (9th Cir, 2014).

59 Rebecca Ananian-Welsh, 'Who is a Journalist? A Critical Analysis of Australian Statutory Definitions' (2022) 50(4) *Federal Law Review* 449.

links, which is what the definitions in New South Wales, Western Australia, Victoria, and South Australia direct attention to.[60] Section 14R(1) provides that a journalist is a person 'engaged and active in (a) gathering and assessing information about matters of public interest; and (b) preparing the information, or providing comment or opinion or analysis of the information, for publication in a news medium.' Section 14R(1) is supplemented by s 14R(2), which is similar to Victoria's s 126J(2)[61] and provides additional factors which *may* be considered by a court in assessing whether someone is a journalist, such as whether the person or publisher complies with recognised professional codes in carrying out their activities. It is beneficial that the factors which may be considered in s 14R(2) are relatively confined, as an expansive list of factors, such as that found in Victoria's s 126J(2), may unnecessarily limit the flexibility given to s 14R(1) by its broad drafting.[62]

The concept of a 'news medium' has bearing on the definition of 'journalist' because 'journalist' is defined partly by reference to whether the person prepares information about matters of public interest, or provides comment, opinion, or analysis of such information for publication in a 'news medium'.[63] 'News medium' is defined as 'a medium for the dissemination of news and observations on news to the public'.[64] This definition focusses protection on 'journalistic news-related activities rather than on the sharing of any information', although this will almost always fall within 'journalistic activities'.[65] Queensland's definition is virtually identical to the Commonwealth definition in s 126(J) of the *Evidence Act 1995* (Cth), which in turn was based on the New Zealand definition in s 68(5) of the *Evidence Act 2006* (NZ).[66]

It must be acknowledged that the same words in different statutes do not necessarily have the same meaning or intended operation.[67] However, similar statutes in different jurisdictions with similar or identical wording can aid the interpretation of an Act.[68] This is especially apposite where the statutes in

---

60 Explanatory Notes (n 16) 5; Committee Report (n 15) 8.

61 Although note that the Victorian provision lists more factors than the Queensland Bill and states that regard 'must' be had to the listed factors, whereas Queensland's s 14R(2) provides a court discretion to consider the listed matters.

62 HRLC Submission (n 5) 7. Cf *Kumova* (n 47) [32] (Flick J).

63 EAQ (n 13) s 14R(1)(b).

64 Ibid s 14T.

65 Explanatory Notes (n 16) 4; Committee Report (n 15) 10.

66 'Journalist' is defined as 'a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium': *Evidence Act 2006* (NZ) s 68(5). See also Commonwealth Explanatory Memorandum (n 35) [6].

67 *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Industry, Innovation, Science, Research and Tertiary Education* (2012) 206 FCR 92, 111 [71] (Kenny, Edmonds and Robertson JJ).

68 For example, the expression 'mining operation' in the *Income Tax Assessment Act 1936* (Cth) was considered to require being interpreted by having regard to similar expressions used in state

question are sufficiently analogous,[69] as they are here, and the wording of the 'news medium' provisions across these three jurisdictions are identical. As a result, Queensland courts may choose to adopt or be guided by either the Commonwealth's or New Zealand's approaches to its own definition of 'news medium'. Were 'news medium' interpreted in the same manner as its Commonwealth equivalent,[70] the medium would be required to meet minimum thresholds of character of material, regularity of publication, and normative use by 'journalists'.[71] This construction would not capture persons publishing in a forum containing vast amounts of 'non-news' such that the forum cannot rightly be described as a 'news medium'.[72] In contrast to the Commonwealth's definition, 'news medium' has been interpreted by the High Court of New Zealand as *not* imposing quality requirements, with the determinative consideration being whether the medium disseminates new or recent information of public interest.[73] The identical wording of Queensland's shield law and the equivalent Commonwealth and New Zealand provisions makes it difficult to predict how Queensland's courts will ultimately interpret 'news medium' if they choose to be guided by the identical definitions in other jurisdictions.

Because the High Court of New Zealand found that the determinative element of whether an entity is a 'news medium' is that they regularly provide new or recent information of public interest, a person's employment status as a journalist was held to be largely irrelevant.[74] As opposed to solely focussing on employment or organisational links in concluding that someone is a journalist, like the New South Wales legislation does,[75] the New Zealand approach considers the importance of the regular receipt and dissemination of information through a news medium via the application of journalistic skill.[76] Similarly, by focussing on the function of journalism, rather than its traditional forms,[77] the Queensland

---

mining legislation: *Federal Commission of Taxation v ICI Australia Ltd* (1972) 127 CLR 529, 541 (Walsh J), 581 (Gibbs J). See also the discussion of the *in pari materia* principle in Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 119–21 [3.42]–[3.44], although the question of when statutes should be treated in accordance with that principle is beyond the scope of this article.

69 *Russell v Scott* [2017] NSWSC 1720, [71] (Adams J). Cf *Alfonso v Northern Territory* (1999) 131 NTR 8.

70 *Evidence Act 1995* (Cth) s 126J(1).

71 *Kumova* (n 47) [33], [44] (Flick J); Committee Report (n 15) 8.

72 Ibid.

73 *Slater v Blomfield* [2014] 3 NZLR 835, 863 [140] (Asher J) ('*Slater*').

74 Ibid 850 [65] (Asher J).

75 *Evidence Act 1995* (NSW) s 126J.

76 *Slater* (n 73) 850–51 [66], 851 [69], 852 [74], 853 [82] (Asher J).

77 See, eg, *Broadcasting Services Act 1992* (Cth) s 202(5) for an example of the conception of 'traditional' journalism in legislation. This provision provides that a 'broadcast journalist' is: 'a person engaged in the profession or practice of reporting, photographing, editing, recording or making: (a) television or radio programs; or (b) datacasting content; of a news, current affairs, information or documentary character'. In Queensland, 'journalist' has been legislatively defined in the context of whistleblower protections as a person 'engaged in the occupation or writing or editing material intended for publication in the print or electronic news media': *Public Interest Disclosure Act 2010* (Qld) s 20(4).

definition of 'journalist' appears to incorporate this approach such that the core focus is whether a person is finding and disseminating information in the public interest, irrespective of whether they have the infrastructure of a media organisation supporting them.[78]

In this regard, the Queensland definition accommodates new and innovative methods of communication unconfined to traditional forms of media, and the broad and multifactorial definition of 'journalist' ensures that diverse modes of communicating news, such as blogging, are captured.[79] This is a principled approach in light of the purpose of shield laws, being to protect the free flow of information by encouraging sources to volunteer information to individuals who will disseminate it, provided that those individuals meet certain conditions (discussed further below).[80] The Queensland definition therefore goes further than other jurisdictions by removing the recognition of a 'journalist' being contingent on some professional engagement. Instead, the definition emphasises the process of 'journalism' — that is, the handling, gathering, and presenting of information — in a way that would survive future changes to technology or work practices.[81]

As the nature of journalism has evolved, it has been increasingly recognised that freelancers, academics, 'citizen journalists', and others play a role in public interest journalism.[82] A broad definition of 'journalism' raises concerns that shield laws could become practically unworkable if they are not confined to news media.[83] Fears remain that broadening the definition of 'journalist' (as Queensland has) could unjustly shield 'sources' who provide information that is detrimental to a party who cannot seek redress without knowing the source's identity.[84] These concerns have some merit. With the advent of digital technologies, 'journalism' has become increasingly difficult to define as such technologies have made publishing material easier. This has allowed practically anyone calling themselves a 'journalist'[85] to publish material that has serious consequences on a website or social media page.[86] The potential harm that can be

---

78 Hannah Ryan, 'What's in a Name? Bloggers, Journalism and Shield Laws' (2014) 33(4) *Communications Law Bulletin* 10, 11–12 ('Bloggers').

79 Explanatory Notes (n 16) 4–5.

80 Ryan, 'Bloggers' (n 78) 11; *Slater* (n 73) 850 [65] (Asher J).

81 Peter Greste, 'Define Journalism; Not Journalists' (Reform Briefing 3, 2021) 2.

82 Public Interest Journalism Foundation, Submission No 13 to Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (2017) 9; Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017* (Report, March 2018) 16.

83 Discussion Paper (n 31) 4, 7.

84 Sara Phung, 'Function Not Form: Protecting Sources of Bloggers' (2012) 17(1) *Media and Arts Law Review* 121, 129.

85 As one author put it, this includes 'basement-dwelling opinioneers': John D Castiglione, 'A Structuralist Critique of the Journalist's Privilege' (2007) 23(2) *Journal of Law & Politics* 115, 131.

86 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (Final Report, September 2014) 62 [3.101].

caused by internet publications is compounded by the internet's ability to instantaneously disseminate information widely and rapidly. Because of this ability, a party that is significantly harmed by such publications may be left without sufficient redress if a person who meets the statutory definition, but is not a journalist in substance, is not required to disclose a source.[87]

The argument can be made that because shield laws are premised on journalists' professional and ethical obligations, it follows that a 'journalist' should have professional obligations and should be honouring the essential watchdog function that a free press plays to claim the benefit of these protections.[88] This is because requiring an individual and their employer to have such obligations, and requiring them to adhere to the accountability practices that come with those obligations, demonstrates that they are committed to truth and serving the public interest.[89] Applying this reasoning, it becomes dangerous and undermines that special watchdog function when self-described journalists are given special rights and privileges, as opposed to the applicability of shield laws being limited to a category of people devoted to monitoring and reporting on matters of public interest while adhering to common professional and ethical standards.[90] Requiring a commitment to a recognised professional code of conduct in any definition of 'journalist' would offer a powerful incentive for journalists to adhere to those codes, consequently providing the public with confidence that such codes are meaningful.[91] Making the question of whether someone is a journalist contingent on their membership of a recognised news provider would also provide internal mechanisms within those news organisations (who often employ staff to verify facts) to confirm the legitimacy of their sources before publication.[92] These mechanisms may be absent amongst non-professional journalists — that is, individuals who collect and present information having the character of news, irrespective of whether they work for

87 Phung (n 84) 129–30.

88 Sonja R West, 'Press Exceptionalism' (2014) 127(8) *Harvard Law Review* 2434. See also Greste (n 81) 4.

89 Amy Bauer, 'Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers' (2009) 10(2) *Minnesota Journal of Law, Science & Technology* 747, 770. See also *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563, [149] (MacReady M).

90 West (n 88) 2457; Discussion Paper (n 31) 4, 7.

91 Consultation (n 43) 9.

92 Bauer (n 89) 769. One illustrative example of bloggers publishing irresponsibly and failing to verify their facts is *Cohen v Google LLC*, 887 NYS 2d 424 (NY Sup Ct, 2009), where a blogger maintained a blog entitled '*Skanks in NYC*' and published sexually suggestive pictures of the plaintiff with captions describing her as a 'skank' and 'whore' and suggesting she was promiscuous.

a media organisation or adhere to a recognised code[93] — like bloggers.[94] Verifying the legitimacy of sources is especially important when publishing about 'grey matter' areas, such as the private affairs of a public figure.[95] Further, failing to require individuals to adhere to the codes of professional journalism bodies, such as the MEAA, in order to be categorised as a 'journalist' under shield laws increases the likelihood of persons reporting on public interest matters who fail to honour promises of confidentiality incurring no personal consequences, while eroding the trust between actual journalists and their sources.

Despite the practical and policy arguments as to why 'journalist' should be defined, at least to some degree, by reference to professional associations or recognised ethical codes of conduct, Queensland's process-based definition presents a viable middle-ground. By providing that a court 'may' consider whether the person in question complies with a recognised professional standard or code of practice in deciding whether they are a 'journalist',[96] rather than obliging the court to do so (as in the *Evidence Act 2008* (Vic)),[97] the Queensland definition maintains flexibility. A journalist's ethical obligations or professional affiliation can therefore 'inform a decisionmaker's application of the definition, without courting the significant problems that can arise if such characteristics become requirements of journalistic status.'[98] However, as Ananian-Welsh acknowledges, such considerations may problematically evolve into factors that are effectively obligatory, depending on how Queensland courts interpret them.[99] In any event, s 14R(2) implicitly acknowledges that adherence to an industry code is not a decisive factor in determining whether someone is a 'journalist' given that it is a factor which 'may' be considered in determining that question. Accordingly, a 'non-professional' journalist who, for example, does not adhere to such codes, can nevertheless be a 'journalist' for the purposes of s 14R(1) provided that the primary statutory criteria in s 14R(1) are otherwise met.[100]

---

93 See the definition of 'journalist' as being 'a person who is *engaged and active in the publication of news* and who may be given information by an informant in the expectation that the information may be published in a news medium' (emphasis added) in *Evidence Act 1995* (Cth) s 126J and *Evidence Act 2011* (ACT) s 126J as examples of statutory definitions which accept that non-professional journalists can still fall within the definition of 'journalist'. See also the discussion in Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2011, 2393–4 (Andrew Wilkie).

94 Bauer (n 89) 769.

95 Although arising in a different legal context, for an example of 'kiss and tell' reporting on the activities of a public figure, see: *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

96 EAQ (n 13) s 14R(2)(b).

97 *Evidence Act 2008* (Vic) s 126J(2)(d).

98 Ananian-Welsh (n 59) 478.

99 Ibid 475.

100 See also *von Burlow v von Burlow*, 811 F 2d 136, 142 (2nd Cir, 1987) where it was held that: 'an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press.'

While 'the difficulty of defining journalism is undeniable', adopting functionalist considerations, as Queensland's definition of 'journalist' has, rather than rigidly adhering to traditional conceptions of journalism, is likely the more meritorious approach.[101] Eschewing references to occupation or ethical obligations and focussing on a person's journalistic activities provides the flexibility that modern shield laws require in light of the way that new media and technology has re-defined and re-territorialised traditional media functions, and how the 'democratisation' of the industry has allowed a range of individuals to be publishers.[102] This necessitates that shield laws reflect these trends in order for them to remain relevant and adequately protect sources, as is examined below.

The qualified nature of the privilege also favours a broader definition of 'journalist', as potential overreach may be addressed through the application of a public interest balancing test when determining whether disclosure is justified (discussed below in Section III.B). This makes it unlikely that courts will provide undue protection to bloggers or other 'non-professional' journalists given the already conservative approach adopted by courts when applying the balancing exercise to professional journalists.[103] The focus of the Queensland definition is not on individuals, but on journalistic output; it therefore properly ensures that the broad range of individuals engaging in public interest journalism and their sources receive deserving protections while accommodating changing technologies and communication methods.[104] It also allows for the shield to be appropriately withheld from individuals who publish news-related content as a by-product of some other non-journalistic activity or from individuals who publish recklessly.[105] Provided that non-traditional or non-professional journalists use anonymous sources justifiably, follow procedures to verify newsworthy information, and adhere to recognised journalistic-standards of professionalism such as those prescribed by industry codes, it remains sensible to legislatively treat platforms of that nature, like blogs, as functionally equivalent to traditional news media and protect them accordingly.[106]

---

101 Ryan, 'Bloggers' (n 78) 12; Ananian-Welsh (n 59) 474–475.

102 Mark Deuze and Tamara Witschge, 'Beyond Journalism: Theorizing the Transformation of Journalism' (2018) 19(2) *Journalism* 165, 177; Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (Report, February 2018) 29–30; Johnston and Wallace (n 58) 858; Consultation (n 43) 7.

103 Consultation (n 43) 7; Phung (n 84) 131.

104 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 15 November 2010, 1141 (Nick Xenophon).

105 *Kumova* (n 47) [31]–[33] (Flick J); University of Queensland, Submission to Department of Justice and Attorney-General, Parliament of Queensland, *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (July 2021) 3–4; Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017* (Report, March 2018) 16; Ryan, 'Bloggers' (n 78) 12; Greste (n 81) 9.

106 Richard Faron Jr 'Protecting the New Media: Application of the Journalist's Privilege to Bloggers' (2007) 120 *Harvard Law Review* 996, 1005; Phung (n 84) 131; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

The shield laws of New South Wales, Western Australia, South Australia, and Victoria only being applicable to journalists with institutional or employment affiliations has the consequence of arbitrarily leaving unprotected a significant proportion of journalists' sources where those sources provide information to individuals producing public interest journalism.[107] Limiting the scope of protection by reference to a person's employment status as a journalist unduly restricts the protection's applicability with respect to who may claim it. This gives rise to inconsistencies across Australia where some people may be able to claim the protection in some jurisdictions but others cannot. The definitional breadth of 'journalist' that is provided by the Queensland definition assists in achieving the purpose of the shield law by ensuring that its protection can be enjoyed by sources who disclose information to a diverse range of journalists, including non-professional journalists as described above.[108] The consistent adoption of this definition across Australian shield laws would not only provide strong protections in this way, but would address the divergence in judicial approaches and inconsistent degrees of protection that are likely to arise from nationwide definitional differences.[109]

3 *'Relevant Persons'*

The Commonwealth, Australian Capital Territory, New South Wales, and Victorian Evidence Acts all provide that a journalist's employer may rely on the shield to protect the identity of a journalist's source.[110] By contrast, Queensland's shield protections can be invoked by any 'relevant person', which is broader than just a journalist's employer. 'Relevant persons' are current or previous employers of the journalist, a person who has engaged the journalist under a contract, or a person who is or has been involved in the publication of a news medium and works or has worked with the journalist in relation to publishing the information in the news medium.[111] Like the definition of 'journalist', this definition goes further than other jurisdictions by recognising that additional parties, such as editors, producers, and camera operators, may be exposed to the identity of or information about a source in the course of investigating issues and preparing information for publication.[112]

It is sensible to extend the protection of shield laws across Australia to everyone involved in producing a piece of journalism, as Queensland has, for three

---

107 HRLC Submission (n 5) 6; Consultation (n 43) 6. See also Journalism Education and Research Association of Australia, Submission No 21 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Press Freedom* (2019) 5.

108 Ananian-Welsh (n 59) 463.

109 Ibid 463; *Kumova* (n 47) [16] (Flick J).

110 *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence Act 1929* (SA) s 72; *Evidence Act 2008* (Vic) s 126K(1).

111 EAQ (n 13) s 14T.

112 Explanatory Notes (n 16) 5; Discussion Paper (n 31) 5.

reasons. First, because the purpose of shield laws is to maintain the integrity of the relationship between the journalist and their sources; secondly, because there has been a shift away from traditional forms of news and this shift has changed the way journalists are employed; and thirdly, because journalism is generally a collaborative process.[113] Failing to do so would allow the shield to be easily circumvented by simply compelling an involved non-journalist to expose the source, defeating the shield's intended purpose. Stronger protections on this point through uniformity in line with Queensland's definition of 'relevant person' is therefore warranted across Australia.

B *Balancing the Public Interests For and Against Disclosure*

1 *The Statutory Framework*

Queensland's shield law does not guarantee an absolute privilege that would enshrine the right of journalists to never reveal a confidential source as their ethical obligations demand. Instead, the protection from compellability is limited and specific. Section 14V(1) provides a rebuttable presumption that a journalist cannot be compelled to give evidence or comply with a disclosure requirement in relation to a 'relevant proceeding' if doing so would disclose the identity of the informant or enable their identity to be ascertained.[114] Section 14V(2) also extends this rebuttable presumption to 'relevant persons' where they become aware of an informant's identity in the normal course of the relevant person's work with a journalist or as a result of a relevant proceeding. The presumption is rebuttable because despite the importance of protecting journalists' sources and the public interest in upholding freedom of the press, these considerations can and do clash with 'equally important public interest considerations'.[115]

As such, under ss 14W(1)–(2), if a journalist or relevant person is called to give evidence at a relevant proceeding and claims the privilege under s 14V, the court must decide whether their claim is established.[116] If a court decides that the claim under s 14W is established, a party to the relevant proceeding may apply for an order from the court directing the journalist to give the evidence despite s 14V.[117] Under s 14Y, an order to remove the shield may be made if the court is satisfied, having regard to the issues in the proceeding, that the public interest in

---

113 Discussion Paper (n 31) 5; Consultation (n 43) 10.

114 In this sense, s 14V may be better characterised as an exemption from compellability, which is technically conceptually distinct from an entitlement to privilege, but has the same effect in that it allows journalists to withhold certain information in judicial proceedings despite that information's relevance to the issues to be determined: JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020) 893 [25005].

115 Commonwealth Explanatory Memorandum (n 35) [19].

116 The journalist or relevant person has the onus of establishing the claim on the balance of probabilities: EAQ (n 13) s 14W(3).

117 Ibid s 14X(1). Here, the onus shifts to the applicant: s 14X(2).

disclosing the informant's identity outweighs any adverse effect of the disclosure on the informant or another person.[118] The court must also be satisfied that the public interest in disclosing the informant's identity outweighs the public interest in communicating facts and opinion by the media and accordingly, the media's ability to access sources.[119] This 'public interest test' is substantially identical to equivalent provisions in all Australian shield laws.[120] Queensland's new shield law therefore requires courts to take the public interest in maintaining source confidentiality as the starting point, and only order disclosure if disclosing the source outweighs the public interest in protecting them.[121]

Journalists or relevant persons in relevant proceedings can also object to complying with disclosure requirements in pre-trial proceedings, which includes summons, subpoenas, and discovery, among other things,[122] if complying with such requirements would disclose the identity of an informant or enable their identity to be ascertained under s 14Z.[123] The considerations in deciding whether to order disclosure in this context are the same as the considerations for an order disclosing a source's identity through the giving of evidence. That is, the public interest test in s 14Y(1) must be considered,[124] and the court may also consider the matters in s 14Y(2) (considered below).[125] An important distinction between ss 14Y and 14Z is that if the court decides the objection under s 14Z is not established, the journalist or relevant person *must* comply with the disclosure requirement.[126] However, the court has a discretion to make an order requiring disclosure of an informant's identity having regard to the matters in s 14Y if an application for a journalist to give evidence about a source's identity is made under s 14X.[127] If the shield is removed, the court has the power to impose conditions on the order.[128] The scope for conditions is potentially very wide, such as being able to limit access to the relevant evidence or prohibiting further disclosure of the source's identity, and this is advantageous as it allows the court to craft conditions that protect the journalist and their source from reprisals in the context of the circumstances.[129]

---

118 Ibid s 14Y(1); Explanatory Notes (n 16) 5; Discussion Paper (n 31) 1, 3.

119 EAQ (n 13) s 14Y(1); Explanatory Notes (n 16) 5; Discussion Paper (n 31) 1, 3.

120 *Evidence Act 1995* (Cth) s 126K(2); *Evidence Act 2011* (ACT) s 126K(2); *Evidence Act 1995* (NSW) s 126K(2); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(2); *Evidence Act 1929* (SA) s 72B(4); *Evidence Act 2008* (Vic) s 126K(2); *Evidence Act 1906* (WA) s 20J(2).

121 Hannah Ryan, 'The Half-Hearted Protection of Journalists' Sources: Judicial Interpretation of Australia's Shield Laws' (2014) 19(4) *Media and Arts Law Review* 325, 327 ('Half-Hearted Protection').

