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Articles

Open Justice, Closed Courts and the *Constitution*: Australian and Comparative Perspectives

Kieran Pender*

Open justice is an essential feature of the judiciary, in Australia and elsewhere. The principle has constitutional salience, as an element of judicial power in Chapter III of the Constitution. Yet, open justice is not absolute. In recent years, the tension between open justice and national security has been a matter of public controversy in Australia, as a result of the Bernard Collaery, Witness K and Witness J prosecutions, which have all been shrouded in secrecy. Reconciling open justice with the confidentiality required to protect national security is a common challenge for many jurisdictions. This article compares the Australian approach with the United Kingdom and Canada. It argues that Australian law and practice in relation to protecting open justice in the national security context is underdeveloped. Drawing on the British and Canadian experience, the article proposes methods to better balance these competing interests in Australia, in a manner which would reflect emerging constitutional principles.

I Introduction

Where there is no publicity there is no justice.[1]

Open justice is a significant, and longstanding,[2] judicial principle. It is considered a hallmark of the judicial branch of government in many jurisdictions, including Australia.[3] In some legal systems, open justice has been constitutionalised,[4] while the principle is also protected in national and international human rights

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1 Jeremy Bentham, quoted in *Scott v Scott* [1913] AC 417, 477 (Lord Shaw) ('*Scott*').

2 Garth Nettheim, 'The Principle of Open Justice' (1984) 8(1) *University of Tasmania Law Review* 25, 26–30 ('Open Justice').

3 As one scholar notes, the principle 'is treated as sacrosanct in a number of Commonwealth jurisdictions': Eric Barendt, 'Happy Centenary Birthday to *Scott v Scott*' (2013) 5(2) *Journal of Media Law* 297, 297.

4 Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40(3) *Federal Law Review* 385, 388.

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frameworks.[5] At its essence, open justice requires that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[6] This takes a range of practical forms: for example, that judicial hearings are open to the public, including the media,[7] that judgments are published, and that court records are accessible.[8] But open justice 'is a means to an end, and not an end in itself.'[9] The principle is therefore not absolute. In a range of circumstances, a tension will arise between the desirability of open justice and the benefits of secrecy. Where the interests of justice so require, courts can derogate from what open justice would otherwise demand.[10]

One context in which this tension is felt acutely is national security.[11] In Australia, the appropriateness of limitations on open justice in proceedings involving a national security dimension has been hotly contested in recent years.[12] The high-profile criminal cases of whistleblowers Bernard Collaery and Witness K have seen observers barred from the courtroom through the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*').[13] Even Collaery and his lawyers were prevented from viewing evidence, described as 'court only' evidence, that the federal government had sought to rely upon in seeking an order that the trial be held behind closed doors (the case was subsequently discontinued).[14] In the case of Witness J, meanwhile, a former intelligence officer was charged, sentenced, and imprisoned in complete secrecy.

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5 See, eg, *Human Rights Act 1998* (UK) sch 1 art 6; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

6 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart CJ). For an amusing discussion of the appropriateness of Lord Chief Justice Hewart's fame for this encapsulation of open justice, see JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *University of New South Wales Law Journal* 147, 147–50.

7 For discussions of the special role of the media in the context of open justice, see, eg, Michael Douglas, 'The Media's Standing to Challenge Departures from Open Justice' (2016) 37(1) *Adelaide Law Review* 69; Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29(3) *University of New South Wales Law Journal* 90.

8 See generally Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38(2) *Melbourne University Law Review* 482, 493–4.

9 *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ) ('*Hinch*').

10 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2nd ed, 2020) 552–5 ('*Federal Judicature*').

11 See generally Garth Nettheim, 'Open Justice and State Secrets' (1986) 10(3) *Adelaide Law Review* 281 ('State Secrets').

12 See, eg, Kieran Pender, 'There is No Place for Secret Trials in Australia', *Canberra Times* (online, 17 May 2021) <https://www.canberratimes.com.au/story/7254301/there-is-no-place-for-secret-trials-in-australia/>.

13 Christopher Knaus, 'Open Justice v Secrecy: What is the Case Against Witness K Lawyer Bernard Collaery All About?', *Guardian Australia* (online, 31 January 2022) <https://www.theguardian.com/australia-news/2022/jan/31/open-justice-v-secrecy-what-is-the-case-against-witness-k-lawyer-bernard-collaery-all-about>.

14 Elizabeth Byrne, 'Top-Secret Evidence Will be Allowed in Bernard Collaery's Court Case, ACT Supreme Court Judge Rules', *Australian Broadcasting Corporation* (online, 16 March 2022) <https://www.abc.net.au/news/2022-03-16/bernard-collaery-top-secret-evidence-allowed/100914432>.

The situation provoked outcry when it subsequently came to light.[15] Whereas other exceptions to open justice, such as those relating to trade secrets, may be relatively uncontroversial, the use of secrecy in cases relating to government conduct or where the secrecy is invoked by the government itself raises greater concern. In such cases, questions may arise about the appropriate accommodation of competing interests. What safeguards ensure that the right balance is struck?[16]

This article explores the constitutional dimensions of the principle, through an Australian and comparative lens, to consider the extent of permissible departure from open justice. Is open justice a protected constitutional value in Australia? How are limits on open justice to be assessed for compatibility with constitutional principle? How do the constitutional underpinnings of open justice in Australia compare to cognate jurisdictions, such as the United Kingdom ('UK') and Canada? And are there practical steps that could be taken to better reconcile secrecy and transparency in Australian courts, borrowing from international practice?

It proceeds in five parts. Part I explores the development of open justice in Australian law and outlines the application of the *NSI Act* to limit open justice in two prominent cases, Collaery and Witness J. Part II considers two potential limits on departures from open justice, Chapter III of the *Constitution* and the implied freedom of political communication, and how these principles have developed in existing case law. Part III explores cognate British and Canadian law and practice. Part IV concludes by considering how Australian law might evolve and what could be learned from these comparative perspectives. Part V briefly summarises the anticipated way forward.

An exploration of these themes is overdue. While there is extensive literature on the open justice principle in Australian law generally,[17] less attention has been given to the constitutional dimensions. Although parts of the *NSI Act* were subject to constitutional challenge in *R v Lodhi* ('*Lodhi*'), in the NSW Supreme Court[18] and

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15 Andrew Probyn, '"The Quiet Person You Pass on the Street": Secret Prisoner Witness J Revealed', *Australian Broadcasting Corporation* (online, 5 December 2019) <https://www.abc.net.au/news/2019-12-05/witness-j-revealed-secret-trial/11764676>.

16 The author has ventilated similar questions, in a shorter format, elsewhere: Kieran Pender, 'Witnesses J, K – and L? Open Justice, the *NSI Act* and the *Constitution*', *AusPubLaw Blog* (online, 12 October 2021) <https://www.auspublaw.org/2021/10/witnesses-j-k-and-l-open-justice-the-nsi-act-and-the-constitution/> ('Open Justice, the *NSI Act* and the *Constitution*').

17 See, eg, Bosland and Gill (n 8); Douglas (n 7); Rodrick (n 7); Nettheim, 'Open Justice' (n 2); Jason Bosland, 'Two Years of Suppression under the *Open Courts Act 2013* (Vic)' (2017) 39(1) *Sydney Law Review* 25; Jason Bosland and Judith Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23(4) *Communications Law* 183; Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35(4) *Sydney Law Review* 671; Chief Justice JJ Spigelman, 'Seen to Be Done: The Principle of Open Justice: Part I' (2000) 74(5) *Australian Law Journal* 290.

18 *R v Lodhi* (2006) 163 A Crim R 448 ('*Lodhi*').

on appeal,[19] there has been little detailed analysis of that case and its wider implications.[20] In light of the subsequent operation of the *NSI Act* in cases where democratic concerns are more central, such as Collaery and Witness J, it is necessary to squarely revisit these issues.[21] In July 2022, the Independent National Security Legislation Monitor ('INSLM') delivered its report into the Witness J case;[22] the Attorney-General, Mark Dreyfus KC, subsequently requested that the INSLM undertake a full review of the *NSI Act*. That inquiry is ongoing, due to report in late 2023; it is hoped this article can contribute to these continuing discussion around the appropriateness of the current law and its compliance with constitutional bounds. As has been said, 'recognition of open justice as a constitutional principle remains incomplete',[23] such that '[t]he accommodation of the constitutional value of open justice and competing interests will no doubt require further refinement and calibration.'[24] Legislative and jurisprudential development is to be anticipated.

Given the British provenance of the open justice principle, and the continuing similarity in conceptions of open justice across the common law world, comparative perspective is helpful in the present context.[25] This is particularly the case given the common challenge faced by many jurisdictions with the rise in national security-related litigation in recent decades, including the post-9/11 rise in terror-related trials. Given the shared legal context, similar parliamentary systems and common engagement with the dilemma of balancing of open justice and national security imperatives in recent years, Britain and Canada are compelling subjects for comparative analysis, notwithstanding divergent approaches to constitutional position for free speech.

Departing from open justice can impact both a litigant and the public at large (including the media). The use of court-only evidence in *R v Collaery (No 11)*[26] is a vivid illustration, whereby the defendant cannot make submissions in relation to

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19 *Lodhi v The Queen* (2007) 179 A Crim R 470. Special leave to appeal to the High Court was denied: Transcript of Proceedings, *Lodhi v The Queen* [2008] HCATrans 225.

20 But see Michael McHugh, 'The Constitutional Implications of Terrorism Legislation' (2007) 8(2) *Judicial Review* 189; Justice Anthony Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8(3) *Judicial Review* 353; Lawrence McNamara, 'Counter-Terrorism Laws and the Media: National Security and the Control of Information' (2009) 5(3) *Security Challenges* 95.

21 For an earlier contribution on the tension between national security and open justice, pre-*NSI Act*, see Nettheim, 'State Secrets' (n 11).

22 Matthew Doran, 'National Security Watchdog Launches Investigation into Secret Trial of Witness J', *Australian Broadcasting Corporation* (online, 2 March 2021) <https://www.abc.net.au/news/2021-03-02/investigation-restarted-witness-j-secret-trial/13206154>; Christopher Knaus, 'Labor Announces National Security Law Review after Inquiry Criticises Secrecy of Witness J Case', *Guardian Australia* (online, 28 July 2022) <https://www.theguardian.com/australia-news/2022/jul/28/labor-announces-national-security-law-review-after-inquiry-criticises-secrecy-of-witness-j-case>.

23 Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16).

24 Stellios, *Federal Judicature* (n 10) 555.

25 For other scholars who have drawn on comparative perspective in this field, see: Cunliffe (n 4); Garth Nettheim, 'Open Justice Versus Justice' (1985) 9(4) *Adelaide Law Review* 487.

26 [2022] ACTSC 40.

that evidence, while the public is unaware of the evidence on which the federal government is seeking a closed-court trial.[27] For the litigant, such secrecy also raises procedural fairness issues, in addition to questions of open justice. However, in the interests of brevity, this article will not consider the related but distinct principle of procedural fairness.[28] The intersection between secrecy, procedural fairness, and the *Constitution* was recently considered by the High Court in *SDCV v Director-General of Security*.[29]

The principle of open justice is directed at the need to uphold public confidence in the judicial branch. In the seminal British case, *Scott v Scott* ('*Scott*'), Lord Shaw quoted philosopher Jeremy Bentham: '[p]ublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'[30] While national security cases will often give rise to a legitimate, indeed, compelling interest in confidentiality, the use of secrecy around proceedings must be carefully contained. In October 2021, in the *Collaery* case, the Australian Capital Territory ('ACT') Court of Appeal accepted an appeal against secrecy orders issued at first instance. At the time of writing, the Court's judgment has still not been published, with an appeal against the level of redactions to be applied to the reasons pending,[31] the Court issued a summary. It said, relevantly, that 'there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed.'[32] In light of this and other developments, a close consideration of the constitutional dimensions of open justice, drawing on Australian and comparative perspectives, is timely.

II Context

A *Open Justice*

1 *Origins*

The timing and manner of the emergence of open justice as a significant legal principle is not entirely clear.[33] In a recent speech, Justice Stephen Hall traced the

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27 Ibid.

28 On the distinction, see *Guardian News & Media Ltd v Incedal* [2014] EWCA Crim 1861 [12] ('*Incedal*').

29 (2022) 405 ALR 209. See *SDCV v Director-General of Security* (2021) 284 FCR 357 ('*SDCV*').

30 (n 1) 477.

31 Transcript of Proceedings, *A-G (Cth) v Collaery* [2022] HCATrans 66. The new Albanese government withdrew the High Court appeal, and sought to have the issue reheard by the ACT Court of Appeal. The argument was heard in September 2022. As at June 2023, reasons had not been delivered.

32 'Judgment Summary: *Collaery v The Queen (No 2)* [2021] ACTCA 28', *Supreme Court of the Australian Capital Territory* (Web Page, 6 October 2021) <https://www.courts.act.gov.au/___data/assets/pdf_file/0004/1870627/Collaery-v-The-Queen-Judgment-Summary.pdf> ('*Collaery* Judgment Summary').

33 Nettheim, 'Open Justice' (n 2) 26.

principle back to the late Middle Ages, noting that the practice of public attendance at criminal trials 'has been so since at least the beginning of reliable records.'[34] In a record from court proceedings in the early 1300s, it was said to be the monarch's will that 'all evil doers should be punished after their just deserts … and for the better accomplishing of this, he prayed the *community of the county by their attendance there* to lend him their aid'.[35] Two centuries later, Sir Thomas Smith wrote that trials were conducted 'openly in the presence of the judges … the prisoner, and so many as will or can come so near as to hear it'.[36] On the other hand, open justice was not mentioned in significant legal documents of the era, including the *Magna Carta* (1215) and *Bill of Rights* (1689).[37] Far from being a foundational judicial value, some scholars have suggested the principle arose in a 'more or less accidental' manner, as a necessary corollary of jury trials.[38] '[I]t seems almost a necessary incident of jury trials', Max Radin suggests, 'since the presence of a jury — involving a panel of thirty-six men and more — already insured the presence of a large part of the public.'[39]

In any event, by the 1700s the principle was entrenched and referred to approvingly by key jurists. 'In other countries the Courts of Justice are held in secret; with us publicly and in open view,' wrote one author in 1730.[40] At the time the benefits of open justice were thrown into stark relief by more tyrannical 'justice' carried out in continental Europe—the Spanish inquisition, *lettre de cachet* and so on. The 'evil reputation' of such methods 'gave the "open and public trial" of the common law something of an odor of sanctity', even if, in the view of some, this feature was hardly 'a deliberately planned safeguard against the dangers incident upon secrecy.'[41]

The principle was affirmed in Britain in *Scott*, in 1913, in what has become the leading authority for open justice.[42] The case arose out of a petition for divorce, heard in closed court, and subsequent contempt proceedings after notes from the proceedings were provided to third parties. The House of Lords held that there was no justification for the proceedings to have been closed. '[E]very Court of justice is open to every subject of the King,' noted the Earl of Halsbury.[43] Lord Shaw added: '[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the

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34 Justice Stephen Hall, 'Open Justice: Seen to be Done' (Speech, Piddington Society, 19 February 2021) 2.

35 Quoted in William Holdsworth, *A History of English Law* (Methuen, 1927) vol 3, 268 (emphasis added).

36 Sir Thomas Smith, *De Republica Anglorum* (Alston, 1972) 101.

37 Nettheim, 'Open Justice' (n 2) 26.

38 Max Radin, 'The Right to Public Trial' (1932) 6(3) *Temple Law Quarterly* 381, 388.

39 Ibid.

40 Sollom Emlyn, *A Complete Collection of State Trials and Proceedings for High-Treason and other Crimes and Misdemeanours from the Reign of King Richard II to the Reign of King George II* (J Walthoe, 3nd ed, 1730) iii.

41 Radin (n 38) 389.

42 *Scott* (n 1).

43 Ibid 440.

sand.'[44] The case put beyond doubt the primacy of open justice, subject only to limited exceptions: 'the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done.'[45]

Scott was endorsed in Australia within a year, Barton ACJ holding that 'one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings'.[46] The principle's enduring application has been reiterated on many occasions. In *Russell v Russell* ('*Russell*'), Gibbs J observed: '[t]he fact that courts of law are held openly and not in secret is an essential aspect of their character.'[47] In *Grollo v Palmer*, McHugh J noted that '[o]pen justice is the hallmark of the common law system of justice'.[48] Open justice considerations have arisen frequently in the *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[49] line of cases.[50] The principle has also been given statutory footing; the *Federal Court of Australia Act 1976* (Cth), for example, provides that, except where a departure from justice is otherwise authorised, 'the jurisdiction of the Court shall be exercised in open court.'[51]

2 *Contemporary Position*

Accordingly, the present position in Australia is that open justice must be upheld except where a departure from the principle is permitted by statute or the category of exceptions.[52] The substantive content of this principle includes, at least:

> first, that judicial proceedings are conducted, and decisions pronounced, in 'open court'; second, that evidence is communicated publicly to those present in the court; and, third, that nothing should be done to discourage the making of fair and accurate reports of judicial proceedings, including by the media.[53]

The category of cases where departure is permitted at common law include those involving trade secrets (where '[r]evelation of the secret would destroy its value to the person seeking the court's protection'),[54] cases involving blackmail or police informants, proceedings involving children or people experiencing mental

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44 Ibid 477.
45 Ibid 437 (Viscount Haldane LC).
46 *Dickason v Dickason* (1913) 17 CLR 50, 51 ('*Dickason*').
47 (1976) 134 CLR 495, 520 ('*Russell*').
48 (1995) 184 CLR 348, 379.
49 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*').
50 See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licencing Court (SA)* (2009) 237 CLR 501; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 ('*Pompano*').
51 Section 17.
52 See, eg, *Hinch* (n 9) 530–1 (French CJ).
53 Bosland and Gill (n 8) 483–4.
54 *SDCV* (n 29) 366–7 [26].

illness (where jurisdiction has a 'parental and administrative' nature)[55] and those relating to national security. In *Hogan v Hinch* ('*Hinch*'), French CJ held that '[t]he categories of case are not closed, although they will not lightly be extended.'[56]

The common law test for departing from open justice is often described in the language of necessity, specifically: 'necessary to secure the proper administration of justice.'[57] In an early Australian case, Isaacs J noted that publicity 'can only be disregarded where necessity compels departure'.[58] Kirby P more recently observed: '[i]f the very openness of court proceedings would destroy the attainment of justice in the particular case … the rule of openness must be modified to meet the exigencies of the particular case.'[59] But these are high thresholds — they are not met by expediency or to avoid embarrassment.[60] As a 2017 review of Victoria's open justice legislation summarised: 'The law recognises that restricting access to a courtroom, or limiting publication about a proceeding, should only be considered in exceptional circumstances.'[61] In practice, though, courts in several Australian jurisdictions have been criticised for their willingness to depart from open justice.[62] One commentator has bemoaned that '[t]he Courts are singularly happy to hand out suppression orders, like lollies to children.'[63]

B *Closed Courts*

1 *National Security*

The tension between open justice and the imperatives of national security is not new. The need for open justice to accommodate the secrecy that might sometimes be required by national security is recognised by the common law in a range of jurisdictions,[64] and in international law. For example, the *International Covenant on Civil and Political Rights*, to which Australia is a signatory, provides a right to a 'public hearing' in criminal cases. However, the clause is expressly limited: '[t]he press and the public may be excluded from all or part of a trial for reasons of … national security in a democratic society'.[65] Thus while *Scott* did not identify

55 *Scott* (n 1) 437 (Viscount Haldane LC).
56 *Hinch* (n 9) 531 [21].
57 Ibid.
58 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 549.
59 *John Fairfax Group Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141.
60 See, eg, *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523; *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 294–5.
61 Frank Vincent, *Open Courts Act* Review (Report, September 2017) 32.
62 For a nuanced analysis, see Jason Bosland, 'Debunking the Myth: Why Victoria is Not the Suppression Order 'Capital' of Australia' (2020) 24(1) *Media and Arts Law Review* 11.
63 Richard Ackland, 'You Wouldn't Read About It: Not That You Can', *Sydney Morning Herald* (online, 27 January 2006) <https://www.smh.com.au/national/you-wouldnt-read-about-it-not-that-you-can-20060127-gdmusc.html>.
64 See generally Nettheim, 'State Secrets' (n 11).
65 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

national security as a standalone exception, it is widely accepted today that 'some measure of secrecy' will be permitted 'for material related to issues of defence and national security.'[66]

Prior to the enactment of the *NSI Act*, that secrecy came about through several common law methods. In some cases, courts have refused to consider claims relating to national security matters on the basis that they are non-justiciable.[67] More commonly, relevant information was protected through the public interest immunity doctrine. As Gibbs ACJ summarised in *Sankey v Whitlam*, 'the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it'.[68] Importantly, this was a judicial determination: '[i]t is in all cases the duty of the court … to decide whether a document will be produced or may be withheld'.[69] The public interest immunity doctrine continues, at common law and in evidence statutes.[70] Additionally, the inherent common law jurisdiction of a court to control its processes[71] has seen, in exceptional cases, hearings held *in camera.* In a British case, *R v Govenor of Lewes Prison; Ex parte Doyle*, heard only a few years after *Scott*, the turmoil in Ireland at the time was held to justify deviation from the general rule.[72] Lastly, courts have jurisdiction—at common law (in the case of superior courts) and in statute (generally)—to issue suppression orders and restrict access to evidence.[73]

The adequacy of these mechanisms to protect national security interests was called into question in Australia (and globally)[74] in the early 2000s. In *R v Lappas*, in 2001, an intelligence officer had been charged with secrecy offences after seeking to sell classified information to a foreign power.[75] During the prosecution, the federal government made a public interest immunity claim over various documents. The claim was successful. However, Gray J subsequently stayed one of the charges: 'I do not think the accused can have a fair trial unless far more of the text of the documents is disclosed'.[76] This apparent inability to prosecute secrecy offences while also protecting classified information was the primary impetus for a law reform process that led to the *NSI Act*. It is noteworthy, though, that Gray J expressed frustration that the immunity claim was made 'at this late

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66 Nettheim, 'State Secrets' (n 11) 281.
67 Most famously in *Liversidge v Anderson* [1942] AC 206. See ibid 282–4.
68 (1978) 142 CLR 1, 38.
69 Ibid.
70 See Adrian Hoel, 'Public Interest Immunity' (Speech, Legalwise Public Sector Law Conference, 5 March 2019).
71 See generally Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41(4) *Sydney Law Review* 423.
72 [1917] 2 KB 254. See also *A v Hayden (No 2)* (1984) 156 CLR 532, 599 (Deane J).
73 See generally Bosland (n 17).
74 Isabella Cosenza, 'Open Justice and National Security Cases' (2004) 84 *Australian Law Reform Commission Reform Journal* 50, 50.
75 [2001] ACTSC 115.
76 Ibid [24].

stage', indicating that if the matter had been raised earlier, it might have been appropriately managed.[77]

Nonetheless, the partially-failed *Lappas* prosecution, and the spectre of an evolving post-9/11 security landscape, prompted the Howard government to instruct the Australian Law Reform Commission ('ALRC') to review mechanisms for protecting sensitive information in litigation and consider potential reform.[78] This was concluded in mid-2004, with a comprehensive consideration of the issue and extensive recommendations for reform, most significantly the enactment of dedicated legislation to manage the tension between open justice and secrecy in national security cases.[79] The ALRC's report is the most detailed analysis of this tension in Australian law and remains a valuable resource. However, five days *before* the ALRC was set to report, the legislation which became the *NSI Act* was introduced to parliament.[80] While directed at the same dilemma, the Howard government's *NSI Act*, and the proposal advanced by the ALRC, differ in terms of the level of judicial discretion, power given to the Attorney-General, and safeguard mechanisms.

The *NSI Act* is intended to protect information where disclosure 'is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.'[81] National security is defined to mean 'Australia's defence, security, international relations or law enforcement interests.'[82] Primary aspects of the operation of the *NSI Act* will be outlined below, in the context of two recent cases. In short, the law requires a party that anticipates national security information will be disclosed during proceedings to notify the Attorney-General.[83] The Attorney-General may issue a non-disclosure or witness exclusion certificate.[84] The issuing of such a certificate precipitates a hearing where the court considers whether to make an order to protect the information during the ultimate trial.[85] Alternatively, at any time, the parties can agree an arrangement to protect national security information, which the court can then give effect to.[86] While this article largely focuses on the operation of the *NSI Act* in criminal proceedings, the regime also has application in civil proceedings. In one case, the Attorney-General gave notice that the *NSI Act* applied to defamation proceedings between a former Australian soldier and several newspapers.[87]

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77 Ibid [18].
78 See *R v Collaery (No 7)* [2020] ACTSC 165 [12] ('*R v Collaery (No 7)*').
79 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report No 98, May 2004).
80 Ibid 38.
81 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3(1).
82 Ibid s 8. Each part of this definition is, in turn, defined — see ss 9, 10, 11.
83 Ibid s 24.
84 Ibid ss 26, 28.
85 Ibid s 31.
86 Ibid s 22.
87 See, eg, *Roberts-Smith v Fairfax Media Publications Pty Limited (No 4)* (2020) 277 FCR 337.