122 EAQ (n 13) s 14T.

123 Ibid ss 14Z(1), 14Z(2)(a).

124 Ibid s 14Z(2)(a)–(b).

125 Ibid s 14Z(3).

126 Ibid s 14Z(6).

127 Ibid s 14Y(1).

128 Ibid s 14Y(5).

129 Ibid s 14ZA(2)–(3); HRLC Submission (n 5) 15.

2 *Merits of a Qualified Privilege — is an Absolute Protection Needed?*

It is apt to acknowledge a tension between the qualified nature of the privilege provided under ss 14V–14Y and the codes of ethics and professional duties of journalists,[130] which generally prescribe an absolute requirement to respect confidences 'in *all* circumstances'.[131] Because of the absolute nature of this requirement, it has been argued that this obligation should be reflected in Queensland's shield law by enshrining an absolute privilege for journalists in it,[132] that is, an unqualified protection against journalists having to disclose information about sources.[133] Critics of the qualified privilege model have described the possibility of the shield being removed where the public interest in doing so outweighs countervailing considerations as a 'tokenistic' protection.[134]

But there are three counter-arguments that highlight the conceptual and practical difficulties of absolutely protecting journalists from disclosure in certain circumstances. First, such a far-reaching protection may come at the expense of other important interests, such as the detection and prevention of crime, national security, and the ability to respond to situations where lives are endangered.[135] Secondly, implementing an absolute privilege gives rise to the danger that this will encourage or facilitate poor journalistic practices, at least to a greater degree than under a qualified privilege, such as inventing or misquoting confidential sources.[136] By creating these opportunities for abuse, an absolute protection would also be counterproductive to an essential goal of shield laws, that is, to enable or assist journalists to act as public watchdogs and uncover the truth about public interest matters.[137] Thirdly, courts have considered that having available all relevant and admissible information before them to facilitate the administration of justice is a paramount principle.[138] This is tempered by the public policy argument that it is in the public interest for journalists to be able to 'assure sources that their information can be imparted without fear that courts

---

130 Mike Dobbie (ed), *Truth vs Disinformation: The Challenge for Public Interest Journalism* (MEAA Report, 2019), 52–3 ('*Truth vs Disinformation*'); ALRC Evidence Report (n 38) 508–9 [15.31].

131 See, eg, *MEAA Code* cl 3: 'MEAA Journalist Code of Ethics', *Media, Entertainment & Arts Alliance* (Web Page) <https://www.meaa.org/meaa-media/code-of-ethics/>.

132 Dobbie, *Truth vs Disinformation* (n 130) 53.

133 Joseph Fernandez and Pauline Sadler, 'A Shield Law for Journalists in Australia: The Never Ending Story?' in Pauline Sadler (ed), *Contemporary Issues in Law & Policy* (Applied Law & Policy, 2010), 123, 140.

134 Queensland, Parliamentary Debates, Legislative Assembly, 25 May 2022, 1386 (Stephen Andrew).

135 Damian Carney, 'Theoretical Underpinnings of the Protection of Journalists' Confidential Sources: Why an Absolute Privilege Cannot be Justified' (2009) 1(1) *Journal of Media Law* 97, 119; Louis A Day, *Ethics in Media Communication: Cases and Controversies* (Thomson Wadsworth, 5th ed, 2006) 187.

136 Carney (n 135) 120.

137 Ibid 126.

138 *McGuinness* (n 31) 87 (Rich J), 102–3 (Dixon J); *Cojuangco* (n 27) 354–5 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

will be able to discover their identity'.[139] By operating to always override the public interest in the administration of justice, an absolute privilege fails to achieve the proper balance between these competing public interests.[140]

Consequently, a qualified privilege that provides for a presumption of non-disclosure which can only be displaced where the public interest in disclosure outweighs the public interest in the protection of sources[141] (like in Queensland's shield law) is the only model that can effectively accomplish this balancing. The fact that Queensland's shield law is not absolute does not mean it is ineffective or 'tokenistic'. Queensland's shield law emphasises the primacy of source protection by providing a rebuttable presumption of non-disclosure in s 14V(1) and requiring the party seeking disclosure[142] to demonstrate a compelling justification under the statutory criteria for forcing disclosure.[143] In doing this, the shield provides a high, but not overriding, level of protection.[144] In this regard, Queensland's shield law (as well as the shield laws of other jurisdictions adopting similar models)[145] permits neither set of competing public interests – that is, the interests for and against disclosure – to automatically prevail, allowing the appropriate balance to be struck on a case-by-case basis.[146] As will be discussed below, the provisions of a shield law of this nature can still provide an appropriate protection for journalists, irrespective of the privilege being qualified and accordingly, this does not reduce the persuasiveness of the argument that there is merit to modelling a uniform shield law based on the drafting of Queensland's privilege.

3 *How Protective is s 14Y?*

The approach under s 14Y(1) largely follows the approaches taken in all other Australian jurisdictions, as this provision recognises that in rare circumstances, it may be necessary to reveal a source's identity in order to protect other fundamental interests.[147] Section 14Y also recognises the potential grave consequences of revealing a confidential source's identity for journalists, sources, and the democratic accountability provided by a robust free press, and accordingly provides a restrictive test which focuses attention on these harms to

---

139 Sharon Rodrick, Jennifer Ireland, Brendan Clift and Lesley Power, *Australian Media Law* (Thomson Reuters, 6th ed, 2021) 572–3.

140 Ibid 574.

141 Ibid 574–5.

142 EAQ (n 13) s 14X(2).

143 That is, having regard to whether the public interest in disclosure outweighs any likely adverse effect of the disclosure and the public interest in the communication of facts and opinion to the public by the media and the ability of the media to access sources under s 14Y(1), alongside the discretionary factors provided in s 14Y(2).

144 Carney (n 135) 121–2, 127.

145 These jurisdictions are the Australian Capital Territory, New South Wales, and Western Australia: Rodrick, Ireland, Clift and Power (n 139) 575–6.

146 Carney (n 135) 123.

147 HRLC Submission (n 5) 14.

mitigate them.[148] The presumption in s 14V can therefore be displaced if a party seeking disclosure satisfies the court that a countervailing public interest is paramount in the particular case,[149] and the matters articulated in s 14Y(2) allow varying relevant considerations to be addressed in assessing the competing public interests according to each particular case.[150] In this respect, the operation of s 14Y is comparable to s 10 of the *Contempt of Court Act 1981* (UK), which provides that:

> No court may require a person to disclose … the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

While Queensland's courts may draw on jurisprudence considering s 10 in interpreting s 14Y, especially jurisprudence prior to the introduction of the *Human Rights Act 1998* (UK),[151] it should be acknowledged that s 10 needs to be understood in light of its relationship with the *European Convention on Human Rights*.[152] The applicability of such jurisprudence may therefore be somewhat limited.[153] Nevertheless, the English judiciary have approached the balancing of public interests under s 10 similarly to how Australian courts have approached the balancing exercises in shield laws that are similar to s 10.[154]

Section 14Y requires a value judgement, which turns on assessing the weight of competing public interests and the likelihood of adverse effects materialising from disclosure.[155] The requirement for the court to undertake a balancing exercise between competing interests is further affirmed by the use of the word 'outweighs' in s 14Y(1), although the nature of this balancing exercise may be better described as an evaluative judgment of fact and degree rather than purely an exercise of discretion as conventionally understood.[156] Further, the text of s 14Y(1) indicates that the public interest in the disclosure of the source's identity must outweigh *two* factors as described above: any adverse effect of the disclosure on the informant or another person, and the public interest in communicating facts and opinion by the media and the media's ability to access sources. Despite s 14Y lacking guidance as to the relative weight to be attached to these two factors, the trend of authority in New Zealand and the United Kingdom is to attach

---

148 Ibid 14; Discussion Paper (n 31) 8.

149 *Carolan v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1010, [8], [15] (McCallum J). See also *X Ltd v Morgan-Grampian Publishers Ltd* [1991] 1 AC 1, 44 (Lord Bridge).

150 Discussion Paper (n 31) 8; Consultation (n 43) 16; Ryan, 'Half-Hearted Protection' (n 121) 349.

151 See, eg, *Madaferri v The Age Company Ltd* (2015) 50 VR 492, 506 [42] (John Dixon J) ('*Madaferri*').

152 *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).

153 See Ruth Costigan, 'Protection of Journalists' Sources' [2007] (Autumn) *Public Law* 464.

154 Ryan, 'Half-Hearted Protection' (n 121) 349.

155 *Madaferri* (n 151) 507 [47], 508 [50] (John Dixon J). See also *Camelot Group Plc v Centaur Communications Ltd* [1999] QB 124, 138 (Thorpe LJ) ('*Camelot*').

156 *Police v Campbell* [2010] 1 NZLR 483, 502 [89]–[90] (Randerson J) ('*Campbell*'). See also *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, 151 [17] (Elias CJ).

substantial weight to freedom of expression as well as encouraging the free flow of information and protecting journalists' sources.[157] It must be acknowledged that this conclusion is influenced by the respective human rights legislation in those jurisdictions which guarantee freedom of expression.[158] Nevertheless, this trend, and the requirement that Queensland courts interpret legislation in a way that is compatible with human rights (including the right to freedom of expression)[159] both indicate that it is likely that courts will not depart lightly from the presumptive high public importance attached to journalists' source protection.[160] Those two matters also indicate that any departure will only occur following a careful weighing of the prescribed statutory considerations in s 14Y.[161] Alternatively, even if the *Human Rights Act 2019* (Qld) is considered to not interact with Queensland's shield law, shield laws in other Australian jurisdictions have nevertheless been given beneficial interpretations,[162] and it is likely that Queensland's courts will follow this trend, consistently with statements of intent in the shield law's Explanatory Notes.[163]

That is not to say that compelling journalists to reveal their sources would only be permissible under s 14Y in truly exception circumstances[164] — this would impermissibly extend the operation of s 14Y in the absence of Parliament including a qualifying expression in s 14Y.[165] Courts will nevertheless inevitably order disclosure in some matters related to national security and the commission of crime,[166] which are relevant matters under the s 14Y(2).[167] But this is counterbalanced by the consideration of the importance of the information and the informant's identity to the proceeding, and the availability of other evidence.[168] In other words, journalists and their sources are provided an additional degree of protection through the consideration that the evidence of the informant's identity, while not needing to be essential or critical, must at least be important and not merely desirable.[169] It appears that under these provisions, similarly to the interpretation given to s 68 of the *Evidence Act 2006* (NZ), the more crucial the identity of the informant is, the greater the weight which will be attached to the public interest in disclosing their identity.[170] The importance of a

---

157 *Campbell* (n 156) 502 [92] (Randerson J).
158 *New Zealand Bill of Rights Act 1990* (NZ) s 14; *Human Rights Act 1998* (UK) s 12. See *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 361 (Scarman LJ) ('*Guardian*').
159 *Human Rights Act 2019* (Qld) ss 4(f), 21.
160 *Campbell* (n 156) 503 [93] (Randerson J). See *Hancock* (n 35) [151], [165] (Pritchard J).
161 Ibid.
162 *Hancock* (n 35) [174] (Pritchard J); *Madaferri* (n 151) 506 [42]–[43] (John Dixon J).
163 Explanatory Notes (n 16) 4–6.
164 Costigan (n 153) 486–7.
165 *Campbell* (n 156) 502 [91] (Randerson J).
166 *In re An Inquiry Under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660; *Guardian* (n 158).
167 EAQ (n 13) ss 14Y(2)(d), 14Y(2)(j)(i)–(ii).
168 Ibid s 14Y(2)(b).
169 *Campbell* (n 156) 503 [96]–[97] (Randerson J).
170 Ibid.

fair trial (in a criminal context) and the ability to present an effective case or whether non-disclosure will unfairly deny an effective remedy to a party (in a civil context) also remain relevant to this assessment of the public interest in disclosure.[171] All of these matters pertaining to the balancing exercise are largely the same throughout all Australian jurisdictions, so Queensland has essentially caught up with respect to s 14Y(1).

The drafting of Queensland's shield law diverges from other jurisdictions in s 14Y(2), which prescribes matters that a court *may* consider to further assist in deciding whether to remove the shield. The shield law provisions of Western Australia, Tasmania, Victoria, and the Northern Territory similarly prescribe factors to be considered when assessing whether to override the shield, although the language of these statutes positively *requires* these factors to be considered.[172] Allowing the court to consider the matters in s 14Y(2) as part of the broader weighing exercise under s 14Y(1)'s public interest test beneficially allows for a nuanced consideration of the privilege on a case-by-case basis.[173] Because the s 14Y(2) factors are permissive, and not prescriptive, this also allows for the court's decision-making to be assisted, without unnecessarily restricting or impacting the decision-maker's final discretion or the overarching balancing exercise.[174] These listed matters relate to other public interest considerations and include: whether the information provided is a matter of public interest; the importance of the provided information to the relevant proceeding and the availability of other information; and an accused's right to a fair hearing in a criminal proceeding. Other relevant considerations include the way in which the journalist used or kept the information, including whether they verified the information and used it in a way that is fair and accurate and minimised likely adverse effects on other persons. The informant's identity as the source of the information already being in the public domain is also a relevant factor.[175] This is a potentially critical factor if Queensland's shield law is interpreted similarly to s 126K of the *Evidence Act 1995* (Cth). That is, if a party seeking disclosure can establish that there is already information available which discloses an informant's identity or enables their identity to be ascertained, then the privilege will be displaced.[176] A statutory list of guiding considerations to assist the balancing exercise therefore beneficially allows for contextual concerns to be addressed and weighed without

---

171 EAQ (n 13) ss 14Y(2)(b), 14Y(2)(c), 14Y(2)(d); Ryan, 'Half-Hearted Protection' (n 121) 355; *Madaferri* (n 151) 510 [57] (John Dixon J).

172 *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(3); *Evidence Act 2001* (Tas) s 126B(4); *Evidence Act 2008* (Vic) s 126K(2); *Evidence Act 1906* (WA) s 20J(3).

173 Kretowicz (n 52) 6; Butler and Rodrick (n 3) 499–500.

174 Consultation (n 43) 16.

175 EAQ (n 13) s 14Y(2)(f).

176 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2, [81] (Besanko J); *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 27)* [2022] FCA 79, [24]–[25] (Besanko J).

introducing them as defining considerations, guiding a decision-maker's discretion without unnecessarily constraining it.[177]

The inquiry into the likely adverse effect of the disclosure on the informant or another person under s 14Y(1)(a) is expected to focus on the consequences to the informant or another person, like the journalist, such as the risk of physical harm or property damage. This is similar to how the New Zealand equivalent embraces consideration of these adverse effects.[178] In appraising the public interest in the communication of facts and opinion by the media, Queensland courts should consider that there exists a baseline level of public interest in these matters in every case by reference to those potential consequences. The existence of such a baseline is evident in, for example, the emphasis placed on source protection as demonstrated through the rebuttable position provided in s 14V(1) that a journalist cannot be compelled to give evidence that discloses the identity of their source or enables their identity to be ascertained.

This baseline is also necessary due to the prospect of a chilling effect on sources entrusting journalists with information, which would arise where the identity of sources can be easily disclosed.[179] This chilling effect can be described as the phenomenon that where journalists are compelled to betray confidences through legal proceedings, sources will be discouraged from trusting journalists with information they may have to offer, making accessing sensitive information difficult for journalists.[180] Because the concept of the 'public interest' is notoriously nebulous and subjective,[181] it may have been desirable to explicitly direct the court to consider the link between source confidentiality, public interest journalism, and democratic accountability. This could have been done by including in s 14Y(2) a specific consideration about the importance of public interest journalism in facilitating democratic accountability, and the need to avoid the 'chilling effect' that disclosing sources may produce.[182]

In Queensland, unlike other Australian jurisdictions, 'the extent to which making the order [for disclosure] is likely to deter other persons from giving information to journalists' is explicitly provided as a relevant discretionary factor in assessing whether to order disclosure in s 14Y(2)(k). This inclusion acknowledges that public interest journalism and the free flow of information are inextricably linked, and often contingent on, source confidentiality being maintained. It also implicitly addresses the need to avoid this chilling effect,

---

177 Ananian-Welsh (n 59) 576–577.

178 *Campbell* (n 156) 504 [100] (Randerson J).

179 Ryan, 'Half-Hearted Protection' (n 121) 352–3.

180 See Janice Brabyn, 'Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions' (2006) 69(6) *Modern Law Review* 895, 926; Commonwealth Explanatory Memorandum (n 35) [22]; *Camelot* (n 155) 138 (Schiemann LJ).

181 Greste (n 81) 9; HRLC Submission (n 5) 14.

182 Joseph M Fernandez, Submission No 1 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009* (May 2009) 11; HRLC Submission (n 5) 15.

which benefits public interest journalism and democracy more broadly. While it is challenging to empirically assess the extent of any chilling effect,[183] s 14Y(2)(k) nevertheless permits courts to consider this as part of the balancing exercise. Due to these difficulties however, at best, the nature and extent of any chilling effect is likely to be assessed as a matter of intuition taking into account the circumstances of each case, the frequency with which courts are willing to require disclosure, and the circumstances in which courts will do so.[184] A greater chilling effect is likely to be observed where there is a greater frequency to court-ordered disclosure coupled with publicity surrounding the making of such orders.[185] Recognising that there is a consistent baseline level of public interest in maintaining the *prima facie* position that it is contrary to the public interest that sources should be disclosed beneficially seeks to avoid the harms of the chilling effect. This is so even where the source has illegitimate or selfish motives in providing the information, as this baseline is constant in every case, but the source's motives will ultimately have bearing on the separate question of whether there is an overriding public interest in disclosing the source.[186] Adopting an explicit consideration allowing this chilling effect to be taken into account in a statutory list, as opposed to it being embedded in the public interest test as is the case in most shield laws, would strengthen shield laws across Australia and better recognise the public interest in avoiding this chilling effect.

Even if Australian jurisdictions adopt the position that the public interest in non-disclosure remains constant regardless of a source's motives, this is not a licence to publish irresponsibly as such considerations can be tempered by countervailing factors. These factors appear in Queensland's s 14Y(2), such as whether the information is a matter of public interest, whether the information was used fairly and accurately, and whether the journalist complied with a professional standard or code.[187] As such, despite being difficult to quantify, the Queensland Parliament has nevertheless recognised the public interest in preserving the ability of the media to access sources; and other jurisdictions can do the same by introducing a similar list of guiding factors. Queensland is set apart from other jurisdictions in this respect, because even though the prospect of a chilling effect is an inherent component of the public interest test generally, it has been explicitly provided as a separate factor (alongside other matters) in the assessment of an order for disclosure, which will likely work in favour of journalists as a factor militating against disclosure.[188] Provided that ss 14V and 14Y

183 *Branzburg v Hayes*, 408 US 665, 693–5 (1972).
184 *Campbell* (n 156) 493 [49] (Randerson J).
185 Ibid 493 [49].
186 *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515, 537 [101] (Laws LJ).
187 EAQ (n 13) ss 14Y(2)(b), 14Y(2)(h), 14Y(2)(i).
188 See, eg, while not explicitly included in the New Zealand legislation like the Queensland Bill, the New Zealand High Court has nevertheless interpreted 'the public interest in the communication of

are interpreted consistently with their purpose, that is, to better protect journalists and their confidential informants, and accordingly to facilitate the 'free, independent and effective media' that is 'crucial for a strong democracy',[189] it is likely that courts will generally only order disclosure where the public interest in doing so is very strong. Because gathering and disseminating news by the media is a robust public interest, the privilege under these shield laws as it is currently formulated in Queensland has the potential to significantly improve the protection of journalists and their sources,[190] and therefore how these provisions are framed should also be adopted nationwide.

C *Circumventing the Shield — Applicability to Warrants*

1 *The Source of the Problem*

Shield laws in most Australian jurisdictions do not extend to investigatory or non-curial processes.[191] As a consequence, most Australian law enforcement agencies are able to circumvent the object of shield laws by using search and seizure powers to investigate journalists' records and identify their confidential sources before legal proceedings have commenced.[192] This is in contrast to the Victorian position where shield law protections apply to search warrants, preventing a document that would identify a journalist's confidential source from being accessed under a regular warrant.[193] Practically, source confidentiality remains just as important in police investigations as it is in court proceedings.[194] In jurisdictions where shield laws do not apply to warrants, law enforcement can coercively obtain documentary evidence during the investigatory stage of criminal proceedings, obviating the need to seek disclosure in court proceedings and consequently eroding the utility of shield laws.[195]

Indeed, the vulnerability of source confidentiality was highlighted by the Australian Federal Police's raid on the home of journalist Annika Smethurst in June 2019, which arose out of Smethurst's reporting on a proposal to expand

---

facts and opinion by the news media and, accordingly also, in the ability of the news media to access sources of facts' under the *Evidence Act 2006* (NZ) s 68(2)(b) to inherently include considerations of whether an order for disclosure would contribute to this chilling effect: *Campbell* (n 156) 504 [101] (Randerson J).

189 Explanatory Notes (n 16) 1.

190 Ryan, 'Half-Hearted Protection' (n 121) 352; Leah Jessup, 'Journalists' Privilege — Improved Protection Made Law' (2011) 30(1) *Communications Law Bulletin* 5, 7. See also Michael Douglas, 'A Broad Reading of WA's Shield Laws' (2013) 18(4) *Media and Arts Law Review* 377.

191 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 15th ed, 2020) 20; Kretowicz (n 52) 2.

192 Rebecca Ananian-Welsh and Joseph Orange, 'The Confidentiality of Journalists' Sources in Police Investigations: Privacy, Privilege and the Freedom of Political Communication' (2020) 94(10) *Australian Law Journal* 777, 789.

193 *Evidence Act 2008* (Vic) s 131A(2)(g).

194 Kretowicz (n 52) 6.

195 McNamara and McIntosh (n 17) 89.

federal surveillance powers.[196] One aim of the raid had been to identify the anonymous source who had provided Smethurst with classified information concerning the proposal. The raid on Smethurst's home 'demonstrated the stunning fragility' of press freedom and source confidentiality in Australia, as the AFP had access to all material on Smethurst's phone — confidential or otherwise — with the relevant shield laws offering no protection due to their exclusive applicability to court proceedings.[197]

As shown by this raid, law enforcement agencies in jurisdictions where shield laws do not apply to warrants can use search powers to identify confidential sources before legal proceedings have commenced.[198] Promises of confidentiality by journalists are therefore rendered meaningless where search warrants entitle law enforcement to examine the entire contents of a newsroom or a journalist's home without prior warning.[199] The rise of metadata interception also necessitates that journalists must assume their conversations with their sources could be intercepted, further undermining the intent of shield laws.[200] These weaknesses in shield laws across Australia risk 'chilling' public interest journalism because if journalists operate knowing that they can become the subject of an invasive search warrant and potential sources understand that confidences cannot be assured because of this, neither party will be willing to engage in such journalism.[201]

2 *The Position in Queensland*

As canvassed above, the protections in Queensland's shield laws apply to pre-trial stages of civil and criminal proceedings.[202] Additionally, Queensland's laws go further than most other Australian jurisdictions by extending to search warrants[203] and aligning these protections more closely, but not entirely, with the shield law framework of Victoria.[204] For shield law protections in relation to warrants to apply, a journalist or relevant person must object during the warrant's execution to an 'authorised officer' dealing with a document or thing

196 Rebecca Ananian-Welsh, '*Smethurst v Commissioner of Police* and the Unlawful Seizure of Journalists' Private Information' (2020) 24 *Media & Arts Law Review* 60, 60–1. See *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

197 Ananian-Welsh and Orange (n 192) 789.

198 Ibid 789.

199 Nel (n 1) 111; *Hancock* (n 35) [104] (Pritchard J).

200 Media, Entertainment and Arts Alliance, Submission No 98 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Potential Reforms of National Security Legislation* (2012) 7. See also *F v Crime and Corruption Commission* (2021) 9 QR 451, 456 [4] (Mullins JA) ('*F Appeal*'). For an analysis of how national security powers and metadata retention and access regimes undermine journalists' ethical obligations, see: Adam Lukacs, 'Source Confidentiality Under Siege: How Law Enforcement Powers Threaten Journalists' Ethical Obligations' (2022) 41(2) *Communications Law Bulletin* 33.

201 Nel (n 1) 111; Kretowicz (n 52) 5.

202 EAQ (n 13) s 14Z.

203 Ibid s 14ZC.

204 *Evidence Act 2008* (Vic) s 131A(2)(g).

in a way authorised under warrant on the grounds that the document contains information that would disclose the identity of the informant or enable their identity to be ascertained.[205] If the authorised officer still wishes to deal with the document despite the objection, they may request the journalist or relevant person to agree to the document being stored in a secure way specified by the officer and held for safekeeping.[206] The journalist, relevant person, or authorised officer can apply to the Supreme Court within seven days of the request being made to decide whether the document may be dealt with in a way authorised by the warrant.[207] However, if the journalist does not agree to the document being stored and does not avail themselves of these procedures, the officer may deal with the document as authorised by the warrant.[208] If an application is made to the Supreme Court, the authorised officer must ensure that the document is provided to the Supreme Court Registrar for safekeeping until the application is decided.[209]

The Supreme Court must first decide whether the document would in fact disclose the identity of the informant or enable their identity to be ascertained, with the journalist or relevant person bearing the onus to prove this.[210] If this is established, the court may decide that the document may be dealt with in a way authorised by the warrant despite the objection. It may only order this if the court is satisfied that the public interest in disclosing the informant's identity outweighs any likely adverse effect of disclosure on the informant or another person, and the public interest in the communication of facts and opinion by the media and the media's ability to access sources.[211] The party seeking to deal with the sealed document under warrant, such as the police, has the onus of proving this on the balance of probabilities.[212] The court may also have regard to the matters in ss 14Y(2)(a) and (e)–(l), the nature of the investigation to which the warrant relates, the importance of the information and the informant's identity to the investigation to which the warrant relates, the availability of other evidence, and the purposes for which the information and informant's identity are intended to be used.[213] In this way, an application for dealing with such a document under warrant involves balancing competing public interest considerations as analysed above.

These provisions for warrant applications are somewhat similar to the procedures in the United Kingdom, which prohibit search warrants from being issued for material subject to a confidentiality undertaking, and instead a

---

205 EAQ (n 13) s 14ZC.
206 Ibid s 14ZD(1).
207 Ibid ss 14ZE(2), 14ZE(3).
208 Ibid s 14ZD(3).
209 Ibid s 14ZD(5).
210 Ibid s 14ZF(1).
211 Ibid s 14ZF(3).
212 Ibid s 14ZF(3A).
213 Ibid s 14ZF(4).

contested warrant application proceeding is provided for such material.[214] Under this arrangement in the United Kingdom, a judge retains an overarching discretion whether to *issue* a warrant (as opposed to an objection to the warrant's execution, like in Queensland). In deciding this, they may have regard to factors such as the value of the material, the viability of other methods of obtaining the information, and whether certain public interest criteria are met.[215] The higher procedural bar for accessing a document containing information subject to confidentiality undertakings under s 14ZF, coupled with the need to balance the public interest in media freedom and source protection with other matters when deciding warrant applications, is a great strength of Queensland's warrant procedures.[216] If the approach taken by the United Kingdom's courts to their similar legislation provides any indication, and similarly to the balancing exercise under s 14Y, there will likely be significant weight attached to the importance of protecting sources when deciding warrant applications under s 14ZF.[217] Equally, the consideration of matters favouring uncovering the source will probably need to be convincingly established and approached with caution.[218] Sections 14ZD–14ZF therefore effect meaningful change in this respect, reaching a middle ground between allowing law enforcement to easily circumvent the shield by using warrants, and imposing a blanket prohibition on accessing documents that may impact source confidentiality under warrants. For these reasons, not only should other Australian jurisdictions extend their shield laws to apply to warrants,[219] they should also lay down an application process for accessing material under warrants where objections to this are taken, subject to public interest considerations, as Queensland has done.

This is especially so in light of the argument that failing to extend shield laws to preliminary and non-curial proceedings creates a gap in the law, allowing parties to use pre-hearing processes such as warrants to access a source's identity when this would be protected if the same request were made in court proceedings.[220] However, the efficacy of warrants may arguably be undermined by allowing pre-emptive objections due to the risk of targets defeating investigative strategies by concealing or destroying evidence if they are given

---

214 *Police and Criminal Evidence Act 1984* (UK) s 11(2)–(3), Sch 1.

215 Ibid Sch 1 [2](b)–(c), [12]–[14]; University of Queensland, Submission No 20 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Press Freedom* (30 August 2019) 11.

216 McNamara and McIntosh (n 17) 90–1.

217 *R v Central Criminal Court, Ex parte Bright* [2001] 2 All ER 244, 259–60 [83]–[84] (Judge LJ).

218 *R (on the application of Malik) v Manchester Crown Court* [2008] 4 All ER 403, 426–7 [87] (Dyson LJ).

219 In the same way that some jurisdictions' shield laws not applying to subpoenas has been said to be 'curious' (at least in relation to Western Australia's shield laws), the same can also be said for shield laws not applying to warrants (except in Victoria): *Hancock* (n 35) [102] (Pritchard J).

220 Mia Herrman, 'Enhancing Press Freedom in Australia: Establishing a Media Freedom Act with Coordinated National Security Law Reform' (2020) 21(6) *University of New South Wales Law Journal Student Series*; PJCIS Report (n 41) 63 [3.62]; HRLC Submission (n 5) 13.

notice of an impending search.[221] However, the process provided by ss 14ZD–14ZF is apt to assuage such concerns, as is the fact that there is no evidence that the similar processes in the United Kingdom have compromised the interests of justice or national security.[222]

Other Australian jurisdictions should adopt this process and make accessing information about sources under warrants subject to a balancing exercise, because such a process ensures that sources are not left vulnerable to identification at early, often crucial, stages of an investigation.[223] This also allows the effect of warrants to take precedence over source confidentiality where there is an overriding public interest in doing so. This framework thereby offers a more robust and complete protection than that currently provided by other Australian jurisdictions. It strikes an appropriate balance between the interests of law enforcement and journalists while ensuring shield laws fulfil their operative purpose — to encourage the free flow of information, which risks being undermined if journalists and their sources are inadequately protected.[224]

D *'Relevant Proceedings': Applicability of Shield Laws to Corruption and Integrity Bodies*

The need for robust shield laws in Queensland, and nationwide, was given prominence in Queensland in the case of a journalist known only as 'F'. In 2018, F received a tip-off from a police officer about an impending raid on the home of a murder suspect, leading to the suspect's arrest being filmed by a camera operator and reporter dispatched by F.[225] Queensland's Crime and Corruption Commission ('CCC') investigated the disclosures made, and required F to answer questions at a CCC hearing to identify the source.[226] F refused to answer questions that would identify the source on the grounds that F had agreed to keep the source's identity confidential and because, *inter alia*, journalists' ethical obligations to maintain source confidentiality are encompassed within public interest immunity.[227] F applied to Queensland's Supreme Court on these grounds to prevent the source

---

221 Discussion Paper (n 31) 12.

222 Consultation (n 43) 24.

223 Kretowicz (n 52) 7.

224 *Ashby v Commonwealth (No 2)* (2012) 203 FCR 440, 446 [18] (Rares J).

225 Allyson Horn, 'Journalist Loses Court Appeal to Keep Confidential Source a Secret, Could be Jailed for Up to Five Years', *ABC News* (online, 15 November 2021) <https://www.abc.net.au/news/2021-11-15/qld-journalist-loses-court-appeal-keep-source-secret/100622164#:~:text=Queensland%20is%20the%20only%20jurisdiction,having%20to%20reveal%20their%20sources>. See also Mark Pearson and Joseph M Fernandez, 'Surveillance and National Security 'Hyper-Legislation': Calibrating Restraints on Rights with a Freedom of Expression Threshold' in Johan Lidberg and Denis Muller (eds), *In the Name of Security: Secrecy, Surveillance and Journalism* (Anthem Press, 2018) 51.

226 *F v Crime and Corruption Commission* [2020] QSC 245, [2], [6], [11]–[14] (Jackson J).

227 Ibid [2], [3], [14] (Jackson J).

from being exposed, but these arguments were rejected by the Court and also subsequently by the Court of Appeal.[228] This ruling is just one in a tapestry of cases highlighting the lack of legal protection for journalists' ethical obligations to maintain source confidentiality where no statute confers such a protection, as was the case at the time in Queensland.

As indicated above, the privilege applies only in relation to a 'relevant proceeding',[229] which means any proceeding before a court of record, including the Supreme Court, District Court, Queensland Industrial Relations Commission, and the Queensland Civil and Administrative Tribunal.[230] A major deficiency in the Queensland shield law is that its protections do not apply to CCC proceedings.[231] The CCC retains the power to require journalists to attend hearings and give evidence or produce a document,[232] subject to the journalist being able to refuse to answer questions because of a statutorily applicable privilege.[233] Journalists' privilege is not one of these applicable privileges, so journalists remain barred from staying silent in response to questions at CCC hearings.[234] As such, even if Queensland had its current shield law in place at the time, they would have been of no assistance to journalist F.

The legislative framework in relation to crime, corruption, and integrity commissions varies significantly between Australian jurisdictions. For example, shield laws do not apply to investigations undertaken by Victoria's Independent Broad-Based Anti-Corruption Commission,[235] nor does anti-corruption body legislation in New South Wales protect witnesses who refuse to answer questions or produce a document or thing on the ground of privilege.[236] Source confidentiality is equally pertinent in proceedings before non-judicial bodies such as corruption and integrity commissions. If the shield is appropriate in a criminal or civil court, in principle, it is equally appropriate in an integrity body given that journalists' confidentiality obligations remain consistent irrespective of the setting in which they are compelled to appear.[237] This is especially so if one considers the wider implications of removing the shield in proceedings before integrity bodies. Such implications include the prospective impact of a chilling effect on public interest journalism and press freedom more broadly, in an environment where these types of bodies are increasingly exercising their coercive powers to compel journalists to reveal their sources under threat of

---

228 Ibid [39] (Jackson J); *F Appeal* (n 200).
229 EAQ (n 13) s 14U.
230 Ibid s 14S(1); Explanatory Notes (n 16) 5.
231 EAQ (n 13) s 14S(2).
232 *Crime and Corruption Commission Act 2001* (Qld) s 82(1)(a)(i)–(ii).
233 Ibid s 192(2A).
234 Ibid ss 190(1)–(2), 192(1), 192(2)(a).
235 *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 99.
236 *Independent Commission Against Corruption Act 1988* (NSW) ss 24(3), 98(c).
237 Consultation (n 43) 14; Kretowicz (n 52) 7.

serious consequences.[238] Queensland's failure, and the failure of other Australian jurisdictions, to extend the applicability of the shield's protections to proceedings before corruption and integrity bodies not only undermines the purpose of shield laws (to support a free press and democracy) more broadly, but also significantly undercuts the benefit of the privilege for individuals.[239] As demonstrated by F's case, if the shield does not apply to such proceedings, journalists 'continue to risk being fined or jailed for simply doing their jobs' and adhering to their ethical obligations where they have undertaken to maintain confidentiality.[240]

A favourable option would be for all Australian jurisdictions to allow journalists or relevant persons to request an exemption from disclosing a source's identity in these proceedings and permit them to apply to their respective Supreme Court to determine the claim.[241] This would entail allowing the Supreme Court, and not the relevant integrity body, to determine whether the shield should apply on a case-by-case basis. This would allow the integrity body to advocate why the shield should be overridden on a case-by-case basis, as opposed to imposing a blanket rule that the privilege never applies in such proceedings.[242] In determining the claim, the Court should apply the balancing test referred to above in s 14Y(1), and consider other applicable matters as part of that assessment, such as those in s 14Y(2).[243] As discussed above, the application of the balancing exercise would ensure that an additional procedural protection is provided for journalists because the onus would be placed on the integrity body to demonstrate that a compelling public interest necessitates overriding the shield.[244]

The Australian Capital Territory's ('the ACT') Integrity Commission framework already adopts a similar procedure. Under that framework, a witness before the ACT Commission may claim journalistic privilege irrespective of the fact that the rules of evidence and privilege against self-incrimination do not apply.[245] If a claim for privilege is made, the ACT Supreme Court determines whether the privilege applies with respect to preliminary inquiries,[246] search warrants,[247] and examinations.[248] Every jurisdiction except New South Wales, Western Australia, and the Commonwealth (which, at the time of writing, will

---

238 See Nick McKenzie and Cameron Stewart, 'Australia's "Star Chambers"' in Jonathan Este (ed), *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia 2012* (Report, 2012) 35, 38–9.

239 Butler and Rodrick (n 3) 520; Consultation (n 43) 29.

240 Australia's Right to Know Coalition, Submission No 004 to Legal Affairs and Safety Committee, Parliament of Queensland, *Evidence and Other Legislation Amendment Bill 2021* (17 January 2022) 3; Queensland, Parliamentary Debates, Legislative Assembly, 25 May 2022, 1386 (Stephen Andrew).

241 Consultation (n 43) 29.

242 Queensland, Parliamentary Debates, Legislative Assembly, 25 May 2022, 1361 (Tim Nicholls).

243 Queensland Law Society, Submission No 005 to Legal Affairs and Safety Committee, Parliament of Queensland, *Evidence and Other Legislation Amendment Bill 2021* (17 January 2022) 7.

244 McKenzie and Stewart (n 238) 40; Consultation (n 43) 29.

245 *Integrity Commission Act 2018* (ACT) ss 174–5.

246 Ibid ss 95–7.

247 Ibid ss 127–9.

248 Ibid ss 161–3.

implement a new National Anti-Corruption Commission on 1 July 2023)[249] have similar mechanisms allowing their respective Supreme Courts to determine whether a privilege applies in integrity body proceedings in certain circumstances.[250] Given that a similar legislative framework is already in place in several states and territories, procedures of this nature could be extended to integrity body proceedings and used by Supreme Courts (or the Federal Court in the Commonwealth's case) to determine whether shield law privileges should be overridden.[251] The beneficial effect of extending the shield to integrity body proceedings has already been acknowledged by the Queensland Government to some extent, yet the Government resiled from so extending the shield in the 2022 legislation due to its application in CCC proceedings being 'very complex'.[252]

Applying this sentiment nationwide, any journalists' privilege extending to integrity body proceedings would need to be recognised within each Australian jurisdiction's Evidence Act and integrity body framework. Such a privilege would also need to be drafted in such a way to apply the privilege to matters outside integrity body hearings but otherwise connected with the integrity body's powers,[253] such as the power to compel the production of documents.[254] Nevertheless, the Queensland Attorney-General has indicated that Queensland's shield law will be extended to apply in CCC proceedings, with legislation to this effect expected to be introduced in June 2023.[255] While this is a positive outcome, it remains to be seen what the full scope of the proposed protections will be in CCC proceedings. In any event, a national uniform privilege applying to integrity body proceedings would help to ensure that journalists and their sources were consistently protected in all contexts.

---

249 Although see *National Anti-Corruption Commission Act 2022* (Cth) s 31(1)–(2). Instead of the Federal Court being empowered to determine whether privilege is to apply in the National Anti-Corruption Commission, this provision instead provides for a shield law protection where a source gives a journalist information on the express or implied understanding that the source's identity would not be disclosed. If this is satisfied, the journalist, their employer, and persons assisting the journalist (either in an employed or professional capacity) are not required to do anything under the Act which would disclose the identity of the informant or enable their identity to be ascertained. However, s 31(4) provides that this protection does not apply to law enforcement powers, such as executing search warrants, being exercised for the purposes of the Act but that a public interest test, found in s 124(2B), applies to the issuing of search warrants directed to journalists.

250 *Integrity Commission Act 2018* (ACT) ss 128–9, 162–3; *Independent Commissioner Against Corruption Act 2017* (NT) ss 89–90; *Crime and Corruption Commission Act 2001* (Qld) ss 195, 195B, 196; *Independent Commissioner Against Corruption Act 2012* (SA) Sch 3 cls 3–4; *Integrity Commission Act 2009* (Tas) ss 92(5)–(7); *Independent Broad-Based Anti-Corruption Act 2011* (Vic) ss 59M–59N, 100–101, 147–8.

251 Consultation (n 43) 29; HRLC Submission (n 5) 11.

252 Queensland, Parliamentary Debates, Legislative Assembly, 16 November 2021, 3479–80 (Shannon Fentiman, Attorney-General).

253 Queensland, Parliamentary Debates, Legislative Assembly, 26 May 2022, 1474 (Mark Ryan).

254 See, eg, *Crime and Corruption Commission Act 2001* (Qld) s 72.

255 Lydia Lynch, 'Queensland Moves to Lock in Whistleblower 'Shield Laws'', *The Australian* (online, 22 January 2023) <https://www.theaustralian.com.au/business/media/queensland-moves-to-lock-in-whistleblower-shield-laws/news-story/53cbfc9e02447249c54c4c893b0da1c6>.

IV Conclusion

Australia enjoys a robust tradition of strong public interest journalism that is capable of holding government and institutions of power accountable by publishing stories that expose corruption and wrongdoing, as well as other stories that may be embarrassing to government but are necessary to keep the public well-informed.[256] In the same vein, source confidentiality serves the democratic purpose of supporting a free and independent press in the fulfilment of the fourth estate role of the media, ensuring and facilitating representative and responsible government while providing the public with the information it needs to engage in informed debate.[257] Indeed, as was poignantly recognised by the Supreme Court of Canada, the ability of the media to convey information to the public 'is fragile unless the press is free to pursue leads, communicate with sources, and assess the information acquired.'[258]

Respecting source confidentiality and the ethical obligations which oblige journalists to maintain such confidentiality is therefore inextricably linked to, and an indispensable part of, the media's ability to gather facts and ideas needed to report news. Exempting journalists, related persons, and their materials from the operation of standard evidentiary laws through shield laws is thereby necessary to protect journalists from undue interference in newsgathering, and to safeguard the fourth estate's ability to meaningfully facilitate and participate in the democratic process unimpaired.[259] Queensland enacting shield laws is a positive step towards ensuring the better protection of journalists and their sources, and will enable Queensland courts to be cognisant of the realities of journalists' ethical obligations when applying rules of evidence. Queensland's new shield law has, however, equally highlighted the degree to which shield laws in other jurisdictions are deficient, underscoring the need for reforms that result in the harmonisation of shield laws Australia-wide. For the reasons set out in this article, the favourable provisions in Queensland's shield law that have been discussed provide a desirable and achievable benchmark.

But the concept of the 'ideal' shield law framework has remained a chimera, due to the nature of such laws inherently requiring competing interests to be balanced, and the lack of uniform agreement between jurisdictions as to how particular elements of the shield should be framed.[260] As has been discussed, the shield law frameworks across Australia have common foundational elements — they all establish a qualified privilege that applies to court proceedings and disclosure requirements, and they all provide that a court may override the

256 Ananian-Welsh and Orange (n 192) 781.
257 Ibid 784.
258 *R v Vice Media Canada Inc* [2018] SCR 374, 434 [127] (Abella J).
259 Ibid 434 [125] (Abella J); Ananian-Welsh and Orange (n 192) 788.
260 For example, the definitional discourse and degree of uncertainty surrounding the concept of a 'journalist'.

privilege where countervailing public interests prevail.[261] Notwithstanding this, in order for shield laws to confer robust protections in all jurisdictions, as is their intention, further nationwide commonalities should be adopted in line with the provisions outlined below in Queensland's shield law.

Specifically, other Australian jurisdictions should first adopt uniform, functionalist definitions of 'journalist' by focusing their definitions on the process of journalism as opposed to professional engagement, which would allow for a more liberal application of the privilege and capture practitioners of 'new media' like bloggers. Secondly, the applicability of shield laws throughout Australia should extend beyond just a journalist and their employer and recognise the realities of the journalism process by bringing additional parties that have been exposed to the source's identity through their involvement in the publication process under the shield's protections. This would uphold the shield's purpose by closing a potential loophole that could be exploited to easily reveal a source where non-journalists have learned the identity of a source in the process of publication. Thirdly, a discretionary list of guiding considerations should be included across all Australian shield laws as part of the balancing exercise required for deciding whether to order disclosure of a source's identity, and one discretionary consideration included in this list should be explicit consideration of any 'chilling effect' arising from ordering disclosure. Such discretionary guidance would also import some degree of objectivity into the nebulous and subjective 'public interest' concept. Finally, the ambit of shield law protections should be extended to non-curial processes and warrants throughout Australia and other jurisdictions should adopt amendments making accessing information about sources under warrant subject to a public interest balancing test. This would curtail the ability of law enforcement agencies to overreach in their desire to access confidential material via warrant, which is currently achievable for law enforcement in most jurisdictions.

Even though this article recommends the adoption of these aspects of Queensland's new shield law, that shield is not without its flaws, many of which are also seen in other jurisdictions' shield laws. The requirement that an 'express promise' of confidentiality is made for the shield law to apply should be uniformly rectified by amending shield laws across Australia to permit the shield to apply where such a promise may be reasonably expected or inferred from the circumstances. Every jurisdiction, including Queensland, should also adopt amendments allowing the shield to apply in integrity body proceedings. Those amendments should also allow applications to be made to Supreme Courts in each jurisdiction to determine whether the privilege applies in these bodies, offering a more complete protection for journalists in all contexts.

Queensland's shield law provides significantly beneficial protections, even if some aspects of those protections are imperfect. Crafting 'ideal' shield laws will

---

[261] Committee Report (n 15) 14.

always be challenging, but Queensland's new law walks the tightrope of addressing competing interests and it does so in a way that strikes a balance in protecting journalists' confidential sources which is comparatively better to other jurisdictions' shield laws. Because of this, the Queensland shield law provides important lessons and attainable benchmarks for shield laws that the rest of Australia should follow. But of course, in order for shield laws in Queensland and elsewhere to be harmonised in an adequately protective manner, they also need to adopt amendments allowing the shield to apply where promises of confidentiality can be inferred or expected, as well as amendments making the shield applicable in integrity body proceedings. In any event, even though significant reforms still need to occur in other jurisdictions to ensure that shield laws nationwide are harmonised and adequately protective, Queensland's reforms are likely to be an advantageous catalyst for enhancing media freedoms within Queensland. If sunlight is the best disinfectant,[262] then Queensland's law reforms have at least made things a little bit brighter in the Sunshine State.

[262] Louis Dembitz Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Company, 1914) 92.