2 *The Collaery Trial*

In 2018, Collaery, a Canberra lawyer and former ACT Attorney-General, was charged with five offences under the *Intelligence Services Act 2001* (Cth).[88] He was charged alongside his client, Witness K, a former intelligence officer. Collaery pleaded not guilty and was subsequently embroiled in litigation over the application of the *NSI Act* to his trial, involving over a dozen judgments and almost 100 court dates.[89] Witness K pleaded guilty and was given a suspended sentence in 2021.[90] In the Collaery trial, the Attorney-General applied for orders under s 31 of the *NSI Act* 'which would have the effect of requiring that significant parts of the trial on those charges not be conducted in public'.[91] Pursuant to s 29, a hearing to consider the making of orders under s 31 *must* be held in closed court. The court has no discretion in this respect. Section 31(7) outlines the factors for the court to consider in deciding the nature of the orders to make. The court *must* consider whether 'having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security' if the information was disclosed, whether such an order 'would have a substantial adverse effect on the defendant's right to receive a fair hearing' and 'any other matter the court considers relevant'. Notably, under s 31(8), in making its decision, the court 'must give greatest weight' to the risk of prejudice to national security (informed by the Attorney-General's position). In this way, the scale is tilted against open justice.

In *R v Collaery (No 7)*, Mossop J made s 31 orders substantially in the form sought by the Attorney-General.[92] His Honour reached this position having determined that the orders would not have 'a substantial adverse effect on the defendant's right to receive a fair hearing' and that 'the principle of open justice does not outweigh the desirability of protecting the information'.[93] Instead, Mossop J held, 'the risk of prejudice to national security is a real risk which is entitled to significant weight'.[94]

Collaery successfully appealed. The judgment has not yet been published.[95] However, in a summary, the ACT Court of Appeal noted that it 'doubted that a

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88 Andrew Greene and Lucy Sweeney, '"Witness K" and Lawyer Bernard Collaery Charged with Breaching Intelligence Act over East Timor Spying Revelations', *Australian Broadcasting Corporation* (online, 28 June 2018) <https://www.abc.net.au/news/2018-06-28/witness-k-and-bernard-collaery-charged-intelligence-act-breach/9919268>.

89 See 'Explainer: The Unjust Prosecution of Bernard Collaery', *Human Rights Law Centre* (Web Page) <https://www.hrlc.org.au/explainer-the-unjust-prosecution-of-bernard-collaery>.

90 Christopher Knaus, 'Witness K Spared Jail after Pleading Guilty to Breaching Secrecy Laws over Timor-Leste Bugging', *Guardian Australia* (online, 18 June 2021) <https://www.theguardian.com/australia-news/2021/jun/18/witness-k-should-be-shown-judicial-mercy-not-used-to-deter-others-court-told>.

91 *R v Collaery (No 7)* (n 77) [2].

92 Ibid.

93 Ibid [128].

94 Ibid.

95 See Transcript of Proceedings, *Attorney-General (Cth) v Collaery* [2022] HCATrans 66.

significant risk of prejudice to national security would materialise. On the other hand, there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed.'[96] During the first-instance proceeding, the Attorney-General sought to rely on 'court only' material, which Collaery would not be permitted to see. Mossop J reached his initial conclusion without determining whether to accept the court only evidence.[97] As such, following the resolution of the appeal, the Court remitted the matter to Mossop J to consider whether to accept the judge-only evidence and, if so, whether it altered the Court's ultimate decision.[98] That aspect of the litigation remained unresolved when, in July 2022, the Attorney-General discontinued the prosecution – the first time in Australian legal history this power had been exercised.[99]

3 *Witness J*

Another recent criminal case involving the *NSI Act* is that of 'Alan Johns' (a pseudonym), known publicly as the Witness J case. The defendant was, as the INSLM has subsequently summarised, 'charged, arraigned, convicted on his plea of guilty, sentenced and served his sentence — without public awareness of any of this.'[100] Witness J had been charged with secrecy offences relating to conduct occurring during his employment with an intelligence agency. By virtue of a s 22 agreement reached by the parties, and given effect by the ACT Supreme Court, the entire case was resolved in secret. It was only thanks to a series of coincidences and the work of journalists that the public came to be aware of the case.[101] Once the Witness J case became known, it caused considerable public uproar. The then-INSLM, James Renwick SC, noted: '[a]s far as we know there has never been another case, at least in peacetime in Australia, where all of it has been conducted in secret.'[102] The current INSLM, Grant Donaldson SC, undertook an inquiry,

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96 *Collaery* Judgment Summary (n 32).

97 *R v Collaery (No 7)* (n 77) [129].

98 See *R v Collaery (No 10)* [2021] ACTSC 311.

99 Paul Karp, 'Prosecution of Whistleblower Lawyer Bernard Collaery Dropped after Decision by Attorney General', *Guardian Australia* (online, 7 July 2022) <https://www.theguardian.com/australia-news/2022/jul/07/prosecution-of-whistleblower-lawyer-bernard-collaery-dropped-after-decision-by-attorney-general>.

100 'The Operation of Section 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) as It Applies in the 'Alan Johns' Matter (A Pseudonym)', *Independent National Security Legislation Monitor* (Web Page) <https://www.inslm.gov.au/node/191>.

101 Probyn (n 15).

102 James Renwick, 'What are the Right Encryption Laws for Australia?' (Speech, Lowy Institute, 5 March 2020) 13.

which reported in June 2022 and was made public the following month.[103] The recommendations of the INSLM's inquiry will be considered further below.

In April 2023, and prompted by a recommendation of the INSLM, the ACT Supreme Court published a redacted version of the original sentencing remarks in the Witness J case. In her covering judgment, McCallum CJ observed:

> The prospect of a person being imprisoned in this country in proceedings closed to the public on suppressed charges proved by secret evidence is inherently likely to cause consternation. Secrecy is anathema to the rule of law. The administration of justice thrives on the discipline that comes with public scrutiny. That is the premise of the principle of open justice.[104]

III Open Justice and the *Constitution*

Open justice has two constitutional dimensions in Australian law: salience in relation to Chapter III of the *Constitution*, which establishes the federal judiciary, and protection in relation to the implied freedom of political communication, to the extent that limitations on open justice burden political communication. This Part will consider these dual constitutional aspects in turn, before analysing the only Australian case where the constitutional validity of the *NSI Act* has been directed considered, *Lodhi*. The section will conclude with several observations.

It is helpful to begin, though, with some overarching remarks. Limitations on open justice can arise in two primary forms: through statute, such as the *NSI Act*, or through common law. Both legislation and common law must conform with the *Constitution*.[105] To the extent that legislation does not conform with the *Constitution*, it will be invalid. To the extent that common law does not conform with the *Constitution*, it will be altered to ensure conformity. As the High Court said in *Lange v Australian Broadcasting Corporation* ('*Lange*'), '[t]he development of the common law in Australia cannot run counter to constitutional imperatives'.[106] While this article predominantly focuses on the *NSI Act*, this dual-application of constitutional limitation is important given the authority to derogate from open justice typically has both statutory and common law bases. This observation also denies the strength of the argument against invalidity that

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103 Independent National Security Legislation Monitor, *Review into the Operation of Part 3, Division 1 of the National Security Information (Criminal and Civil Proceedings) Act 2004 as it applies in the Alan Johns Matter* (Report, June 2022) ('Witness J'). In the interests of transparency, it should be noted that the author made written submissions to the INSLM and participated in a hearing of the inquiry, on behalf of the Human Rights Law Centre.

104 *R v Johns (A Pseudonym) (No 2)* [2023] ACTSC 83 [4], agreeing to the publication of *R v Johns (A Pseudonym)* [2019] ACTSC 399.

105 See, eg, James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324; Joshua Sheppard, 'Why Does the Common Law Conform to the *Constitution*?' (2021) 49(4) *Federal Law Review* 569; Adrienne Stone, 'The Common Law and the Constitution: A Reply' (2002) 26(3) *Melbourne University Law Review* 646.

106 (1997) 189 CLR 520, 566 ('*Lange*').

what is provided in statute could in any event be done through common law — a point that has been made, and resisted, in the cognate procedural fairness context in *SDCV*.[107]

A *Chapter III*

Chapter III of the *Constitution* establishes the federal judicature and permits the government to invest state courts with federal jurisdiction. The High Court has identified limits on the federal and state parliaments in legislating in relation to the judicial process, derived by implication from Chapter III.[108] These respective limits 'differ, in their constitutional foundation and scope'[109] — the limitation on federal legislative power arising as a result of separation of powers and the constitutional meaning of a court,[110] the limitation on state legislative power arising from the *Kable* principle and the integrated nature of the Australian court system.[111] However, as James Stellios has observed, 'at least in the area of due process protections, there is considerable overlap'.[112] Accordingly, while there is conceptual distinction in the constitutional context between open justice limitations arising in the *NSI Act*, a statute of federal parliament, and laws enacted by states, the distinction is not presently material.

1 Russell

Since federation, open justice has been accepted as a central feature of judicial power. The seminal British case, *Scott*, was promptly endorsed by the High Court.[113] It was not until 1976 that a significant open justice issue returned to the High Court. In *Russell*, the validity of s 97 of the *Family Law Act 1975* (Cth) was called into question. That provision provided, subject to exceptions, that 'all proceedings in the Family Court, or in another court when exercising jurisdiction under this *Act*, shall be heard in closed court.' The High Court, by majority, held that the provision was unconstitutional in its application to state courts. Gibbs J observed:

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107 SDCV, 'Submissions of the Appellant', Submission in *SDCV v Director-General of Security*, S27/2022, 11 April 2022, 13–16.

108 Stellios, *Federal Judicature* (n 10) 317–8.

109 Ibid 318.

110 See generally *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 274–5 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205; Will Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31(3) *Sydney Law Review* 411.

111 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; Stellios, *Federal Judicature* (n 10) ch 9.

112 Stellios, *Federal Judicature* (n 10) 318.

113 *Dickason* (n 46).

> To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule … and the category of such exceptions is not closed to the Parliament … In requiring them to sit in closed court in all cases … the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.[114]

Stephen J and Barwick CJ concurred, although the Chief Justice added: 'this conclusion does not affect the validity of the section in relation to federal courts created under s 71 of the *Constitution*.'[115] Jacob J and Mason J both dissented, the latter holding that 'neither provision interferes with the constitution, structure or organization of State courts.'[116] His Honour said: 'No doubt a hearing in open court has been traditionally regarded as of great importance. Yet this in itself does not warrant the conclusion that a hearing in open court is a constituent element in the organization of State courts'.[117]

2 *Subsequent Developments*

The constitutionalisation of open justice continued a decade later in a statement made by Deane J sitting alone in *Commonwealth v Toohey*.[118] This was a peculiar case, arising out of a courtroom incident. The Commonwealth had sought an injunction to prevent the publication of an intelligence agent's identity. After completion of proceedings, Deane J became aware that a government representative had sought to record the names of members of the public seated in the gallery during the hearing. Deane J convened a special sitting:

> The *Constitution* establishes this Court as the ultimate repository of national judicial power. As a general rule the Court's exercise of that judicial power is in public sittings … One reason for that approach to the exercise of judicial power is that open and public administration of justice by the country's final Court is a safeguard of judicial independence and conducive to public trust … [The incident underscores] the importance of ensuring that the right of members of the public to attend the public sittings of the Court be not compromised …[119]

In the subsequent decade, a number of High Court justices made curial statements, underscoring the significance of open justice to the exercise of judicial power. In *Re Nolan; Ex parte Young*, Gaudron J observed: '[q]uite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.'[120] Similar comments were made by McHugh J and Gummow J in *Grollo*

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114 *Russell* (n 47) 520.
115 Ibid 507.
116 Ibid 536.
117 Ibid 537 (citations omitted).
118 'Orders in ASIS Secrets Case' (1988) 19 *Legal Reporter* 6.
119 Ibid 6–7.
120 (1991) 172 CLR 460, 496–7.

v Palmer.[121] This string of cases led Fiona Wheeler to observe that the nature of the judicial process 'would necessarily embrace the associated requirement that courts proceed, save in exceptional circumstances, by way of open and public hearing.'[122] Establishing the bounds of those exceptional circumstances, she continued, 'will of course involve the Court in "policy evaluation" and a balancing of social interests. Nonetheless, it is a balancing process which in other contexts the High Court has been prepared to undertake.'[123] Subsequently, in *Nicholas v The Queen*, Gaudron J noted that 'a court cannot be required or authorised to proceed in any manner … which brings or tends to bring the administration of justice into disrepute.'[124]

This series of cases made clear that open justice is a central feature of the exercise of judicial power. However, little clarity was provided as to the maximum extent of parliament's ability to limit open justice. As Leslie Zines observed, '[w]hile the Court has continued to affirm that Chapter III restricts the power of Parliament to interfere with due process in the courts, it has left open the question of what common law rules are essential to the judicial process and which can be modified and changed by Parliament.'[125]

3 Kable *Cases*

Since the High Court's decision in *Kable*, these issues have been further explored in the context of the institutional integrity of courts and limits on state legislative power. As James Stellios notes, 'it has been recognised that courts exercising federal judicial power must be characterised by procedural features of *an open and public* inquiry.' However, 'while there may be a general rule that judicial proceedings shall be conducted in public — a rule that is now constitutionalised as a feature of State courts — that rule is not absolute'.[126] Indeed, litigants seeking to uphold open justice in *Kable* cases have largely failed.

In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* ('*Gypsy Jokers*'), one vice asserted by the appellant was a provision of the relevant legislative scheme, s 76(2), which provided the Commissioner to identify information that would prejudice its operations, and 'information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to the proceedings, or *publicly disclosed in any way*.'[127] The majority rejected a challenge to the validity of this provision, holding that the Supreme Court retained power to review the Commissioner's identification of information.

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121 (1995) 184 CLR 348, 379–80 (McHugh J), 394 (Gummow J).

122 Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23(2) *Monash University Law Review* 261–2.

123 Ibid 248.

124 (1998) 193 CLR 173, 208–9.

125 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 274.

126 Stellios, *Federal Judicature* (n 10) 552–5 (emphasis added).

127 (2008) 234 CLR 532, 558 (emphasis added).

The joint judgment observed that the public disclosure limitation 'should not be read as an attempted legislative direction as to the manner of the outcome of any review application … The words are no more than an attempt at exhortation and an effort to focus attention by the Court to the prejudicial effect disclosure may have.'[128] Kirby J, in dissent, would have found the provision invalid.[129] Similar issues were raised in *K-Generation Pty Ltd v Liquor Licencing Court (SA)* ('*K-Generation*').[130] Again the High Court held that sufficient judicial discretion remained. French CJ, for example, noted, '[s]ection 28A infringes upon the open justice principle that is an essential part of the functioning of courts in Australia … However, it cannot be said that the section confers upon the [relevant court] functions which are incompatible with their institutional integrity as courts of the States'.[131]

In *Hinch*, meanwhile, a challenge to Victoria's suppression law scheme was unsuccessful.[132] For French CJ, the existence of similar powers at common law supported a finding of validity, as did the fact that discretion remained with the court in the exercise of the statutory power.[133] His Honour noted that 'Chapter III does not impose on federal courts or the courts of the States a more stringent application of the open justice principle than [at common law].'[134] French CJ therefore concluded, '[t]here is nothing in the nature of the power conferred upon the court by s 42, properly construed, which is repugnant to or incompatible with the judicial function or otherwise incompatible with any implication derived from Ch III.'[135]

The majority reached the same conclusion. Applying *Russell*, and Gibbs J's distinction in that case between providing discretion to close the court and insisting on a closed court,[136] they held:

> This reasoning should be followed here and has three consequences. First, it denies any restriction drawn from Ch III which in absolute terms limits the exercise of the legislative power of the Parliament. Secondly, it indicates that a federal law to the effect of s 42 would be valid and would not deny an essential characteristic of a court exercising federal jurisdiction. Thirdly, this being so, as a State law s 42 does not attack the institutional integrity of the State courts as independent and impartial tribunals …[137]

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128 Ibid 561.
129 Ibid 579.
130 (2009) 237 CLR 501.
131 Ibid 512.
132 (n 9).
133 Ibid 534.
134 Ibid 541.
135 Ibid 542.
136 Stellios notes that the reliance on *Russell* is somewhat curious, given that case was concerned with federal legislation and state courts. But he notes 'the slippage in analysis may be of little consequence': Stellios, *Federal Judicature* (n 10) 555.
137 (n 9) 554 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

Finally, in *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*'),[138] a statutory provision required the Queensland Supreme Court to consider an application, for information to be declared 'criminal intelligence',[139] in an ex parte 'special closed hearing'.[140] The High Court rejected a challenge to the validity of the relevant provision. French CJ began by tracing the significance of the open justice principle and conceded that such hearings were '[a]ntithetical to that tradition'.[141] However, giving attention to the 'statutory scheme taken as a whole', French CJ was satisfied that the Supreme Court retained power to mitigate unfairness where necessary.[142] His Honour therefore held: '[d]espite the incursions on the open court principle … effected by the impugned provisions … they do not so impair the essential or defining characteristics of the Supreme Court as a court as to be beyond [the Queensland Parliament's] legislative power'.[143] The majority, Hayne, Crennan, Kiefel and Bell JJ, agreed.[144] Gageler J broadly agreed with French CJ, although held that the closed court provisions were 'saved from incompatibility … only by the capacity for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest.'[145] Notwithstanding these unsuccessful challenges, the High Court has continued to underscore that open justice is a cornerstone of the judicial function in a number of recent cases.[146]

B *Implied Freedom of Political Communication*

Since the 1990s, the High Court has recognised an implied freedom of political communication in the *Constitution*.[147] Where a law burdens political communication, the widely although not unanimously accepted test for assessing validity is identifying the law's purpose and then using a structured proportionality process to ask whether the law is suitable, necessary, and adequate in balance.[148] While limitations on open justice may raise implied freedom concerns, this potential constitutional constraint has been litigated far less frequently than Chapter III. The primary High Court authority is *Hinch*, where the implied freedom claim failed. French CJ and the majority judgment each

138 (2013) 252 CLR 38.
139 *Criminal Organisation Act 2009* (Qld) s 63.
140 Ibid ss 66, 70.
141 *Pompano* (n 50) 46–7.
142 Ibid 78 [87].
143 Ibid 80 [89].
144 Ibid 95.
145 Ibid 105 [178].
146 *Wainohu v New South Wales* (2011) 243 CLR 181, 208–9 (French CJ and Kiefel J); *Kuczborski v Queensland* (2014) 254 CLR 51, 118–19 (Crennan, Kiefel, Gageler and Keane JJ); *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 593–4 (French CJ, Kiefel and Bell JJ).
147 See, eg, *Lange* (n 106).
148 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178.

accepted that the suppression order regime challenged in that case could constitute a burden on political communication. Nonetheless, the Court found that the law was reasonably appropriate and adapted to a legitimate end.[149]

However, an open justice challenge was successfully mounted in an earlier case, in the NSW Court of Appeal, in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*.[150] In that case, legislation required certain proceedings in relation to contempt to be held in closed court. Although the Court by majority rejected a Chapter III argument, it invalidated the law on implied freedom grounds. Spigelman CJ held (with Priestley JA agreeing) that 'parliament went too far in the sense that it intruded into the freedom of communication … in a manner not reasonably appropriate and adapted to achieving the legitimate objective'.[151] This was largely because the requirement for hearings to be held *in camera* went beyond what was necessary, as the legitimate purpose — to protect reputation — could have been achieved by anonymity orders.[152] Meagher JA dissented. 'There is nothing in the legislation which prevents [the relevant issues] being discussed, and endlessly,' his Honour held.[153] 'In these circumstances the possibility of [the provision] being contrary to the doctrine in *Lange's* case is non-existent.'[154]

C Lodhi

The constitutional validity of the *NSI Act* was considered in *Lodhi*,[155] a prosecution related to terrorism offences. A group of media interests, intervening, were granted leave to challenge Part 3 of the *NSI Act*. This challenge was framed in relation to both Chapter III and the implied freedom. The accused also argued for invalidity, although with less substance. Whealy J rejected the constitutional challenge. His Honour did not accept that the 'greatest weight' requirement constituted an 'infringement of the judicial power of the Commonwealth' or an 'alteration by the legislation of the character or nature of the Supreme Court'.[156] Counsel for the media interests had described the discretion in s 31 as a 'sham' or 'mere window dressing', because of the 'greatest weight' direction. But Whealy J noted that 'there is no suggestion, on the proper construction … that the certificate is conclusive or determinative of the issue. Subject to giving the [certificate] the appropriate weight, the Court is free to form a view that is entirely contrary to the tenor of the certificate.'[157] Accordingly, his Honour rejected the Chapter III argument.

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149 *Hinch* (n 9) 544.
150 (2000) 158 FLR 81 ('*Fairfax*').
151 Ibid 104 [129].
152 Ibid 103–4.
153 Ibid 112.
154 Ibid.
155 *Lodhi* (n 18).
156 Ibid 458 [55].
157 Ibid 468 [105].

In relation to the implied freedom, Whealy J proceeded on the presumption — without deciding — that the freedom was burdened. But he held it was nonetheless valid: 'the fact that the s 31 hearing is to be a closed hearing does not place an undue burden given the legitimate aim of such a hearing and the subject matter with which it deals … it is not far different from the method in which a public interest immunity claim is dealt with by a court dealing with sensitive material.'[158] The media interests had highlighted their inability to participate as an additional factor. His Honour rejected this, too: 'Nor do I consider the fact that the media interests have no right to make submissions in relation to such a hearing is itself an impermissible burden.'[159] Lodhi appealed to the NSW Court of Criminal Appeal.[160] One appeal ground related to the 'greatest weight' provision in s 31 of the *NSI Act* and fair trial concerns. The appeal was unsuccessful. The media interests did not seek to appeal the implied freedom argument. An application by Lodhi for special leave to appeal to the High Court was denied.[161]

D *Observations*

A number of observations can be extracted from the preceding analysis of constitutional evolution of open justice in Australia. Four critical contentions will now be articulated:

1. open justice as a constitutional principle in Australia remains underdeveloped, which is undesirable;
2. residual judicial discretion has been an important factor in preserving the validity of legislation which limits open justice;
3. it is arguable that parts of the *NSI Act* are unconstitutional, even on current, underdeveloped jurisprudence, in light of the lack of discretion; and
4. there must be a constitutionalised open justice 'floor', such that the level of secrecy in the Witness J case was arguably unconstitutional.

1 *Constitutional Evolution*

As is clear from the preceding discussion, open justice is underdeveloped as a freestanding constitutional value. As most of the jurisprudence has arisen by way of constitutional challenge from a party to litigation, frequently criminal

158 Ibid 473–4 [123].
159 Ibid 474 [124].
160 *Lodhi v The Queen* [2007] NSWCCA 360 (20 December 2007).
161 Transcript of Proceedings, *Lodhi v The Queen* [2008] HCATrans 225.

defendants, the analysis has typically proceeded with a focus on due process and procedural fairness; open justice has therefore developed as a notion within these other principles, subsumed by, for example, fair trial rights. In notable contrast to the position in Britain and Canada, considered below, where much open justice case law has arisen through interventions by media organisations, this standalone open justice litigation has been less common in Australia (*Lodhi* and *Fairfax* being the notable exceptions). The underdevelopment of the principle, as a standalone value which can be vindicated by third party interests, such as media organisations, and rather than as a constituent element of procedural fairness, is undesirable.[162] Given the constitutional importance of open justice, it is overdue for Australian courts to move beyond high-level value statements and give the principle greater practical substance.[163]

2 *Discretion*

The case law, particularly arising from the *Kable* jurisprudence, has underscored the importance of residual judicial discretion in protesting open justice and procedural fairness. Even pre-*Kable*, in *Russell*, the lack of discretion was a central factor in the finding of invalidity. Hence, Gibbs J noted that if the law had only empowered the courts 'to sit in closed court in appropriate cases', rather than requiring it, 'I should not have thought that the provision went beyond the power of the Parliament.'[164] In *Gypsy Jokers*, *K-Generation* and *Hinch*, the court ultimately retained discretion, while in *Pompano* the residual power to stay a proceeding for unfairness was important to the validity analysis (indeed, for Gageler J, it was determinative).[165] Accordingly, legislation that directs courts to proceed in a certain manner in relation to open justice, and denies discretion, is likely to face stricter constitutional scrutiny.

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[162] Notably, in the recent Witness J matter, Guardian Australia sought to intervene in relation to the level of redactions to be applied to the sentencing remarks. McCallum CJ indicated that her Honour would not grant leave, because there was 'no issue in which the Guardian has an interest': Paul Karp, 'ACT Supreme Court Intends to Publish Alan Johns Sentencing Remarks', *Guardian Australia* (online, 22 February 2023) <https://www.theguardian.com/australia-news/live/2023/feb/22/australia-news-live-anthony-albanese-defence-aukus-military-spies-asio-economy-interest-rates-energy-cost-of-living-health-weather-housing?page=with:block-63f558108f08305414a34f21#block-63f558108f08305414a34f21>. Despite this, her Honour subsequently noted of the need for close scrutiny of the Attorney-General's position: '[t]hat is particularly so in light of the second point made by the offender, which was that there are significant practical impediments to any potential challenge by him to the redactions proposed by the Attorney-General in this case. In that circumstance, which means that there is in effect no contradictor to the Attorney-General's application, close scrutiny of the Attorney-General's claims for secrecy is all the more important': *R v Johns (A Pseudonym) (No 2)* [2023] ACTSC 83 [9].