THE ACADEMY AND THE COURTS: CITATION PRACTICES

RACHEL KLESCH,* GUZYAL HILL† AND DAVID PRICE‡

Chief Justice Susan Kiefel's vision, shared in a 2020 article, involves a mutually beneficial relationship where judges and the academy work together towards developing law in an ever-changing and complex landscape. The academy writes material that is useful for the courts and, in turn, this material is cited, which is beneficial to the academy. This vision of an interdependent, mutually enriching relationship between the courts and the academy has inspired this article to examine what academic publications judges cite. The literature review reveals that, whereas the High Court of Australia regularly cites academic material, state Supreme Courts rarely do. This article aims to fill a gap in the existing literature on Supreme Courts by examining citation practices in two Australian territories: the Northern Territory and the Australian Capital Territory. Using the law-as-data and citation-counting method, the article examines data published from 2010–20 by the Supreme Courts of the two territories. It compares this data to the existing research of the state Supreme Courts. It finds that the citation patterns of the Supreme Courts in the territories are consistent with those in the existing literature: in brief, the judiciary cites few academic publications. This trend is alarmingly problematic for the academy writing for the judiciary, and its flow-on effects can potentially diminish the symbiotic relationship envisioned by Chief Justice Kiefel.

I INTRODUCTION

In 2020, Chief Justice Susan Kiefel shared her vision of a mutually beneficial relationship where judges and the academy work together towards developing law in an ever-changing and complex landscape. She explains that judges' use of academic work 'confirms our shared concern with the correct and coherent development of the law'.[1] The relationship is symbiotic in that judges appreciate valuable and relevant academic commentary, and the academy rely on their research being published and cited to contribute to the knowledge and development of law. This relationship has been a long-standing practice between the courts and the academy. In 1956, Sir Owen Dixon noted that there is 'nothing

* Academic & Research Librarian, Charles Darwin University.
† Senior Lecturer, Charles Darwin University.
‡ Emeritus Professor, Charles Darwin University.

1 Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) *Melbourne University Law Review* 447, 448.

DOI: 10.38127/uqlj.v42i1.6741

strange in a reference from … learned journals'.[2] Academic writing directed to judges can be a valuable resource, and Chief Justice Kiefel notes that the relationship between the academy and the judiciary should be maintained and improved if possible.[3]

Inspired by Chief Justice Kiefel's paper and the comprehensive corpus of research conducted by Smyth and others on rates of judicial citation of the academy, this article reports the findings of a study on the nature of judicial citation practice of secondary sources by the Supreme Courts of the Northern Territory ('NT') and the Australian Capital Territory ('ACT') during the decade 2010–20. Smyth and others' research volume encompasses federal and state jurisdictions and longitudinal studies of collective jurisdictions and specific areas of jurisprudence. However, absent from Smyth's studies is an examination of judicial citation practices in the NT and ACT Supreme Courts. The study reported in this article seeks to address this lack of research and continue the discussion on the relationship between the academy and the courts.

Citation data gathered in this paper does not reflect a mutually beneficial relationship in practice whereby the academy write for a judicial audience and are cited in return. Academic work is rarely cited in Australian courts, except for the High Court. This paper aims to continue the discussion on the role of the academy and the courts by examining the literature on the topic and expanding knowledge on the citation practice of the ACT and NT Supreme Courts. It is vital to keep the relationship between the academy and the courts thriving. Without a healthy relationship, courts may lack access to quality and relevant academic writing, and members of the academy may be vulnerable if they cannot show the 'citation impact' of their writing. For example, decreased citations can lead to the further decline of the already low funding available for legal research, the perceived low social utility of research through traditional doctrinal methods and, in turn, the lack of academic content published for the benefit of the judiciary. The academy and the courts will need to work together to ensure their relationship stays strong.

II Factors in Citation of Academic Work by the Judiciary

The judiciary use academic writing when examining aspects of the law and preparing written judgments. Many challenges affect the judiciary in their citation practices. For example, judges may be hesitant to cite authors that are not deceased because of the so-called 'living author rule', 'licensed plagiarism', lack of citation of articles from counsel, and the nature of judgment writing.[4] Although there are mixed academic views on whether it is appropriate for the judiciary to

---

2 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 470.
3 Kiefel (n 1) 448.
4 Kiefel (n 1) outlines the major issues in judicial citation.

cite secondary sources, it is generally accepted as a positive practice.[5] However, many factors may limit how the judiciary relies on and cites academic work.

There are several different reasons why the judiciary cites academic material. Smyth summarises the main reasons:

> One reason is convenience. The author of a journal article or legal text may summarise the law, particularly the law in another jurisdiction, together with citation to the relevant case law, and it is convenient for the judge to adopt it as a correct statement of the law. A second reason for citing secondary sources is to examine academic opinion on the development of the law or for statements about what directions future developments in the law should take. A third reason is to refer to the views of well-respected academics in deciding what earlier cases decided. A fourth reason is to draw on the opinion of other judges, writing extra-judicially. Fifth, some secondary sources are cited because previous cases have stated that they correctly represent the law. A sixth reason for citing secondary sources, particularly non-legal sources, is to examine the scientific or social science underpinnings of legal rules or examine the basis of expert evidence.[6]

As Justice Michael Kirby has explained, articles may succinctly state the position of the law, and they can also provide the judiciary with the depth of research that they cannot cover in their writing.[7]

Chief Justice Kiefel notes several factors that may affect the judiciary's citation of academic work, including the 'living author rule'.[8] In the past, Australian courts have self-imposed a system of voluntary restraint on using academic writings in the form of the 'living author' rule, whereby authors who are not deceased are not cited as an authority.[9] The risk of using this rule is that the judiciary will not be able to rely on recent or relevant articles and the elimination of the chance for living authors to be cited. However, Smyth noted that in 20th century England, this rule was 'regarded as no more than a polite fiction',[10] although the practice may have continued to be used in Australia with some exceptions.[11] Lord Denning was also cautious of the 'living author rule'. For example, his Lordship noted that waiting for an author to die would eliminate

---

5 Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9(1) *Griffith Law Review* 25, 30 ('The Authority of Secondary Authority').

6 Russell Smyth, 'What do Trial Judges Cite? Evidence from the New South Wales District Court' (2018) 41(1) *University of New South Wales Law Journal* 211, 220–1 ('What Do Trial Judges Cite?').

7 Justice Michael Kirby, 'Welcome to Law Reviews' 26(1) (2002) *Melbourne University Law Review* 1, 6–8.

8 Kiefel (n 1) 451–2.

9 See a more detailed discussion of this rule of citing living authors in GVV Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28(4) *Canadian Bar Review* 422, 425–40.

10 Russell Smyth, 'Citing Outside the Law Reports: Citing of Secondary Authorities on the Australian State Supreme Courts Over the Twentieth Century' (2009) 18(3) *Griffith Law Review* 692, 699 ('Citing Outside the Law Reports').

11 Ibid.

work examining recent law development.[12] Smyth and Nielsen's study of the citation practices of the High Court found that the Court has been willing to cite authors, whether deceased or living.[13] If the 'living author rule' is no longer in use, it is, therefore, important to examine the citation trends of the courts to ensure that the living academy can assist the judiciary with published work.

Another factor in this paucity of academic citation by the courts, as explained by Chief Justice Kiefel, is a sensitivity to the accusation of 'licensed plagiarism',[14] where the work may be used to summarise an area of law but is used without acknowledgement.[15] Lord Burrows explained that 'some judges appear reluctant to cite academic work even if they have relied on it or found it useful'.[16] However, as Chief Justice Kiefel explained, this reluctance is no longer widespread in Australian courts and 'these days acknowledgment is given where it is due'.[17] Therefore, it could be concluded that 'licensed plagiarism' is not a major factor in the lack of judicial citation.

There are, however, limits to the value of academic writing for the courts. In particular, academic writing has no precedential value. Although academic material can summarise the law and provide academic perspectives, it is not a source of the law itself.[18] Similarly, judges are limited to the issues for determination. Material beyond a specific issue, such as reform or theoretical exploration, would not be needed or cited.[19] This would exclude articles that explore a range of topics that would not apply to matters currently before the court. Equally, legal practitioners prepare and deliver their arguments on specific legal issues, and academic material that does not advance their argument, or is additional to the primary sources of law, would be superfluous and not presented. When writing curially, the judiciary is mainly limited to the primary sources that are the sources of the law, and the use of academic material is limited to the topics specific to each case.

Additionally, judges must work within the constraints of the judicial system with the pressures of brevity and clarity of judgments to avoid the expended discourse. As stressed by Chief Justice John Doyle:

---

12 AT Denning, 'Review of PH Winfield, A Textbook of the Law of Torts' (1947) 63 *Law Quarterly Reports* 516, as cited in Smyth (n 5) 32.

13 See Russell Smyth and Ingrid Nielsen, 'The Citation Practices of the High Court of Australia, 1905–2015' (2019) 47(4) *Federal Law Review* 655, 660 ('The Citation Practices') citing *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 637–8, 650, 652 and *Mills v Mills* (1938) 60 CLR 150, 181–2 as examples of citing both living and dead authors.

14 Kiefel (n 1) 452.

15 Ibid.

16 Lord Burrows, 'Judges and Academics, and the Endless Road to Unattainable Perfection' (2022) 55(1) *Israel Law Review* 50, 58.

17 Kiefel (n 1) 451–2.

18 Russel Smyth, 'Who gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21(1) *University of Queensland Law Journal* 7 ('Who gets Cited?').

19 Chief Justice Murray Gleeson, 'Performing the Role of the Judge' (1998) 10(8) *Judicial Officers Bulletin* 57.

> I believe our judgments are getting longer and more complex … I think that we are tending to over-elaborate in our dealing with authority and learned writers. I think that we are probably too willing to deal with arguments that are not essential to the issue. In short, I think we are, perhaps, thinking too much of our judgments as an enduring legacy, and as a contribution to the development of the law, and not enough of the desirability of a judgment expeditiously delivered which meets the essentials … but does no more.[20]

Indeed, with these pressures, the judgments must include a discussion of points that are necessarily central to the issue of the case and avoid superfluous discussions of the historical points of the evolution of law. A summary of law from an academic source can be viewed as lacking research rigour from the bench, and with pressure to be succinct, a long academic discussion may be omitted from a judgment, therefore defeating the purpose of an academic citation.[21] Undeniably, courts are not immune to public service pressures of efficiency in administering justice, and this places a limit on time for research and lengthy written decisions where it is not essential.[22] This may also be true of counsel assisting who have a limited time to research and present succinct arguments and therefore lack the opportunity to present academic material to the court. The topic of the separate roles of the legal profession and the academy would require further exploration beyond this paper. As the literature demonstrates, many different pressures affect the citation of academic work. By examining the limitations to citing academic sources, we can gain a deeper understanding of the relationship between academics and the courts.

III Why are Judicial Citations Important to the Academy?

The legal academy is faced with competing challenges created by the imposition of citation metrics as a measure of research output and quality.[23] For this article, the academy includes members of Australian law schools with the acknowledgement that members of the judiciary, when writing extra-curially, are also important contributors to academic writing.[24] The lack of citation by

---

20 John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73(10) *Australian Law Journal* 737, 740.

21 Smyth, 'Citing Outside the Law Reports' (n 10) 700–1.

22 Wayne Martin, 'Court Administrators and the Judiciary: Partners in the Delivery of Justice' (2014) 6(2) *International Journal for Court Administration* 3; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Springer, 2017); John Lowndes, 'Delivering Justice in the Lower Courts on the Sniff of an Oily Rag' (Conference Paper, Criminal Lawyers Association Northern Territory, Bali Conference, June 2017).

23 See the discussion in K G Weatherall and Rebecca Giblin, 'Inoculating Law Schools Against Bad Metrics' (Research Paper No 940, University of Melbourne Legal Studies, 21 June 2021). In Australia, legal scholars are increasingly using quantitative metrics for grant and research income.

24 See the discussion of the role and attitude to judges publishing in Russell Smyth 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2(2) *Queensland University of Technology Law and Justice Journal* 198.

judges creates a dual problem for the academy: first, the contemporary funding of academic research has little regard for writing for judges; and second, with little evidence of citation, funding may be diverted away from this type of research.[25] For example, there is an increasing focus on demonstrating the benefits of research and its impact on reporting and promotion.[26] If the judiciary cites an academic article, the author could build a valid argument that one of the research impacts of their work was the benefit to society through assisting the judiciary.[27] Without the evidence of writing material that is used for and cited by the judiciary, it can be difficult to show and assess the benefits of such research.

Members of the academy must establish the impact of their work, which becomes a complex and even contentious topic for legal researchers when traditional citation and impact metrics are used. The law discipline in Australia's Excellence in Research Assessment ('ERA') exercise is assessed by peer review, and peer assessors utilise expert opinions in the field to inform their evaluation.[28] However, metrics used for STEM (science, technology, engineering, and mathematics) and national and global education policies and practices are also in play in the higher education sector.[29] This practice creates a 'Catch-22' situation, since journals included in the Australian Research Council's ERA listings that suffer from low citation rates (including law journals) often appear among the lower ranks on the listings.[30] Due to the paucity of citations, these journals often drop even lower in the rankings over time with the application of standard journal ranking tools.[31] As Sheehy and Dumay have observed, 'law is not a citation-based discipline … [in relation] to scholarly citations … [It] is better assessed by evaluation of specific uses, such as a court's use'.[32] Therefore, the legal academy is particularly vulnerable to traditional research metrics, a situation compounded by the lack of citations by the courts. Traditionally, the Australian Law Reform Commission has been a leader in the citation of doctrinal legal research. However, as funding for the Commission has declined over the years,[33] so the academy had to rely more on the judiciary to support the development of law.

---

25 For a discussion on the doctrinal method and funding, see Terry Hutchinson, 'Legal Research in the Fourth Industrial Revolution' (2017) 43(2) *Monash University Law Review* 567.

26 'Research Impact Principles and Framework', *Australian Research Council* (Web Page, 27 March 2019) <https://www.arc.gov.au/policies-strategies/strategy/research-impact-principles-framework> ('Research Impact Principles and Framework').

27 'Research Impact Pathway Table', *Australian Research Council* (Online Document) <https://www.arc.gov.au/file/611/download?token=6psGpzS_>.

28 Australian Research Council, *ERA 2018 Evaluation Handbook* (Commonwealth of Australia, 2018).

29 See, eg, 'Research Impact Principles and Framework' (n 26).

30 Smyth, 'Citing Outside the Law Reports' (n 10) 719.

31 Scimago Journal and Country Rank, *Scimago Institutions Ranking* (Web Page, 2022) <https://www.scimagojr.com/>.

32 Benedict Sheehy and John Dumay, 'Examining Legal Scholarship in Australia: A Case Study' (2021) 49(1) *International Journal of Legal Information* 32, 36.

33 Guzyal Hill and John Garrick, 'Architecture for Developing National Uniform Legislation: Reinvent, Create, or Strengthen?' (2022) 96(3) *Australian Law Journal* 256 ('Architecture for Developing National Uniform Legislation').

The lack of citation can also be understood as a failure of law as a discipline to adjust to the new reality of publishing and scholarly work. Sheehy and Dumay have argued that, currently, 'we live in an era where law's authority in the academy and the prowess of its methods of argumentation are on the wane'.[34] While the authors of this study do not share this view, it is, nevertheless, a perception that can be imposed on the academy. Moreover, the courts in the United States and Australia have expressed concerns about the insufficient volume of doctrinal research by modern legal scholars and the predominance of interdisciplinary scholarly work.[35] Legal scholars might publish their work as interdisciplinary to ensure it is cited, at least through other disciplines.

IV Law-as-data Methods

In 1897, eminent American jurist Oliver Wendell Holmes predicted that 'for the rational study of the law the blackletter man may be the man of the present, but a man of the future is the man of statistics and the master of economics'.[36] Yet, the academy in Australia has largely ignored the intersection of law and statistics even as technological changes have 'invigorated the formerly dormant field'.[37] The 'law-as-data' movement[38] offers an alternative to the doctrinal and case study methods. Viewing cases as data or text rather than rules allows important empirical data to be introduced and statistical methods to be used to analyse the data collected. Rather than examining the substance of the cases being studied, a 'law-as-data' approach allows for analysing the factors affecting court decisions.

Citation analysis allows conclusions to be drawn from a solid empirical foundation. It allows for further insight into what has sometimes been anecdotal evidence or merely some expert intuition. The strategic goal of this article is 'to extract meaningful content from an entire corpus of text in a systematic way'.[39] Theoretically, content analysis is 'a method for systematically describing the meaning of qualitative data' by 'assigning successive parts of the material to the categories of a coding frame'.[40] Like other methods, content analysis can follow a

---

34 Sheehy and Dumay (n 32) 48.

35 Smyth, 'Citing Outside the Law Reports' (n 10) 700.

36 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 467–8.

37 Daniel Martin Katz, 'Quantitative Legal Prediction —or —How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry' (2012) 62(4) *Emory Law Journal* 909, 936.

38 Dru Stevenson and Nicholas J Wagoner, 'Bargaining in the Shadow of Big Data' (2015) 67(4) *Florida Law Review* 1337, 1352.

39 Jonathan B Slapin and Sven-Oliver Proksch, 'Words as Data: Content Analysis in Legislative Studies' in Shane Martin, Thomas Saalfeld and Kaare W Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press, 2014) 126, 127.

40 Margrit Schreier, 'What is Qualitative Content Analysis?' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Analysis* (SAGE, 2013) 170.

quantitative or qualitative design or a combination of both.[41] This article relies on both designs to achieve its aim, emphasising quantitative analysis. However, it should be noted that content analysis is also used to examine the themes and patterns (both implicit and explicit) found across the data. The overall method goes beyond merely counting the number of certain occurrences within the data.[42] Therefore, this article adopts a mixed-methods approach. The first part of the article relies on literature to establish the conceptual underpinnings and review the previous research in the field. The second part examines the judgments of full courts of two territories to give full coverage to research that has been done so far.

V Citation Analysis in the Existing Literature

Prior studies have demonstrated the importance of examining the citation of secondary sources by courts and have done so using various methodologies.[43] Earlier research has been undertaken in the United States and Canada; however, citation analysis as a methodology has been used relatively recently to examine citations in Australian courts.[44] Studies have had various scopes, including a focus on specific areas of law or specific topics, and a subset of studies have examined law reviews or the citation of specific types of resources such as dictionaries.[45] As demonstrated in Table 1 below, a significant and detailed body of research has been developed by Smyth and other authors, who have focused on citation analysis of Australian courts, which has encompassed the citation practices of the High Court of Australia,[46] the Federal Court of Australia[47] and the State Supreme

41 John Brewer, 'Content Analysis' in Robert Lee Miller and John D Brewer (eds), *The A-Z of Social Research: A Dictionary of Key Social Science Research Concepts* (SAGE, 2003) 44.

42 Greg Guest, Kathleen M MacQueen and Emily E Namey, *Applied Thematic Analysis* (SAGE, 2011) 11.

43 For example, Smyth explained that citation analysis is of practical relevance to solicitors and barristers about which periodical and texts a court will consider. It informs law libraries about important material that should be made available. For the main purposes of this article, it informs the academy about which periodical or resource a court may use, Smyth, 'The Authority of Secondary Authority' (n 5) 25–7.

44 See, eg, the discussion on citation analysis in Smyth, 'Citing Outside the Law Reports' (n 10) 692–3.

45 Ibid. Smyth provides a summary of literature from 1969 to 2006 on the different purposes of academic literature in relation to citation analysis.

46 Smyth, 'Who gets Cited?' (n 18); Russell Smyth 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17(2) *University of Tasmania Law Review* 164 ('Academic Writing and the Courts').

47 Smyth, 'The Authority of Secondary Authority' (n 5).

courts.[48] Table 1 represents a summary in chronological order of leading research on citation practice in Australian courts.

The data show that the literature on citation counting in Australia has primarily focused on the state Supreme Courts (55 per cent of papers), followed by the High Court (35 per cent of papers) and the Federal Court (10 per cent of papers). Of this literature, a set focused on examining both primary and secondary source citations (52 per cent of papers), some examined purely secondary source citations (26 per cent of papers), others examined primary source citations (11 per cent of papers), and other citations explore which High Court judges have been cited (11 per cent of papers).[49] The literature has concluded that secondary citations have steadily increased over time in the High Court.[50] However, this increase in the use of secondary citations has not been reflected in the state Supreme Courts, for which secondary citations have remained low[51] or even decreased over time.[52]

---

48 Russell Smyth and Dietrich Fausten, 'Coordinate Citations between Australian State Supreme Courts over the 20th Century' (2008) 34(1) *Monash University Law Review* 53; Russell Smyth, 'A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia' (2008) 34(1) *University of Western Australia Law Review* 145 ('A Century of Citation'); Russell Smyth, 'What Do Judges Cite?—An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25(1) *Monash Law Review* 29 ('What Do Judges Cite'); Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence from a Hundred Years of Data' (2008) 29(1) *Adelaide Law Review* 113 ('Citation to Authority'); Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century' (2009) 28(1) *University of Queensland Law Journal* 39 ('Trends').

49 Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21(1) *University of Queensland Law Journal* 7.).

50 Smyth, Academic Writing and the Courts (n 46); Russell Smyth, 'Other than "Accepted Sources of Law"?: A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22(1) *University of New South Wales Law Journal* 19 ('Accepted Sources of Law'); Smith and Nielsen, 'The Citation Practices' (n 13).

51 Russell Smyth, 'What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21(1) *Adelaide Law Review* 51 ('What do Intermediate Appellate Courts Cite?'); Smyth, 'What Do Judges Cite?' (n 48); Smyth, 'A Century of Citation' (n 48).

52 Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005' (2007) 26(1) *University of Tasmania Law Review* 34; Smyth, 'Citation to Authority' (n 48); Smyth, 'Trends' (n 48). The only exception to this decreased use of secondary citations in state supreme courts was reported in Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practices on the Supreme Court of Victoria' (2007) 31(3) *Melbourne University Law Review* 733 ('A Century of Citation Practices'), where a slight increase in the use of secondary sources was reported.

Table 1: Selection of Significant Literature on Australian Courts and Citation Counting

Citation	Jurisdiction/ Years	Source Type	Main Findings
Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia' (1992) 14(2) Adelaide Law Review 181.	High Court 1901–87	Primary	Cases related to constitutional law and theory had the largest representation; American cases were most cited by the High Court in its first decade and during 1971–87.
Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17(2) University of Tasmania Law Review 164.	High Court 1990–97	Secondary	A total of 41% of cases contained citations to periodicals, with an average of 3.70 periodicals cited per case. There was a steady increase in citations over time.
Russell Smyth, 'Other than "Accepted Sources of Law"?: A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22(1) University of New South Wales Law Journal 19.	High Court at intervals of 1960, 1970, 1980, 1990 and 1996	Secondary	Over time, the number of reported cases decreased, and the length of the reports increased. Reference to secondary sources increased.
Russell Smyth, 'What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21(1) Adelaide Law Review 51.	Six state Supreme Courts selected between 1996–99	Primary and secondary	An average of 27.6 authorities were cited per case. There was no correlation between subject matter and citation count. Legal texts accounted for 61.2% of citations to secondary sources, legal periodicals for 17.3% and legal encyclopedias for 5.4% of citations to secondary sources. State Supreme Courts cited far fewer periodicals than the High

Citation	Jurisdiction/ Years	Source Type	Main Findings
			Court, which cited 11 times the number of citations.
Russell Smyth, 'What do Judges Cite?—An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25(1) Monash Law Review 29.	Supreme Court of Victoria – intervals at 1970, 1980 and 1990	Primary and secondary	The total number of citations was somewhat consistent across the three years for primary and secondary sources. Of the secondary sources, textbooks and treatises were cited six times more than journal articles, followed by legal encyclopedias and dictionaries.
Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9(1) Griffith Law Review 25.	Federal Court 1996–98	Secondary	On average, there were 1.8 secondary authorities cited per case.
Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21(1) University of Queensland Law Journal 7.	High Court 1995–99	High Court Judges'	Four of the most often cited justices by name were Mason, Dean, Dixon and Brennan.
Mita Bhattacharya and Russell Smyth, 'Aging and Productivity among Judges: Some Empirical Evidence from the High Court of Australia' (2001) 40(2) Australian Economic Papers 199.	High Court 1995-99	High Court Judges'	The findings support a life-cycle hypothesis suggesting a Judge's citation profile increases, reaches a peak and then declines.
Russell Smyth, 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2(2) Queensland	High Court and Federal Court 1970–2001	Secondary	A total of 80% of Federal Court judges published one or more articles; 88% of High Court judges published at least one article.

Citation	Jurisdiction/ Years	Source Type	Main Findings
University of Technology Law and Justice Journal 198.			
Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005' (2007) 26(1) University of Tasmania Law Review 34.	Supreme Court of Tasmania 1905–2005 at 10-year intervals	Primary and secondary	There is an upward trend in the length of the reports and the use of citations in cases. Secondary sources accounted for 30% of citations, in 1995 18%, and in 1965 at 14%; in 1995 and 2005, they represented less than 5% of the Court's citations.
Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practices on the Supreme Court of Victoria' (2007) 31(3) Melbourne University Law Review 733.	Supreme Court of Victoria 1905–2005 at 10-year intervals	Primary and secondary	The length of judgments and number of authorities cited have increased over time, including those from secondary sources.
Russell Smyth and Dietrich Fausten, 'Coordinate Citations between Australian State Supreme Courts over the 20th Century' (2008) 34(1) Monash University Law Review 53.	State supreme courts 1905–2005 at 10-year intervals	Primary	The frequency of coordinate citations increased over time.
Russell Smyth, 'A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia' (2008) 34(1) University of Western Australia Law Review 145.	Supreme Court of Western Australia 1905–2005 at 10-year intervals	Primary and secondary	A higher proportion of English cases were cited throughout the twentieth century; the Court's citation to its own decisions and the High Court's decisions increased in recent decades; the Court's citation to secondary sources remained low.

Citation	Jurisdiction/ Years	Source Type	Main Findings
Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence from a Hundred Years of Data' (2008) 29(1) Adelaide Law Review 113.	Supreme Court of South Australia 1905–2005 at 10-year intervals	Primary and secondary	The citation rate has increased since the end of WWII. Citation of English cases has declined, being replaced by citations of the Court's own decisions and the High Court. Citations to other courts in Australia have increased. Secondary sources comprise less than 10% of total citations, peaking in 1935 with 9.7% but decreasing in the following years to less than 5% in the 2005 decade.
Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31(1) University of New South Wales Law Journal 189.	Supreme Court of New South Wales 1905–2005 at 10-year intervals	Primary and secondary	Average citations per case increased 760% from 1905 to 2005. Secondary citations were 5–6% total of citations and peaked in years between 1975 and 1995 at 7–8% of total citations. The most cited legal secondary sources were books followed by periodicals.
Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century' (2009) 28(1) University of Queensland Law Journal 39.	Supreme Court of Queensland 1905–2005 at 10-year intervals	Primary and secondary	There was an upward trend in average citations per case. In 1905, the Court cited 2.8 authorities per case, and in 2005 the Court cited 16.2 authorities per case. There was a decline in secondary source citations.
Russell Smyth, 'Citing Outside the Law Reports: Citing of Secondary	State supreme courts	Secondary	Citations to secondary sources increased over time; the state Supreme

Citation	Jurisdiction/ Years	Source Type	Main Findings
Authorities on the Australian State Supreme Courts Over the Twentieth Century' (2009) 18(3) Griffith Law Review 629.	1905–2005 at 10-year intervals		Courts cited fewer secondary citations than the High Court.
Russell Smyth, 'What do Trial Judges Cite? Evidence from the New South Wales District Court' (2018) 41(1) University of New South Wales Law Journal 211.	New South Wales District Court 2005–2016	Primary and secondary	Secondary citations are low, discussion on the nature of legal publishing not being well suited to the District Court, judges often cite journals other than those highly ranked.
Russell Smyth and Ingrid Nielsen, 'The Citation Practices of the High Court of Australia, 1905–2015' (2019) 47(4) Federal Law Review 655.	High Court 1905–2015 at 10-year intervals	Primary and secondary	From 1905 to 1975, the Court cited relatively few sources; during the last four sample years, the Court cited more sources, including secondary sources. In 1905, the percentage of secondary sources consisted of .09%, with slight variation until 1975 when the rate increased to 5.5% and then in 2015 8.7%.

Source: compiled by the authors

Early Australian work using the citation-counting method started in the 1990s and has continued through to recent times. The use and depth of the citation-counting methodology has changed over time. The work of von Nessen explored the use of American cases in Australia,[53] which was then followed by Smyth, who examined citation practices of academic articles in the High Court.[54] Smyth's research highlights the importance of using citation analysis to gain a deeper understanding of what the courts cite. This type of analysis can be useful for various reasons; in this research, it was useful for ensuring that the academy appreciates the type and scope of secondary citations made by the courts.[55] Smyth

[53] Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia' (1992) 14(2) *Adelaide Law Review* 181.
[54] Smyth, 'Academic Writing and the Courts' (n 46); Smyth, 'Accepted Sources of Law' (n 50).
[55] Smyth, 'Accepted Sources of Law' (n 50) 20–1.

found that, overall, the number of cases reported by the High Court fell over the last half of the twentieth century, even though the High Court increased its use of secondary source citations.[56]

VI Data and Scope

This study presents empirical data gathered from the ACT and the NT law reports.[57] Cases were selected following a similar methodology to that utilised by Smyth, who, in some studies, limited cases to authorised law reports, enabling the selection of cases that have 'perceived precedent value and relevance to the profession'.[58] This approach is also pragmatic in that it limits the pool of cases and, therefore, the time needed to analyse and compile the data.[59] One limitation of this is that 'some important cases reported in the specialised reports may be neglected'.[60] For example, the NT and the ACT may have cases reported in the *Australian Law Reports*, *Motor Vehicle Reports*, *Federal Law Reports* and other specialist reports. There may also be cases that were unreported. However, limiting the study to the authorised reports creates a smaller data set that can be analysed in a shorter time frame. The cases selected for analysis were handed down between 2010 and 2020, being the latest cases available for the selected years in January 2023.

Data was collected from each case to determine the number and trends in secondary sources over time. One of the challenges of this study is the nature of law reporting and publishing. It can take some time for cases to appear in the law reports.[61] As of January 2023, cases are only available up to 2020 in the reports for the NT and the ACT Supreme Courts. Further study is needed to determine whether the trends observed in this study have changed over the decades, such as in Smyth's later studies.[62] However, general trends can be established using the available data; for example, Smyth used a smaller dataset from 1996–99 to establish the citation trends of the Australian state Supreme Courts.[63]

Data collected included the total number of pages per case, and the number of primary and secondary source citations were tallied. For each case, each

---

56 Ibid 29.

57 The *Northern Territory Law Reports* and the *Australian Capital Territory Law Reports* were used to compile the data.

58 Smyth, 'The Authority of Secondary Authority' (n 5) 28.

59 See, eg, Smyth's work that required analysis of 64,500 citations: Smyth, 'Citing Outside the Law Reports' (n 10) 703.

60 Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31(1) *University of New South Wales Law Journal* 189, 195 ('One Hundred Years of Citation').

61 For example, editing and selecting reports can take up to 18 months for Commonwealth Law Reports, Sue Milne and Kay Tucker, *A Practical Guide to Legal Research* (Thomson Lawbook, 2008) 94.

62 See, eg, the High Court data analysed over a century in Russell Smyth and Ingrid Nielsen, 'The Citation Practices of the High Court of Australia, 1905–2015' (2019) 47(4) *Federal Law Review* 655.

63 Smyth, 'What Do Intermediate Appellate Courts Cite?' (n 51).

citation was counted once, with duplicates discarded. This approach differs from Smyth's methodology, where repeated citations to the same source in subsequent paragraphs or footnotes were tallied.[64] The rationale for the approach used here was that deleting duplicates would demonstrate the number of unique citations, rather than the number of times a specific source was cited. Secondary sources were those sources defined in Smyth's 2009 article to include legal periodicals, textbooks, legal encyclopedias and other social science and non-legal authorities.[65] As this study concentrates on the role of the academy, citation counts for bench handbooks, law reform and other reports, and unpublished conference papers were excluded. Primary sources analysed in the citation count included cases and legislation. While citation counting and analysis have been used in many papers, as outlined in the existing literature, this methodology has several limitations. For example, citation analysis can be a time-intensive and manual process of selection and organisation. Although text analysis software is available, it is unsuitable for differentiating between primary and secondary sources and cannot identify duplicates where the citation practices vary. A judge may use the author's full name and title in one citation and just the author's name in another. Although manual data analysis assists with the quirks of referencing, there is also a risk that a manual search could miss some sources. Similarly, citation counting contains no detailed analysis of the context or topic of the secondary citations. This decision was made to limit the scope of the data collected.[66] A limited date range of just one decade is also a limitation in establishing strong trends in data. For example, some studies have examined citations over a longer time and at decade intervals.[67] That, of course, opens opportunities for further research. However, for this study, the number of primary and secondary citations within the criteria produced sufficient data for analysis, as outlined in the findings below.

VII Findings in the Territories

The trend in the data from the Supreme Courts of the NT and ACT largely paralleled the trend identified in the literature for the Supreme Courts in other jurisdictions, namely, that the courts cited relatively few secondary sources across the number of cases considered.[68] A total of 339 cases across both jurisdictions were analysed (169 from the NT and 170 from the ACT), and 7,849 citations were tallied (3,112 from the NT and 4,737 from the ACT). Of these

64 Smyth, 'Accepted Sources' (n 50) 29.
65 Smyth, 'Citation to Authority' (n 48).
66 Ibid. Smyth followed a similar methodology.
67 Smyth, 'Citing Outside the Law Reports' (n 10); Smyth and Nielsen, 'The Citation Practices' (n 13).
68 See Smyth, 'Citing Outside the Law Reports' (n 10) for an example of trends from other Supreme Courts in Australia.

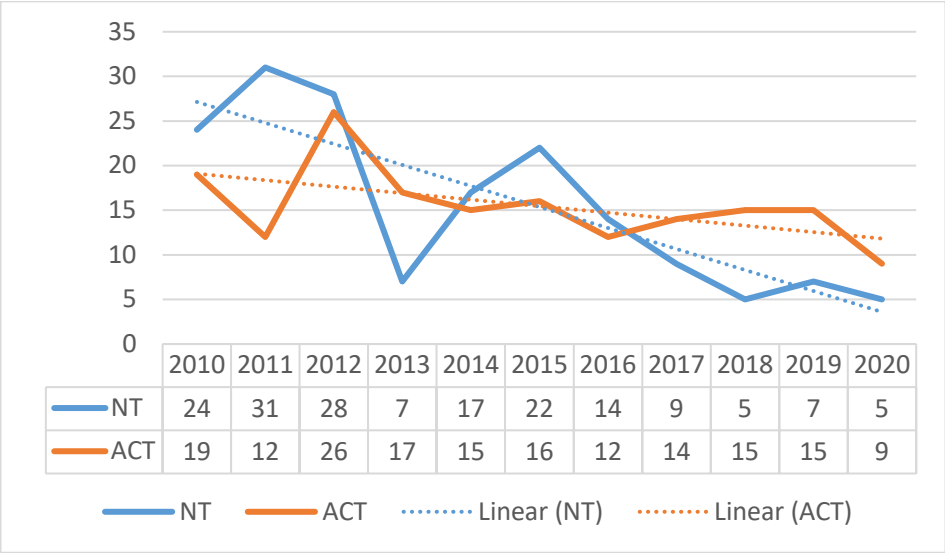
citations, only 200 were from secondary sources, constituting only 2.5 per cent of the total citations.

Table 2: Summary of collected citation data

Year	Reported Cases		Total Citations		Secondary Source Citations		Total Case Pages		Percentage of Secondary Citations per Page	
	NT	ACT	NT	ACT	NT	ACT	NT	ACT	NT	ACT
2010	24	19	416	601	11	19	481	407	2.28 %	4.66 %
2011	31	12	548	379	32	14	562	217	5.59 %	6.45 %
2012	28	26	437	611	21	11	448	459	4.68 %	2.39 %
2013	7	17	121	399	5	4	117	374	4.27 %	1.06 %
2014	17	15	215	672	5	6	266	774	1.87 %	0.77 %
2015	22	16	408	327	7	6	429	281	1.63 %	2.13%
2016	14	12	373	321	14	6	388	233	3.60 %	2.57 %
2017	9	14	286	420	5	7	257	335	1.94 %	2.08 %
2018	5	15	96	359	2	4	43	312	4.65 %	1.28 %
2019	7	15	133	384	0	8	79	235	0.00 %	3.40 %
2020	5	9	79	265	4	9	78	317	5.12 %	2.83 %
Total	169	170	3,112	4,737	106	94	3,168	3,944		

A linear trend line was used to best-fit data points to indicate whether the number of cases (see Figure 1) and citations (see Figure 2) increased or decreased over time. Overall, the number of cases reported gradually decreased (see Figure 1).

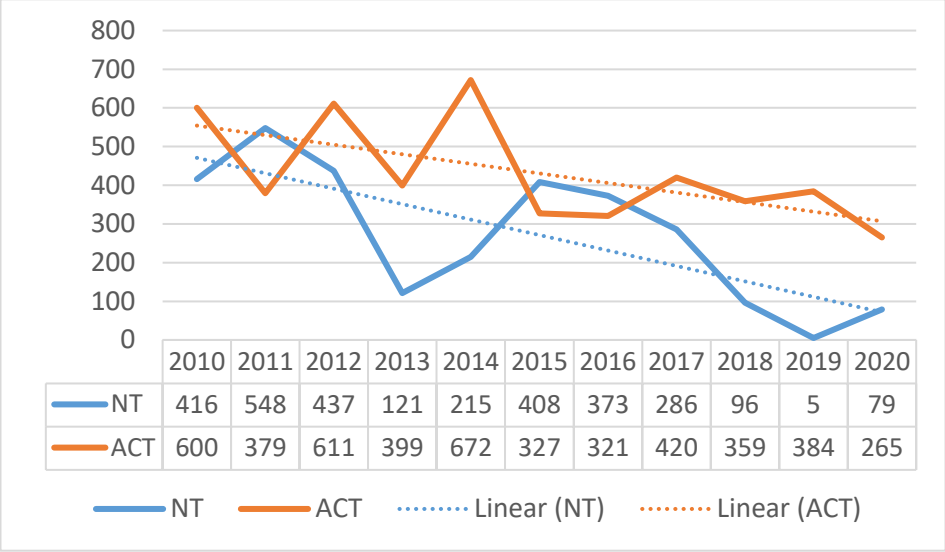
Figure 1: The number of reported cases from 2010–20



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
NT	24	31	28	7	17	22	14	9	5	7	5
ACT	19	12	26	17	15	16	12	14	15	15	9

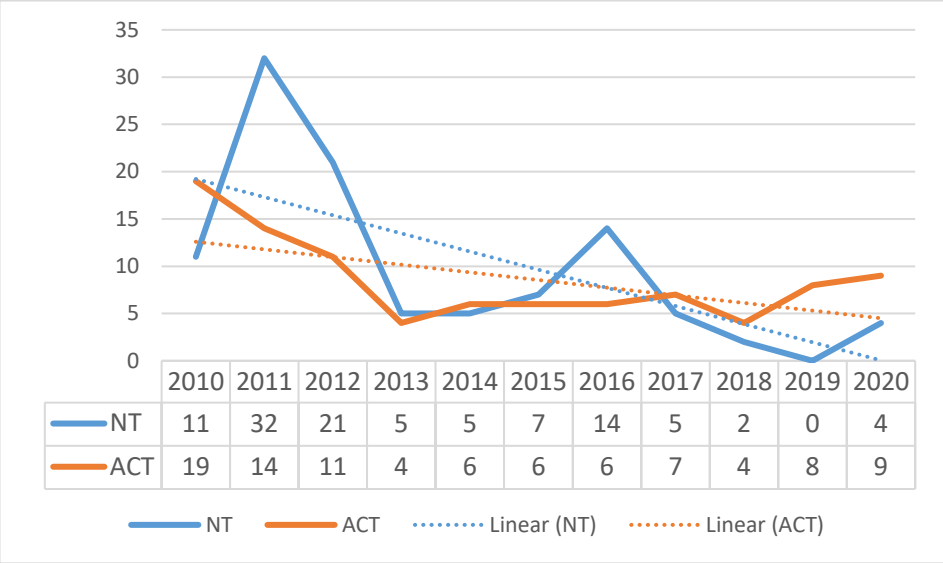
Following the trend in the decrease of published decisions, the total number of citations per year also decreased (see Figure 2).

Figure 2: Total citations per year



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
NT	416	548	437	121	215	408	373	286	96	5	79
ACT	600	379	611	399	672	327	321	420	359	384	265

Figure 3 demonstrates that the number of secondary citations for both jurisdictions decreased at comparable rates over the decade. The graph reveals that for the NT Supreme Court, the number of secondary citations decreased each year at a steady rate throughout the decade with the years 2010–12 having the largest amounts of citation. The ACT Supreme Court followed a similar pattern for 2010–12 but remained steady with lower citations from 2013–20.

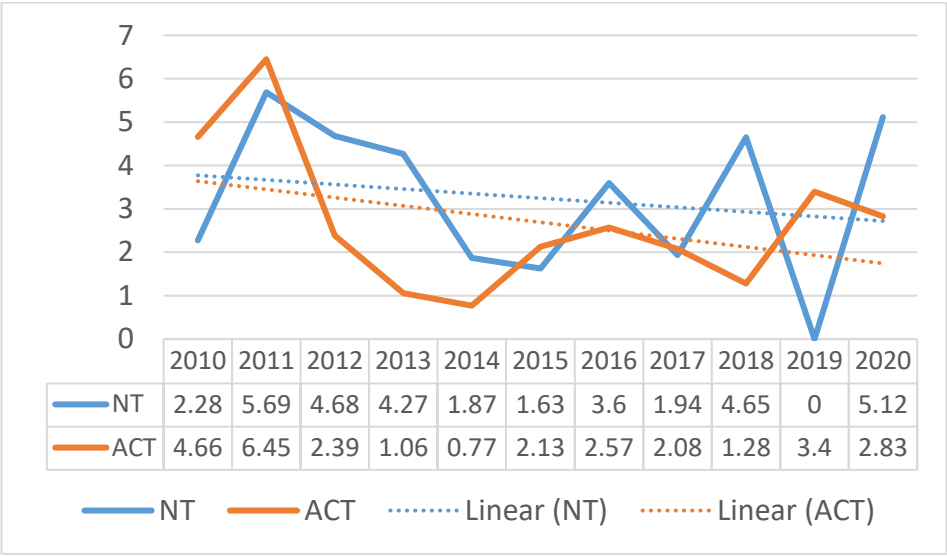


	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
NT	11	32	21	5	5	7	14	5	2	0	4
ACT	19	14	11	4	6	6	6	7	4	8	9

To establish whether secondary citations decreased overall, rather than due to the decrease in the total number of cases reported, this study divided the number of citations per case for each year. This approach varies from Smyth's methodology, which used the number of citations per judgment.[69] This method was used in the current study as it is possible that as the length of a decision grows, so does the opportunity to cite secondary sources; therefore, counting citations per page was used to establish whether the use of secondary citations varied over the decade. The trend line in Figure 4 demonstrates that, based on the decade of data, there was no increase in the citation of secondary sources for the NT and or ACT Supreme Courts. Instead, the data indicated that citing secondary sources for both the ACT and the NT Supreme Courts remained steady.

[69] Smyth, 'What do Trial Judges Cite?' (n 6) 211, 247–8.

Figure 4: The number of secondary citations divided by total pages published per year



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
NT	2.28	5.69	4.68	4.27	1.87	1.63	3.6	1.94	4.65	0	5.12
ACT	4.66	6.45	2.39	1.06	0.77	2.13	2.57	2.08	1.28	3.4	2.83

Books were the most cited secondary source (see Table 3). In the NT court, the most cited books were D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, with 10 citations, and R G Fox and A Freiberg, *Sentencing State and Federal Law in Victoria*, with eight citations. Various editions of these textbooks were cited. The most cited was the *Macquarie Dictionary*. The ACT followed a similar pattern, with 5 citations to D C Pearce and R S Geddes, *Statutory Interpretation in Australia*. The ACT court had no established preference over the listed textbooks. Interestingly, the court did not cite any websites.[70] Eight different texts were cited; however, none were cited more than once.

[70] See, eg, the discussion of citing Wikipedia in other Australian Courts in Smyth, 'What do Trial Judges Cite?' (n 6) 211, 250.

Table 3: Secondary source citation by source type

	NT	ACT
Books	67	60
Journals	15	18
Encyclopedia/ looseleaf	6	5
Dictionaries	14	11
Total	102	95

The journals cited differed for each jurisdiction. The most popular journals cited in the NT reports were the *Northern Territory Law Journal*, with five citations, followed by the *Australian Law Journal*, with four citations. There were a handful of other journals with one citation each. The ACT had 4 citations to the *Criminal Law Journal*, with other articles appearing in various journals.

VIII Discussion

A comparison of the citation practices for the NT and ACT Supreme Courts reveals similar citation practices, although the sources they cite are different. Both courts have unlimited jurisdiction within each territory in civil matters and hear the most serious criminal matters. They also have similar numbers of permanent judges, with the ACT court having five permanent judges,[71] and the NT court having seven,[72] with additional and acting judges used occasionally. The NT has a population of 232,605 people, while the ACT has 454,499 people.[73]

The rate of secondary source citation for the ACT and NT over the decade examined remained low and, it is suggested, is likely to remain low or decline. This trend raises the issue of the relationship between the academy and the courts in the NT and the ACT concerning citations. Chief Justice Kiefel is not in favour of a German-style approach to citation use, which is extensive.[74] Similarly, Sir Garfield Barwick noted that excessive citation might undermine a judgment.[75] Cane echoes this point and adds that excessive citation of secondary sources might make judgments look more like journal articles, which would not be desirable.[76] Based on the above findings, it is unlikely that the superior courts of

71 The five judges in the ACT court comprise the Chief Justice, three resident judges and an Associate Judge. See 'Judiciary', *Australian Capital Territory Government* (Web Page) <https://www.courts.act.gov.au/supreme/about-the-courts/judiciary>.