[163] Of course, such jurisprudence can only come about via appropriate litigation, although there is somewhat of a chicken-and-egg problem given the limited existing case law on which to run such a case.

[164] *Russell* (n 47) 520.

[165] *Pompano* (n 50) 105.

3 *Invalidity*

The significance of discretion in those constitutional cases focuses attention on the potential invalidity of s 29 in the *NSI Act*, which denies any discretion to the court in requiring the s 31 hearing to be closed. In *Lodhi*, such an argument was rejected, with Whealy J focusing on the narrow nature of a s 31 hearing. 'In my opinion, the function is a very limited one and is concerned only with the disclosure of information,' his Honour held.[166] 'It is quite clear that a s 31 hearing is concerned essentially with disclosure as between the parties.'[167] This characterisation was central to his implied freedom analysis: 'the fact that the ... hearing is to be a closed hearing does not place an undue burden given the legitimate aim of such a hearing and the subject matter with which it deals. It is a limited hearing dealing with a limited topic as I have indicated'.[168]

That may have been an accurate characterisation in *Lodhi* (although the primary vice, an absence of discretion, is still problematic). Yet in the Collaery trial, the public interest in the litigation and the contested nature of the s 31 hearing — involving the extent to which a trial of major national interest, involving alleged wrongdoing by the federal government, was to be held behind closed doors — is evidently distinguishable. The absence of discretion in s 29, for the trial judge to determine the appropriate level of secrecy required in the s 31 hearing, therefore runs contrary to the authorities canvassed above, and suggests that s 29 may be invalid, on Chapter III grounds or under the implied freedom (with the necessity analysis failing given the possibility of less burdensome measures, namely a residual discretion).

There may also be compelling Chapter III grounds to contest the validity of s 31, particularly the 'greatest weight' requirement contained therein. In *Lodhi*, Whealy J upheld the provision's validity. However, in a 2007 article following *Lodhi*, former High Court Justice Michael McHugh cast fresh doubt:

> It is no doubt true that in theory the [*NSI Act*] does not direct the court to make the order which the Attorney wants. But it goes as close to it as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing.[169]

McHugh proceeded to ask, rhetorically, '[h]ow can a court realistically say I am going to make an order in favour of a fair trial even though, in exercising my discretion, I give the issue of a fair trial less weight than the Attorney-General's certificate.'?[170] On one hand, the fact that the ACT Court of Appeal in the Collaery trial did just that partially addresses McHugh's concern (although it is difficult to assess the significance of that judgment when it remains unpublished). But the

166 *Lodhi* (n 18) 464 [82].
167 Ibid.
168 Ibid 473 [123].
169 McHugh (n 20) 209.
170 Ibid.

force in his position remains. As McHugh concluded, the various aspects of the *NSI Act*'s wider scheme 'combine to make a strong case that the legislation is an attempt by parliament to usurp the judicial power of the Commonwealth.'[171] In a subsequent paper, Justice Whealy admitted that 'there is plainly a highly respectable school of thought that thinks [the *NSI Act* is unconstitutional] ... it appeared that the more powerful arguments in favour of invalidity had not been presented before me ... I am sure we have not heard the last of this contention.'[172] A further constitutional challenge to the *NSI Act* may therefore have prospects of success.

4 *Minimum 'Floor'*

Notwithstanding the underdevelopment of open justice as a standalone constitutional principle, its constitutional importance is sufficiently clear. It follows that there must be a minimum standard of openness, below which legislation and courts cannot go, such that the application of the *NSI Act* in the Witness J was arguably unconstitutional. This minimum 'floor' of transparency is necessary because, without it, review of the secrecy imposed in a particular case is impossible. As this author has argued elsewhere:

> Even if it was accepted that there might be extraordinary circumstances [where] the complete denial of open justice was desirable, cloaking a case in total secrecy, – as in Witness J – permits no safeguard to the possibility that the balancing act was wrongly decided.[173]

Just as the *Constitution* entrenches a minimum level of judicial review,[174] recognition of open justice as a constitutional value necessitates the ability to contest the balance struck, by legislation or common law jurisdiction, in a particular case. Where a case is held in complete secrecy, as in Witness J, the ability to seek appellate review of the level of secrecy imposed, or even challenge the constitutional validity of the authorising provision, is removed. Given the recognition, at common law and in statute, that the media, for example, has standing in public interest cases,[175] a minimum floor of openness must necessarily follow.[176] Otherwise, there is no way to exercise that standing.

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171 Ibid.

172 Whealy (n 20) 365.

173 Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16) .

174 See, eg, Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463.

175 Douglas (n 7).

176 In the Witness J inquiry, the INSLM indicated a contrary position: see INSLM, 'Witness J' (n 103), 37–8. The INSLM suggested 'an a priori definition of minimum standards of openness, required in all cases, is extremely problematic': 37 [140]. However, his recommendations have the same effect, albeit achieved via different methods: 'if these recommendations are accepted and implemented, there is no practical need for the prescription of immutable minimum standards of openness': 38 [141].

Against this argument,[177] it might be put that if natural justice can be reduced to nothingness, so too can open justice in the appropriate circumstances. In *Leghaei v Director General of Security* ('*Leghaei*'),[178] the applicant's visa was cancelled on national security grounds. He sought judicial review on the basis that no allegations had been put to him and hence he had been denied natural justice. At first instance, it was held that 'the potential prejudice to the interests of national security involved in such disclosure appears to be such that the content of procedural fairness is reduced, in practical terms, to nothingness'.[179] This holding was not disturbed on appeal, in a heavily-redacted judgment.[180]

However, the critical distinction is that, in *Leghaei*, the applicant still knew the adverse decision had been made. He could therefore exercise his constitutionally-entrenched ability to seek judicial review (even if that was to prove a fruitless exercise). In contrast, in a Witness J scenario, other interested parties (such as the media) have no ability to contest the appropriateness of the secrecy imposed on a case. It may well be that, in extraordinary circumstances, the minimum standards guarantee only minimal disclosure of the bare fact of a case taking place. That may not be much. But it is better than nothing and enables interested parties to seek review by a superior court. Having considered the Australian position, it is now instructive to venture to other jurisdictions for comparative perspective.

IV Comparative Perspective

The challenge of balancing the competing interests of transparency and national security in the judicial process is a shared one, at least in legal systems where open justice is a central feature.[181] The tension between these two interests has only become more acute in the past two decades, following an increase in global terrorism activity and related criminal prosecutions, which has also been a shared experience. Given the mutual inherited principles in the common law world, and the similarity of challenges presented in recent years, comparative perspective sheds helpful light on the prevailing Australian approach. In particular, the UK (more precisely, England and Wales), and Canada serve as useful case studies, given the similar legal and constitutional contexts. These jurisdictions are frequently chosen for the purpose of comparative analysis in Australian

177 This subsection is adapted from Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16).
178 [2005] FCA 1576 ('*Leghaei*').
179 Ibid [88].
180 *Leghaei v Director-General of Security* (2007) 97 ALD 516.
181 Although the principle resonates most strongly in the common law world, equivalent concepts are also found in some civil law jurisdictions. For example, across Europe, open justice is required in domestic legal systems by a supranational treaty: *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) art 6.

scholarship, including in relation to open justice.[182] Notwithstanding the occasional hostility of Australian courts to comparative constitutional law,[183] comparative inquiry is illuminating in the present context. There is one significant difference, though: both the UK and Canada have express legal protections for human rights (including free speech, with constitutional status in Canada[184]). Australia, on the other hand, lacks comprehensive protections for human rights in federal law, other than limited constitutional protections for certain rights, such as the implied freedom.

A *UK*

Open justice has constitutional status in the UK (a jurisdiction without a written constitution). In *Scott*, the principle was described as 'a sound and very sacred part of the constitution of the country and the administration of justice'.[185] The principle is also reflected in domestic human rights legislation, which implements European human rights law.[186]

The most significant judicial attempt to balance the competing interests of open justice and national security occurred in the 2014 case of *Guardian News and Media Ltd v Incedal*.[187] In that case, two individuals had been charged with terrorism offences. The trial judge ordered that the entirety of the trial take place in closed court, and that the identities of the defendants not be published.[188] The media appealed. After affirming the importance of open justice, the Court of Appeal noted the growing tension between open justice and national security: '[a]ll the more so, given the emergence of the Agencies from the shadows … and the extension of the law's reach over the past decades.'[189] Having reviewed the authorities, the Court set out a 'serious possibility' threshold for departing from open justice in this context: 'where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice … a departure from open justice may be justified.'[190]

The Court ultimately held that this test was satisfied, and that an *in camera* hearing was justified. However, on the basis that 'no departure from the principle

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182 Bosland and Townend (n 17) 1.

183 See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530, 570 (Keane J); *Monis v The Queen* (2013) 249 CLR 92, 183 (Heydon J); *Brown v Tasmania* (2017) 261 CLR 328; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13(1) *Indiana Journal of Global Legal Studies* 37. See also, in a related context, Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29(1) *Melbourne University Law Review* 95.

184 *Human Rights Act 1998* (UK); *Canada Act 1982* (UK) c 11 sch B pt I.

185 (n 1) 473 (Lord Shaw).

186 *Human Rights Act 1998* (UK) sch 1 art 6.

187 [2014] EWCA Crim 1861 ('*Incedal*').

188 Ibid [2].

189 Ibid [15].

190 Ibid [17].

of open justice must be greater than necessary', the Court determined that at least some parts of the case — the swearing in of the jury, reading of the charges, initial opening remarks, verdicts and sentencing — could be held in open court. Additionally, in a rather novel approach, the Court ordered that 10 accredited journalists be permitted to attend the closed hearing, even though they would not be able to contemporaneously report it (and indeed any subsequent reporting would require reconsideration of the orders by the court). Nonetheless, the Court observed, 'the proposal for the attendance of accredited journalists means that the scrutiny function of the media will be preserved throughout the trial'.[191]

The Court therefore concluded that it was 'satisfied that the solution arrived at in this Court means that everything possible has been done to minimise the departure from the principle of open justice.'[192] On the other hand, the Court revoked the anonymity orders in relation to the defendant, expressing 'grave concern as to the cumulative effects' of a closed hearing and anonymised defendants.[193] The Court held: 'We find it difficult to conceive of a situation where both departures from open justice will be justified.'[194]

Notwithstanding these accommodations, *Incedal* was not uncontroversial. Scholars have described it as offering 'further evidence of diminished state accountability, with insufficient regard to the public interest in open justice and an individual's right to a fair trial and is a dangerous precedent for case management more generally … The judgments reveal an ill-defined, *sui generis* approach with no statutory basis.'[195] In subsequent proceedings in 2016, after media organisations unsuccessfully sought to vary the public restrictions following the trial, the Court of Appeal cast doubt on the efficacy of the *Incedal* model. The Court noted that the partial-attendance of journalists 'made the management of the trial very much more difficult', adding: 'the experience of the way in which it affected the conduct of the trial leads us to the firm conclusion that a court should hesitate long and hard before it makes an order similar to that made'.[196]

While *Incedal* was a criminal case, a legislative procedure to manage confidential evidence and closed hearing also exists: the *Justice and Security Act 2013* (UK), enacted in response to two high profile cases which the British government had argued showed insufficient deference to national security.[197] A statutory review of closed material procedure brought about by the 2013 law was

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191 Ibid [41].
192 Ibid [44]
193 Ibid [47].
194 Ibid.
195 Lorna Woods, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) 84(3) *Modern Law Review* 553, 569–70.
196 *Guardian News & Media Ltd v Incedal* [2016] EWCA Crim 11 [68]–[69].
197 *Al Rawi v The Security Service* [2011] UKSC 34; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin).

reported in November 2022, recommending a range of improvements.[198] The law has proven controversial; a civil society submission to the review argued that its procedures were 'inherently unfair' and 'fundamentally inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal. Their use across the justice system threatens both the right to a fair hearing and the accountability of the Government.'[199]

B *Canada*

Like Australia, the Canadian judiciary also inherited the British legacy of open justice — although the concept is more commonly known in Canada as the 'open court' principle.[200] The principle has constitutional status, as a consequence of the *Canadian Charter of Rights and Freedoms* ('*Charter*').[201] Section 2(b) of the *Charter* protects freedom of expression, including freedom of the press, and Canadian jurisprudence has identified the open court principle as a necessary corollary of those freedoms.[202] In a 1996 case, *Canadian Broadcasting Corporation v New Brunswick*,[203] La Forest J held that the *Charter* provision 'protects the freedom of the press to comment on the courts … [a]s a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information.'[204] More recently, in *Toronto Star Newspapers Ltd v Ontario*,[205] Fish J underscored the nexus between s 2(b) and the open court principle: '[i]n any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy … These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest.'[206] Section 11(d) of the *Charter* also provides a right 'to be presumed innocent until proven guilty according to law in a fair and *public hearing* by an independent and impartial tribunal'.[207] This duality

198 Sir Duncan Ouseley, *Independent Report on the Operation of Closed Material Procedure under the Justice and Security Act 2013* (Report, November 2022) 118–25.

199 JUSTICE, 'Call for Evidence: JUSTICE's Response', *Statutory Review of the "Closed Material Procedure" Provisions in the Justice and Security Act 2013* (Web Page, June 2021) 3 <https://files.justice.org.uk/wp-content/uploads/2021/07/06141459/Review-of-CMP-in-the-JSA-2013-JUSTICE-Response.pdf>.

200 For comparison of open justice in Australia and Canada, albeit in a different context, see Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia: Part One' (2007) 31(1) *Melbourne University Law Review* 171; Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia: Part Two' (2007) 31(2) *Melbourne University Law Review* 443.

201 *Canada Act 1982* (UK) c 11 sch B pt I ('*Charter*').

202 See generally Dana Adams, 'Access Denied? Inconsistent Jurisprudence on the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases' (2011) 49(1) *Alberta Law Review* 177.

203 [1996] 3 SCR 480.

204 Ibid 498 [26].

205 [2005] 2 SCR 188 ('*Toronto Star*').

206 Ibid 191 [1]–[2].

207 *Charter* (n 200) cl 11(d).

to open justice in Canada means that the distinction 'between the public's and litigant's rights' is more pronounced.[208]

Recognising the *Charter* imperative, the Canadian Supreme Court has developed an exacting test for determining whether to permit departures from the open court principle. This test only allows a publication ban where:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[209]

This test was later extended to govern '*all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.'[210]

Even pre-9/11, Canadian law and practice was well developed in seeking to balance secrecy and transparency in the present context; as one scholar noted in a 1996 paper, 'Canada has gone further than any other legal system in devising novel procedures to meet these difficulties.'[211] These mechanisms continued to evolve following 9/11. Amendments were made to s 486(1) of the *Criminal Code of Canada*[212] to provide that a hearing could be closed to the public where 'necessary to prevent injury to international relations or national defence or national security'. While this change was 'more symbolic than technically significant', it signalled to the courts a legislative desire for departure from the open court principle where appropriate.[213] This change, together with a range of other measures, led one respected observer to note that the previously-existing 'degree of commitment to the open court principle has not survived 9/11 … While things could have been worse, I do not think that this balance has been achieved.'[214]

However, in two significant cases, the Canadian Supreme Court has upheld the open court principle in the face of incursions prompted by national security law. In *Re Vancouver Sun*,[215] in 2004, the Court considered the open justice position of judicial investigative hearings held under provisions inserted into Canadian law by the *Anti-Terrorism Act*, SC 2001. One of these unusual investigative hearings was taking place *in camera* when a newspaper journalist recognised lawyers involved in an open part of the terrorism-related case and sought access to the

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208 Ian Leigh, 'Secret Proceedings in Canada' (1996) 34(1) *Osgoode Hall Law Journal* 113, 120.

209 As summarised in *Vancouver Sun v Attorney-General (Canada)* [2004] 2 SCR 332, 347 ('*Vancouver Sun*').

210 *Toronto Star* (n 204) 192 [7] (emphasis in original)

211 Leigh (n 207) 114.

212 RSC 1985, c C-46.

213 David Paciocco, 'When Open Courts Meet Closed Government' (2005) 29(1) *Supreme Court Law Review* 385, 403.

214 Ibid 402.

215 [2004] 2 RCS 332REF.

court-room the lawyers had entered. Access was refused; the newspaper subsequently commenced a constitutional challenge. The Supreme Court held that the *Dagenais/Mentuck* test applied, notwithstanding the novel nature of the investigative exercise, and that, while an initial ex parte dimension of the hearing was properly *in camera*, the remainder should have been open to the public.[216] Iacobucci and Arbour JJ observed that 'the present facts clearly illustrate the mischief that flows from a presumption of secrecy'.[217] The case was therefore a significant victory for the open court principle in Canada.

Similarly, in *Ruby v Solicitor-General of Canada*, the Supreme Court read down a mandatory closed-hearing provision.[218] In that case, arising after a Canadian lawyer made a request under privacy law for materials held by the Canadian Security Intelligence Service, an administrative review court was *required* by legislation to be closed when considering the applicability of a national security exemption. The Court held that the provision was contrary to the *Charter*, noting that '[t]he concept of open courts is deeply embedded in our common law tradition'.[219] The mandatory requirement was unconstitutional because it failed 'on the question of minimal impairment', as judicial practice in other cases had already developed such that the hearing was only closed when receiving ex parte submissions, and not otherwise. Accordingly, it was read down to only apply to a narrow part of the hearing.[220] Canada has also developed a system of special advocates and *amici curiae* to mitigate unfairness in relation to the use of 'secret' evidence under national security law (although the efficacy of these measures is contested).[221]

Notwithstanding the considerable constitutional protection for the open court principle in Canada, there has recently been an outcry in Quebec in relation to a 'secret trial', echoing the Witness J controversy in Australia. The 'phantom trial', *Designated Person v Her Majesty the Queen*, came to light in April 2022 after an appeals court issued a heavily redacted decision.[222] '[N]o trace of this trial exists, other than in the minds of the individuals implicated,' said the judgment.[223] According to reports, 'the trial had no docket number, … was never archived' in the court system, the names of lawyers and the judge involved was not made public, while 'witnesses in the case were questioned outside the courtroom and the parties asked the judge to decide the case based on

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216 *Vancouver Sun* (n 208) 353–4.
217 Ibid 354.
218 [2002] 4 SCR 3.
219 Ibid 31 (Arbour J).
220 Ibid 33–5.
221 See Graham Hudson and Daniel Alati, 'Behind Closed Doors: Secret Law and the Special Advocate System in Canada' (2018) 44(1) *Queen's Law Journal* 1.
222 Gail Cohen, 'Canadian Lawyers Decry Secret Trial', *Law.com* (Web Page, 6 April 2022) <https://www.law.com/international-edition/2022/04/06/canadian-lawyers-decry-secret-trial-in-organized-crime-probe/?slreturn=20220519232209>.
223 Quoted in ibid.

transcripts.'[224] In June 2022, media organisations petitioned the Court of Appeal for more details to be made public; the petition was rejected.[225] In March 2023, the Supreme Court agreed to hear the case and, at the time of writing, it is scheduled to be heard in December 2023.[226]

V Resolving the Tension?

The British and Canadian experiences contain lessons for Australia. Given the cognate legal and constitutional contexts, there is much to commend the additional measures taken by British and Canadian courts to protect open justice. With the INSLM's review of the *NSI Act* underway, and reform expected to follow, consideration of comparative perspective can helpfully inform these anticipated changes. If legislative amendment and jurisprudential development are pursued, the *NSI Act* and the wider constitutional backdrop might evolve to better maintain the balance between secrecy and transparency in national security cases.

A *Higher Threshold*

Both British and Canadian courts have adopted exacting scrutiny in considering whether to depart from open justice, even in the national security context. In *Incedal*, this was expressed as a 'serious possibility' of adverse impact on the administration of justice; in Canada, the two-tier test requires both a necessity analysis, informed by alternative measures, and consideration of the negative impact of a departure from open justice. In contrast, the *NSI Act* does not even explicitly consider open justice in the s 31 analysis, although it has been accepted as a factor that falls within the catch-all 'any other matter the court considers relevant' provision.[227] Within the wider open justice jurisprudence, the test is typically expressed in the language of necessity, albeit there has been no specific approach developed in the national security context (no doubt given the work already done by the *NSI Act*), nor for assessing conformity with constitutional requirements. The contrast with the higher threshold adopted in comparable jurisdictions underscores the underdevelopment of open justice as a standalone constitutional value in Australia and the need for legislative reform.

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224 Ibid.

225 'Lawyers Ask Quebec Court of Appeal to Shed More Light on Secret Trial', *CTV News* (online, 7 June 2022) <https://montreal.ctvnews.ca/lawyers-ask-quebec-court-of-appeal-to-shed-more-light-on-secret-trial-1.5935145>.

226 'Supreme Court Agrees to Hear Case About Quebec's "Secret Trial"', *CBC* (online, 16 March 2023) <https://www.cbc.ca/news/canada/montreal/secret-trial-quebec-supreme-court-quebec-court-of-appeal-1.6780731>.

227 See *R v Collaery (No 7)* (n 78) [122]–[124].

B *Awareness*

The contention advanced earlier, that a minimum standard of openness is essential, finds support in these comparative approaches. In *Vancouver Sun*, not dissimilarly to the Witness J case, there was an element of coincidence about the manner in which the newspaper became aware of the closed hearing. The Supreme Court was critical of this departure from the open court principle, distinguishing the situation from a typical, partially-closed hearing, where the partial closure is publicly-known and open to challenge by media interests:

> Whether better notice should be given to the press, or to other possibly interested parties, of proceedings that are held in camera or that are subject to a publication ban is beyond the scope of the issues raised on this appeal but we again suggest serious consideration should be given to this matter …[228]

One shortcoming in *Witness J* was that the complete departure from open justice came about through agreement between the parties, given force by a judge. This was a significant and distinctive feature of the case. The absence of a contradictor has been criticised.[229] In the British context, one expert has made the salient point that '[i]t should not be up to the parties to decide what the public gets to know. Consent arrangements are very troubling because information which is not potentially prejudicial to national security may for reasons of trial management or embarrassment be considered under a closed procedure.'[230] The force in this proposition is underscored by the facts in Witness J. The INSLM has subsequently said that he saw no reason why at least some material in relation to that case was not published at the time,[231] and the sentencing remarks have now been published (if in redacted form).

C *Practical Solutions*

The *Incedal* case provides an instructive guide as to some of the practical solutions available to mitigate the impact of sweeping secrecy while still protecting national security interests. In its initial judgment, the Court of Appeal sought to find a middle-ground, a position in contrast to the binary approach largely adopted to date by an Australian court, as a result of the strictures of the *NSI Act*.

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228 *Vancouver Sun* (n 207) 355.

229 See Human Rights Law Centre, Submission No 8 to Independent National Security Legislation Monitor, *The Operation of Section 22 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) as it Applies in the 'Alan Johns' Matter (A Pseudonym)* (30 April 2021) 10.

230 Lawrence McNamara, 'Open Justice and Secret Justice: National Security and Law Reform in the UK' (Discussion Paper, April 2012) 3.

231 Sarah Basford Canales, '"No Reason" Most Witness J Case Details Couldn't Be Made Public Earlier: Grant Donaldson', *Canberra Times* (online, 9 June 2021) <https://www.canberratimes.com.au/story/7289705/no-reason-witness-j-details-couldnt-be-made-public-earlier/>.

By permitting parts of the otherwise closed hearing to be held in public, and allowing journalists to attend, with the possibility for subsequent review of reporting restrictions, the Court sought to balance competing interests in an eminently practical manner. While the methods adopted have been criticised, by open justice advocates on one hand, and the Court of Appeal on the other, for being, with hindsight, unduly burdensome on the trial, the Court's approach contrasts favourably to the Australian approach. Such safeguards, although ad hoc, at least ameliorate the worst of the secrecy and its negative impact on open justice and democratic accountability.

D *Retention and Review of Redacted Judgments*

Both the British and Canadian experience have underscored the need for the retention, and ongoing review, of judgments that are subject to some form of departure from open justice. At the end of the second *Incedal* appeal judgment, the Court of Appeal noted that existing court practice did not facilitate the retention of closed judgments. 'This is not satisfactory,' it observed. 'A court ought to be able to refer to earlier decisions to achieve consistency and take advantage of the experience to be derived from the way in which the issues were approached.' This was particularly so, the Court added, given 'it must always be a possibility, that at a future date, disclosure will be sought at a time when it is said that there could no longer be any reason to keep the information from the public'.[232] Subsequently, a practice direction established a dedicated library.[233] In *Vancouver Sun*, the Canadian Supreme Court underscored the need for the level of secrecy to be reconsidered: 'we would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing [other relevant interests].'[234] Given the interests of national security evolve, what is required to be kept secret today might not be so in a decade, but, unless there is a process of retention and review, the limitation on open justice is effectively permanent. In a submission to the INSLM, the Law Council of Australia has called for the establishment of a 'repository' of closed judgments.[235]

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232 *Incedal* (n 186) [77]–[80].

233 Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Practice Direction: Closed Judgments' (14 January 2019) <https://www.judiciary.uk/wp-content/uploads/2019/01/lcj-and-spt-practice-direction-closed-judgments-jan-2019-as-published.pdf>; Owen Bowcott, 'Secret Judgments Database Opened to Special Advocates and Senior Judges', *The Guardian* (online, 24 January 2019) <https://www.theguardian.com/law/2019/jan/23/secret-judgments-database-opened-to-special-advocates-and-senior-judges>.

234 *Vancouver Sun* (n 207) 357.

235 Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry Into the Operation of the NSI Act as it Relates to the 'Alan Johns Matter'* (3 April 2020) 16 [53].

This solution is not entirely unproblematic. One risk of establishing such a repository is that it might in fact support a regime of greater secrecy, by permitting courts to defer the problem of balancing open justice and national security. It offers a remedy that, somewhat ironically, entrenches the position of the judiciary in maintaining secrecy, contrary to the tenets of open justice.[236] Practical concerns also abound with establishing such a library. Nonetheless, it might be the least-bad solution to a problem that lacks an easy resolution.

These are several themes and solutions emerging from the British and Canadian experience. If implemented in Australian law, through jurisprudential evolution and amendments to the *NSI Act*, the competing interests of open justice and national security would be more appropriately balanced. These suggestions are not exhaustive; other safeguards, such as the appointment of a contradictor (an 'open justice advocate'), a public statement of reasons when departures from open justice take place (as proposed by the ALRC in its 2004 report) and greater data collection and transparency around the use of the *NSI Act* have been recommended elsewhere (most recently by the INSLM itself, outlined further below).[237] Together, such changes would better uphold open justice

VI Next Steps

In July 2022, the Attorney-General tabled the INSLM's inquiry into the Witness J case. The INSLM made several recommendations. First, where closed court orders are sought under s 22, the Attorney-General be required to make submissions 'why such orders are appropriate and should be made having regard to the object of the NSI Act and the deeply rooted common law tradition of the open court.'[238] This, the INSLM suggested, could be achieved by regulation or direction, rather than amendment to the *NSI Act*. Second, that the *NSI Act* be amended to allow the court to appoint a contradictor when s 22 orders are sought.[239] Third, that s 22 orders be made publicly available (redacted, if necessary), and that annual reporting requirements required by the *NSI Act* include data on s 22 orders.[240] Fourth, that the Attorney-General be required to seek reasons for s 22 closed court orders.[241] Finally, although not subject to a formal recommendation, the INSLM indicated that he concurred with submissions that recommended periodic review and retention requirements, and would consider them further.[242]

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236 With thanks to an anonymous reviewer for highlighting this risk.
237 See, eg, Human Rights Law Centre (n 228) 10–12.
238 INSLM, 'Witness J' (n 103), 40–1.
239 Ibid 41–3.
240 Ibid 43–4.
241 Ibid 48.
242 Ibid 44–8.

In a response issued in January 2023, the Attorney-General accepted the INSLM's recommendations.[243] They have not, at the time of writing, been formally implemented. As and when adopted, the recommendations will address some of the concerns highlighted above. Additionally, following the Witness J inquiry and comments from the INSLM about the need for a wider-ranging review into the *NSI Act*, the Attorney-General referred to the INSLM a review of the entire *NSI Act*. In a statement, Dreyfus indicated that '[t]he review will consider how the Commonwealth can better balance the vital importance of open justice with the essential need to protect national security.'[244] The review has commenced and is due to report in October 2023. It is hoped that the analysis and commentary in this article will helpfully contribute to the review.[245]

VII Conclusion

Prior to the 2022 federal election, Labor MP Dreyfus said of the Collaery case that the 'very manner in which the government has sought to conduct the prosecution appears to me to be an affront to the rule of law'.[246] The level of secrecy was a particular concern for Dreyfus; in an earlier press release, responding to the Court of Appeal's judgment last October, Dreyfus said that 'Labor strongly supports the principle of open justice'.[247] Following the election, Dreyfus was appointed Attorney-General; he subsequently discontinued the prosecution, although continued the prior government's attempts to have the Court of Appeal's judgment partially-redacted.

Yet, the open justice concerns raised by the Collaery prosecution, and the secret case of Witness J, go far beyond the particular facts of each case. They point to wider issues undermining open justice in Australia and an urgent need to reform the *NSI Act*. As the Human Rights Law Centre submitted to the INSLM review, 'further safeguards are needed in the *NSI Act* to protect the public interest

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243 Attorney-General's Department, *Australian Government Response to the Independent National Security Legislation Monitor Report: Review into the Operation of Part 3, Division 1 of the National Security Information (Criminal and Civil Proceedings) Act 2004 as it Applies in the Alan Johns Matter* (Report, January 2023) <https://www.ag.gov.au/sites/default/files/2023-01/Government%20response%20to%20recommendations%20in%20INSLM%20Alan%20Johns%20Report.PDF>.

244 Attorney-General's Department, 'INSLM to Review National Security Information Act' (Media Release, 28 July 2022) <https://ministers.ag.gov.au/media-centre/inslm-review-national-security-information-act-28-07-2022>.

245 The author contributed to the Human Rights Law Centre's submission to the review and appeared before it at a hearing in July 2023.

246 Christopher Knaus, 'Mark Dreyfus Flags Bernard Collaery Case as Priority if Appointed Attorney General', *Guardian Australia* (online, 24 March 2022) <https://www.theguardian.com/australia-news/2022/may/24/mark-dreyfus-flags-bernard-collaery-case-as-priority-if-appointed-attorney-general>.

247 Mark Dreyfus, 'Morrison Government Humiliated by Collaery Ruling' (Media Release, 6 October 2021) <https://www.markdreyfus.com/media/media-releases/morrison-government-humiliated-by-collaery-ruling-mark-dreyfus-qc-mp/>.

in open justice.'[248] This article has sought to explore the constitutional themes that must animate ongoing legislative and jurisprudential progress in this context. Drawing on comparative perspectives from the UK and Canada, the article has considered alternative approaches to reconciling the competing interests of secrecy and transparency in national security cases. It has recommended practical steps Australia might take to better resolve this tension, in light of the British and Canadian experience.

The principle of open justice is primarily directed at ensuring public confidence in the judiciary. National security may from time to time require departures from the principle. But, as this article has demonstrated, with reference to the UK and Canada, more can be done within Australia's current legislative and jurisprudential milieu to maintain open justice, even when a level of secrecy is required by the demands of national security. The inadequacy of the existing law and practice risks undermining public confidence in the court system.[249] The Witness J case is a sobering example. The idea that the Australian court system might permit someone to be prosecuted and imprisoned in complete secrecy would have previously seemed absurd. The notion is anathema to a fundamental judicial principle and, quite possibly, unconstitutional. And yet it happened. In the absence of reform, it might happen again.[250] The INSLM's proposed reforms are an important start. But there is much more work to be done to ensure an appropriate balance is struck between open justice and national security in Australia.

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248 Human Rights Law Centre (n 229) 10.

249 For a consideration of similar issues, albeit from a press freedom perspective, see George Williams and Keiran Hardy, 'Press Freedom in Australia's Constitutional System' (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 222.

250 See Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16).

SPORTS AND ESPORTS AS CONDUITS FOR GAMBLING: THE LEGAL REGULATION OF GAMBLING ADVERTISING IN AUSTRALIA

JOACHIM DIETRICH* AND MATTHEW RAJ†

Australians are some of the highest consumers of gambling products in the world and, per capita, their resultant losses may also be among the highest. This article considers the Australian legal regulatory landscapes that govern both sports (including Esports) gambling and, specifically, the advertising of sports gambling products. Although gambling in Australia is highly regulated, this article reveals significant gaps that create opportunities for gambling service providers to target consumers of sport (especially young people) to market their products and further embed gambling into sports culture. Ultimately, the article offers policy-based legal reforms to curb the enticement of young people into gambling. These reforms include introducing legislation banning the advertisement of gambling service providers: (1) on public roads, public transport and near schools; (2) after 8:30pm during breaks in live broadcast sporting events; (3) during highlights, replays or on-demand sporting events (including via internet streaming); and (4), via signage (including electronic signage), branding, or promotion as part of sponsoring a sporting event, club, or venue. In the light of the June 2023 Senate Committee Report on online gambling, the possibility of more wide-ranging reforms, including a ban on all advertisements of online gambling on sport, may even be achievable. That particular reform is one that we would support.

I INTRODUCTION

Gambling, and the advertising of gambling, is ubiquitous in Australian society.[1] Australians are some of the highest consumers of gambling products in the world and, per capita, their resultant losses may also be among the highest.[2] The

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1 Noting that three-quarters of Australian children aged 8–16 consider that betting on sport is 'normal': Hannah Pitt et al, '"It's Just Everywhere!" Children and Parents Discuss the Marketing of Sports Wagering in Australia' (2016) 40(5) *Australian and New Zealand Journal of Public Health* 483.

2 Lenny Roth, *Gambling: An Update* (Research Paper No 1, Parliamentary Research Service, Parliament of New South Wales, March 2020) 2, citing Stephen Letts, 'Chart of the Day: Are Australians the World's Biggest Gambling Losers? You Can Bet on it', *ABC News* (online, 20

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availability of gambling products via digital platforms, including mobile phones, has meant both greater access to, and popularity of, gambling, especially among young people.[3] Young people are being targeted as consumers of online (or 'interactive') gambling,[4] and the attraction to sports betting (or 'wagering')[5] has grown significantly. For example, between 2015 and 2018, participation among the Australian population in sports betting, excluding racing, grew from 3.3 to 4.6 per cent.[6] As an overall percentage of gambling expenditure, betting on sports, including racing, is the fastest growing form of gambling.[7] The focus of much recent marketing of gambling products is on sports betting and, importantly, the association between sport (including the watching of sport) and betting continues to grow.[8]

Gambling — including the psychology of gambling, addiction, and its social harms — is widely researched. There is some evidence that such harms may arise even from low to moderate levels of gambling.[9] There is, however, relatively little

November 2018) <https://www.abc.net.au/news/2018-11-20/australians-worlds-biggest-gambling-losers/10495566>. Australians' losses were USD958 per capita in 2017, compared with next highest, Hong Kong, at USD768. Interestingly, the UK, which has a reputation as a gambling culture, had only USD346 losses per person.

3 In Australia, see, eg, Emily G Deans et al, 'The Influence of Marketing on the Sports Betting Attitudes and Consumption Behaviours of Young Men: Implications for Harm Reduction and Prevention Strategies' (2017) 14(1) *Harm Reduction Journal* 5; Megan Freund et al, 'The Prevalence and Correlates of Gambling in Australian Secondary Schools' (2022) 38(4) *Journal of Gambling Studies* 1173, 1175. In the UK, see, eg, Darragh McGee, 'On the Normalisation of Online Sports Gambling Among Young Adult Men in the UK: A Public Health Perspective' (2020) 184(15) *Public Health* 89–94. Due to the absence of reliable statistics, it is difficult to precisely quantify such increases.

4 See, eg, Evaristo Barrera-Algarín and María Josefa Vázquez-Fernández, 'The Rise of Online Sports Betting, Its Fallout, and the Onset of a New Profile in Gambling Disorder: Young People' (2021) 39(3) *Journal of Addictive Diseases*. This study noted two key factors in this trend: the 'boom in advertising' and ease of access via digital technologies.

5 We use the terms interchangeably. Section 4 of the *Interactive Gambling Act 2001* (Cth) ('*IGA*'), discussed further below, defines 'bet' to include wagering, and defines 'wagering service' as 'gambling services', encompassed by paras (a) and (b) of the definition of the latter term, both paras of which themselves refer to 'bets'. In short, neither 'betting' nor 'wagering' are defined except by reference to each other.

6 Australian Institute of Health and Welfare, 'Gambling in Australia', *Australian Institute of Health and Welfare* (Web Page, 16 September 2021) <https://www.aihw.gov.au/reports/australias-welfare/gambling>. This is despite slight decreases in participation in all forms of gambling. In Victoria, sports betting losses rose by around 50 per cent in five years to 2018–19, though off a low base. According to internal figures from Sportsbet, a major gambling service company, sports gambling revenue was up to $8.4 billion in 2022, a doubling in five years: see Matthew Elmas, 'Push to Outlaw Betting Ads as Big Players Take Billions from Punters', *New Daily* (online, 27 March 2023) <https://thenewdaily.com.au/finance/finance-news/2023/03/27/gambling-sportsbet-tab/>.

7 See Queensland Government Statistician's Office, Queensland Treasury, 'Australian Gambling Statistics, 37th edition, 1994–95 to 2019–20' (19 December 2022) 267. In the 20 years between 2000–01 and 2019–20, sports betting expenditure as a percentage of overall gambling expenditure rose from 12.8 per cent to 21.5 per cent. These figures include racing, a long-established focus of wagering. It must be noted, however, that these figures are stated to be 'incomplete'. Gaming machines are still the most pervasive form of gambling.

8 The perception of the predominance of sports-betting advertisements may also be enhanced by the fact that there are significant restrictions on advertising gaming machines (as noted at n 81 below).

9 Deans et al (n 3) 2, citing Matthew Browne et al, *Assessing Gambling-Related Harm in Victoria: A Public Health Perspective* (Report, April 2016). Noting that, annually, approximately 400,000 Australians experience, or are at moderate risk of experiencing, gambling-related harm.

academic writing focussed on the laws regulating gambling, especially in Australia.[10] This article considers the Australian legal regulatory landscapes that govern both sports gambling and the advertising of sports gambling products. The focus is on sports betting (including Esports) — a smaller subset of gambling in Australia, which is dominated by gaming machines ('poker' machines or 'pokies'). The reason for this focus on sports gambling as opposed to gambling more generally is fourfold. As is explained further below, first, sports betting has significant appeal to young people and its online availability makes it readily accessible, including to minors. Secondly, the problem of sports being used as conduits for introducing gambling to new markets has been widely acknowledged. Thirdly, the link between sports and gambling has the potential to exacerbate gambling harms. And fourthly, the 2018 regulations curbing gambling advertising,[11] particularly during live sports events, have failed to counter the marketing and growth of sports betting and the increasing association of sport with gambling on its outcomes.[12] We outline these regulations in Part IV C of this article.

The gambling industry is highly regulated and there are substantial limitations on when and how gambling products can be marketed. There are, however, significant gaps in those limitations, which allow gambling service providers to target consumers of sport to market their products and further embed gambling into sports culture. This article proposes reforms to minimise the impact of gambling, especially on young people. We note the difficulty of achieving any reforms against industry resistance to further regulation. In 2018, Hancock, Ralph and Martino claimed that, as in other harm producing industries such as tobacco,

> [t]he influence of powerful vested interests over policy processes [in the gambling industry] has posed barriers to the implementation of harm prevention public policies in industries known for potential harms.[13]

This article is both timely and topical as, in June 2023, while this article was under review, the findings from a Federal Parliamentary Inquiry into online gambling

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10 One exception, which provides an excellent overview of the Australian regulatory landscape, is Jamie Nettleton, Shanna Protic Dib and Brodie Campbell, 'Australia' in Carl Rohsler (ed), *The Gambling Law Review* (Law Business Research, 6th ed, 2021) 63 ('Australia'). See also Kristy Eulenstein, 'Legal Consciousness and The Australian "Interactive Gambling Act" — The Success of Expert Bureaucrats in Transnational Networks' [2018] 24 *Australian International Law Journal* 155. Gambling law appears to be a much more significant focus of academic writing in the United States: see, eg, I Nelson Rose and Martin D Owens Jr, *Internet Gaming Law* (Mary Ann Liebert, 2nd ed, 2009).

11 These took the form of changes to commercial television and radio industry codes, and amendments contained in the *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (Cth) relating to live streaming.

12 See, eg, Freund et al (n 3) and text to notes 30-31.

13 Linda Hancock, Natalie Ralph and Florentine Petronella Martino, 'Applying Corporate Political Activity (CPA) Analysis to Australian Gambling Industry Submissions against Regulation of Television Sports Betting Advertising' (2018) 13(10) *PLoS ONE* 1–21, 2. This study considers gambling industry resistance to advertising reforms prior to the 2018 reforms: see below Part IV.

and its impacts on those who experience gambling harm were released.[14] The Inquiry received 161 submissions from a wide range of stakeholders, and the final report, *You Win Some, You Lose More* (the '*2023 Senate Committee Online Gambling Report*') makes 31 recommendations targeting online gambling (and simulated gambling among children), including a ban on all forms advertising for online gambling.[15]

This article undertakes a close inspection of the specific rules within the overall regulatory framework that govern the promotion and marketing of gambling products, highlighting significant gaps. It engages with the wider debate about the adverse impact of all forms of gambling on Australian society and resistance by industry to gambling law reforms,[16] as well as specific concerns that have been raised about sports betting and the close relationship between the gambling industry and sporting bodies.[17]

The article proceeds as follows. First, it provides background to the increasing use of online platforms to gamble, the links between sports and sports gambling, and the growing participation in gambling, especially by young people. It then provides an overview of the general regulatory scheme that governs gambling in Australia, before focusing on the specific rules that govern the promotion and marketing of gambling products. Although the legal regulations seem, on their face, strict, gambling products, particularly sports wagering, have been able to forge strong links with popular sports. The article then considers reform options, including banning sports sponsorship by gambling operators or advertising on sports grounds, and banning all advertising (as was achieved in relation to the tobacco industry), while noting the pervasive political and economic clout of gambling industries and their resistance to reforms. (Such bans in relation to gambling are not unprecedented; for example, in 2019, Italy

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14 Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *You Win Some, You Lose Some: Online Gambling and Its Impacts on Those Experiencing Gambling Harm* (Report, June 2023) ('*2023 Senate Committee Online Gambling Report*').

15 Ibid 6.99 [5.148]–[5.145]. Stakeholders who made submissions included academics, the Australian Football League, state governments, Responsible Wagering Australia, Australian Psychological Society, Australian Banking Association, Australian Medical Association, Sportsbet, and Tabcorp.

16 For example, poker machine reform was a major issue in the 2023 New South Wales state election: see, eg, Jennifer Hewett, 'Perottet Takes on the Pokies Lobby — but There's a Catch', *Australian Financial Review* (online, 6 February 2023 <https://www.afr.com/companies/games-and-wagering/perrottet-takes-on-the-pokies-lobby-but-there-s-a-catch-20230206-p5ci9a?>.

17 See, eg, Elias Clure, 'Is the AFL Too Reliant on Its Partnerships with Sports Betting Companies?', *7.30* (ABC News, 6 March 2023) <https://www.abc.net.au/news/2023-03-06/is-the-afl-too-reliant-on-its-partnerships-with/102060624> ('7.30 Report'). See also Henry Belot, 'AFL to Stick with Gambling Ads Despite More Than 75 per cent of Fans Supporting Bans', *The Guardian Australia* (online, 16 March 2023) <https://www.theguardian.com/australia-news/2023/mar/16/afl-to-stick-with-gambling-ads-despite-more-than-75-of-fans-supporting-bans> ('AFL'); Henry Belot, 'Australian TV Broadcasters Claim More Gambling Ad Restrictions Could Cut Free Sport Coverage', *The Guardian Australia* (online, 10 February 2023) <https://www.theguardian.com/australia-news/2023/feb/10/australian-tv-broadcasters-claim-more-gambling-ad-restrictions-could-cut-free-sport-coverage> ('Australian TV broadcasters').

imposed a blanket ban on domestic gambling advertising.)[18] The article concludes by suggesting specific reforms to curb the harms caused by sports gambling through the advertisement of gambling service providers.

II Background

A *Sports, Gambling and Advertising*

There is evidence that the accessibility of gambling services via digital platforms and their widespread advertising have led to rapid increases in both the popularity and volume of sports betting. Although gambling has long been a highly regulated industry,[19] as McGee observes (in a United Kingdom study), the '"gamblification" of sport has given rise to a global industry promoting gambling as a knowledge-based, risk-free leisure activity.'[20]

In Australia, it has been argued that 'sports betting has become closely aligned with young men's sports fan rituals', and studies have highlighted 'the role that marketing strategies may play in stimulating the risky consumption of sports betting products'.[21] A consequence of these various marketing techniques is that the socialisation of gambling as a normal part of sport is ubiquitous and is leading to more gambling disorders manifesting among consumers, especially young people. Sports gambling is considered a 'gateway for gambling-related harms', and, as McGee notes, sports betting via digital platforms (mobile phone apps predominantly) has, among young men, become a normalised aspect of being a sports fan.[22]

Research shows that most young people engage in some form of gambling before the age of 18,[23] that gambling participation among young people is

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18 See Vincenzo Giuffré, 'Do's and Don'ts on the Italian Gambling Advertising Ban in Legal Design Style' *GamingTechLaw* (Web Page, 17 February 2022) <https://www.gamingtechlaw.com/2022/02/italian-gambling-advertising-ban-legal-design/>.

19 The problem, as Craig has noted, is that 'one of society's most tightly regulated activities, gambling, intersects with its least regulated communications medium, the Internet': Aaron Craig, 'Gambling on the Internet' [1998] (Spring) *Computer Law Review and Technology Journal* 61, 61.

20 McGee (n 3) 89.

21 Deans et al (n 3) 2 (citations omitted).

22 McGee (n 3) 92. One study has shown that the rate of online problem gambling is up to three times higher than it is for other types of gambling: Nerilee Hing et al, *Interactive Gambling* (Report, March 2014) 280. On the risk factors for gambling problems associated with different forms of gambling, see Nerilee Hing et al, 'Risk Factors for Gambling Problems on Online Electronic Gaming Machines, Race Betting and Sports Betting' (2017) 8 *Frontiers in Psychology* 779.

23 For a useful overview of recent research citing a number of Australian and overseas studies, see Samantha L Thomas et al, 'Young People's Awareness of the Timing and Placement of Gambling Advertising on Traditional and Social Media Platforms: A Study of 11–16-year-olds in Australia' (2018) 15(1) *Harm Reduction Journal* 51, 2 ('Young People's Awareness'). For a study suggesting that the range of under 18s who have ever gambled is lower (31 per cent), see Freund et al (n 3).

dramatically increasing (at least in the United Kingdom),[24] and that the percentages of those under age 25 in Australia who could be classified as 'problem' or as 'at-risk' gamblers are alarmingly high (5 per cent and 16 per cent respectively).[25]

A 2017 study of the impact of sports gambling marketing on young Australian men revealed that advertising for sports betting was perceived to be everywhere, including during live sports broadcasts, sporting programmes, previews and panel discussion shows.[26] The study also highlighted the use of inducements to encourage the opening of new accounts or by means of 'bonuses' for betting as encouraging riskier behaviour.[27] The sponsorship of specific sporting clubs was also viewed by participants as integrating gambling into the sport itself. The study concluded that:

> For the young men in our study, the emotional investment in the game, and the ways in which they 'consume sport', for the most part, now included betting on the match. In aligning gambling with culturally valued entities, and pushing numerous incentivisation strategies through ubiquitous marketing channels, the gambling industry is influencing not only individuals' gambling risk perception but also the level to which they engage in gambling.[28]

We note that, at this stage, while the 2017 study was concerned with gambling by young men, there is evidence that women are also a growing market for online gambling.[29]

Since the 2017 study, Australian Commonwealth law has banned gambling advertisements promoting 'live' betting odds and commentators discussing odds during most live sporting broadcasts. Commonwealth law also prohibit**s** some types of inducements, specifically bonuses to open new accounts. However, generic advertising during breaks in live sporting broadcasts, along with other marketing techniques**,** such as sponsorships and advertising at venues and on venue infrastructure, continue to play a significant role in the ubiquity of the marketing of gambling products.[30] A study of Australian secondary students has

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24 Thomas et al, 'Young People's Awareness' (n 23) 2, citing UK Gambling Commission, *Gambling Participation in 2016: Behaviour, Awareness and Attitudes* (Annual Report, February 2017).

25 Thomas et al, 'Young People's Awareness' (n 23), citing Nola Purdie et al, Gambling Research Australia, *Gambling and Young People in Australia* (Report, August 2011). Thomas et al note another study that found that 60 per cent of young people wanted to try gambling, including 35 per cent sports betting.

26 Deans et al (n 3) 5–6.

27 Ibid 7.

28 Ibid 10. On the normalisation of sports betting, including risky betting, via marketing techniques in Britain and Spain, see Hibai Lopez-Gonzaleza, Frederic Guerrero-Solé and Mark D Griffiths, 'A Content Analysis of How "Normal" Sports Betting Behaviour is Represented in Gambling Advertising' (2018) 26(3) *Addiction Research & Theory* 238.

29 See Simone McCarthy et al, 'Women's Gambling Behaviour, Product Preferences, and Perceptions of Product Harm: Differences by Age and Gambling Risk Status' (2018) 15(1) *Harm Reduction Journal* 22.