72 The seven judges in the NT Court comprise the Chief Justice, five resident judges and an Associate Judge.

73 'Population: Census', *Australian Bureau of Statistics* (Web Page, 2022) <https://www.abs.gov.au/statistics/people/population/population-census/latest-release>.

74 Kiefel (n 1) 252.

75 Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, 1995) 224.

76 Peter Cane, 'What a Nuisance' (1997) 113 (October) *Law Quarterly Review* 515, 519.

the NT and the ACT would be at risk of over-citation. The results of our study do raise the question, however, of how the academy and the courts might best go about developing a mutually beneficial relationship whereby the court is serviced with quality secondary sources, and the academy are supported through acknowledgement that can lead to further funding and research opportunities.

Both the NT and the ACT are distinctive jurisdictions that provide significant opportunities for academic research. If there is a low possibility of academic work being cited, this raises the question of the continuing relationship between writing and research on topics that may be useful to the judiciary. This article does not seek to answer this question but seeks to raise the issue for discussion. For example, content in 'law reviews is traditionally directed at matters heard in the High Court',[77] which raises the question of the academy writing for a more local judicial audience. Smyth also suggests that further research is needed as to why Courts cite books more often than journals. He offers several possible explanations:

> The first could be that the law reviews publish few articles that are relevant to the case load of the State supreme courts. The second is that legal periodicals typically contain articles advancing cutting edge normative statements, which are perhaps better suited to the case load of the High Court as a final court of appeal while books tend to contain positive statements of the law, better suited to the case load of an intermediate appellate court.[78]

Similarly, the content of law reviews has substantially changed with the diversification to specialty areas, increasing numbers of law units, and specialised law journals that offer a place to publish on key social issues as well as legal issues.[79] Due to the low citation of academic work, it may be wiser for the academy to aim their research at a new and diverse area of law.

As Chief Justice Kiefel notes, the 'living author rule' should not be applied today.[80] This article reveals a similar finding to that of Smyth and Nielsen for the High Court in that the NT and the ACT Supreme Courts are willing to cite authors who are living or deceased, demonstrating that this rule is not a limitation in these jurisdictions.[81] For example, the ACT Supreme Court cites living or deceased

---

77 Smyth, 'Citing Outside the Law Reports' (n 10) 708.
78 Nielsen and Smyth, 'One Hundred Years of Citation' (n 60) 189, 212.
79 Smyth, 'Citing Outside the Law Reports' (n 10) 709.
80 Kiefel (n 1) 451–2.
81 See Smyth and Nielsen, 'The Citation Practices' (n 13).

authors.[82] The NT Supreme Court follows a similar practice with a willingness to cite authors deceased and authors still living.[83]

The data from this study may also be limited in that while it indicates low secondary-source citations in the ACT and NT courts, it is a problem that may require deeper research. For example, further research may be needed to understand the nature of the relationship between the academy and the courts to establish the drivers and significance of this trend. Qualitative research could be undertaken by interviewing the judiciary on the prospective useful research directions. Additionally, quantitative research could be conducted on the topics of journal articles to understand how many articles are relevant to the main topics adjudicated in the two territory jurisdictions — for instance, criminal law and human rights law.

Further research may also reveal whether the low citations are due to the nature of judicial writing in the territories or whether the academy can assist in producing material in preferred subject areas. Research may discover that legal scholars are not interested in the development of the common law in the longer term and prefer to focus on short-term goals due to the demands of academic metrics. On the other hand, perhaps little research has been published that suits the needs of the courts in the NT and the ACT. As noted by Sir Gerard Brennan, law reviews published in Australia are subject to rigour and must contain material that assists in judicial analysis, not mere opinion.[84] However, Smyth found that, at least for the New South Wales Supreme Court, most journals cited multiple times were not ranked in the Excellence in Research Australia ('ERA') or the Australian Business Dean's Council ('ABDC') ranking of periodicals .[85] It may be that the type of analysis needed for the territories is not being produced.

Smyth proposed some theories as to why, over time, the High Court has increased its use of secondary citations.[86] First, the number of cases judges must consider has increased over time; hence, the imperative to quickly access large amounts of information has increased. Second, the opportunity and capacity to find these resources have improved with time, making secondary sources more accessible.[87] These observations go some way to explaining the increase in citations by the High Court and may also explain the absence of increasing citation

---

82 See, eg, the case of *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* (2010) 173 ACTR 33, which cites Sir Jacob as a prominent author; Cyril Glasser, 'Sir Jack Jacob', *The Guardian* (online, 1 January 2001) <https://www.theguardian.com/news/2001/jan/01/guardianobituaries1>. See also *R v Muller* (2013) 178 ACTR 1, citing Steven Odgers, still alive at the writing of this article, 'Stephen Odgers SC', *Forbes Chambers* (Web Page) <https://www.forbeschambers.com.au/stephen-odgers-sc.html>.

83 See, eg, *Re Registrar General's Stated Case* (2011) 30 NTLR 83, which cited J Baalman, presumed to have died due to the date of publication in 1948, and *R v GP* (2015) 35 NTLR 117, which cited Les McCrimmon, currently alive, 'Member Profiles', *Northern Territory Bar Association* (Web Page, 2022) <https://ntbar.asn.au/member-profiles/professor-les-mccrimmon/>.

84 Gerard Brennan, 'A Critique of Criticism' (1993) 19(2) *Monash University Law Review* 213, 216.

85 Smyth, 'What Do Trial Judges Cite?' (n 6) 248.

86 Smyth, 'Accepted Sources of Law' (n 50) 30.

87 Ibid.

rates for the NT and the ACT courts. Examining just a single decade may be insufficient to demonstrate a significant increase in the need to rely on increasingly complex areas of law. However, searching and retrieving information significantly changed during those years, compared to the arrival of online and accessible databases covered in earlier research. Smyth's early work on the unique context of the High Court was confined to a seven-year period, and Smyth established a trend within the data.[88] A wider sample of cases from, say, 1960 to the present may reveal a different trend for the NT and the ACT Supreme Courts.

There are alternatives to the above-mentioned theories as to the continuingly low citation rate of the academy in the NT and ACT courts. As outlined in the citation analysis of the existing literature, the jurisdiction of the court may have a significant impact on the need for the court to summarise common law or comparative law issues. The nature of matters that come before the Supreme Courts of the ACT and the NT are also significantly different from those that typically come before the High Court. As the final court of appeal in Australia, the High Court more regularly deals with highly complex and difficult areas of law, and is thus more likely to rely on the academy to assist in its analysis. Smyth made a similar conclusion when examining the use of secondary citations in the High Court.[89] In addition, some 'studies have suggested that the Supreme Court of New South Wales and … the Supreme Court of Victoria are judicial innovators' compared to other states' Supreme Courts, leading to more citations in New South Wales and Victorian courts.[90] Therefore, the likelihood of the NT and ACT Supreme Courts using secondary citations could be influenced by the judge's view as an innovator or traditionalist and by the nature of the matters that come before the court.

Other factors may also be relevant when considering whether to cite secondary sources in judicial writing. For example, Smyth pointed out that dissenting judgments often contain more citations and that judges' personal preferences and attitudes towards secondary citations may influence the overall citation rate.[91] Smyth examined the number of citations per judge, which is outside the scope of this study, so a comparison of citations per judge cannot be ascertained for the NT and ACT Supreme Courts.

In addition to the challenges of examining the rationale behind judicial citation practices is the challenge of understanding the publishing patterns of the academy writing for the courts. If there is little chance of being cited by the judiciary, this in turn leads the academic to write less for that audience. The expectation of being cited by the law reform commissions is decreasing due to the

---

88 Smyth, 'The Authority of Secondary Authority' (n 54) 170.

89 Smyth, 'Accepted Sources of Law' (n 50) 30.

90 Fausten, Nielsen and Smyth, 'A Century of Citation Practices' (n 52); Nielsen and Smyth (2008), as cited in Smyth, 'Citing Outside the Law Reports' (n 10) 695.

91 Smyth, 'Accepted Sources of Law' (n 50) 32, 36–7.

diminishing funding and resourcing of law reform commissions.[92] Legal academics experience the same pressures as other academics working in higher education, as they 'are often under pressure to publish papers and source grant funding'.[93] This pressure leads to a precarious position where legal academics are not benefiting from the system that favours STEM practices of citation in addition to not being cited by non-traditional citation systems. While legal academics argue that the approach to law research needs to change, John Gava urges that the whole approach of Australian law schools must be different.[94] In particular, Gava states that the 'law reviews take on a sinister aspect when the use of law review writing signifies a judiciary that has forsaken the common law tradition in favour of an openly instrumentalist form of judicial decision-making'.[95] Gava goes on to explain that the 'publish or perish' mentality stands in the way of good teaching in a system where law reviews

> not only represent a symptom of malaise amongst judges; they also work to threaten law schools. Law reviews have become the public face of an unpleasant and inappropriate form of academic life that degrades scholars, wastes valuable time and money, and devalues the importance of good teaching and collegiality in law schools.[96]

There is a danger, however, that a focus on teaching alone can force law schools into becoming legal trade schools taught by faculty disengaged from legal scholarship, which would be a slippery slope towards an even more stratified legal academy.[97] This article does not have an answer to balance the interest of research or education but endeavours to highlight some of the challenges.

In his analysis of the work of United States scholarship, Mark Tushnet explained that:

> many think that their articles will directly influence judges and policy-makers, failing to take account of much that external scholarship about the law reveals: Judges' ideologies, predispositions, and attitudes are important and perhaps nearly exclusive determinants of what they view to be the 'right' legal result; policy-makers are influenced by ideology, politics, and the general cultural atmosphere; and much more. With so much space occupied by things other than the ideas offered by legal academics, legal scholarship aimed at influencing the development of the law might seem the product of peculiarly inflated egos.[98]

---

92 Hill and Garrick, 'Architecture for Developing National Uniform Legislation' (n 33).

93 Hannah Chan, Trevor G Mazzucchelli and Clare S Rees, 'The Battle-Hardened Academic: An Exploration of the Resilience of University Academics in the Face of Ongoing Criticism and Rejection of Their Research' (2021) 40(3) Higher Education Research and Development 446.

94 John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26(3) *Melbourne University Law Review* 560.

95 Ibid 575.

96 Ibid 575–6.

97 Jay S Silver, 'Responsible Solutions: Reply to Tamanaha and Campos' (2014) 2(2) *Texas A&M Law Review* 215.

98 Mark Tushnet, 'Academics as Law-Makers?' (2010) 29(1) *University of Queensland Law Journal* 19, 28.

This pessimistic appraisal of the value of legal scholarship is not novel, and legal scholarship, of course, is not directed at only developing law. As Piety observes, 'we engage in the production of legal scholarship for all sorts of reasons — the search for the truth, professional distinction, sheer pleasure, or compulsion'.[99] Piety has developed a convincing counter-argument to Tushnet, building on Redish's seminal 1971 article,[100] to illustrate why many of the conventional methods for assessing scholarship's value to the profession and the development of the law are inadequate and the reasons 'why the claims of legal scholarship's irrelevance are overblown'.[101] Piety's argues that citations are not the only way to measure non-academic impact of legal scholarship: the 'number of citations is the tool frequently used, but it is a crude and imperfect measure of' research impact. Furthermore, 'Redish's article is instructive: even though the court appeared to be adopting his argument,' ironically, the court did not cite Professor Redish's seminal 1971 article.[102] In addition, the development of law lags and will always lag; it may take several decades before courts fully embrace an argument.[103] For the academy, the reality is that their research may be of use to the court, but they may not be cited, and nor should it be their main motivation for publishing.

Webber states that 'the law faculties have a responsibility to bring the kind of investigation to law that other disciplines bring to their areas of study'.[104] In investigating the nature of research that is expected of legal academics in delivering on this responsibility, Webber reviewed the criticism of legal academics and concluded that

> a few clearly think the law schools are wasting their time on the wrong things; many others — I believe most — simply wish that law schools would do more. But the fact remains that many judges and barristers wish that academics would offer more guidance on matters of professional concern.[105]

In discussing the citation analysis between the ACT and NT Supreme Courts, it can be seen that it is only a preliminary analysis that is based on limited available data — the deeper rationale between the sources the judiciary cite and the pressures and choices of the academy are topics that require further exploration.

---

99 Tamara R Piety, 'In Praise of Legal Scholarship' (2017) 25(3) *William & Mary Bill of Rights Journal* 801.

100 Martin H Redish, 'The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression' (1971) 39(3) *George Washington Law Review* 429.

101 Piety (n 99) 806.

102 Ibid 808.

103 Ibid.

104 Jeremy Webber, 'Legal Research, the Law Schools and the Profession' (2004) 26(4) *Sydney Law Review* 565, 567.

105 Ibid 571.

IX Conclusion

An aspirational goal for the academy in Australia might be to achieve the status of legal academics in Germany, where, as Chief Justice Kiefel observes, 'it has been German law professors who, over many centuries, have shaped the ideas behind German law and [have been] responsible for drafting the civil codes'.[106] However, an aspirational goal of this nature is unlikely to come to fruition due to differences between common law and civil law systems and due to the differences in the role of precedent and the role of the judge within each system. What would be more achievable is a respectful relationship between the academy and the judiciary. As Smyth noted, there is a 'greater judicial willingness on the part of judges to engage with academia',[107] which is supported by Kiefel's CJ paper.[108] Understanding what judges cite is key to understanding the practice and continuing this relationship. There are several limitations to using citation analysis methodology to draw conclusions about the citation practices of the Supreme Courts of the states and the Supreme Courts of the NT and ACT. As this study demonstrates, there has not been an increase in secondary citations in the NT and ACT courts in the decade 2010 to 2020. The state Supreme Courts, in general, cite less secondary material than the High Court, and this has been confirmed to be the same in the ACT and NT courts. The reasons why academic work is not cited in judgments are complex. However, the lack of secondary citations has put the academy in the vulnerable position of being unable to demonstrate research impact, if the criteria for measuring the impact remain the same, particularly when this is aimed at a state or territory level and written to assist the judiciary. This practice can potentially reduce funding for valuable legal research and, as a consequence, the coherent development of law. The academy and the judiciary should continue to develop their relationship to ensure future engagement and benefit, as envisaged by Chief Justice Kiefel.

---

106 Kiefel (n 1) 449, citing William Twining et al, 'The Role of Academics in the Legal System' in Mark Tushnet and Peter Cane (eds), *Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 920, 936, 939.

107 Smyth, 'Citing Outside the Law Reports' (n 10) 712.

108 Kiefel (n 1).

THE 22ND WA LEE EQUITY LECTURE

18 NOVEMBER 2021, BANCO COURT, SUPREME COURT OF QUEENSLAND

THE HON JUSTICE SARAH C DERRINGTON*

I INTRODUCTION

The impetus for my topic this evening is the current work of the Australian Law Reform Commission in its Inquiry into the Legislative Framework for Financial Services and Corporations Law. The aim of this work is to reduce legislative complexity to facilitate an adaptive, efficient, and navigable framework of legislation within the context of existing policy settings. I posit that one way of achieving this aim might be through reliance on equitable doctrines and remedies.

The origin and history of the equitable jurisdiction has been recounted by numerous scholars over the centuries since its emergence in the 14th century. This paper cannot and does not seek to add to that wealth of scholarship. Rather, it seeks to explore the extent to which the indeterminate language of 'fairness' — identified by Commissioner Hayne in the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* ('*FSRC*') as a fundamental norm of behaviour — might suborn the application of settled principles of equity in the context of financial services law and regulation.

It also asks whether statutory recognition of those settled principles, as has occurred in relation to unconscionable conduct,[1] would simplify the statutory law and, perhaps counter-intuitively, create greater certainty than is provided by the 'plethora of pointlessly technical and befuddling statutory provisions scattered over many Acts in defined situations'.[2]

Since Lord Mansfield's observations in 1774 that the great object in all mercantile transactions should be certainty,[3] it remains the case that commercial law 'must be certain, but it must also be fair and just; simple and practical, but comprehensive; and it must be able to be employed and enforced, without undue

* President, Australia Law Reform Commission; Justice, Federal Court of Australia.

1 *Competition and Consumer Act 2010* (Cth) sch 2 ss 21 & 22 ('*ACL*'); *Australian Securities and Investments Commission Act 2001*(Cth) ss 12CA–12CC ('*ASIC Act*').

2 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028, Summary (Rares J) ('*Wingecarribee*').

3 *Vallejo v Wheeler* (1774) 1 Cowp 143.

DOI: 10.38127/uqlj.v42i1.7819

expense, delay or confusion'.[4] That is not the general experience of those who engage regularly with financial services legislation.

Justice Mark Leeming has argued that the ethical, normative 'principles' of equity (often associated with value judgments) arguably create greater certainty than the more rigid rules of the common law in complex areas.[5] He points particularly to the operation of rules in complex environments such as corporations and taxation law, citing Professor Braithwaite's observations that such rules will have a penumbral area of uncertainty, to which 'wealthy legal game players aim for the penumbra, play the game in ways that expand the grey area of the law'.[6] This is sometimes described as 'creative compliance' or 'compliant non-compliance' — essentially 'box-ticking' — the conduct of the bank that led to the decision of the High Court in *Westpac v ASIC*[7] being an example of this type of creativity. Similarly, Allsop CJ has said: 'Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion',[8] a matter that the ALRC's inquiry has found to be so in the context of our current financial services law.

The Chief Justice's statement resonates with Lord Ellesmere's explanation of the underlying rationale for the very existence of equitable principles and doctrines in the *Earl of Oxford's Case* in 1615: 'The Cause why there is a Chancery is, for Men's Actions are so divers and infinite, That it is impossible to make any general law which may aptly meet with every Act, and not fail in some Circumstances.'[9]

II The Financial Services Eco-system

The suite of Commonwealth statutes that provides for consumer protection in relation to financial products and services and that regulates the market for those products and services, is comprised, in the main, of the *Corporations Act 2001* (Cth) ('*Corporations Act*'), the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCPA*'), and the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). Of relevance too are the protections within the *Superannuation Industry (Supervision) Act 1993* (Cth), and the obligations arising under the

---

4 James Allsop, 'Conscience, Fair-dealing and Commerce — Parliaments and the Courts' in Tim Bonyhady (ed), *Finn's Law — An Australian Justice* (Federation Press, 2016) 92, 93.

5 Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes — Meeting the Needs of any Sophisticated and Successful Legal System' (2019) 47 *Australian Bar Review* 137, 156.

6 Ibid 156; John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 54.

7 *Westpac Securities Administration Ltd v Australian Securities and Investment Commission* (2021) 270 CLR 118.

8 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 267 [268] ('*Paciocco*').

9 (1625) 21 ER 485, 486.

Insurance Contracts Act 1984 (Cth) ('*ICA*') and the *Marine Insurance Act 1909* (Cth) ('*MIA*').

These various statutes are not simply concerned with contractual arrangements, but are also necessarily concerned with complex equitable constructs, such as the trust arrangements underlying superannuation funds, investments in financially engineered products, or in derivatives, forms of securitisation, and many other forms of modern capital raising which depend upon doctrines of equity for their very existence.[10]

The complexity of the financial services ecosystem cannot be underestimated. The size and diversity of Australian financial markets has increased from $4.3 trillion in 2001 to $19.5 trillion in 2021.[11] Particular markets, such as those for derivatives and employee share schemes have exploded from $120 billion in 2001 to $727 billion in 2021.[12] Australian financial markets, and the nature of their participants, are under constant evolution. Unsurprisingly, the legislature lags behind the entrepreneurs and is engaged in a constant cycle of amendments to the statutes, amendments to the regulations, and the creation of legislative instruments (including to exempt or exclude emerging products and services from provisions of the law that are no longer fit for purpose). It has become a game of whack-a-mole, which explains its growth from 445,996 words in 2001 to today's count at 805,821 words — the second largest Commonwealth statute.[13] This is precisely the type of environment in which the flexibility of equitable doctrines and remedies is essential.

The length and complexity of the financial services legislation is, however, also a consequence of a 'tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence'.[14] This is particularly so in relation to the regulation of financial services, which aresubject to rules, protocols, and checklists that often obscure the underlying conduct to which such rules are directed.

Obligations in the *Corporations Act* alone are numerous and widely dispersed. Approximately 1495 sections require that something 'must' be done.[15] The failure to comply with existing conduct obligations, and broader community expectations concerning the conduct of financial services entities, was well documented in the Financial Services Royal Commission. It found that 'conduct by many entities' had 'broken the law' or 'fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to

---

10 Leeming (n 5) 149.

11 Australian Bureau of Statistics, *Key Economic Indicators* (Catalogue No 1345.0, 2021).

12 Ibid.

13 ALRC data. Word counts exclude tables of contents and endnotes, and subsection, paragraph, subparagraph and sub-subparagraph lettering and numbering.

14 Chief Justice Allsop AO, 'The Judicialisation of Values' (Conference Paper, Law Council of Australia and Federal Court of Australia Joint Competition Law Conference Dinner, 30 August 2018) 3 [17].

15 ALRC data.

expect of them'.[16] It is therefore not surprising that the *Corporations Act* has consistently been among Commonwealth statutes most frequently considered by the Commonwealth and New South Wales courts, including the Court of Appeal.

The Financial Services Royal Commission noted that '[i]ndustry, community groups and regulators agreed the current law is too complex'.[17] The *FSRC* seemed to consider that a clearer body of law — particularly as concerns the conduct obligations of financial services entities — may lead to better compliance, noting that '[t]he more complicated the law, the harder it is to see unifying and informing principles and purposes'.[18]

The current statutory regime does not identify expressly which unifying and informing principles and purposes are being pursued in the various detailed rules and prescriptive provisions of the legislation. There is also significant overlap and duplication amongst the statutes, which detracts from clarity, simplicity and certainty. The provisions relating to prohibited conduct, and through which individuals and corporations may be subject to civil and/or criminal penalties, are particularly opaque.

The *FSRC* recommended that, as 'far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter'.[19]

III The Fundamental Norms

Six fundamental norms of behaviour were identified by Commissioner Hayne:

- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.

Commissioner Hayne also observed that these six fundamental norms of behaviour are all reflected in existing law, but the reflection is piecemeal.[20] They

---

16 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1, 1.
17 Ibid 494.
18 Ibid 44.
19 Ibid Rec 7.4.
20 Ibid 9.

are reflected in the general obligations of holders of an Australian Financial Service Licence (AFSL licensees) under the *Corporations Act*, the general obligations of holders of an Australian Credit Licence (ACL licensees) under the *National Consumer Credit Protection Act 2008*, the provisions of the *ASIC Act*, the obligations of registrable superannuation entity (RSE) licensees under the *Superannuation Industry (Supervision) Act 1993* (Cth), and in the obligations of utmost good faith on both insureds and insurers under the *ICA* and the *MIA*.