30 See the discussion Part V below. Thomas et al, 'Young People's Awareness' (n 23) conducted their research after these changes and their study of 11–16-year-old basketball fans found widespread awareness of gambling promotion through various media.

shown that seeing a greater number of gambling advertisements is a factor that increases the likelihood of their gambling and the risk of problem gambling.[31]

The sponsorship of sports bodies or clubs by gambling companies is another concern. The *2023 Senate Committee Online Gambling Report* noted that the Australian Football League ('AFL') and the National Rugby League ('NRL') are both 'significantly leveraged by gambling interests and that a loss of gambling revenue would affect their operations'.[32] Indeed, the recommendation in the Report that there be a comprehensive ban on all forms of advertisement is to be introduced in four phases, over three years, to allow sporting organisations (as well as commercial television and radio) to find alternative revenue.[33]

Sponsoring sports bodies is a particularly effective way in which gambling companies can positively influence consumers, especially children. It can create or reinforce a child's association between their favoured sports or clubs and socially detrimental products and brands, such as alcohol and junk food, and, indeed, gambling products. 'Unhealthy commodity' products or brands, as Bestman et al describe them, become 'normalised as part of everyday life' as sponsorship is treated less sceptically by consumers than other forms of marketing. [34]

Another means of product promotion is 'affiliate marketing', whereby third-party companies or individuals are financially rewarded for directing custom towards a specific product or brand. Such embedded marketing techniques may be particularly influential on users of social media as they may not be identified as 'advertising'. For example, social media 'tipsters' giving sporting tips may not disclose that they have a relationship with gambling companies.[35] We note further below some legal provisions that, in part, regulate such techniques by Australian advertisers and gambling service providers, but we are not aware of any Australian studies as to the use of such techniques.

Similarly, outside of Australia, social media (such as X, formerly Twitter) is increasingly being used as a platform for gambling advertising. For example, a UK study showed that many such advertisements do not comply with legal regulatory requirements (such as not targeting children).[36] The same study also found that Esports gambling advertising was 'markedly different' to that of traditional

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31 Freund et al (n 3) 1187–8.

32 Evidence to Senate Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 4 April 2023, 30–1, 33 (Gillon McLachlan, AFL); 32 (Andrew Abdo, NRL).

33 *2023 Senate Committee Online Gambling Report* (n 14) 120–7.

34 Amy Bestman et al, 'Children's Implicit Recall of Junk Food, Alcohol and Gambling Sponsorship in Australian Sport' (2015) 15(1) *BMC Public Health* 1022, 1029.

35 See, eg, Scott Houghton, Mark Moss and Emma Casey, 'Affiliate Marketing of Sports Betting — A Cause for Concern?' (2020) 20(2) *International Gambling Studies* 240. The authors stress (at 243) the need for further research on how gamblers respond to affiliates that may be promoting expert advice, whilst simultaneously being rewarded for directing gamblers to providers.

36 See Raffaello Rossi et al, '"Get a £10 Free Bet Every Week!" — Gambling Advertising on Twitter: Volume, Content, Followers, Engagement, and Regulatory Compliance' (2021) 40(4) *Journal of Public Health & Marketing* 487.

sports and had a particularly strong appeal to children. It should be noted, however, that, in Australia, direct marketing of gambling via email, text messages, and the like, is not generally lawful without the consent of the customer (see further below).[37] But again, there is limited research on the 'nature and extent' of gambling advertising on social media platforms in Australia.[38] This lack of research includes the extent of gambling advertising by overseas operators offering illegal gambling services.

B *Esports, 'Crypto Casinos' and a 'Gambling Boom'*

In July 2021, WIRED magazine published an article in which it claimed (among other things) that 'Twitch', a livestreaming gaming service was, at that time, 'in the middle of a gambling boom', with gamblers playing in 'crypto casinos' by purchasing digital currencies such as Bitcoin and Ethereum. Crucially, the article exposed the practice of online cryptocurrency casinos sponsoring top US streamers to play in online casinos via Twitch.[39] For example, it was reported that 'Trainwrecks', a gaming streamer with 1.5 million followers, would livestream his play in an online cryptocurrency casino, 'Stake.com', to audiences of 25,000 viewers. One of the issues was that the Stake.com was unlicensed (in the US), and so players would need to innovate to overcome any denial of access to the website by US authorities, such as using a VPN (virtual private network), or physically relocating to a country where the practice was legal.

Chief among the concerns raised in the 2021 WIRED article was access to livestreams by young people and, relatedly, the disparate approaches or policies of livestreaming services to ensuring compliance with gambling laws. It was highlighted that Twitch's competitors, 'YouTube' and 'Facebook Gaming', prohibited the streaming of online gambling sites that have not been previously reviewed. Further, the article suggested that Twitch did not have an age limit on, for example, 'slots'. The very purpose of age limits on some games (such as 'slots') was, of course, to prevent young people viewing the livestreaming of gambling-related content.

Undeniably, the promotion of online gambling to young audiences is concerning, particularly in the light of a wealth of research identifying the social

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37 See, eg, *Betting and Racing Act 1998* (NSW) s 33HA; *Wagering Act 1998* (Qld) s 228D; *Interactive Gambling (Player Protection) Act 1998* (Qld) s 166D.

38 See Thomas et al, 'Young People's Awareness' (n 23) 2–3. However, the authors also reported that 55 per cent of the youth interviewed in the study recalled seeing gambling advertising on social media platforms: at 9.

39 Cecilia D'Anastasio, 'Twitch Streamers Rake in Millions With a Shady Crypto Gambling Boom', *Wired* (Web Page, 13 July 2021) <https://www.wired.com/story/twitch-streamers-crypto-gambling-boom/>. On a different aspect of streaming, see Brett Abarbanel and Mark R Johnson, 'Gambling Engagement Mechanisms in Twitch Live Streaming' (2020) 20(3) *International Gambling Studies* 393. The authors argue that many features of streaming incorporate mechanisms that could constitute gambling and therefore be subject to gambling regulation.

harms caused by gambling. The use of electronic banking or cryptocurrencies — intangibles — may detach a player from the full appreciation of the value of their stake or bet, ever increasing a sense of 'safety' in the face of real losses. Concerned that simulated gambling in interactive gaming can normalise gambling, the *2023 Senate Committee Online Gambling Report* recommended improvements to age-based guidance for parents regarding interactive gaming.[40] As part of this, the Senate Committee recommended that a consistent National Classification (age-rating) Scheme be applied across Google Play, Apple App, and Steam stores.[41]

III Gambling Laws in Australia: Overview

A *What is Gambling?*

There is considerable case law on the definition of gambling and yet the meaning of the term remains unsettled.[42] For current purposes, we simply adopt a basic definition, consistent with case law, that gambling involves 'the staking of money or other valuable consideration … on the outcome of an event determined in whole, or in part, by chance and with the objective of winning a prize.'[43] There are more specific definitions adopted in statutes for legislative purposes, without necessarily defining the overarching concept of gambling (so that common law definitions still hold sway). For example, the definition of a 'gambling service game' under s 4 of the *Interactive Gambling Act 2001* (Cth) ('*IGA*'), which Act is discussed further below, requires that a game is played for money 'or anything else of value'.

The basic definition of gambling (above) does not resolve difficult questions at the penumbra, such as, for example, whether 'loot boxes' in electronic games constitute gambling.[44] Loot boxes are virtual items purchased by players during some electronic games. The boxes are purchased with money or other consideration (such as cryptocurrencies, game tokens etc) without the player knowing the precise prizes contained in the loot boxes. As such, the purchase is

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40 Hancock, Ralph and Martino 13) 146.

41 See *2023 Senate Committee Online Gambling Report* (n 14), Recommendations 27, 28, and 29.

42 See, eg, in the United States context, ch 1 and ch 2 of Rose and Owens (n 10). One classic definition is found in *Carlill v Carbolic Smoke Ball Company* [1892] 2 QB 484, 490–1 (Hawkins J). See also the Sackar J's detailed discussion: *Lottoland Australia Pty Ltd v Australian Communications and Media Authority* [2019] NSWSC 1041, [87]–[106] (Sackar J) ('*Lottoland Australia*').

43 Nettleton, Dib and Campbell 'Australia' (n 10) 63. The term is not defined in the *Interactive Gambling Act 2001* (Cth) ('*IGA*'), which defines 'gambling services' inclusively by reference to a variety of other concepts that are not themselves further defined, such as 'bets'. A 'bet' is merely defined as including a wager: s 4 (definition of 'bet').

44 For an Australian perspective, see Jamie Nettleton, Joseph Abi-Hanna and Aleksandra Pasternacki, 'Loot Boxes in Australia: Gaming or Gambling?' (2020) 42(1) *Bulletin (Law Society of South Australia)* 18; Arvind Dixit and Robert Ceglia, 'What's in the Box? Overseas Developments Bring the Regulation of Loot Boxes into Focus' (2021) 23(9) *Internet Law Bulletin* 175.

based on chance (or mixed chance and skill). It is not clear, however, whether the prizes offered by loot boxes can be monetised (that is, whether they are something of 'value').[45] If they are not, they do not fall within the scope of the *IGA*.

Indeed, following a Parliamentary Inquiry in 2018,[46] the Australian Government did not to regulate loot boxes as gambling.[47] This is despite the fact that loot boxes share considerable similarities with gaming machines (both electronic gaming machines ('EGMs') and physical), with usually no skill involved, and the 'prizes' being randomly generated and often accompanied by 'psychological' mechanisms intended to encourage such purchases.[48] The use of loot boxes has been associated with higher risks of both gambling activity and gambling-type problems in young people, including minors.[49] Interestingly, in 2022, Cartwright and Hyde argued for the regulation of loot boxes from a consumer law perspective, on the basis that they involve unfair commercial practices.[50] In some overseas jurisdictions (eg, Japan, United States, and China), recent responses to loot boxes have included the implementation of transparent odds.[51]

Equally problematic are the definitions of more precise concepts used in gambling legislation, such as distinctions between online games (which are prohibited under the *IGA*) and betting on an 'event' (which can legally be provided online in Australia as wagering that is 'excluded' from prohibition if provided by a licensed operator). As an example, in *Lottoland Australia Pty Ltd v Australian Communications and Media Authority*,[52] Sackar J held that gambling in 'Lotto' pools, where the winning numbers were generated by reference to financial market indices, was not a 'game' and, therefore, not a 'prohibited interactive gambling services' within the meaning of s 5 of the *IGA*. Rather, due to the way in which the 'Lotto' was constructed, the player was betting on an 'event', and this

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45 Dixit and Ceglia (n 44) 176.

46 Environment and Communications References Committee, Parliament of Australia, *Gaming Micro-Transactions for Chance-Based Items* (Report, November 2018).

47 See Australian Government, *Response to the Senate Environment and Communications References Committee Report: Gaming Micro-Transactions for Chance-Based Items* (March 2019), which notes that research on the topic is still in its infancy: at 4.

48 Dixit and Ceglia (n 44) 177.

49 See, eg, Heather Wardle and David Zendle, 'Loot Boxes, Gambling, and Problem Gambling Among Young People: Results from a Cross-Sectional Online Survey' (2021) 24(4) *Cyberpsychology, Behaviour, and Social Networking* 267.

50 Peter Cartwright and Richard Hyde, 'Virtual Coercion and the Vulnerable Consumer: "Loot Boxes" as Aggressive Commercial Practices' (2022) 42(4) *Legal Studies* 555.

51 See Department of Infrastructure, Transport, Regional Development, Communications and the Arts Submission No 104.1 to Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *You Win Some, You Lose Some: Online Gambling and Its Impacts on Those Experiencing Gambling Harm* (June 2023). See also Leon Y Xiao, Submission No 127.2.

52 *Lottoland Australia* (n 42) 1041 (Sackar J).

was, therefore, permitted as an 'excluded wagering service' within the meaning of s 8A of the *IGA*.[53]

B *State and Territory Regulation*

The regulation of gambling services and operators in Australia is by means of State, Territory, and Commonwealth legislation. The web of regulation is complex and confusing. To give one example, in Queensland alone, there are seven extensive statutes regulating various forms of gambling (plus a further five statutes in relation to specific casino licence agreements), seven detailed regulations promulgated under those statutes, five sets of legally binding gaming rules and several service-specific Codes of Practice.[54] Many of these regulations contain similar provisions albeit applying in different contexts. This complexity of regulation makes it impossible to provide anything other than a snapshot of the relevant laws.

The *licensing* of gambling services providers — that is, the granting of licences to sell gambling products or to operate gambling premises — is controlled by state or territory governments. Once a licence is obtained to conduct gambling online or digitally by an operator, that licensee can operate throughout Australia.[55] Gambling *on premises*, including in casinos, is regulated by state or territory laws. The purchase of scratch lotteries and lotteries, the playing of physical gaming (poker or slot) machines, and casino-type games such as roulette and cards (eg, blackjack) are types of gambling activities that are still widely carried out on premises. However, on-premises gambling is of decreasing relevance in the context of sports betting and is not further considered in this article for this reason.[56]

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53 That decision included consideration of amendments made immediately prior to the case by sch 1 of the *Interactive Gambling Amendment (Lottery Betting) Act 2018* (Cth): see *Lottoland Australia* (n 42) [78]–[80], [121]. The amendments prohibit betting on the outcomes of lotteries. The Northern Territory Government subsequently sought to alter the conditions of Lottoland's licence to effectively shut down that part of their business: see *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing* [2020] NTSC 65, granting an interlocutory injunction against the Minister's actions. As at 30 August 2023, Lottoland was still offering those services (other than to South Australian residents): see https://www.lottoland.com.au/.

54 For the full list, see Office of Liquor and Gaming Regulation, 'OLGR Laws and Policies' (Web Page, 27 July 2023) <https://www.justice.qld.gov.au/about-us/services/liquor-gaming/laws-policies>. The *Casino Gaming Rule* and *Wagering Rule 2010* are 366 and 224 pages long respectively. Similarly, New South Wales has eight statutes regulating gambling (excluding the *Gaming Machine Tax Act 2001* (NSW)) as well as numerous regulations and rules.

55 See, eg, *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418 ('*Betfair*'), on which see IV A below.

56 Importantly, on-premise gambling products are not readily accessible by underage users, whereas online gambling products are.

C *Commonwealth Legislation*

In 2001, the Commonwealth, relying on its telecommunication powers,[57] enacted the *IGA* to regulate the provision of online and digital gambling products and services to Australian consumers (described in the legislation as 'interactive' gambling services). Further significant reforms to the *IGA* came into effect in 2017–18, including changes to increase the effectiveness of enforcement measures against overseas operators.[58]

The *IGA* prohibits certain types of interactive gambling services altogether (such as gambling games) and it is an offence to provide such services to Australian customers (s 15). The approach of the *IGA* is to define 'prohibited interactive gambling services' as including all gambling services provided in the course of business via digital and electronic platforms (s 5(1)(b)) unless such a service is an 'excluded gambling service' (s 5(3)). An 'excluded gambling service' under the *IGA*, such as wagering (s 8A) and lotteries (s 8D), can be sold online or digitally, but only by an operator licensed under state or territory laws. Importantly, online betting on games of luck, such as gaming machine and casino-type games,[59] and instant online scratch lotteries, are prohibited and cannot be legally offered to Australian consumers (except, of course, free games, where no money or other consideration is gambled by the user).[60]

Section 15 of the *IGA* makes it a criminal offence (subs (1)) to intentionally provide a prohibited interactive gambling service which has an 'Australian-customer link' (an Australian-customer link is established if a customer of the service is physically present in Australia).[61] The offence is punishable by up to 5,000 penalty units (equivalent to $1.375M in 2023).[62] Further, s 15 makes the provision of a prohibited service with an Australian-customer link unlawful and subject to a civil penalty of 7,500 penalty units (equivalent of more than $2.06M in 2023) (subs (2A)) and, contrastingly, does not require proof of intention (to provide the service). The latter civil penalty regime was introduced as part of the 2017 reforms to the *IGA* to enhance compliance (especially against overseas

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57 *Australian Constitution* s 51(v).

58 For the background to those reforms, and their effectiveness, see generally Eulenstein (n 10). The key features of the reform package are set out at 161–2. See also Explanatory Memorandum, Interactive Gambling Amendment Bill 2016 (Cth).

59 There is a limited exception in the *IGA* under which such games may be provided digitally on equipment made available at a particular place (i.e., physical premises) by a licensed service provider: *IGA* (n 43) s 8B.

60 Inherent in all definitions of gambling is that the player must give consideration (something of value) to participate in the chance to win. See, eg, *IGA* (n 43) s 4 (definition of 'gambling service' para (e)). The *IGA* includes 'bets' under 'gaming service' without defining it, however. So, we suggest that it is lawful to create an 'app' which allows a user to play 'pokies' via their mobile phone, so long as the app does not require the user to pay to play.

61 See *IGA* (n 43) s 8.

62 Currently, a penalty unit is $275: see *Crimes Act 1914* (Cth) pt 1A s 4AA(1); Attorney-General, *Notice of Indexation of the Penalty Unit Amount* (14 May 2020).

operators).[63] There will be no infringement of either subs (1) or subs (2A) if the person providing the service did not know, and 'could not, with reasonable diligence, have ascertained', that the service had Australian customers (subs 3).[64]

Section 15AA establishes a similar regime of criminal offences and civil penalties for the provision of permitted gambling services without a licence. The ss 15 and 15AA criminal prohibitions and civil penalties apply both to licensed Australian and overseas providers of gambling products.

Of note, prior to the Commonwealth legislation, Queensland passed the *Interactive Gambling (Player Protection) Act 1998* (Qld).[65] In theory, the Queensland Act contemplates the licensing of operators to provide online gambling in casino-type games and EGMs (as well as other interactive gambling).[66] Since such games are prohibited under the *IGA* (Cth), that legislation takes precedence. Consequently, such games cannot be licensed to operate in Queensland either.[67] The Queensland legislation governs the licensing of operators providing other types of gambling services that can be legally provided under the *IGA.* It also has provisions dealing with advertising that replicate provisions in other Queensland legislation. Given its limited operation, the *Interactive Gambling (Player Protection) Act 1998* (Qld) will not be given any further treatment, although it highlights the complexity of the regulatory landscape of gambling in Australia.

D *The Problem of Overseas Products and Their Marketing*

Importantly, although interactive casino-type games are not the focus of this article, under the *IGA*, the *use* of prohibited gambling services by Australian users is not illegal (meaning, a person in Australia playing a prohibited electronic gambling game (eg, online slots) commits no offence). This fact is exploited by unlicensed operators or overseas licensed operators that may even target Australian audiences.[68]

Despite attempts to strengthen enforcement and increase penalties against overseas product providers through the *Interactive Gambling Amendment Act 2017* (Cth), bans have proved problematic. The Australian Communication and Media Authority ('ACMA'), which, alongside the Federal Police, enforces the *IGA*, can ask

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63 See *Interactive Gambling Amendment Act 2017* (Cth); Explanatory Memorandum, Interactive Gambling Amendment Bill 2016 (Cth).

64 The *IGA* sets out factors relevant to determining whether reasonable diligence could have ascertained an Australian link: see *IGA* (n 43) s 15A(4).

65 Very similar legislation was also passed in the ACT: *Interactive Gambling Act 1998* (ACT). See also *Gambling Regulation Act 2003* (Vic).

66 *Interactive Gambling (Player Protection) Act 1998* (Qld) s 4, 6.

67 See, eg, 'Interactive Gambling Licensing', *Business Queensland* (Web Page) <https://www.business.qld.gov.au/industries/hospitality-tourism-sport/liquor-gaming/gaming/interactive-gambling-licensing>.

68 See, eg, 'Online Poker Australia. Best Gaming Sites for Beginner or Pro Players in Australia to Play Online Poker in 2023', *Professional RakeBack* (Web Page) <https://professionalrakeback.com/online-poker-australia>. This site includes advice as to how to circumvent ISP blocks.

Australian ISP providers to block overseas gambling websites, and currently nearly 700 such sites are on the banned list.[69] Nonetheless, such bans can be easily circumvented.[70] New sites are constantly coming online, and access to such sites is readily available via phone apps that can be downloaded from mobile phone app stores. Both access to and use of such overseas and (under Australian law, at least) unregulated gambling websites may be an increasing problem, including the use of such online gambling games by minors, with recent studies suggesting a significant percentage of Australian gamblers access offshore gambling sites.[71]

Those who gamble using offshore sites are significantly more likely to be at moderate risk of developing gambling problems or of being problem gamblers, than domestic gamblers.[72] Moreover, those who use offshore sites do so despite having concerns about the risks associated with such use (lack of consumer protection, unfairness, financial risk etc).[73] Indeed, there are clear warnings of these risks from Government regulators such as ACMA.[74] As noted above, the fact that the *use* of such services by Australian customers is not illegal is exploited by service providers deliberately targeting Australian audiences.

That said, in Australia, the increase in the availability in recent years of licensed (and subject to Australian regulation) online gambling providers, including the legalisation of online sports and race-betting services in a competitive market, has led to a substantial overall decline in the use of offshore gambling services,[75] — a trend that appears consistent with other jurisdictions.[76] Yet, there are difficulties in quantifying the offshore gambling market. A 2015

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69 This is up from around 400 a year ago. The current list of blocked gambling websites can be found on the Australian Communications and Media Authority ('ACMA') website: 'Blocked Gambling Websites', *ACMA* (Web Page, 26 July 2023) <https://www.acma.gov.au/blocked-gambling-websites>.

70 For example, the authors tried to access two of the websites, picked at random, and although one was blocked, another redirected the search to another live online gambling site. See also *Professional RakeBack* (n 68).

71 See, eg, Sally M Gainsbury et al, 'Consumer Engagement with and Perceptions of Offshore Online Gambling Sites' (2017) 20(8) *New Media & Society* 2990 ('Consumer Engagement'). Importantly, this study predates 2018 amendments to the *IGA* that sought to enhance compliance by offshore websites. Cf Maria E Bellringer and Nick Garrett, 'Risk Factors for Increased Online Gambling during COVID-19 Lockdowns in New Zealand: A Longitudinal Study' (2021) 18(24) *International Journal of Environmental Research and Public Health* 12946 ('Factors'). This is a recent New Zealand study which noted that the use of (illegal) offshore gambling sites increased somewhat during Covid lockdowns in 2020–1, but that the percentage of gamblers gambling on offshore sites was still relatively low. The study in question did not include youth gamblers, however, since the participants were all 18 years and above in 2012. Anecdotally, one of the authors is aware of a number of examples of high school students gambling online on sports and on electronic gaming machines and casino-type games. See also Freund et al (n 3).

72 Gainsbury et al, 'Consumer Engagement' (n 71) 3003.

73 Ibid 3006. For further on some of those risks, see Sally M Gainsbury, Brett Abarbanel and Alex Blaszczynski, 'Factors Influencing Internet Gamblers' Use of Offshore Online Gambling Sites: Policy Implications' (2018) 11(2) *Policy and Internet* 235, 238, 247 ('Factors').

74 See 'Protect Yourself from Illegal Gambling Operators', *ACMA* (Web Page, 24 January 2022) <https://www.acma.gov.au/protect-yourself-illegal-gambling-operators>.

75 Gainsbury, Abarbanel and Blaszczynski 'Factors' (n 73) 238.

76 See ibid, the authors noting, however, the difficulty in quantifying the size of the offshore gambling market. Further, most survey respondents in the study were, in fact, offshore gamblers.

government review cited two vastly different estimates as to the money gambled by Australians on sports wagering (excluding EGMs and casino-type games) with overseas providers: nearly $64 million according to one report and $400 million according to another.[77]

Reforms introduced in 2017 to the *IGA* to enhance compliance with Australian laws against overseas operators appear to have had some success. ACMA has used networks with overseas regulators, which has led to some overseas *licensed* operators from either withdrawing their services from Australian customers or seeking Australian licences to provide permitted services in Australia.[78] Such actions, however, may merely increase the market share of less scrupulous offshore operators (eg, ones that are unlicensed, or that are licensed in countries with lax regulatory regimes), particularly ones operating in the sphere of EGMs and casino-type games, given that these cannot be legally provided in Australia even with a license. It is likely that the offshore market for gambling products that are not legally available in Australia will increase.

Nonetheless, in the context of sports betting, gambling services to Australian consumers are still predominantly provided by licensed and regulated operators, although Australian gamblers are also clearly using offshore providers for sports betting and betting on racing etc.[79] And, most importantly, in relation to such offshore gambling providers, the domestic regulatory regimes will not be readily enforceable against offshore providers of gambling products. This means that the restrictions noted below — for example, on the types of inducements that can be legally offered, or on the direct marketing of services, as well as the regulation of advertising standards, and the placement and target audience etc, of the advertising and marketing of products — will prove ineffective against such operators. The *2023 Senate Committee Online Gambling Report* considered the problem of illegal offshore gambling and recommended better resources to both quickly and effectively block offshore gambling websites, blocking bank transactions to known illegal operators (with the cooperation of Australian banks), and stronger sanctions for illegal operators.[80]

We turn now to the crux of the article — that is, the specific laws and regulations that govern the advertising of gambling in Australia.

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77 Barry O'Farrell, Department of Social Services, Parliament of Australia, *Review of Illegal Offshore Wagering* (Report, 18 December 2015) 19.

78 See Eulenstein (n 10) 166–7, who also discusses the ineffectiveness of the *IGA* in enforcing restrictions against overseas operators prior to those reforms.

79 Gainsbury et al, 'Consumer Engagement' (n 71) 2996.

80 See (n 14) 2.152.

IV Gambling Advertising Laws in Australia

A *Overview*

The law governing the *advertising* of gambling is also a complex mix of state, territory, and Commonwealth laws, as well as industry self-regulation. Specific state laws, for example, prohibit any advertising of unauthorised gambling products,[81] prohibit the advertising of specific gambling products such as gaming machines,[82] or both. Other State laws are generic in setting standards for advertising and some provisions reflect already existing consumer laws. For example, s 210 of the *Wagering Act 1998* (Qld) requires that the advertising of wagering is not 'indecent, offensive, false or misleading'.[83] Some states and territories also have codes of practice that include rules on advertising. That said, those rules tend to be quite generic and largely replicate consumer laws and legislation similar to the above mentioned s 210 of the *Wagering Act 1998* (Qld), such as precluding false or misleading advertising — generally, or specifically — in relation to betting odds and the chances of winning.[84] Other code provisions prohibit advertisements targeting minors, for example.[85] These codes are of limited impact on advertising during sports, which is the subject of the Commonwealth regulations considered in this Part.

Some States ban gambling advertising at specific locations and venues. In Victoria, for example, the advertisement of gambling is banned on public transport, public roads, and near schools.[86] Certainly, as will be seen below, such laws could have a significant impact in the context of sport if they extended to sports venues, which are not presently subject to restrictions.

For our purposes, as most advertising for sports (including Esports) betting products occurs while broadcasting (free-to-air and subscription television and radio), or by means of the internet or digitally, it is therefore largely subject to Commonwealth regulation. To the extent that State and Territory laws regulating gambling advertising are inconsistent with Commonwealth legislation (generally

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81 See, eg, *Gambling Regulation Act 2003* (Vic) s 2.2.8; *Gaming and Wagering Commission Act 1988* (WA) s 43A.

82 See, eg, *Gambling Regulation Act 2003* (Vic) ch 3 pt 5 div 4.

83 The same prohibition is duplicated in Queensland: *Gaming Machine Act 1991* (Qld) s 229. See also *Betting and Racing Act 1998* (NSW) s 33H(2)(c); *Gaming and Wagering Commission Regulation 1988* (WA) reg 43(2)(c).

84 See, eg, Department of Industry, Tourism and Trade (NT), 'NT Code of Practice for Responsible Gambling 2022' (2022) 10, Practice 8; Department of Justice and Attorney-General (Qld), 'Queensland Responsible Gambling: Code of Practice' (2015) 6–7, Practice 6; Attorney-General's Department (SA), 'Authorised Betting Operations Gambling Code of Practice' (2021) [9]–[26].

85 Specific manuals under some of these codes, targeted at particular gambling sectors, add little to these restrictions, generally only restating the generic practices for specific actors and contexts. See, eg, Department of Industry, Tourism and Trade (NT), 'NT Code of Practice for Responsible Gambling Online 2019' (2019) 14–15, Practice 8; Department of Justice and Attorney-General (Qld), 'Queensland Responsible Gambling Resource Manual: Racing' 19–21 [6.1]–[6.13], Practice 6.

86 *Gambling Regulation Act 2003* (Vic) s 4.7.1.

they would not be so, as they typically operate in tandem with those laws),[87] Commonwealth laws prevail.

Previously, the capacity to offer (and, therefore, advertise) gambling services in a state was significantly restricted by state and territory laws, thereby limiting competition in the market by interstate operators. For example, a Queensland licensed operator could not operate in New South Wales. The effect of these laws was to preserve state-based monopolies. However, they were struck down by the High Court's 2008 decision in *Betfair Pty Limited v Western Australia* ('*Betfair*'),[88] as the prohibitions infringed the constitutional guarantee of 'absolutely' free interstate trade, commerce and intercourse under s 92 of the *Australian Constitution*. The *Betfair* decision opened the market to multiple providers licensed in other states or territories.[89] The sudden increase in licensed operators competing against each other led to a surge in advertising across multiple media platforms, including during broadcasts of sporting events. At the time (circa 2008), there were no Commonwealth restrictions on gambling promotions during sports broadcasts.

B *'Publishing' vs 'Broadcasting'*

Under part 7A of the *IGA*, it is an offence to advertise any 'designated interactive gambling service' (as defined in s 61BA *IGA*) which, in essence, is comprised of either any prohibited gambling services, or any regulated gambling services being offered by an unlicensed service provider (s15AA *IGA*). Part 7A is, however, both lengthy and detailed, and there are numerous exceptions and qualifications to the general prohibition on advertising-prohibited gambling services. Crucially, part 7A draws a distinction between *publishing* an advertisement, which is defined very widely in s 61CA, but which meaning excludes *broadcasting* (delivering television and radio programs to receivers) and datacasting (s 61CB). Broadcasting does not include programs delivered via internet streaming (visual or audio),[90] and, so, such programs would therefore fall under the broad definition of publication.[91]

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87 See, eg, *Betting and Racing Act 1998* (NSW) s 30(3). Under the Act, it is an offence to provide access to unlicensed wagering operations or information about such operations via the internet, online communications or subscription television. Such a state offence is clearly consistent with offences under the *IGA*. See also s 29 of the NSW Act.

88 *Betfair* (n 55). See also *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 for challenges to certain requirements in New South Wales's licensing regime.

89 The decision led to legislative changes in states and territories, having to include licence holders from other states and territories as being authorised to provide, and advertise, gambling services in the jurisdiction. See, eg, *Gaming and Wagering Commission Act 1987* (WA) s 43A(3)(da).

90 Ibid s 61AA. This section makes the definition consistent with the definition of broadcasting under the *Broadcasting Services Act 1992* (Cth). See Revised Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth) 68 ('IGA Explanatory Memorandum') for commentary on *IGA* s 61AA.

91 IGA Explanatory Memorandum (n 90) 73 for commentary on *IGA* s 61CA.

The purpose of these two categories is 'to avoid overlap between publishing, and broadcasting or datacasting, which are addressed separately in Part 7A'.[92]

What, then, is the reason for this separate treatment? There are two distinct classes of offences set out for both the (1) publication, and (2) broadcasting of designated (ie, prohibited gambling services, or unlicensed services) interactive gambling service advertisements, under ss 61EA and 61DA respectively. While the basic penalty schemes for both classes of offence are the same, the reason for the distinction derives from the exceptions to the prohibitions against advertising through the different mediums, that is, what is excused conduct. For our purposes, the most important of these excuses the *publication* of promotions of gambling services, where no reward is given for the promotion, in broader circumstances than where gambling services are promoted during a *broadcast* for no reward.

In relation to publication, s 61EE of the *IGA* is relevant here:

> **Publication by person not receiving any benefit permitted**
>
> (1) A person may publish a designated interactive gambling service advertisement if:
>
> (a) the publication is not in the course of the provision of designated interactive gambling services; and
>
> (b) the person publishes the advertisement on the person's own initiative; and
>
> (c) the person does not receive any direct or indirect benefit (whether financial or not) for publishing the advertisement.

This provision captures, for example, product placements such as a publisher wearing clothing advertising a gambling service provider. Similarly, it would cover circumstances where a publisher lists providers via a search engine.[93] To take another example, if a video gamer streaming an Egame were to promote a prohibited ('designated') gambling service or service provider while streaming, this would not infringe the *IGA* provided that the streamer was not receiving a financial or other benefit for the 'plug', and provided they were not 'put up' to it. Of course, if the gambling service is permitted in Australia and is one provided by a licensed operator, then advertising by means of 'product placement' or promos during, say, a live-stream or on a posted video, is legal, even if for reward, and the promotor would not necessarily need to disclose the arrangement, subject to laws on misleading or deceptive conduct (or other advertising standards).[94]

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92 See ibid for commentary on *IGA* s 61CB.

93 See ibid 79–80 for commentary on *IGA* s 61EE.

94 In some circumstances, a failure to disclose a financial relationship with an advertiser could amount to misleading or deceptive conduct under *Australian Consumer Law*: *Competition and*

For *broadcasting*, however, s 61DB allows the broadcasting of a designated advertisement without reward, but only where such broadcast occurs 'as an accidental or incidental accompaniment to the broadcasting or datacasting of other matter' (s 61DB(1)(a)). As with publication, there must be no direct or indirect benefit received for the advertisement. For example, a news reporter may interview a person who is wearing a shirt emblazoned with the logo of a gambling service provider without infringing advertising prohibitions. Similarly, the *IGA* Explanatory Memorandum provides that:

> For example, this would permit the broadcast of an international sporting event at an overseas venue where an interactive gambling service advertisement might be permitted. If, however, the broadcaster receives some benefit for the interactive gambling service advertisement, additional to the benefit arising from broadcasting the sporting event, the interactive gambling service advertisement would not be permitted under this clause.[95]

A video uploaded on the internet can therefore actively promote designated (prohibited) advertisements, provided that the promotion is not for reward, whereas a broadcast cannot; the latter must be accidental or incidental.

Further regulations that impact on the advertising of gambling services that are permitted under the *IGA* (ie, advertisements for services offered by licensed gambling operators) are found in other legislation and regulations. The most important regulations are the product of significant reforms that commenced in 2018.

C *Latest Reforms*

Prior to 2018, there was increasing community concern about the impact of advertising gambling products during sporting events. The saturation of such advertising was leading to the 'inherent' association of sport with gambling and the normalisation of gambling as part of sport, particularly among adolescents.[96] Those perceptions no doubt underpinned community pressure for reform,[97] such

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Consumer Act 2010 (Cth) sch 2 s 18. Further, the Australian Association of National Advertisers' ('AANA') 'Code of Ethics' requires that 'advertising be clearly distinguishable as such': AANA, 'Code of Ethics' (February 2021) 3 [2.7]. These standards are only subject to self-regulation. However, Ad Standards, the body responsible for enforcement, commissioned a detailed report on distinguishing advertising, including by social media influencers: see Colmar Brunton, *Community Perception of Clearly Distinguishable Advertising* (Report, December 2018).

95 IGA Explanatory Memorandum (n 90) 75 for commentary on *IGA* s 61DB.

96 Hannah Pitt, Samantha L Thomas and Amy Bestman, 'Initiation, Influence, and Impact: Adolescents and Parents Discuss the Marketing of Gambling Products During Australian Sporting Matches' (2016) 16(1) *BMC Public Health* 967, 5.

97 See, eg, James Willoughby, 'The "Sinister and Dangerous Activity" Concerning Star AFL Players', *The New Daily* (online, 14 February 2017) <https://thenewdaily.com.au/sport/sport-focus/2017/02/14/gambling-ads-sport/>; Greg Baum, 'For Harry Taylor and Easton Wood, All Bets are Off', *The Sydney Morning Herald* (online, 14 February 2017) <http://www.smh.com.au/sport/for-harry-taylor-and-easton-wood-all-bets-are-off-20170214-guctdz.html>.

that significant changes to laws governing the advertising of gambling during sports broadcasts were passed and commenced operation in 2018. First, new industry codes applying to commercial television and radio, subscription services and SBS were approved by ACMA, banning gambling advertisements on *television and radio* during the broadcast of live sports (but not during breaks after 8:30pm) Those new codes commenced operation in 2018.[98] Alongside those changes, amendments were made to the *Broadcasting Services Act 1992* (Cth) and other legislation enabling ACMA to similarly regulate *online* content service providers *streaming* live sport.[99] These similar rules took effect from September 2018 and are contained in the *Broadcasting Services (Online Content Service Provider Rules) 2018* ('*OCSP Rules*').[100] Such restrictions on the advertising of gambling during live sport were previously opposed by the gambling industry when submitting to a 2013 Parliamentary Inquiry.[101]

The rules contained in registered industry codes under s 125A *Broadcasting Services Act 1992* (Cth) and in the *OCSP Rules* are detailed and the definitions adopted setting up the frameworks for the regulations are complex. To simplify (considerably), the specific rules on advertising relevantly are that:

- between 8:30pm and 5:00am, no advertisements for gambling products or promotion of 'live' odds on that event are allowed during a sporting event (including Esports events) and no promotion of odds is allowed during breaks in the event (although gambling adverts are allowed during breaks, including for odds on other events);[102]
- betting odds cannot be promoted by sports commentators (or gambling industry representatives) both 30 minutes before and after a sporting

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98 J Chandra, *Communications Law and Policy in Australia, Broadcasting Commentary, Schedule 8, Gambling Advertising During Broadcast and Online Coverage of Live Sport* (LexisNexis, December 2021), 'Commentary on Schedule 8' precis.

99 The rules in relation to advertising during internet streaming of sport were authorised under s 216E and Schedule 8 of the *Broadcasting Services Act 1992* (Cth) as inserted by *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (Cth) ss 21–2.

100 See Chandra (n 98) for an overview of sch 8, which is the enabling framework allowing ACMA to make relevant rules and enforce them.

101 See submissions by the gambling industry to the Parliamentary Joint Select Committee on Gambling Reform, *Fifth Report: Inquiry into the Advertising and Promotion of Gambling Services in Sport*. (Report, June 2013) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/gamblingreform/completedinquires/2010-13/gamblingsport/report/index which Committee had recommended against restricting advertising during sport. See Hancock, Ralph and Martino (n 13) for analysis of the strategies adopted by the gambling industry in its submissions. It should be noted, however, that some gambling operators have taken a more socially responsible approach in relation to the marketing of gambling products to which, for example, children may be exposed. See Rob Harris, 'Tabcorp Calls for Fresh Crackdown on TV Gambling Advertising', *Sydney Morning Herald* (online, 9 September 2021) <https://www.smh.com.au/politics/federal/tabcorp-calls-for-fresh-crackdown-on-tv-gambling-advertising-20210909-p58q7v.html>.

102 See 'Gambling Ads During Live Sport on Broadcast TV and Radio', ACMA (Web Page, 15 October 2021) <https://www.acma.gov.au/gambling-ads-during-live-sport-broadcast-tv-and-radio>.

event commences ends;[103] however, adverts promoting gambling can be run immediately both prior to the start and after the conclusion of sporting events;

- where advertising of gambling services or odds occurs through industry representatives (during permitted times and programming) there are also regulations requiring the clear identification of industry representatives and restrictions on the location from which they can broadcast; and
- between 5:00am and 8:30pm, no adverts are allowed starting from five minutes before and ending five minutes after the event (and therefore, of course, not during breaks and play).[104]

The ban on live betting odds during sports broadcasts and breaks (and in the 30 minutes prior to a game),[105] combined with laws that prevent *online* betting (but not telephone betting) during games,[106] are aimed at limiting the encouragement of impulsive gambling in the heat of the sporting moment. Critically, however, adverts for gambling services generally are *not* prohibited during breaks in-play, as well as before and after play, which are, presumably, highly lucrative for broadcasters and, indirectly, sporting organisations.[107]

These rules also apply to livestreaming of sporting events via the internet; however, for some less popular sports, odds for other games or sports events that have not yet commenced may be promoted during breaks in play between 8:30pm and 5:00am.[108] Further, if the livestream is of an overseas sporting event, these rules do not apply to adverts not targeted to Australian audiences. Nor do these rules apply to horse or dog racing,[109] which have long been recognised as sports carried out almost exclusively to generate gambling revenue. There are additional rules that apply to Children's programs, but these rules do not specifically concern sports.[110]

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103 See ibid.

104 See ibid.

105 In relation to adverts during breaks in play, the rules are more detailed and restrictive than simply stating that adverts are allowed during breaks in play between 8:30pm and 5:00am. See, eg, *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth) rr 14–15 ('*OCSP Rules*'), which covers internet streaming; ACMA, 'Commercial Television Industry Code of Practice 2015' (2015) 32–42, which covers commercial television broadcasters.

106 See below n 112 and accompanying text.

107 See, eg, 7.30 Report (n 17) which points out that the AFL receives 10 cents for every bet on AFL games from Sportsbet, its official betting partner. Further, broadcast deals are the main source of revenue for the AFL, but gambling advertisements are a significant source of revenue for the broadcasters who have paid large sums for broadcasting rights. The report gives a figure of $287 million in gambling advertising revenue in a year, a significant proportion of which were adverts placed during football matches.

108 See *OCSP Rules* (n 105) r 14(3).

109 See, eg, ibid r 8.

110 See 'Gambling Ads During Children's Programs', *ACMA* (Web Page, 21 October 2020) <https://www.acma.gov.au/gambling-ads-during-childrens-programs>.

Of note, in New South Wales, there is a blanket ban on the broadcasting of advertisements during sporting events, which prohibits any advertisements during a 'sporting fixture' (but excluding both horse and dog racing from this prohibition).[111] It remains unclear (and, indeed, unchallenged) as to whether such a broad ban is inconsistent with Commonwealth law.

These rules restricting when gambling advertising can be broadcast during live sports were also supported by amendments made to the *IGA* by the *Interactive Gambling Amendment Act 2017* (Cth). The amendments prohibit *online* live betting on a sporting event while it is 'in-play'. However, live in-play telephone betting is allowed during the event under s 8E and s 5(3)(a). Telephone betting is therefore a regulated and excluded gambling service (ie, it is permitted), whereas in-play betting is prohibited.[112]

D *Inducements*

To regulate questionable marketing approaches, the Commonwealth, states, and territories, as part of the 2018 *National Consumer Protection Framework for Online Wagering: Baseline Study*,[113] agreed to ban online gambling providers offering inducements (such as credits, vouchers or reward) to both new customers and existing customers who refer new customers. Such inducements were previously banned in some jurisdictions, but the framework ensures a national minimum standard.[114] However, there are disparate approaches to banning other types of inducements. In New South Wales, for example, the ban on inducements to open new accounts is accompanied by a general prohibition under the *Betting and Racing Act 1998* (NSW) on advertising any inducements to gamble, or to gamble more frequently, even if offered to existing account holders.[115] Regulators tend to take a broad view as to what constitutes an inducement.[116] These prohibitions

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111 See *Betting and Racing Act 1998 (NSW)* s 33I; subs (6) defines 'sporting fixture' as not applying to a 'race'as defined in s 4 (definition of '"race" means a greyhound race, harness race or horse race'). See also *Totalizator Act 1997* (NSW) s 80A.

112 *IGA* (n 43) s 8A(3)(b), 10B.

113 Rebecca Jenkinson et al, Australian Institute of Family Studies, *National Consumer Protection Framework for Online Wagering: Baseline Study* (Final Report, June 2019). See also the detailed policy statement for the report, which set outs the respective responsibilities of state and territory, and Commonwealth, governments in implementing the Framework: Department of Social Services (Cth), *National Consumer Protection Framework for Online Wagering – National Policy Statement* (Final Report, 30 November 2018). The Framework also provides for the disallowing of operators from imposing turnover requirements that must be met before existing customers can withdraw winnings obtained using complimentary betting credits or vouchers. See, eg, *Wagering Act 1998* (Qld) s 228C.

114 See, eg, *Betting and Racing Act 1998* (NSW) s 33JA, 33GA; *Wagering Act 1998* (Qld) s 228B (and *Interactive Gambling (Player Protection) Act 1998* (Qld) s 166B); the more restrictive WA legislation is noted below.

115 See *Betting and Racing Act 1998* (NSW) s 33H(2)(h) prohibiting advertisements of inducement. Similarly, see also *Totalizator Act 1997* (NSW) s 80(2)(h).

116 See Liquor and Gaming NSW, *Gambling and Advertising Inducements* (GL 4015) 7–8 ('NSW Guidelines Inducements').

exist even where the advertisement states that the inducement excludes New South Wales residents.[117] It is worth noting that it remains unclear the extent to which these prohibitions are enforced. The prohibition on advertising inducements does not apply, however, to inducements communicated *directly* to existing account holders (s 33GA(3) definition of inducements).

In Western Australia, under the *Gaming and Wagering Commission Regulation 1988* (WA) reg 43(2)(e) and (f), the restrictions go further: even advertising inducements to existing account holders is unlawful unless the account holders have consented to the sending of such inducements (s 43(5));[118] consequently, bonus bet offers that are commonly offered by gambling service providers (nationally) will exclude WA residents. These restrictions on advertising inducements in Western Australia and New South Wales do not apply to advertisements shown on what are predominantly (both dog and horse) racing dedicated services, though the prohibition of inducements to open new accounts applies even in the racing context.[119]

In 2015, gambling inducements were the subject of consumer protection litigation by the ACCC against potentially misleading promotions in *ACCC v Hillside (Australia New Media) Pty Ltd t/as Bet365*.[120] In that case, Bet365 was found to have engaged in misleading or deceptive conduct in promoting up to $200 worth of 'free bets' to new customers, without adequately making them aware of the conditions (including that if one were to win a bet using the $200 credit, one could not immediately withdraw the subsequent winnings).

Encouragingly, we note that the 2023 Senate Committee Online Gambling Report recommends that the Australian Government, without delay, prohibit all online gambling inducements and inducement advertising.[121]

E *Self-Regulatory Industry Standards*

Apart from statutory regulations that limit the advertising of gambling, specifically, of sport (as set out above), there are also self-regulatory industry standards contained in the Australian Association of National Advertisers ('AANA') 'Wagering Advertising & Marketing Communication Code' ('*Wagering*

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117 *Betting and Racing Act 1998* (NSW) s 33GA(2).

118 The offering of inducements, as opposed to the advertising of such offers, are also specifically prohibited: see *Gaming and Wagering Commission Regulations 1988* (WA) s 43(7)–(8), which contains exceptions for existing customers.

119 NSW Guidelines Inducements (n 116) 5–6. In Western Australia, the Gaming and Racing Commission has stated that it will not enforce s 43 of the *Gaming and Wagering Commission Regulation 1988* for adverts 'published on platforms that exclusively provide racing content'. See 'Gambling Advertising and Inducements', *Gaming and Wagering Commmission of Western Australia* (Web Page, 25 May 2023) <https://www.dlgsc.wa.gov.au/department/publications/publication/gambling-advertising-and-inducements>. This is despite the absence, seemingly, of any clear legislative basis for this exception in the Regulations.

120 *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd* [2015] FCA 1007.

121 See *Senate Committee Online Gambling Report* (n 14) xxiii [4.142], xxv [5.148]–[5.150].

Code'). The object of the *Wagering Code* 'is to ensure that advertisers and marketers develop and maintain a high sense of social responsibility in advertising and marketing wagering products in Australia'.[122] The *Wagering Code* applies to sporting events (including Esports) as well as horse and dog racing. Complaints that advertisements may breach these advertising standards can be made to the Ad Standards Community Panel.

The *Wagering Code* contain nine principles governing gambling adverts, of which the most relevant for our purposes are that advertising and marketing communication of wagering/gambling products must not:

- be directed primarily to minors (s 2.1);
- depict minors (unless in an incidental role not implying that they will engage in wagering activities) (s 2.2);
- depict a person aged 18–24 years old engaged in wagering activities (s 2.3);
- state or imply a promise of winning (s 2.5);
- portray, condone or encourage excessive participation in wagering activities (s 2.8); or
- portray, condone or encourage peer pressure to wager (s 2.9).

In some states, breaches of some of these standards are offences under state law: for example, in NSW, conduct amounting to breaches of Standards 2.2 and 2.5 of the Code are offences under the *Betting and Racing Act 1998,* paras 33H(2)(b) and (d) respectively.[123]

Importantly, sports sponsorship does not breach Standard 2.1 (must not be directed primarily to minors), even if the sport or team is one that is popular with children. Further, shows or programmes that provide information about the likelihood of an outcome of a sporting event do not qualify as advertising or marketing communication, nor as necessarily implying a 'promise' of winning (2.5). This is so even if such information inherently carries with it the weight of expertise and, further, may be combined with advertisements (during the shows or intermissions) that provide betting odds for the sporting contest in question. For example, if a sports commentator states that Team A has a very good chance to upset the more favoured Team B, then an advertisement in the break telling viewers Team A is paying $2.50 for the win would not infringe that standard. Similarly, it is unlikely that 2.9 of the Code (must not portray, condone, or

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122 See AANA, *Wagering Code* (1 July 2016).

123 Similarly, see *Totalizator Act 1997* (NSW) s 80(2); *Gaming and Wagering Commission Regulation 1988* (WA) reg 43(2)(b), (d). See also reg 42(2)(h), which makes publishing adverts that breach certain Codes of Practice an offence under Western Australian law.

encourage peer pressure to wager) would be breached, we suggest, merely by adverts that portray gambling as a social, fun activity carried out with friends.[124]

Finally, the all-pervasive nature of gambling products for nearly all popular sports, and the widespread advertising and visibility of those products across multi-media platforms, does not breach 2.8 of the Code (portray, condone, or encourage excessive participation in wagering activities). This is so even if the impact of such campaigns and the increasing social saturation of gambling information, products, and indirect and direct sporting links, have been demonstrated in the studies noted in the Background section of this article to have those very impacts.

V Gaps in the Law: What is Permitted?

The restrictions on advertising outlined above certainly put significant limits on when gambling operators can promote their product. Nonetheless, there are considerable gaps that can be exploited to market gambling to viewers of sport. This section outlines some of the main ways in which the promotion of gambling products via sport continues in Australia.