It is important to understand the role or purpose that the fundamental norms are expected to have in the legislative structure. Commissioner Hayne described the fundamental norms as the 'fundamental precepts'. He observed that statutes have often given legislative expression to fundamental precepts with little textual analysis.[21] He suggested, by way of example, that the detailed rules about conflicts of interest and conflicted remuneration should be expressly identified as giving effect to the principle that when a person is acting for another, the person must act in the best interests of that other.[22]

To identify them simply as 'fundamental precepts' does not necessarily assist. One question that may arise is whether a fundamental norm or precept imposes a legal duty that sounds in damages for breach or some other remedy. A straightforward example of how a fundamental precept operates at a higher level than a rule is s 23 of the *MIA*. Whilst it is often described as the 'duty' of utmost good faith, breach of that duty does not sound in damages.[23] Rather, the contract will be void because the fundamental precept, on the basis of which the contract was made — utmost good faith — has been shown not to exist. The contract therefore cannot stand.

A misunderstanding of the role played by the fundamental norms can lead to suspicion or distrust about the practical operability of those norms. Whether referred to as 'principles' or 'fundamental norms of behaviour', the effect is the same — *they are an informing norm, or organising principle*,[24] not a separate implied term. For example, if good faith is simply a term implied in fact, it can itself be construed and applied and found a separate head of damages. This then opens up arguments about whether the principles of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[25] have been satisfied, or whether 'entire agreement' clauses operate to the exclusion of good faith. If, however, good faith is recognised as an informing but binding principle or duty — a means by which the courts can recognise and give effect to an expected standard of behaviour —

---

21 Ibid 495.

22 Ibid.

23 *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203, 210 [40] (Chesterman J): 'in each instance the relationship, that of good faith, is not expressed in terms of an obligation but is the basis for implying a more specific duty'.

24 *Bhasin v Hrynew* [2014] 3 SCR 494. But see *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1, 161 [1007], in which Edelman J expressly declined to follow the Canadian authority.

25 (1977) 180 CLR 266.

then there is no debate as to whether or not the principle is applicable; it is simply a basic assumption of all contractual dealings.[26]

At least since the time of the commercial statutes drafted by Sir Mackenzie Chalmers, statutes have created norms of conduct expressed generally as commands for an expected standard of behaviour in relation to commercial transactions. Examples include s 23 of the *MIA*, referred to earlier, and the circumstances in which there is an implied warranty or condition in relation to fitness for purpose of goods or merchantable quality in the *Sale of Goods Acts* of the early 19th century. More recently, s 52 of the now repealed *Trade Practices Act 1974* (Cth) ('*TPA*') provided that 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive'. This proscription is now found in s 18 of the *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*'), and in s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*. Modern commercial statutes eschew generally expressed norms for detailed prescription.

In Equity, norms and values permeate — as maxims, principles, doctrines, and rules. Equitable intervention in commerce is not exceptional. One of those norms is a rejection of unconscionable conduct.

The statutes with which we are concerned all involve contracts for some type of financial service or product. Some of the provisions apply only to consumers, others apply generally. Where they apply generally, certain direct competitive and self-interested aspects of commerce may negate, limit or constrain the applicability of equitable principles. By their very nature, these types of contracts involve risk. In *Kobelt*, Keane J observed that the purpose of s 12CB of the ASIC Act is to regulate commerce and that 'The pursuit by those engaged in commerce of their own advantage is an omnipresent feature of legitimate commerce'.

The conduct obligations contained throughout financial services legislation can be divided broadly into two categories: prohibited conduct and positive obligations. Prohibited conduct refers to the various proscriptions contained in the *Corporations Act* and the *ASIC Act* on conduct that: is misleading or deceptive;[27] is unconscionable, both within the meaning of the general law and by virtue of statute;[28] imposes unfair contract terms;[29] or involves unfair practices (including making false or misleading representations about products or services or certain business activities).[30] These proscriptions apply generally and are not limited in their scope to financial services licensees. Broadly, the proscription of such conduct is reflective of at least three of the fundamental norms identified by

---

26 Allsop (n 4) 112–13.

27 *Corporations Act* ss 1041H; *ASIC Act* s 12DA, 12 DF; *ACL* ss 18, 33–4.

28 *ASIC Act* 12CA(1); *ACL* s 20(1).

29 *ASIC Act* s 12BF; *ACL* s 23.

30 *Corporations Act* ss 1041E and 1041G; *ASIC Act* s 12DB; *ACL* ss 29 and 37.

Commissioner Hayne — to obey the law, not to mislead or deceive, and to provide services that are fit for purpose.

Positive obligations are created by the *NCCPA* and the *Corporations Act*, which impose an obligation on credit and AFS licensees respectively to do all things necessary to ensure that the activities authorised by their licence are engaged in or provided 'efficiently, honestly and fairly',[31] and by the *Corporations Act* in requiring financial advisors providing personal advice to retail clients to act in the best interests of the client,[32] and to prioritise the interests of clients where there is a conflict. These duties reflect the norms to provide services that are fit for purpose, to deliver services with reasonable care and skill, and when acting for another, act in the best interests of that other.[33]

In the 'first substantive appellate discussion'[34] of the obligation in the *Corporations Act* to act 'efficiently, honestly and fairly', the provision was described by Allsop CJ as: 'part of the statute's legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction.'[35]

That is consistent with the view expressed in the Explanatory Memorandum that accompanied the introduction of this norm into the *NCCPA*, which considered that the obligation would require an assessment 'which reflects an appreciation of … the need to meet community standards of efficiency, honesty and fairness'.[36]

Thus, once the norm of behaviour is identified, the detailed and prescriptive rules that follow in s 912A(1)(aa)-(j) of the *Corporations Act* are to be construed and applied by a court in a particular case having assessed whether a body of conduct satisfied or failed to satisfy the norm. Section 912A(1) makes no reference to fitness for purpose or reasonable care and skill. But if it is accepted that these are fundamental norms, then in assessing, for example, whether or not a licensee was competent, or had adequate resources, or took reasonable steps to ensure their representatives complied with the law, a Court is to determine whether a body of conduct satisfied or failed to satisfy the norm. Simply ticking off the list of prescribed obligations in s 912A cannot answer the question of whether, in all the circumstances and permutations of a particular transaction, a licensee complied with the standard of conduct to which s 912A(1) is directed. And if that is true, might it not be both appropriate and sufficient to give statutory force to those norms of conduct by providing that a financial services licensee

---

31 *National Consumer Credit Protection Act* (Cth) s 47(1)(a); *Corporations Act* s 912A(1)(a).

32 *Corporations Act* s 961B(1).

33 *Corporations Act* s 961J.

34 Patrick Hall, 'Community Standards and Expectations: Has There Been a Fundamental Shift in Obligations on Financial Services Licensees Under Pt 7.6 of the *Corporations Act 2001* (Cth)?' (2020) 31 *Journal of Banking and Finance Law and Practice* 221, 228.

35 *ASIC v Westpac Securities Administration Ltd* (2019) 373 ALR 455, 492 [173].

36 Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) 51–2 [2.110].

must provide financial services that are fit for purpose and deliver services with reasonable care and skill?

If the fundamental norms are indeed properly understood as the statutory expression of a standard of expected community behaviour in commerce as understood by reference to the principles and values of the common law and equity,[37] no higher level of abstraction is required to inform the exhortations 'to obey the law', 'not to mislead or deceive', 'to provide services that are fit for purpose', 'to deliver those services with reasonable care and skill', or 'when acting for another, act in the best interests of that other'. They readily contemplate requirements of honesty, fairness when dealing with consumers, the faithful performance of bargains and promises freely made, the rejection of trickery or sharp practice, the protection of those whose vulnerability places them in a position such that a just legal system will protect them from victimisation or predation, the reversibility of enrichments unjustly received, and the importance of behaviour in commerce that exhibits good faith and fair dealing.[38] All are readily identifiable as falling within existing principles of common law and equity, most particularly those relating to unconscionable conduct, undue influence, mistake, duress, equitable fraud, and fiduciary obligations.

The question is whether attempts to describe conduct at a higher level of abstraction — in particular, by exhortations to 'act fairly' — will have the consequence of decoupling the norms from the anchoring principles and values of the common law and equity, allowing them to float amongst broad standards of morality, fairness, and justice, thereby 'risking descent into moral and distributive justice, lacking stability and consistency'.[39]

IV The Interaction Between Norms and Equitable Principles

So what is to be made of the interaction between the fundamental norms of behaviour and the equitable doctrines and principles, whether as enacted by statute or as generally applicable? Presumably 'to obey the law' is an expression of a social standard of behaviour that extends to obeying all law, not merely the particular provisions of the financial services legislation. Taken to its logical extension, behaviour that, for example, amounts to equitable fraud, undue influence or duress in the provision of financial services would, or should, be assessed against this norm.

There is nothing controversial about accepting as a binding principle or duty that, when acting for another, one must act in the best interests of that other, as prescribed by s 961B of the *Corporations Act*. Such has been the classical

---

37 As posited by Allsop (n 4) 124.

38 Ibid 123.

39 Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9 *Journal of Equity* 1, 23 ('Conscience and Unconscionability').

understanding of fiduciary relationships as described by Mason J in *Hospital Products Ltd v United States Surgical Corp.*[40]

However, what does it mean to say that, within the framework of the financial services legislation, there is a fundamental norm, an informing but binding principle or duty — a means by which the courts can recognise and give effect to an expected standard of behaviour — namely, to act fairly? Further, is there any distinction to be drawn between that norm and the obligation in s 912A to provide financial services efficiently, honestly and fairly? Is such a norm expected to inform the interpretation of the proscription on unconscionable conduct and, if so, to inform the interpretation of the proscription in relation to both the unwritten law and the statutory provisions?[41] Further, is such a norm expected to inform the interpretation of the statutory definition of 'unfair'?[42]

A principled understanding and application of notions of conscience and unconscionability is of itself difficult enough, at least in the Australian context,[43] without superimposing a norm of 'fairness'. Havelock has observed that modern courts have not adopted consistent conceptions of what conscience means; 'instead, the tendency is to invoke conscience (and the variant form of 'unconscionability') uncritically, as if it has (and has always had) a static meaning and role in Equity'.[44] But that is not to deride the concept of conscience itself and its underpinning of equitable principles — still less to dismiss equity's essential role in commerce and in commercial litigation.[45]

V So What of 'Fairness'?

Persons who enter into contracts relating to financial products or financial services usually expect a financial return. When that does not happen, a disappointed person may be heard to say that the outcome was unfair. Does the fundamental norm 'to act fairly' impose some immeasurable concept of fairness as between a financial product provider and a consumer or service recipient? Is fairness to be judged from the point of view of the consumer/recipient or that of the provider, or both?[46] Is the contract prima facie unfair if the consumer/recipient does not achieve the objective of the product or service?

---

40 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7.

41 *ASCI Act* ss 12CA, 12CB, 12CC.

42 *ASIC Act* s 12BG.

43 Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24 *University of Queensland Law Journal* 74; Havelock, Conscience and Unconscionability (n 39) 23.

44 Rohan Havelock, 'The Evolution of Equitable 'Conscience'' (2014) 8 *Journal of Equity* 129, 159 ('Equitable 'Conscience'').

45 Leeming (n 5) 139.

46 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 150 [522] (Beach J): '[f]airness is to be judged having regard to the interests of both parties'.

Fairness cannot turn on subjective views about which party 'ought to win'. This was clear from some of the earliest criticisms of Equity dating back to at least 1526,[47] but was perhaps most famously said by John Selden in 1617:

> Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity Tis all one as if they should make ye Standard for ye measure we call A foot, to be ye Chancellors foot; what an uncertain measure would this be; One Chancellor ha's a long foot another A short foot a third an indifferent foot; tis the same thing in ye Chancellors Conscience.[48]

In *Muschinski v Dodds*, Deane J observed that, long before Selden's statement, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is the essence of any coherent system of rational law.[49] He went on to note, however, that this is not to say 'that general notions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of equity.'[50]

Concerns about the indeterminacy of standards such as 'fair' elsewhere in the law have been commonly aired. For example, in the context of equitable obligations, Birks has commented that the concept of fairness is 'so unspecific that it simply conceals a private intuitive evaluation'.[51] Similarly, Beach J has written, in the context of statutory unconscionability, that reference to 'intellectual ideas of customary morality and societal values without further delineation and ready identification may be at too high a level of abstraction to be an objective touchstone.'[52]

If that be the case for 'fairness', it may give rise to rule of law concerns, since it would mean that substantial discretion is reposed in judges to make moral evaluations, free from meaningful constraint, on matters about which reasonable people commonly disagree. As Dixon CJ observed, '[i]ntuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions'.[53] Albeit in an entirely different context, the Full Court of the Federal Court has observed that 'a process determined by intuition is

---

47 Havelock, Equitable 'Conscience' (n 39) 151 n 221, attributed to Thomas Audley.

48 Sir Frederick Pollock (ed), *Table Talk of John Selden* (Quaritch, 1927) 43.

49 *Muschinski v Dodds* (1985) 160 CLR 583, 616 ('*Muschinski*'); *Ward v James* [1966] 1 QB 273, 293 (Lord Denning MR).

50 *Muschinski* (n 49) 616.

51 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 16–17.

52 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 118 [365].

53 *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 529, 572.

open to criticism as lacking in predictability and transparency and governed by subjectivity, personal proclivity, arbitrariness and lack of confined boundaries'.[54]

The difficulty with the scope of a norm of behaviour to 'act fairly' can be illustrated by some of the judicial attention that has been given to 'fairly' in the context of 'efficiently, honestly and fairly.' In *ASIC v Westpac Securities Administration*, Allsop CJ observed that the 'word "fair" in its adjectival form, directed to conduct, includes a meaning of "free from bias, dishonesty, or injustice; that which is legitimately sought, pursued, done, given etc; proper under the rules"'.[55] In the same case, O'Bryan J considered that there seemed to be 'no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness'.[56]

One criticism of such descriptions is that they merely invoke synonyms that 'are of little assistance' because they 'simply re-express the concept of fairness in terms of other values and societal norms'.[57] As Beach J wrote in the *AGM* case about the s 912A(1)(a) use of 'fairly', 'no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions'.[58]

Anderson conceptualises fairness in three ways. First, that conduct is likely to be unfair if it involves 'the exploitation of another's vulnerability', as is comprehended by the law concerning unconscionable conduct.[59] This is supported by case law, which has established that 'fairness' imposes a 'lower moral or ethical standard than unconscionability',[60] so that a party who had acted unconscionably, by exploiting another's vulnerability, would almost certainly have failed to act in a manner that was fair. Conceptualised in this way, a fundamental norm of behaviour to act fairly does not assist with understanding how it interacts with the normative standard that proscribes unconscionable conduct.

The second conception is 'fairness as the suppression of individual interest'.[61] This appears to be the conception of fairness reflected in the *ASIC Act*'s unfair contract regime and was also recognised by Finn, who observed that:

> one party's decision or action may bear so directly upon the interests of the other that basic fairness to that other may require that in some circumstances he should have

---

54 *Northern Territory v Griffiths (Timber Creek)* (2017) 256 FCR 478, 570 [385].

55 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, 210 [174].

56 Ibid 539 [426].

57 Joshua Anderson, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37 *Company & Securities Law Journal* 450, 453.

58 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 150 [520].

59 Anderson (n 57) 459.

60 *Paciocco* (n 8) 287 [363].

61 Anderson (n 57) 459.

> regard to those interests in addition to his own, and if necessary, should desist from or modify the proposed course of action in consequence.[62]

Donald considers that this conception is reflected in the existing cases concerning 'efficiently, honestly and fairly', which 'all involve situations in which the interests of the client have been adversely affected by the pursuit of the licensee's self-interest. This highlights that, in this context at least, the requirement to act fairly limits the autonomy of the party to act in its own self-interest.'[63] The difficulty with this conception is the interaction of the norm with the statutory definition of 'unfair' in s 12BG of the *ASIC Act*. Parliament has clearly expressed its intention as to what is meant by an 'unfair' contract term in a consumer or small business contract. Is it to be contemplated that a court should apply some other notion of fairness informed by the court's idiosyncratic understanding of whether or not the transaction is 'fair'?

Anderson's third conception of fairness involves 'reciprocity, in the sense of whether the terms of the impugned transaction are reasonable, and both parties receive "fair or agreed value"'.[64] On this conception, arguably conduct that is misleading or deceptive, or the making of false or misleading representations, would be unfair, since it indicates that a party has not received the 'agreed value' of the transactions. If it is accepted that misleading or deceptive conduct (including the making of false representations) is a fundamental norm of behaviour, the interaction with an additional norm of fairness is apt to contaminate the well-established jurisprudence in relation to misleading or deceptive conduct.

This conception of fairness resonates most clearly with a standard of behaviour in a business and consumer context that exhibits good faith and fair dealing. The demands of honest commerce conform with a degree of right behaviour. This conception is now largely, although not universally, recognised as an implication or feature of Australian contract law.[65]

VI If not Fairness, then What?

Unconscionability has become very much part of modern commercial jurisprudence, having been given statutory force in the *ACL* and the *ASIC Act*. In this way the legislature has set a standard in Australian commerce of a form of

---

62 Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 450, 495.

63 Scott Donald, 'Regulating for Fairness in the Australian Funds Management Industry' (2017) 35(7) *Company and Securities Law Journal* 406, 411.

64 Anderson (n 57) 460–1.

65 *Paciocco* (n 8) 272 [287], citing *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151. Cf *Commonwealth Bank of Austrakua v Barker* (2014) 253 CLR 169, 195–6 [42], 214 [107].

decent behaviour, by prohibiting conduct of a proscribed standard — just as it did when s 52 of the TPA was first enacted. If modern commercial law is to be understood as fully encompassing the values that come from statute, the common law, and equity, those equitable values should be comparably enacted, thereby restricting the ability to contract out of behaving decently.

In *ASIC v Kobelt*, Gageler J explained that s 12CB of the *ASIC Act* (statutory unconscionability):

> operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct.
>
> …
>
> The Commonwealth Parliament's appropriation in s 12CB of the terminology of courts administering equity in the expression of the normative standard which the section prescribes serves to signify the gravity of the conduct necessary to be found by a court in order to be satisfied of a breach of that standard.[66]

To interpret the proscriptions on unconscionable conduct by reference to a norm of 'fairness' runs the risk of diluting 'the gravity of the equitable conception of unconscionable conduct so as to produce a form of equity-lite'.[67]

It is worth recalling the matters that a court may have regard to, as provided for in s 12CC, for the purposes of determining whether a person has contravened s 12CB. They include: the relative strength of bargaining power and whether the parties were able to understand the documents (*undue influence/unconscionable conduct?*); whether any *undue influence* or pressure (*duress?*) was exerted by either party; the extent to which either party failed to disclose various factors (*mistake/misrepresentation?*); the amount for which and circumstances in which equivalent services could be obtained and the parity of conduct with other recipients of the same services (*equitable fraud?*). All of these factors also fit comfortably within Anderson's third conception of fairness.

A coherent body of principle concerned with good faith, fair dealing and conscience in commercial dealings must necessarily encompass the equitable doctrines of undue influence, duress, equitable fraud, mistake and misrepresentation, in addition to the existing statutory recognition of unconscionable conduct and fiduciary duties. Whether the scope of those principles is limited to the meaning of the unwritten law (as in s 21 of the ACL and s 12CA of the *ASIC Act*), or is given additional breadth (as in s 22 of the ACL and ss 12CB and 12CC of the *ASIC Act*) is a policy choice — one that I suggest should be vigorously resisted so as to avoid yet further prescription. But a court directed to the equitable rules and principles, rather than to any social or commercial norm

---

66 *ASIC v Kobelt* (2019) 267 CLR 1, 38.

67 Ibid 39.

'to act fairly', will not risk descent into 'a formless void of personal intuition'.[68] The administration of equity

> has always paid regard to the infinite variety of interests and has refrained from formulating or adhering to fixed universal and exhaustive criteria with which to deal with such varying situations. The approach traditionally adopted by equity has been to retain flexibility so as to accommodate the multitudinous instances in which the fundamental equitable rules fall to be applied.[69]

It may be that the best hope for simplification of the financial services law so as to ensure there is meaningful compliance with the substance and intent of the law will be through the restoration of the incremental development and application of equitable rules and principles through the commercial law. The financial services legislation could make plain that its object is: 'To enhance the integrity and stability of the financial services industry and to provide for consumer protection informed by common law and equitable principles of fair-dealing and good conscience.' This would enable the clear statutory expression of proscribed and prescribed standards of conduct without the need for prolix rule-making that results in 'legislative porridge'.[70]

In this way we might, counter-intuitively, enhance the certainty of the commercial law. That such might be the case was already understood centuries ago. Plato, writing in his Seventh Letter, said:

> the soul seeks to know not the quality but the essence, whereas each of these four instruments [the name, the definition, the image, knowledge, reason and right opinion] presents to the soul, in discourse and in examples, what she is not seeking, and thus makes it easy to refute by sense perception anything that may be said or pointed out, and fills everyone, so to speak, with perplexity and confusion.[71]

I should also have heeded Plato's warning in a later passage of that same letter, that 'anyone who is seriously studying high matters will be the last to write about them',[72] but I thank you nonetheless for your polite attention.

---

68 Allsop (n 4) 122.
69 *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216, 223–4 (Kearney J).
70 *Wingecarribee* (n 2) [947]–[948] (Rares J).
71 John M Cooper (ed), *Plato — Complete Works* (Hackett Publishing, 1997) 1660.
72 Ibid 1661.

Attacking the 'New Right', Australian Law Reviews and the Peer Review Process

James Allan*

In a just published issue in one of Australia's oldest and best-known law reviews, the *Federal Law Review*, Dr Harry Hobbs of the University of Technology Sydney has written an article that comes out swinging[1] (read on to see that that is, if anything, a mild description) against critics of three High Court of Australia cases. The three judgments are separated by 28 years in total,[2] but Hobbs lumps them — or rather various critics of any one of these three decisions — together as part of a supposedly coherent and like-minded whole. I am one of those thus lumped, which is why I am taking the time to offer up this brief reply, though there are dozens of others also so categorised.

Accordingly, I must begin by making it clear in this reply that I speak solely for myself, not for any of the numerous others who are the objects of Hobbs's wrath (for wrath it clearly is). Let me also set out for readers the label Hobbs chooses to use in order to group or lump together or classify all those whose views about these three cases he dislikes. That label is 'New Right'. In a 26-page article Hobbs uses the term no less than 52 times.[3] As so many different and varying writers are aggregated or amassed together under this one tag or epithet, readers would expect to be given some detailed account of what Hobbs sees as their shared outlooks or perspectives on law or politics that warrants the use of 'New Right' as applied to them. This expectation is met in three short paragraphs.[4] Alas, virtually all of those three paragraphs is devoted to the provenance of the phrase or term — how it first emerged after WWII; when it surfaced in Australia; under whose

* TC Beirne School of Law, University of Queensland.
Editors' note: The decision to publish this reply was taken in consultation with other members of the TC Beirne School of Law, in accordance with our standard procedures for submissions (such as comments and replies) that are not amenable to blind peer review. The UQLJ considers viewpoint diversity to be a critical feature of academic discourse and we publish this reply in that spirit.

1 Harry Hobbs, 'The New Right and Aboriginal Rights in the High Court of Australia' (2022) *Federal Law Review* (forthcoming).

2 The three cases on which Hobbs focuses his article are *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*'), *Wik Peoples v Queensland* (1996) 187 CLR 1 ('Wik') and *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*').