First, the regulations outlined above allow advertising after 8:30pm during breaks in live sports broadcasting (although not the promotion of odds for that sporting event). If one of the aims of advertising restrictions is to protect minors from exposure to gambling promotion while watching live sport, the 8:30pm cut off assumes that younger viewers will not generally be watching after that time. That assumption is questionable. As one Australian study found, 83 per cent of 11–16-year-olds continue to watch sport after 8:30pm (especially if a game has started earlier), and nearly half of these viewers recalled seeing gambling advertising after that time.[125] It should also be noted that it is possible, at any time, to advertise gambling products prior to the commencement of live sport broadcasts, including during pre-game previews, commentary, and the like, and during other programming (not directed at children).[126] There are no limits on the saturation coverage of such adverts.[127]

Secondly, current restrictions on live sport do not apply to subscription television channels with a 'low audience share'. Those channels can broadcast gambling adverts even between 5:00am and 8:30pm during sports broadcasts.[128]

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124 See, eg, Sportsbets 'Bet with Mates' advertising campaign, available at Adsoftheworld.com, *Sportsbet: Bet With Mates* (Web Page) <https://www.adsoftheworld.com/campaigns/bet-with-mates>.

125 Thomas et al, 'Young People's Awareness' (n 23), 8–9.

126 See 'Gambling Ads During Live Sport on Broadcast TV and Radio' (n 102).

127 Thomas et al, 'Young People's Awareness' (n 23) 3.

128 See ACMA, 'Subscription Broadcast Television Codes of Practice 2013' (2013) 17 [10]–[11] <https://www.acma.gov.au/publications/2019-10/rules/subscription-broadcast-television-codes-practice-2013#:~:text=This%20Code%20for%20subscription%20television,nature%20of%20programs%20being%20provided>. Certain exclusions apply for 'Listed events'. 'Low Audience Share Channel' is defined in the appendix: at 19 (20).

Thirdly, the restrictions do not apply to replays or highlights of major sporting events. Young people often source their content online and may not be watching live sport, especially if it is only available through paid subscription services. For example, a 2018 Australian Video Viewing Report found that online viewing was increasingly popular (Australians played an average 347 million minutes of broadcasters' online content weekly in Q4 2017), especially catch-up or on-demand viewing (an average of 258 minutes weekly).[129]

Fourthly, one important exception to the restrictions on advertising relates to sports sponsorship deals, such as the display of logos on jerseys and at sports grounds. For example, under s 18(3) of the *OCSP Rules*, the rules are not infringed by a sports streaming provider:

> where the reference to gambling promotional content occurs as part of live coverage of the sporting event, and consists of the name of the sporting venue, or of a player's or official's uniform, or of advertising signage, such as a field barrier, big screen or scoreboard, at the venue of the sporting event, and the provider does not receive any direct or indirect benefit (whether financial or not) for providing the gambling promotional content, in addition to any direct or indirect benefit that the provider receives for providing the live coverage of the sporting event.[130]

This is significant. Particularly through the strategic placement of adverts at sports grounds, which are visible during a live broadcast (and replays), there is no limit on how often and how easily viewers can see brand names promoting specific gambling providers even if they do not specifically promote gambling on specific events or odds.

Fifthly, the regulation of advertising during live sports is not relevant to the content of sports governing bodies' or clubs' websites. Such content, including previews, tipping, and post-game analysis, may include advertising, and references to licensed gambling providers, gambling promotions and the like. Sponsorship of the governing sports body itself means that adverts for specific gambling products or specific providers may be closely associated with the sport. For example, in 2020, the AFL renewed its commercial relationship with BetEasy (now merged with and absorbed by Sportsbet) as its wagering partner until 2025.[131] Sportsbet advertisements regularly appear prior to tipping and analysis video content on the AFL website. Further, the AFL website, in its fixtures of upcoming matches, includes betting odds for the teams, and clicking on those odds will take the users directly to the Sportsbet AFL-odds page. Such agreements are both directly and indirectly financially lucrative for sporting organisations such as the AFL.[132]

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129 Doug Peiffer et al, *Australian Video Viewing Report: Quarter 4 2017* (Report, 2018).

130 See *OCSP Rules* (n 105) s 18(3).

131 Anthony Colangelo, 'AFL Signs New Five-Year Deal with Betting Company', *The Age* (online, 1 February 2020) <https://www.theage.com.au/sport/afl/afl-signs-new-five-year-deal-with-betting-company-20200131-p53wki.html>.

132 See, eg, '7.30 Report' (n 17).

Sixthly, given the dearth of academic research on the matter, it is not clear to what extent Esports and internet gaming are used for gambling product placement or promotions, for example, by streamers during games. There ought to be a heightened concern regarding the infiltration of gambling (and the promotion of gambling) in the Esport world, and greater safeguards for minors. Alongside these concerns is, seemingly, a lack of transparency among streamers who are sponsored to gamble online.

The last major issue, previously canvassed, is that the existing restrictions under Australian law — which, in theory, apply to overseas providers and products if they are accessible to Australian clients — cannot be readily enforced against overseas service providers. As expounded earlier, this issue carries with it several legal (and jurisdictional) complexities which are deserving of a separate article.

VI Possible Reforms

A *Barriers to Reform*

Having identified the gaps in existing regulations, we now consider reforms. Any reform agenda, aimed at minimising the social harm of gambling, faces considerable hurdles. In their first-of-its-kind study in Australia, Hancock, Ralph and Martino applied a Corporate Political Activity ('CPA') analysis to the tactics used by the gambling industry to resist advertising reforms in submissions to the 2013 Parliamentary Committee Inquiry on advertising and sport.[133] Those industry efforts were, at the time, successful,[134] albeit ultimately insufficient to resist ongoing community calls for action that later culminated in the significant reforms discussed in Part IV C above.

Research has demonstrated the effectiveness of the way in which the tobacco, alcohol, and processed food industries resisted regulation by using strategies to shape government policy.[135] Hancock et al used the taxonomy developed by Savell et al,[136] to describe the tobacco industries' strategies to oppose increased government regulation and applied this taxonomy to gambling industry submissions to the 2013 Inquiry. Significantly, Hancock, Ralph and Martino concluded that the gambling industry used all of the strategies identified

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133 See Hancock, Ralph and Martino (n 13).

134 See Parliamentary Joint Select Committee on Gambling Reform, Parliament of Australia, *The Advertising and Promotion of Gambling Services in Sport* (Report, June 2013). The report only recommended minor changes: see Recommendations ix-x.

135 See Hancock, Ralph and Martino (n 13) 5.

136 Emily Savell, Anna B Gilmore and Gary Fooks, 'How Does the Tobacco Industry Attempt to Influence Marketing Regulations? A Systematic Review' (2014) 9(2) *PLoS ONE* e87389.

by Savel, Gilmore and Fooks, as well as others, to resist regulation. Those strategies were used

> to ward off government regulatory reform and to protect their vested interests in maintaining the status quo, in this case, industry self-monitoring of sports betting advertising during sporting event broadcasting.[137]

Hancock, Ralph and Martino's study highlights the difficulties faced by the community and policymakers when seeking to regulate powerful industries that use their political influence and financial clout to resist changes to laws that impact their profitability.[138] Since the implementation of the 2018 reforms, the sports gambling industry has continued to grow, and community concerns about the links between sport and gambling continue unabated. However, further reform may well prove difficult to achieve for the reasons identified by Hancock, Ralph and Martino.

B *Suggested Reforms*

In Australia, the 2018 reforms were designed to respond to community concerns about gambling advertising and its leveraging of sport by restricting the advertising of gambling products during live sports broadcasts, among other measures. This article (and, indeed, the *2023 Senate Committee Online Gambling Report*)[139] has doubted the adequacy of those responses. After research on the exposure of young people to gambling advertising, Thomas et al conclude:

> Young people are heavily exposed to gambling advertising and promotion across a wide range of media platforms, including social media, and at all times. The current regulatory systems fail to protect them from gambling promotions through sport and celebrity associations, and offer loopholes that enable such forms of promotion to thrive. Young people themselves are aware and critical of the ubiquity, intent and impact of gambling promotion … [and] believe that more should be done to protect them from … promotion which normalises gambling behaviour from early ages.[140]

We agree with those conclusions. The most radical reform, of course, would simply be to impose a blanket ban on all promotion of gambling products. Some community-based organisations have called for an end to all gambling

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137 Hancock, Ralph and Martino (n 13) 11.

138 Ibid 8, 10, 14. Interestingly, one tactic, under the broader strategy of providing financial incentives against regulation, which Hancock et al were not able to assess, was whether gifts or other financial inducements to policy makers were used, since these were obviously not disclosed in submissions. Coincidentally, a recent newspaper report has identified such conduct and the potential risk of policy makers being conflicted. See Henry Belot, 'Gambling Industry's Dozens of Free Event Tickets to Federal MPs Raise Fears of Potential Conflicts of Interest', *The Guardian Australia* (online, 9 March 2023) <https://www.theguardian.com/australia-news/2023/mar/09/gambling-industrys-dozens-of-free-event-tickets-to-federal-mps-raise-fears-of-potential-conflicts-of-interest>.

139 *2023 Senate Committee Online Gambling Report* (n 14) iv, 110 [5.63]-[5.64].

140 Thomas et al, 'Young People's Awareness' (n 23) 10.

advertising,[141] and more recently, at least, those calls have gained traction.[142] We may be getting to the same point of increasing public support that culminated in the ban on all marketing of tobacco products because of public health concerns. As previously mentioned, such a blanket ban on domestic gambling advertising across all platforms, including bans on club sponsorships, product placements, and promotions by influencers, has been in place in Italy since January 2019,[143] with bans of television adverts now also in place in Belgium and Spain.[144] The Italian laws have been subject to ongoing criticism by major sporting bodies in Italy such as the Italian Football Federation ('FIGC'), citing loss of revenue by sporting associations as a major consequence.[145] Calls to restrict gambling advertising have also been resisted in the United Kingdom for the same reason.[146] To be sure, a blanket ban would have financial consequences for sporting bodies throughout Australia, although perhaps not as significant as those for Italian football, which was highly exposed financially because of extensive gambling revenues prior to the ban. But such costs must be weighed against the benefits, both economic and health-related, which flow from reducing gambling harms. Sensibly, perhaps, the *2023 Senate Committee Online Gambling Report* has recommended that a blanket ban be introduced in phases and over a three-year period. Notably, exceptions to this ban will include dedicated racing channels and programming (from which we infer the entirety of, for example, Melbourne Cup Day coverage).[147] The interesting political question is how strongly and effectively the various stakeholders will push back against this recommendation and whether the political will exists to move in that direction in the teeth of such pushback.

While a blanket ban may not be in immediate reach, therefore, we argue that, at the very least, more modest measures should be implemented (many of which align with recommendations from the *2023 Senate Committee Online Gambling Report*).

A starting point for such increased regulation should focus on the gaps, identified above. Perhaps the most significant gap is that gambling services can be advertised, after 8:30pm, during breaks in sporting contests. Although *live* odds for the game being currently broadcast or streamed cannot be shown, adverts promoting sports gambling in general can, including odds for other games being played later. Such adverts are ubiquitous and, indirectly, promote

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141 See, eg, Alliance for Gambling Reform, End Gambling Ads (Web Page) <https://www.agr.org.au/endgamblingads>.

142 See, eg, Elmas (n 6).

143 See Giuffré, (n 18).

144 See Elmas (n 6).

145 See, eg, Ted Orme-Claye, 'FIGC: Italian Ad Ban "Bringing Sports Sector to its Knees"' *Insider Sport* (Web Page, 2 August 2021) <https://insidersport.com/2021/08/02/figc-italian-ad-ban-bringing-sports-sector-to-its-knees/>.

146 See Thomas et al, 'Young People's Awareness' (n 23) 3.

147 *2023 Senate Committee online gambling Report* (n 14) iv, xxv, 127 [5.148]–[5.150].

links between watching sport and gambling on sport (even if not gambling on the specific game in play). We would suggest that, at a minimum, all gambling promotions should be banned immediately before, during, and immediately after, live sports broadcasts, including during breaks and after 8:30pm. This ought to apply to live broadcasts, highlights, replays and catch-up or on-demand viewing (including via the Internet). We concede that such a ban is not likely to be feasible for the racing industry, given that it is almost entirely dependent on gambling revenue and its sole focus is on *gambling* entertainment.

The association of sport with gambling is also promoted by the linkage of gambling products with sporting organisations and sporting venues. It seems rather futile to ban advertising during live sports broadcasts when electronic signage on the broadcasting venue can be seen during a live broadcast or featuring on players' clothing. Such promotions are inevitable while sponsorship of sports, venues or clubs by gambling service providers is allowed,[148] as such sponsorship is never done for purely altruistic reasons. And the lure of money is difficult to resist by sports organisations, which are therefore themselves invested in allowing such promotions to continue. Again, possible solutions to this are easy enough to state. For example, advertising on sport grounds could be banned, as could the display of gambling brands on sporting clubs' and players' merchandise that are visible during sporting contests.[149] Those are simple starting measures that both could and should be adopted. However, it is difficult to see how such further restrictions — breaking the nexus between sport and gambling — might be achieved while professional sporting organisations are themselves financially invested in gambling promotion. As already noted, the close links between sports organisations, such as the AFL, and the gambling industry, and the significant revenue that flows from those relationships, means that sporting codes have no financial interest in supporting such reforms and, indeed, would argue that any restrictions on sponsorship would significantly impact the commercial viability of professional sports.[150] Finally, uniform legislation ought to be enacted similar to that currently in force in Victoria, which bans the advertisement of gambling on public transport, public roads, and near schools.[151]

This short list of suggested reforms above would not necessarily solve all of the many social costs of gambling harms, especially in vulnerable communities. A far broader range of issues would need to be addressed to achieve those goals, including addressing new challenges such as illegal EGMs and casino-type games. Rather, the reforms that we suggest are a preliminary step towards inoculating sport from being associated with sports gambling. The benefits of professional

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148 Some clubs are starting to take a socially conscious stance on the issue, such as Geelong Football Club, which has stopped displaying gambling adverts and signage at its stadium, and six Victorian AFL clubs, which no longer have 'Poker' machines at their club venues. See '7.30 Report' (n 17) at 4:35.

149 See *2023 Senate Committee Online Gambling Report* (n 14) xxv [5.148]–[5.150].

150 See Belot, 'AFL' (n 17); Belot 'Australian TV Broadcasters' (n 17).

151 *Gambling Regulation Act 2003* (Vic) s 4.7.1.

sport, as entertainment but also as promoting health, fitness, and community participation in sport, means that it is important that children and young people can enjoy sport without being excessively exposed to the promotion of gambling. Betting ought not to be inextricably linked to the enjoyment of sport. As a society, we have long recognised the perversity of using sport to promote harmful tobacco products, and it is time we did the same for gambling. The *2023 Senate Committee Online Gambling Report* should be praised for capturing this sense of urgency and adopting a holistic approach to combatting gambling harms.

VII Conclusion

It is uncontroversial to say that the laws on gambling would benefit from greater simplification and uniformity in approach. Encouragingly, there are strong indicators that both a comprehensive national strategy and regulatory framework could soon exist in Australia, with recommendations that there be a single Australian minister responsible for the reduction of harm caused by online gambling.[152]

The existing complexity of state and Commonwealth regulation of gambling makes it difficult to have a clear overview of the rules governing gambling products and their promotion. The focus of this article, however, has been on the regulation of interactive gambling, and of the advertising of gambling, especially to children and young people. Again, both state and Commonwealth laws apply in this sphere. The rules are found in a complex intersection of Commonwealth, state and territory legislation, regulations, industry codes and codes of practice that often overlap in their sphere of operation. Untangling this web is not an easy task. That said, rules on broadcasting and the internet, including on advertising in those spaces, are largely the province of Commonwealth law and, where inconsistent state and territory laws apply, any Commonwealth legislation would override such laws.

This article has highlighted the ongoing links between sports and gambling services. It has demonstrated that, despite many restrictions on how and when gambling services can be advertised, there are still many opportunities for gambling to be promoted through sports. Those opportunities are effectively exploited by the gambling industries.

We anticipate a seismic shift in Australian policies, regulation, and strategy in the light of the *2023 Senate Committee Online Gambling Report*. A close examination of that Report and, indeed, the 31 recommendations contained within it, is the basis of further research. For example, one far-reaching proposal flagged in the Report is to impose on online wagering service providers a customer duty of care.[153]

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[152] See *2023 Senate Committee Online Gambling Report* (n 14) xix [2.132]–[2.134], [2.136].

[153] Ibid xxiii [4.145]–[4.148].

Further reforms are urgently needed to protect people, especially those who are young or vulnerable (or both), from being saturated by media that portrays sports as being linked to gambling on the outcomes of those sports. The profitability of gambling industries, however, means that they will continue to use their financial and political influence to resist further reforms. This axiom poses serious challenges for policymakers.

LEGAL PARAMETERS OF THE EMPLOYER'S DUTY TO CONSULT

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Significant workplace change requires consultation, and standard consultation obligations exist under legislation and statutory instruments. However, those provisions offer minimal guidance on how to approach consultation. The consultation cases tend to focus on compliance, adding little beyond saying consultation needs to be meaningful. Building on the foundation laid by the 2021 decision in Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd, *this article considers what the parameters of the obligation to consult might — or should — be. It shows that there is an over emphasis in the authorities on timing, as a compliance trigger, rather than the substance of the obligation, and major decisions continue to show the obligation is poorly understood. It argues that clear parameters are needed on how to implement the duty to consult, and that these parameters need to come from statute or clear authority of the courts. Without restricting the inherent flexibility that is needed for consultation to work, or impeding the employer's prerogative to make decisions, it asserts that there is a need for a deeper legal underpinning, and more active obligations, to shift the concept away from the conflictual paradigm of consultation being 'triggered' towards a more collaborative and productive approach.*

I INTRODUCTION

Employers will always need to adjust their workplaces to address new economic challenges and conditions. They are entitled to make those changes, which will necessarily affect employees, whether the changes are wide-ranging restructures or narrow policy adjustments. But the 'humane way' to achieve this is by consulting with employees before any final decision is made. When the changes are significant, it is not simply an expectation to consult. Employers are made to do so by industrial instruments and statutes. However, until now there has typically been little detail given by those instruments that might allow employers and employees to understand what the obligation to consult entails. It was only in the recent 2021 decision in *Construction, Forestry, Maritime, Mining and Energy Union, v Mt Arthur Coal Pty Ltd* ('*BHP Mt Arthur*')[1] that an opportunity was taken to

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1 [2021] FWCFB 6059 ('*BHP Mt Arthur*').

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bring together the scattered authorities on the meaning of workplace consultation into a single set of general principles.

This article aims to build on the foundation laid in *BHP Mt Arthur* by considering what the parameters of the obligation to consult might — or should — be. It does so by first considering the *BHP Mt Arthur* decision. That case was concerned with consultation under the *Work Health and Safety Act 2011* (NSW) ('*WHS Act*')[2] as a new COVID-19 vaccination policy was announced. The issue was whether the mandate fell within the employer's general power at common law to issue 'lawful and reasonable' directions. As discussed below, the five-member Full Bench of the Fair Work Commission took that opportunity to consider what general principles should have informed BHP's consultation rather than what did occur, which was found to be a mere perfunctory exercise.

Next, in Part III, the article sets out the sources of the obligation to consult in industrial instruments and statute. Employers need to be aware that their obligation to consult might be found in modern awards, enterprise agreements, the *WHS Act* and the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').[3] These obligations might overlap in any given workplace, and it is important to appreciate the different consultation 'trigger points'.

Those instruments do not, generally, give detailed principles on what might be involved in a consultation. In Part IV, the article expounds on what the general principles are that (absent express changes) apply to consultations whether under industrial instruments or statute. The key authorities that preceded *BHP Mt Arthur* are also developed. Ultimately, as the authorities discuss, consultation requires a 'genuine opportunity to be heard', which must occur before the final decision is made.

In Parts V and VI, the article looks beyond *BHP Mt Arthur* to why the authorities to date (including *BHP Mt Arthur* itself) might be of limited use in determining the parameters of the obligation to consult. The reasons for this are that (i) the authorities to date have focused on describing what is *not* genuine consultation, rather than taking a positive approach to defining consultation or offering precise guidelines; (ii) in most cases the employer made no attempt to consult at all, rather than offering Courts and Tribunals the opportunity to consider consultation that merely fell short of what is required; and (iii) the cases have focused on *when* consultation should take place — ie before a decision is made — rather than the content of the consultation.

The article concludes that clear parameters are needed on the obligation to consult, and that these parameters need to come from statute or clear authority of the Courts or Full Bench. This is because adjustments will always need to occur as workplaces evolve. Consultation should not be used to restrict the freedom of employers to make such changes, but rather should be used to define precisely

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2 *Work Health and Safety Act 2011* (NSW) ('*WHS Act*').

3 *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

what is expected from a process that good managers should be embarking on anyway. Discussing changes *before* decisions are made allows employees to offer their input, but also to 'buy in' to changes, offering their views to improve workplace adjustments and to facilitate smooth transitions from one structure, policy or approach to the next. In the future, there should be further careful thought given to what positive limits can be set on consultation, particularly in cases where redundancies are being made. However, changes to the current system will also need to be mindful of the flexibility offered by avoiding minimum parameters. Above all, the right of employers to refine their processes and change their workplaces will continue, but those who bring their employees along with them on such changes will be the most likely to succeed.

II The *BHP Mt Arthur* Decision

In *BHP Mt Arthur*, Mt Arthur, a member of the BHP group of companies, had announced in October 2021 that it would require all workers at its Mt Arthur Mine to be vaccinated against COVID-19 as a condition of site entry ('Site Access Requirement'). The Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU') and Mr Matthew Howard filed an industrial dispute in the Fair Work Commission arguing that the requirement was not a 'lawful and reasonable' direction because, inter alia, Mt Arthur had not, in introducing the requirement, complied with the consultation requirements of the *WHS Act*.[4]

The *WHS Act* imposes a duty on employers, where reasonably practicable, to consult with workers who are, or are likely to be, affected by a workplace health or safety matter. That duty requires, among other things, that:

- 'relevant information' about the matter is shared with workers;
- the workers be afforded 'a reasonable opportunity' to 'express their views', 'to contribute to the decision-making process relating to the matter', that their views be 'taken into account'; and that they be 'advised of the outcome … in a timely manner'; and
- 'if the workers are represented by a health and safety representative ['HSR'], the consultation must involve that representative'.[5]

The consultation is required in relation to a number of defined circumstances including 'when identifying hazards and assessing risks to health and safety arising from the work to be carried out', 'when making decisions about ways to

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4 *WHS Act* (n 2). For additional background and comment on the decision, see Giuseppe Carabetta, 'Vaccination Mandates and the Employee's Duty to Obey Lawful and Reasonable Directions' (2022) 50(3) *Australian Business Law Review* 226.

5 *WHS Act* (n 2) ss 47–9.

eliminate or minimise those risks', and 'when proposing changes that may affect the health or safety of workers'.[6]

Mt Arthur argued that it had met these requirements because, prior to the date on which the Site Access Requirement was announced, it had, inter alia, submitted an 'Options Analysis' to its senior leadership, which led to a recommendation that COVID-19 vaccination be a condition of entry to all BHP workplaces (though subject to preliminary steps including a risk assessment and additional consultation). It submitted further that it then engaged in a process of consultation and engagement with workers under the *WHS Act*, including setting up a 'Vaccine Mailbox' inviting questions regarding the proposed Site Access Requirement and responding to and meeting with the unions where requested.[7]

The Full Bench of the Fair Work Commission disagreed, finding that Mr Arthur had failed to consult appropriately prior to implementing the Site Access Requirement.[8] Despite communications promising ongoing engagement with the employees, no genuine attempt was made to consult with the unions, HSRs were not involved in consultations, and the employees were not invited to contribute ideas about the decision-making process or the rationale behind the Site Access Requirement.[9] The Full Bench further noted that, while substantial information had been provided about COVID-19, little if any information was provided about any risk assessment that was undertaken.'[10]

Notably, in addressing the consultation issue, the Full Bench had regard to a number of 'general propositions' from earlier cases on the meaning of consultation.[11] In doing so, it reaffirmed that consultation must be 'meaningful', but that the content of any requirement to consult is determined by the terms of the requirement and the factual context. Importantly however, the Full Bench avoided expressing final conclusions on the content of the *WHS Act* consultation obligations. This was unnecessary given the finding that the employer had largely failed to directly engage at all in implementing the Site Access Requirement. Nor, having considered the general principles from the authorities, did the Full Bench give detailed consideration as to whether or to what extent those principles could inform the duty to consult. These and related questions concerning the nature and scope of the obligation to consult are taken up in Parts V and VI.

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6 Ibid s 49.

7 *BHP Mt Arthur* (n 1) [139]–[140]. These respective actions were taken during an 'options phase' and 'assessment phase', which preceded the announcement and implementation of the Site Access Requirement.

8 While the *WHS Act* requires that employees be afforded an opportunity to express their views and have them considered before the employer makes a definite decision, the opposite was true of the *Mt Arthur Coal Enterprise Agreement 2019*, where the employer was only required to consult over a new 'major change' policy *after* its introduction: see further, the discussion on consultation 'trigger points' in Part III C.

9 *BHP Mt Arthur* (n 1) [150]–[157], [162], [172]–[176].