3 Hobbs (n 1) 1, 2 (two times), 3 (eight times), 4 (seven times), 6, 8 (two times), 9 (two times), 11, 12, 13 (five times), 14 (two times), 16 (two times), 17, 19 (two times), 20, 21, 22, 23 (two times), 24 (four times) and 25 (six times). If I missed any times the term was used, I apologise.

4 See Hobbs (n 1) 3–4.

DOI: 10.38127/uqlj.v42i1.7505

Prime Ministership it became the dominant force within Australian conservatism (author's answer, John Howard); that sort of thing — and to how New Right adherents are generally, but not always, distinct from 'constitutional conservatives'. Here Hobbs also asserts that '[r]ather than [being] worried about judicial activism per se, the focus of New Right criticism is outcome oriented'.[5] This general claim is re-asserted on pages 13,[6] 15,[7] 16,[8] 19[9] and 21,[10] though no direct evidence is ever offered in its support — nothing more than repeated Hobbsian 'this suggests' pronouncements, possibly linked to inferred or guessed at states of mind, but never accompanied by any careful (or non-careful, for that matter) consideration or analysis of specific authors' works.

Put bluntly, Hobbs's assertion here amounts to little more than a blanket charge of bad faith but without the usually required extended exegetical analysis of the attacked writer's (here writers') work to try to back up such ambit claims and make them plausible. That blanket charge of bad faith when directed my way is one that I whole-heartedly reject. Indeed, this repeated assertion of caring only for outcomes but not for defensible interpretive methods is, in my own case, specifically contradicted by my writings about Australia's so-called 'implied freedoms' jurisprudence. I have made plain in various peer-reviewed law review articles, and elsewhere including in newspapers and weeklies, that in general I like the outcome of those judicial 'implied freedoms' innovations, and would support them if they were the result of laid-down-by-the-legislature rules (being one of the most pro-free speech law professors in Australia, if I do say so myself), but nevertheless that I believe that the interpretive approach used by the High Court to achieve those freedoms is appallingly self-serving and looks to many, including me, to collapse into judges simply 'making it up' at the point of application under the guise of performing constitutional interpretation.[11]

---

5 Ibid 4. Hobbs goes on, in the next sentence, to tell readers that despite how 'New Right critics may frame their censure', he will soon tell readers what 'their [ie those in the New Right's] real concern appears to be'.

6 'The ferocity of New Right claims suggests their real concern lies with the outcome of High Court decisions': ibid 13.

7 'Such accusations suggest that the real source of complaint was the outcome of the decision rather than judicial methodology': ibid 15.

8 It 'suggests that Allan's criticisms may well have less to do with the methods of constitutional interpretation adopted by the majority than with the outcome of the decision itself': ibid 16.

9 This 'reveals that New Right criticism fixed on the Court may be clothed in legal argument, but much of it is political in nature, and should be understood as such': ibid 19.

10 New Right 'critics were keenly aware of their larger political motivations': ibid 21.

11 For just one such explicit reference see James Allan, 'Australian Originalism without a Bill of Rights: Going Down the Drain with a Different Spin' (2015) 6 *The Western Australian Jurist* 1, 24: 'Now to be perfectly blunt, I like the outcome of this *ACTV* case; I am at the far end of the spectrum in terms of wanting as much scope as possible for people to speak their minds, including scope to pay for broadcast time to do so in an election campaign. But liking the outcome of a case has nothing to do with thinking that the interpretation of the Constitution that achieved that outcome

As far as what the label 'New Right' actually encompasses (as opposed to its provenance or how its adherents are, says Hobbs, really focused on matters distinct from what they claim to be focused on), and despite Hobbs using the term at least 52 times in his article, the reader is left largely in the dark. All we are told substantively is given in one sentence. We are told that what will mark out 'New Right' adherents is that such writers:

> [are distinguished] from the 'Old Right' by a commitment to economic liberalism and a robust defence of the free-market, and from social democratic parties by an emphasis on traditional conservative policies of law and order and support for the family unit, [and hence that they advocate] for a 'muscular conservatism'.[12]

Now leave aside the fact that 'the Old Right' label is itself never defined or delineated by Hobbs. The main problem here is that these generalised markers of support for economic liberalism, for the free-market, for law and order, and for the family unit are pitched up in the Olympian heights of moral abstractions, where they finesse all disagreements on a host of law and constitution-related matters. That means that Hobbs's account of what it means to be a member of the 'New Right' has next to no worth in terms of helping the reader distinguish anyone from anyone else, at least not on the right-of-centre side of law and politics — the side, as this article makes abundantly clear, that is opposite to that of Dr Hobbs himself. Just about any right-of-centre thinker or writer on constitutional law (and a fair few others too) can loosely be said to favour the free market, law and order and the family. That will be true while at the same time this entire side or half of the political and legal divide will be riven with widespread disagreement on all sorts of detailed interpretive and constitution-related matters. Meanwhile, what does and does not amount to 'muscular conservatism' is never revealed by Hobbs and anyway is very much in the eye of the beholder, or in this case condemner.

Put even more bluntly still, my grievance here is that Hobbs uses the label 'New Right' as a patent term of abuse. He defines it so exiguously that it could apply to all, or to none, of those who differ from him in the realms of constitutional law and politics.[13] It is a version of the *ad hominem* fallacy, just put

---

was remotely plausible.' For just a small sample of my peer-reviewed views on the implied freedom jurisprudence let me here cite two extremely recent pieces of mine published where referees for the *Federal Law Review* might have been expected to see them: James Allan, 'Constitutional Interpretation Wholly Unmoored from Constitutional Text: Can the HCA Fix its Own Mess?' (2020) 48(1) *Federal Law Review* 30; James Allan, 'Arcioni, Crowe and Allan on Constitutional Interpretation: A Worder of Crowes' (2021) 49(4) *Federal Law Review* 499.

12 Hobbs (n 1) 3.

13 For what it is worth, many conservatives would give quite a different account of the views shared by those falling within the ambit of a 'New Right' classification. See, for just one such differing view, that of John O'Sullivan who has been (*inter alia*) a speech writer for Margaret Thatcher, an

forward in the plural rather than the singular form. And before leaving this initial point I might also note that in two further instances Hobbs uses the label 'Hard Right',[14] rather than 'New Right', yet in both such instances he never even attempts to define the phrase in any way. The reader is simply meant to realise that it is not good, definitely not good, to be someone whose views fall under its aegis.

Before I move on to make a few observations about Australian law reviews today, and about the peer review process, I think it is relevant to give readers a taste of the sort of adjectives and nouns Hobbs uses to describe the many New Right writers he discusses (or more accurately condemns). Here is a small sample, with more in the related footnote:

> 'overblown', 'disingenuous', 'legal baselessness', 'political ferocity', 'inflammatory', 'incendiary', 'provocateur', 'caustic', 'beyond the caustic', 'self-evidently absurd' and 'vulgar'.[15]

As I said, that is but a sample of how Hobbs describes and characterises the views and writers with whom he differs. I hope it suffices to give readers a general sense of the manner in which he attempts to make his case. Likewise, and perhaps predictably, when it comes to views with which Hobbs happens to agree, readers can find these described in such terms as that they were 'expertly documented'.[16]

When it came to criticising me in his article,[17] Hobbs cited one blog post and one podcast I had done (the former growing out of the latter) on *Love v*

---

editor of the American *National Review* publication, Conrad Black's first editor of Canada's *National Post* newspaper, a fill-in editor of Australia's *Quadrant* monthly, and the author of *The President, the Pope, and the Prime Minister: Three Who Changed the World* (Regnery, 2008). If this does not make O'Sullivan the best connected conservative in the anglosphere it certainly puts him right up there. O'Sullivan recently gave a much different account of what the label 'New Right' might encompass. See John O'Sullivan, 'Athwart History' (2022) (Summer) *Claremont Review of Books*, reviewing Matthew Continetti, *The Right: The Hundred Year War for American Conservatism* (Basic Books, 2022). Other than those he is attacking in this article, Hobbs appears never to cite any writers, in the main text or the footnotes, who are sympathetic to conservative outlooks, be they political or constitutional — not even in line with the standard 'but for a different view see X, Y or Z' practice.

14 See Hobbs (n 1) 14, 16.

15 Ibid. Those words can be found at 1 (abstract), 1 (abstract), 4, 4, 11, 12, 14, 15, 15, 18 and 20, respectively. Hobbs also describes those with the views he dislikes (ie the so-called 'New Right' writers he attacks) as seeking 'to inflame the issue' (at 6); as having 'an inability to conceive' (at 11); as being driven by a 'political motivation' (at 16, the pot calling the kettle black notwithstanding); as 'cloth[ing their criticisms] in legal argument' (at 19); as writing in terms that were 'less inflammatory but no less inaccurate' (at 23); as dealing in '[i]naccuracy [which] is a feature not a bug' (at 23); as 'misrepresent[ing] the law to make a political point' (at 25); and with a 'legal baselessness and ferociousness' (at 25).

16 Hobbs (n 1) 16.

17 Ibid n 124. Hobbs earlier mentions one of my weekly columns for the *Spectator Australia* when he there takes issue with a criticism I made of the Labor government for withdrawing its appeal in *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (High

Commonwealth ('*Love*'),[18] which was the third of the three High Court of Australia cases whose sundry and disparate critics were the subject of Hobbs's ire in this article. Of my hundred plus law review articles he cited only one, in passing and from a decade before, as evidence that I had previously criticised the Justices of the High Court of Australia for adopting an implausible approach to constitutional interpretation that amounts to judicial usurpation or judicial activism.[19] There was no critique of any of my arguments or analyses in any of my peer-reviewed work or book chapters or books. That was all ignored as Hobbs's focus was solely on a podcast (turned into a blog) I had done on one of the three High Court of Australia cases. (As it happens, I have never written on *Mabo* or *Wik*, the two earlier High Court of Australia cases decided 28 and 24 years before *Love*, respectively, which combine to make up the Hobbsian trinity.) Furthermore, Hobbs solely refers to the first half of my analysis of the *Love* case in that podcast, my charge that the majority judges were making things up out of thin air, and were doing so by leaving the realm of orthodox constitutional law analysis. I argued the High Court majority Justices in *Love* seemed to ground their *ratio* — when it came to whether a non-citizen person claiming Aboriginal status could be deported — on concepts such as 'otherness', 'deeper truth', 'connection [to Australia that] is spiritual or metaphysical' and more of the same, which were then combined together to claim that judge-made law that purported to speak in the name of the Constitution now recognises 'that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and cannot be possessed by, the non-Indigenous peoples of Australia' and that 'different

Court of Australia, S173/2021, commenced 29 November 2021). I wholly stand by that criticism, for what it is worth, and know of no similar examples of a government pulling a case after it has been argued and judgment is imminent, not anywhere else, ever, in Canada, New Zealand, Britain or the United States.

[18] *Love* (n 2). My position on that case, which is one of the things that triggered Dr Hobbs to write his piece, is set out fully in an article that was accepted for publication before I saw this piece in the *Federal Law Review*. James Allan, 'Wokery and High Court "Otherness"' (2021–2) 12 *The Western Australian Jurist* 31–48.

[19] Hobbs (n 1) n 125. In fact, I have set out my critique of the High Court on this score many times, in various places. In addition to those cited in n 11, above, a further small sample might include James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century (2006) 17(1) *King's College Law Journal* 1; James Allan and Nicolas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 30(2) *Sydney Law Review* 245; James Allan, 'Implied Rights and Federalism: Inventing Intentions While Ignoring Them' (2009) 34(2) *University of Western Australia Law Review* 228; James Allan, 'Not in for a Pound — In for a Penny? Must a Majoritarian Democrat Treat all Constitutional Judicial Review as Equally Egregious?' (2010) 21(2) *King's Law Journal* 233; James Allan, 'The Activist Judge — Vanity of Vanities' in L Coutinho and S Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer, 2015), 71; and — the one Hobbs cites in passing — James Allan, 'The Three 'R's of Recent Australian Judicial Activism: Roach, Rowe and (no) 'Riganalism' (2012) 36(2) *Melbourne University Law Review* 743.

considerations apply … to … a person of Aboriginal descent'.[20] In no way at all do I resile from my claim that in *Love* one sees some of the most egregious forms of judicial usurpation and judicial activism going. Put bluntly, it is one of the worst reasoned top-court cases I have ever read, from anywhere in the Anglosphere, in more than a quarter century of slogging through myriad constitutional law cases from Canada, the US, Britain, New Zealand and here in Australia. In the second half of my analysis of the *Love* case — remember, the Hobbs lament is effectively focused solely on one podcast I did — I go on to detail how heads of power interpretation related to federalism is the core constitutional issue that lies at the heart of this deportation case. One must focus on whether the Commonwealth Parliament has the power to legislate to deport non-citizen Aboriginals who otherwise meet other grounds for deportation. And if not, why not? And if not, do the States not have this power in keeping with bog-standard federalism principles? And in what federalist world would states ever be given the deportation power? I then argue that the majority Justices in *Love* wholly ignore the traditional or orthodox approaches to federalism heads of power judicial review in Australia. Now I have no idea whether Hobbs agrees with that federalism analysis of mine, or not. I have no idea because Hobbs never in any way takes issue with, or disputes, my analysis of the federalism dimension to the *Love* case. In fact, he never mentions it at all. Not once. And really, my podcast was not even an hour long so presumably he was aware of it.

I say again, therefore, that I was surprised Hobbs's article had successfully made its way through the peer-review process and been published in an established, well-known Australian law review. Remember, many other supposed New Right adherents are given the same cursory treatment as I by Hobbs. A good few of them are well-known right-of-centre politicians such as former Prime Minister John Howard, former Prime Minister Tony Abbott, Peter Costello, Tim Fischer, Amanda Stoker, John Stone and James Paterson. So let me ask this. Does any reader believe for one second that an article exactly like Hobbs's, but instead a mirror-image one directed against the left-side of politics and against left-leaning views of constitutional interpretation that criticised some exiguously and ill-defined 'New Left' caste of writers (and leading Labor politicians) in the same cursory and perfunctory terms, would ever make it through the peer-reviewed process? Be honest. This Hobbs article has 'political hit job' written all over it. Now to lay my cards fully on the table, I am not in any way against those sorts of pieces. They are part and parcel of the back-and-forth of democratic politics in my view. I just say that they do not belong in peer-reviewed law journals, at least not in any that wish to retain some semblance of political neutrality and to avoid

[20] Those are cites from Justices Gordon and Nettle. All the specific case citations for those quotations, and more again, can be found in Allan (n 18). Of course, it is plain that Hobbs could not have known about this upcoming publication of mine. It is also plain, however, that I strongly disagree with Hobbs's assertion that in *Love* 'the Court engaged in orthodox processes of constitutional interpretation': (n 1) 15. That Hobbsian assertion is baldly stated. It is not defended with argument.

the appearance of being overtly politicised, not to mention expecting authors to read and take seriously the relevant views (so more than half of one podcast, say) of those they are criticising. Again, there is in my opinion zero chance that any mirror image article to this one — an anti-matter Hobbsian-type article that instead attacked a largely undefined New Left and Hard Left in the exact same terms and with precisely the same lack of balance and unconstrained adjectival abandon and lack of interest in writers' wider bodies of work — would ever be accepted for publication in the *Federal Law Review*. Or in any of the G8 Australian university law reviews. Or, frankly, in any law review in this country and probably in any one in any country in the developed Anglosphere. The referees would laugh it out of consideration or pillory it relentlessly for not meeting the established academic journal standards — whether you or they like those standards or not. But when it is an attack on conservative authors, well, standards can change, right?

I make that above claim about being surprised this article made its way through the review process with some degree of experience of law reviews. I have spent nearly two decades of my academic career being the sole editor of peer-reviewed law reviews. From 1998-2004 I was the sole editor of the *Otago Law Review* in New Zealand. And for over a dozen years here in Australia, from 2006 until 2018 (when I resigned in protest at changes being forced on the journal), I was the sole editor of the *University of Queensland Law Journal*. I have also refereed manuscripts for well over a dozen law reviews around the world (including the *Oxford Journal of Legal Studies*, *Legal Theory*, *Journal of Law and Society*, *McGill Law Journal*, *New Zealand Universities Law Review*, *Melbourne University Law Review* and even the *Federal Law Review*, the publisher of this article by Hobbs). At the risk of being seen to be immodest I believe I can be said to have a passing understanding of the peer review process in law and with the expected standards to be brought to bear, as well as with the task of finding peer reviewers.

I mention that because, on reading Hobbs's article, I promptly contacted the current general editor of the *Federal Law Review* and asked for a 'right of reply'. Three days after sending my emailed request I received a reply fromhim, stating that, while I would be welcome to submit a paper to that Journal, it would be subject to the normal review process. In the alternative, the general editor suggested, I could attempt to publish my reply in another journal or communicate my concerns directly to the author. He also noted that he was unaware of any deficiency in the review process.[21]

For readers who have managed to get this far it goes without saying that I disagree with the current general editor's assessment of the review process used in this instance. Nor do I believe it is any easy task to find some other law review willing to publish a short reply detailing perceived deficiencies in the *Federal Law*

[21] Email from the General Editor of the *Federal Law Review* to James Allan, 8 August 2022. On file with the author.

Review's review process. Readers will see that I was unsuccessful in persuading that journal to run this reply. Let me state publicly, though, that I am very grateful to the *University of Queensland Law Journal* for running my reply and showing its commitment to open debate.

Here is another aspect of my charge. If I am correct in claiming there is an asymmetry at work as regards the peer-review process — that an anti-Hobbs type piece aimed at the left-side of politics and constitutional thinking would have zero chance of being judged suitable for publication — then an interesting question is why there is this lop-sided or one-sided asymmetry. My own take on that is that it is closely related to the collapse of viewpoint diversity on campus. The vast preponderance of public law academics (heck, any sort of law teachers) vote for the left-side of politics. This is well-documented in the United States where political donations are public information and where there is much survey data.[22] I believe it is equally true here in Australia. In fact, I could count on one hand, with four fingers, the number of constitutional law professors (including me) who are publicly against the proposed constitutional amendment known as 'the Voice'. And remember, Hobbs's last claim in his article is that the many New Right writers he attacks are not just wrong in opposing this constitutional initiative; he looks inside their heads and asserts that they are writing because they are afraid this constitutional amendment will succeed. I will come back to that claim in a moment. My point here is that if nearly all the academics in an area have one particular political orientation then a submitted article that reinforces and plays to those outlooks and sentiments — especially in an area such as constitutional law which is more than others bound together with politics and political druthers — has a much better chance of slipping through and being approved by referees than does one that is diametrically opposed to the values and sentiments of the referees.

Now of course an editor can attempt to push back against those sorts of truths about human nature by making sure at least one of the referees shares the core political and constitutional outlooks of those being attacked. Did the former editor of the *Federal Law Review* do this when selecting the referees for Hobbs's submitted article? My guess is that he did not, not least because of the miniscule size of the pool of such potential anti-Voice, constitutional law conservative referees. He certainly did not ask me. Or the other three constitutional conservative law professors I had in mind. (I asked all three.) Perhaps, though, he found a retired one to be a referee. That is certainly possible. I do not know. If he did that would certainly buttress the current general editor's claim that he is unaware of any deficiency in the review process for Hobbs's article.[23] Perhaps,

---

[22] For just one source see Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Pantheon, 2012) and many of his more recent writings. Haidt, by the way, is a man of the political centre left, as he openly admits. All the same, the trends of ever fewer conservatives in academia worry him greatly.

[23] See the main text to n 21 above.

then, he will ask the referees for Hobbs's article to waive their confidentiality in this instance. I would, were I ever asked to do so for anything I had ever refereed.

Let me finish by setting the record straight on a few matters. I have already noted that I have written extensively as regards Australia's implied freedoms and that it is very much the implausible (verging on 'making it up') approach to constitutional interpretation that I dislike and critique, not the substantive outcomes (meaning Hobbs's blanket charge of bad faith should be made of sterner stuff, at least when directed at me). I have a multitude of publications on the related notions of what constitutes judicial activism or usurpation and when it amounts to anti-democratic conduct, none of which is even mentioned in any way by Hobbs.[24] I think Hobbs's declaration that '[t]here is no one correct approach to constitutional interpretation' is wrong,[25] and indeed a license for unconstrained conduct. Likewise, I reject Hobbs's assertion that 'constitutional, institutional and professional checks provide a measure of indirect democratic accountability'.[26] Certainly, these are indirect and they may deliver some loose form of accountability. But they do not constitute democratic accountability.[27] Lastly, because Hobbs himself finishes with this point, there is the proposed constitutional amendment known as the Voice. Hobbs asserts that 'neither a First Nations Voice nor treaty would threaten Australian sovereignty'.[28] I disagree. Strongly. Yet that sort of reasonable disagreement is only to be expected in academic life. It is when Hobbs goes on to suggest or assert that New Righters are afraid of the proposed s 128 constitutional amendment that I balk.[29] To remind readers one more time, I speak only for myself here. But in no way at all am I afraid of the looming constitutional referendum. If Hobbs had bothered to check anything else I have written he might have seen that I have explicitly welcomed the coming constitutional referendum because I think it will lose. In fact, I think it will not just lose but lose badly. I have even said so at a Samuel Griffith Conference, these conferences receiving much attention from Hobbs. The sooner

---

24 If Hobbs is interested in my latest foray that in part covers these areas he can see James Allan, *The Age of Foolishness: A Doubter's Guide to Constitutionalism in a Modern Democracy* (Academica Press, 2022).

25 Hobbs (n 1) 13. His immediately subsequent and joined-together claim about no 'one right way for a Judge to exercise their functions' is, of course, a distinct claim to one about no right approach to interpretation and correct. That is because many judicial functions do not involve constitutional or statutory interpretation.

26 Hobbs (n 1) 14.

27 Indeed, to make the case they do, one requires an incredibly fat, morally pregnant understanding of democracy — one that I rejected at length some time ago in James Allan, 'Thins Beats Fat Yet Again — Conceptions of Democracy' (2006) 25(5) *Law & Philosophy* 533.

28 Hobbs (n 1) 24.

29 See, eg, Hobbs (n 1): 'As Australia inches closer towards constitutional reform, the legal baselessness and political ferocity of New Right criticism suggests that perhaps the movement fears that the Australian people do not share their same anxieties' (at 4); 'Perhaps equally important for the New Right is the fear that the Australian people might support meaningful reform' (at 24); This 'suggests that the New Right may recognise its political vulnerability' (at 25).

the referendum is held the better in my view. To repeat, that view of mine would be clear to anyone who took any time at all to discover my views.[30] Alas, no reader of Hobbs's article would gain a remotely fair or accurate view of my position on this, or indeed on any of the matters he discusses. That is my gravamen. And that is why I asked for a right of reply.

[30] And yes, this means that I believe Hobbs's citing an 'analysis of public submissions made to the government's Indigenous Voice Co-Design process reveal[ing] "overwhelming public support for constitutional enshrinement"', and 'most polls since 2017 indicating 70–75 per cent … support' (at 25) mistakes, respectively, activist input for the views of average Australians and amorphous poll question results for what comes after detailed voter consideration of a proposed constitutional amendment that includes hearing the 'No' case — not unlike initial polling surrounding a Republic and the actual 'lost in every State' s 128 result.