10 Ibid [150].

11 As noted in Part IV, where these principles are examined, it did so having noted that there was no direct authority on the *WHS Act* consultation provisions.

III Consultation Provisions in Industrial Instruments and Under Statute

The starting point in any exposition of the legal obligation to consult must be the express consultation provisions found in industrial instruments and under statute. The purpose of such clauses is to 'facilitate change where that is necessary, but to do that in a humane way which also takes into account and derives benefit from an interchange between worker and manager'.[12] A further aim is to assist management by providing access to employees' know-how knowledge, and potentially minimise or alleviate risks associated with a proposal for change.[13]

To advance these aims, during the 1980s and 1990s, there was a period of interest in developing guidelines about information sharing and workplace democracy[14]. In 1994, in his decision in the long running Vista Paper Products dispute, Chief Justice Wilcox of the former Industrial Relations Court of Australia, described 'an industrial trench-war' and 'an orgy of litigation', and stated that 'in a time of widespread work place change … structural workplace reform and elimination of undesirable work processes can be achieved only by cooperation: not by confrontation'.[15]

The business case for consultation could not be more clear, and yet legal instruments are needed to force basic consultation.

A *Modern Award Provisions*

Modern awards contain standard consultation provisions dealing with the requirement for employers to consult with employees and their representatives

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12 *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited [No 2]* [2010] FCA 652, [49] (Logan J), in the context of a consultation clause under an enterprise agreement. See also Mark Perica, 'A Fair Say All Round', in James Fleming (ed), *A New Work Relations Architecture: The AIER Model for the Future of Work* (Hardie Grant Publishing, 2022) 139. As well as industrial instruments and statute, consultation provisions may at times also be found in individual employment contracts.

13 *QR Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, [81] (Gray J) ('*QR Ltd v CEPU*'), noting that '[m]anagement has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it.' See also, *CPSU and Allied Services Union of Australia v Vodafone Network Pty Ltd* [2001] AIRC 1189, [25] ('*CPSU v Vodafone*').

14 See, eg, National Labour Consultative Council, *Guidelines on Information Sharing*, (Australian Government Publishing Service, 1984); Department of Employment and Industrial Relations, *Corporate Accountability and Access to Information by Shop Stewards: Employee Participation Research Report No 10* (Australian Government Publishing Service, 1986); Department of Employment and Industrial Relations, Working Environment Branch, *Industrial Democracy and Employee Participation: A Policy Discussion Paper* (Australian Government Publishing Service, 1986); a 1988 joint statement on participative practices published by the Confederation of Australian Industry and the ACTU; and the Evatt Foundation in 1995.

15 *Printing and Kindred Industries Union v Vista Paper Products Pty Ltd* [1994] 127 ALR 673, 674 (Wilcox CJ).

when the employer intends to implement significant changes. The origin of such provisions is *Amalgamated Metals, Foundry &Shipwrights' Union v Broken Hill Pty Co Ltd*,[16] which was decided in the early 1980s, concerning a log of claims by the Australian Council of Trade Unions, the aim of which was to achieve job security in federal awards. The provisions require employers to consult with their employees when they make a 'definite decision' to introduce a 'major workplace changes' in production, program, organisation, structure or technology 'that are likely to have significant effects' on employees; or where an employer proposes to change an employee's regular roster or ordinary hours of work.[17] 'Significant effects' on employees include any of the following:

- termination of employment;
- major changes in the composition, operation or size of the employer's workforce or in the skills required;
- loss of, or reduction in, job or promotion opportunities;
- loss of, or reduction in, job tenure;
- alteration of hours of work;
- the need for employees to be retrained or transferred to other work or locations; or
- job restructuring.[18]

In the course of a consultation, the employer's initial obligation is to notify affected employees and their representatives (if any) in writing of any such decision and discuss with them 'as soon as practicable after a definite decision has been made':

(i) the introduction of the changes;

(ii) their likely effect on employees; and

(iii) measures to avoid or reduce the adverse effects of the changes on employees.[19]

For the purposes of the discussion the employer must also provide 'all relevant information about the changes' including: (a) their nature; (b) their expected

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16 (1984) 8 IR 34. See further, Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (The Federation Press, 6th ed, 2016) [22.69], [14.56].

17 See, eg, the General Retail Industry Award 2020, cls 34–35 in relation to consultation over major workplace changes. The discussion on modern awards that follows draws on this modern award as an example. In respect of changes to an employee's regular roster or ordinary hours of work, see the discussion on s 145A of the *Fair Work Act* (n 3) below.

18 General Retail Industry Award 2020, cls 34.1, 34.5. Where the award makes provision for alteration of any of these matters; however, such alteration is taken not to have significant effect: cl 34.6.

19 Ibid cls 34.1(c), 34.1(b).

effect on employees; and (c) 'any other matters likely to affect employees'.[20] This does not, however, require the employer to disclose any confidential information if such disclosure would be contrary to their interests.[21]

Significantly, employers have a duty to 'promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion.'[22] However, as will be noted in Part IV, there is no obligation to accept any counter proposals.

B *Provisions in Enterprise Agreements*

Section 205 of the *Fair Work Act* provides that enterprise agreements must contain a provision requiring employers to consult with their employees over any 'major workplace change that is likely to have a significant effect on the employees'; or any 'change to [the employees'] regular roster or ordinary hours of work'. The consultation term must allow for employees to appoint a representative for the purposes of the consultation.[23] If the agreement does not include such a provision (or includes an inadequate one), the model consultation term set out in the *Fair Work Regulations 2009* (Cth) ('*Fair Work Regulations*') applies as a term of the agreement.[24] The parties are able to agree to a different formulation, but only if the term agreed upon complies with the requirements of s 205.

The model consultation term is similar to the standard clause in modern awards. Employers have a duty to consult after making a definite decision to introduce a 'major change' to production, program, organisation (etc) 'likely to have a significant effect on employees' — that is, proposals relating to such issues as terminations or restructuring of positions, retraining, alteration of work hours and transfers.[25] The remaining requirements of the model term to notify and consult mirror those of the standard modern award clause, above.[26] This includes the requirement to give prompt and genuine consideration to matters raised about the change by the affected employees.[27]

The requirements for a change to regular roster or ordinary work hours are in the same terms,[28] save that, in the course of the consultation, the employer is required to provide:

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20 Ibid cl 34.2.
21 Ibid cl 34.3.
22 Ibid cl 34.4.
23 *Fair Work Act* (n 3) s 205(1)(b); *Fair Work Regulations 2009* (Cth) reg 2.09(3)–(4) ('*Fair Work Regulations*').
24 *Fair Work Act* (n 3) s 205(2); *Fair Work Regulations* (n 23) reg 2.09, sch 2.3
25 *Fair Work Regulations* (n 23) reg 2.09(1)–(2), (9).
26 See Ibid reg 2.09 (3)–(9).
27 Ibid reg 2.09(7).
28 Ibid reg 2.09 (10)–(11).

(ii) all relevant information about the change, including the nature of the change;

(iii) information about what the employer reasonably believes will be the effects of the change on the employees; and

(iiii) information about any other matters that the employer reasonably believes are likely to affect the employees; and

(iiv) … invite the relevant employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).[29]

Once again, as with the standard award provisions, consultation terms under enterprise agreements generally do not interfere with the employer's right to make a final decision on any proposal.[30]

Examples of consultation provisions based on the model term are contained in Appendix A.

C *Provisions under Statute*

The requirement to consult is not confined to industrial instruments. As Logan J noted in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* ('*CEPU v QR Ltd*'):[31]

> The imposition of a requirement for one party to consult with another is hardly unique to industrial instruments. I have already made passing reference to coincidental examples of requirements to 'consult' in the course of setting out the history of legislative provision in Queensland with respect to railways. A search of current Commonwealth legislation discloses no less than 572 provisions imposing a requirement on a Minister or other official or agency to 'consult'. In turn, as a study of reported cases discloses, these are but Australian exemplars of a requirement widely employed in a range of public administration applications by the parliaments of the United Kingdom and elsewhere in the Commonwealth of Nations.[32]

An example in the employment context is the *WHS Act* consultation provisions discussed in Part II in relation to *BHP Mt Arthur*. At the federal level, in the redundancy context, the *Fair Work Act* requires employers to notify and consult with a relevant trade union(s) if:

- 'the employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons'; and

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29 Ibid reg 2.09(13)(b)(c).
30 See the discussion in Part IV.
31 (2010) 198 IR 382 ('*CEPU v QR Ltd*').
32 Ibid 394 [42].

- 'the employer could reasonably be expected to have known', when making the decision, 'that one or more of the employees were members of' a trade union.[33]

In the course of the consultation, the employer is required, as soon as practicable after making the decision and before dismissing an employee,[34] to notify each relevant union of: (i) the proposed dismissals and the reasons for them; (ii) the number and categories of employees likely to be affected; and (iii) the time when, or the period over which, the employer intends to carry out the dismissals.[35] Significantly, the employer must also give the union(s) an opportunity to consult the employer regarding 'measures to avert or minimise the proposed dismissals'; and 'measures (such as alternative employment) to mitigate the adverse affects'.[36]

The Fair Work Commission is empowered to make 'whatever orders it considers appropriate, in the public interest' to put the employees and their union(s) in the same position, as reasonably can be done, as if the employer had complied with these obligations.[37] The Commission's powers are subject to significant limitations; this includes not being permitted to make orders for reinstatement of a dismissed employee.[38] However, provided an application is made speedily enough, it may at least be able to stall any redundancies, to ensure that the consultation process is properly followed.[39]

D *Consultation 'Trigger Points'*

While most consultation provisions mirror the standard award and agreement clauses discussed above, an important distinction between provisions is whether they obligate an employer to consult employees about a proposed change or whether the requirement to consult is enlivened only *after* a definite decision to implement change.[40] Some consultation provisions and the model consultation term under the *Fair Work Regulations* provide that the 'trigger point' is the making of a definitive decision, such as a significant organisational or structural change;[41]

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33 *Fair Work Act* (n 3) s 531(1).
34 Ibid s 532.
35 Ibid s 531(2).
36 Ibid ss 531, 786.
37 Ibid ss 531(1), 786.
38 Ibid s 532(2). The same provision provides that the Fair Work Commission must not order, inter alia, withdrawal of notice of a dismissal if the notice period has not expired; payment of moneys in lieu of reinstatement; and, outside certain exceptions, disclosure of confidential or commercially sensitive information relating to the employer or personal information relating to the particular employee.
39 Stewart et al (n 16) [22.67], citing, inter alia, *CPSU v Vodafone* (n 13) and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431. These decisions are examined in Part IV in the context of general propositions highlighting that consultation must be 'real' and include a genuine opportunity to influence the final outcome by having the employees' views considered.
40 See, eg, *Consultation Clause in Modern Awards* [2013] FWCB 1065, [34].
41 See Part III B above. Compare also, the sample provisions contained in the Appendix.

others, however, provide that the obligation to consult is enlivened at the proposal stage.

In *BHP Mt Arthur*, the Full Bench found (as noted in Part II) that BHP had failed to comply with its consultation obligations under the *WHS Act*, because it had failed to adequately consult *prior to* implementing its new mandatory vaccination policy. However, under the applicable 'organisational change' clause in the BHP enterprise agreement (which clause was based on the model consultation term), the employer was only required to consult over the introduction of its new policy after the policy was implemented — a requirement it appeared to have in fact satisfied.[42]

Section 145A of the *Fair Work Act* provides that modern awards must include a term requiring employers to consult employees and afford them an opportunity to give their views about a change to 'their regular or ordinary hours of work'.[43] A Full Bench of the Commission has held that it is implicit in the obligation to consult under s 145A that the consultation must occur prior to any proposed change. This is to ensure — consistently with the legislative purpose of s 145A — that employers cannot unilaterally make changes without giving employees sufficient time to raise any concerns prior to any proposed change.[44]

Similar reasoning was applied to the predecessor provision to s 531 of the *Fair Work Act*, which required consultation before a decision to terminate 15 or more employees for economic, technological (etc) reasons.[45] As noted, s 531 requires the employer, before terminating an employee's employment on such grounds, to consult over measures to avert, minimise or mitigate the adverse effects of the proposed dismissals. As these steps are required as soon as practicable after so deciding, and before terminating an employee's employment, the employer is required to provide the opportunity to consult before making or implementing such a decision.[46]

IV General Principles

Beyond express provisions regarding the requirement to consult are general principles derived from decisions regarding the scope of the obligation under industrial instruments and statute. These cases arose in the context of

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42 *BHP Mt Arthur* (n 1) [106]–[113]. The Fair Work Commission did not consider it necessary to express a concluded view on this issue, given its holding that the employer had failed to meet its *WHS Act* consultation obligations.

43 This provision was introduced in 2013 and applies to all modern awards made since 1 January 2014. See also, *Consultation Clause in Modern Awards* [2013] FWCB 1065.

44 Ibid [37]–[38], [45].

45 *Workplace Relations Act 1996* (Cth) s 170GB.

46 *Construction. Forestry, Mining and Energy Union v Newcastle Wallsend Coal Co Ltd* (1998) 88 IR 202, 217 (Ross VP, MacBean SDP and Deegan C) ('*CFMEU v Newcastle Wallsend Coal Co Ltd*').

consultation obligations of the type discussed in Part III.[47] In *BHP Mt Arthur*, the Full Bench (having noted that there was limited authority regarding the *WHS Act*'s consultation provisions)[48] turned to a number of 'general propositions' from these cases.[49] This was despite emphasising that, ultimately, the 'metes and bounds' of the obligation to consult are delineated by the terms of the relevant statutory provisions, and the factual and legal context in which the obligation is enlivened.[50]

According to the authorities, the right of employees to be consulted is a 'real, substantive' right; it is 'never to be treated perfunctorily or as a mere formality.'[51] Inherent in the obligation is the requirement to provide affected parties, or their representatives, with a genuine opportunity to present their views about a proposed change in order to try and persuade the decision maker to decide on a different course of action.[52] In *CEPU v QR Ltd*,[53] Logan J observed:

> [The authorities] serve to confirm an impression as to the content of an obligation to 'consult' evident from the dictionary meaning of the word. A key element of that content is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility …
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> To elaborate further on the ordinary meaning and import of a requirement to 'consult' may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this

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47 Though all the authorities dealt with the obligation to consult, as will be seen, some of the leading cases deal with non-employment contexts.

48 *BHP Mt Arthur* (n 1) [105] n 98. The Bench noted, as an aside, that there were two recent Australian decisions where the provisions were discussed including another vaccination policy decision: *Brasell-Dellow v Queensland (Queensland Police Service)* [2021] QIRC 356 ('*Brasell-Dellow v QPS*').

49 See *BHP Mt Arthur* (n 1) [106]–[108], providing a summary of general propositions drawn from a range of authorities. As will be seen in Part V, having considered a number of these general propositions, the Fair Work Commission went on to question the extent to which such principles should inform its interpretation of the consultation provisions under the Act.

50 *BHP Mt Arthur* (n 1) [113], drawing on a line of authority. This point is further highlighted below: see text accompanying nn 56–58.

51 *TVW Enterprises Ltd v Duffy [No 2]* (1985) 7 FCR 172, 178–9 (Toohey J) ('*TVW Enterprises*'), citing *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC IIII, *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 and *Sinfield v London Transport Executive* [1970] 1 Ch 550 ('*Sinfield*'). See further, *Kutlu v Director of Professional Services Review* [2011] FCAFC 94, [71] (Flick J) and the authorities cited below in n 52.

52 See *CEPU v QR Ltd* (n 31) 394–5 [44]; *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208, [211]–[212] ('*Tomvald v Toll*'); and *TVW Enterprises* (n 51). The value in enabling differing points of view to be put forward is that at times this may even result in an outright withdrawal of proposed changes: *Sinfield* (n 51).

53 *CEPU v QR Ltd* (n 31).

> is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?' Only in the latter case is there 'consultation'.[54]

As reflected in this passage by Logan J, the content of any specific requirement to consult will vary depending on the context. This includes three elements: i) the precise terms in which the requirement is expressed in the applicable instrument;[55] ii) the factual context in which the obligation arises, including the nature or size of the business, the nature of the change and the impact of the change on affected persons; and iii) whether the factual circumstances might dictate a speedier response.[56] Thus, in terms of the information provided to affected employees, in some contexts it may involve disclosing information without which no meaningful input from the employees is possible; in others, it 'may merely involve the identification of an issue upon which input is then sought'.[57]

That said, the requirement to afford affected workers with an opportunity to voice their views before a final decision is made or course of action is embarked upon is not satisfied merely by providing them with an opportunity to be heard; the requirement extends to affording workers with an opportunity to present their views or state their objections and a genuine opportunity to influence the final outcome by having their views considered.[58] However, having duly provided this opportunity to the affected employees, 'the consultation obligation is not concerned with a likelihood of success of the process', only that the process is genuine.[59]

It is also implicit in the obligation to consult that, for a consultation to be meaningful, it cannot be a mere 'afterthought'.[60] Consultation after an irrevocable decision has been held not to amount to meaningful consultation.[61] If a change has already been implemented, or the employer has already made a definite or irrevocable decision to implement a change, then any subsequent 'consultation' is robbed of its essential characteristic.[62] Furthermore, genuine

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54 Ibid 394–5, [44]–[45]. An appeal in this case was allowed; however, there was no departure from his Honour's holdings on the contents of the obligation to consult: *QR Ltd v CEPU* (n 13).

55 For example, as noted in Part III, under some consultation clauses and the model term under the *Fair Work Regulations*, the 'trigger' for an obligation to consult is the making of a definite decision. In other cases, it might include the requirement for a consultation committee, and the like.

56 *BHP Mt Arthur* (n 1) [113], upon reviewing several authorities. See also, *Tomvald v Toll* (n 52) [212] (Flick J). The process will take on particular significance in the context of proposals that may result in potential redundancies: see, *CPSU v Vodafone* (n 13) [25] (Commissioner Smith).

57 *Tomvald v Toll* (n 52) [212] (Flick J). The process takes on particular significance in the context of proposals that may result in potential redundancies: see, *CPSU v Vodafone* (n 13) [25]-[26] (Commissioner Smith).

58 *Tomvald v Toll* (n 52) [211] (Flick J); *QR Ltd v CEPU* (n 13) [80] (Gray J).

59 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431, [60] (Logan J).

60 *CFMEU v Newcastle Wallsend Coal Co Ltd* (n 46) 217.

61 Ibid. See also, *Maswan v Escada Textilvertrieb* [2011] FWA 4239 (Watson VP).

62 *Consultation Clause in Modern Awards* [2013] FWCB 1065, [35].

consultation 'would generally take place where a process of decision-making is still at a formative stage'.[63]

Whether the consultation process needs to take place on an individual or collective basis will also depend on the terms of the obligation and the nature and circumstances of the case. To ensure compliance the consultation should take place with individual employees and their representatives, to ensure that every employee understands the consultation process. However, in the case of larger organisations such as multi-nationals, or where the employer is required to consult with large cohorts of workers, the process can generally be applied collectively (or via a mix of collective and other processes).[64]

Finally, while an employee's right to be consulted is a fundamental and substantive right, the views expressed by affected employees need not prevail; that is, the right does not confer any veto power on the affected workers and management retains the right to make the final decision.[65] Nor, as confirmed by numerous authorities, is consultation an exercise in collaborative decision-making: 'All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted *before any final decision is made*'.[66]

V Determining the Content of the Duty

It will be noted that many of the general propositions examined above are reflected in the express provisions that were outlined in Part III. Examples include providing affected employees and other relevant persons with information about a significant workplace change proposal and providing them with an opportunity to voice their views before a final decision is made or course is of action is embarked upon. The same is true of the principle that — regardless of the employer's consultation obligations — it remains the employer's prerogative to make the final decision.

However, an issue of contention in *BHP Mt Arthur* was the extent to which the general propositions from the cases may inform the consultation requirements under the *WHS Act*.[67] The same issue has arisen in the context of consultation provisions in industrial awards and agreements.[68] In *BHP Mt Arthur*, some of the employer groups who intervened in the case expressed the concern that, although some of the general elements of the requirement are reflected in the *Act*, applying

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63 *Tomvald v Toll* (n 52) [211] (Flick J).

64 See, eg, *Brasell-Dellow v QPS* (n 48), where prior to issuing a direction to mandate vaccination against COVID-19, the Queensland police service used various collective means to consult with its workforce of over 17,200. See further, *Ulan Coal Mines Ltd v Howarth and Ors* [2010] FWAFB 3488.

65 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2016] FCA 1009 [60] (Logan J) ('*CFMEU v BHP Coal*'); *QR v CEPU* (n 13) [81] (Gray J).

66 *CFMEU v BHP Coal* (n 65) (original emphasis).

67 See especially *BHP Mt Arthur* (n 1) [109]–[113].

68 See, eg, *CFMEU v BHP Coal* (n 65).

the propositions from the authorities may be inconsistent with, and expand upon, the consultation requirements under the *Act*.[69] In the circumstances, and as Mt Arthur had barely consulted at all before introducing its vaccination policy, the Full Bench was not finally required to engage this issue. It did note, however, that the authorities 'contain contextual material that is relevant to an understanding of [the obligation provisions] of the *WHS Act*'.[70]

Beyond applying (to the extent relevant) the general principles from the authorities, however, there may be a limited basis for looking to the authorities to determine the parameters of an obligation to consult. For one thing, while highlighting that consultation must be genuine, many of the authorities tend to focus only on what the requirement does *not* entail. Thus, we know that the duty is no 'empty term' or 'mere formality'. It also (on the other hand) does not involve joint decision making or a right of veto.[71] In a relatively recent case, *Williams v Staples Australia Pty Ltd*,[72] concerning an obligation to consult over redundancy, the employees were informed one day and selected for redundancy the next. The Fair Work Commission found that this 'expedited process', as the employer itself described it, was 'unduly hasty … largely tokenistic' and 'astonishingly fast', involving disingenuous gestures disguised as consultation.[73] In line with previous authority, there was no attempt to 'define' consultation or offer more precise guidelines, beyond saying that it needed to be meaningful.

Similarly, much like in *BHP Mt Arthur*, in a number of the consultation cases the employer made no real attempt to consult with the affected employees or their representatives.[74] In many of these cases, it was therefore unnecessary to determine the content of the requirement to consult, including what information was needed to be disclosed to the affected workers. It was unnecessary to determine such issues because the evidence did not disclose any real form of consultation, or, as in *BHP Mt Arthur*, the employer's attempts at consultation fell significantly short of its (express) obligations to consult under the applicable industrial instrument or statute.[75]

Lastly, many of the cases are more about *when* the mandated consultation must take place, rather than its content. For example, *CFMEU v Newcastle Wallsend Coal Co Ltd*[76] concerned a statutory obligation requiring the employer to provide

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69 *BHP Mt Arthur* (n 1) [112].

70 *BHP Mt Arthur* (n 1) [113]. See also [134]–[157].

71 *CFMEU v BHP Coal* (n 65) ; *Tomvald v Toll* (n 52).

72 [2017] FWC 607 ('*Williams v Staples Australia Pty Ltd*').

73 Ibid [57]–[58]. It also found the employer had breached its express obligations under its enterprise agreement including, *inter alia*, affording the employees with an opportunity to raise concerns about the impact of the final decision. See further, n 73 below.

74 See, eg, *Felton v BHP Billiton Pty Ltd* [2015] FWC 1838; *Marafioti v Gonzalez Pty Ltd* (2017) FWC 5484; *Williams v Staples Australia Pty Ltd* (n 72).

75 See, eg, in *Williams v Staples Australia Pty Ltd* (n 72), contrary to the requirements of the applicable enterprise agreement, the employer failed to even involve a joint consultative committee provision in the decision-making process.

76 (1998) 88 IR 202 (Ross VP, MacBean SDP, Deegan C).

the union with an 'opportunity to consult before terminating 15 or more employees for economic, technological or structural reasons.'[77] The focus was the meaning of 'termination' and, specifically, whether it occurred when the employees were given notice (meaning opportunities for consultation had lapsed at this point), or at expiration of the notice (meaning opportunities for consultation remained open). The same kinds of issues — regarding the timing of or legal 'cut off' point for consultation — have been the focus of a range of cases.[78]

VI Conclusions

As disputes and major cases continue to show, the obligation to consult is not well understood or implemented at all. The consequences of this are important for employers and employees. The consultation requirement is not just a narrow legal compliance obligation. Good leadership involves consultation and consensus building. Consultation is basic good management practice.

A lack of workplace consultation is significant for both sides when changes are being made. For employees and their representatives — ie unions — this is important because the timely provision of information and the opportunity to have a say constitute important safeguards when significant workplace changes are being made. For employers, there are the obvious risks which come with non-compliance with statutory obligations, including civil penalties, damages and even reinstatement for redundancy-based dismissals. But there is also an important positive reason for employers to pay attention to the obligation to consult: consultation creates the opportunity to help employees 'buy in' to changes being made. When that opportunity is ignored, it can cause cultural damage in a workplace, leading to delays while disputes are drawn out, lost efficiency and poor employee retention.

BHP Mt Arthur offers the chance to take stock on whether consultation is neglected because employers do not appreciate those benefits, or simply do not understand the requirements imposed on them by industrial instruments and statute. Refreshingly, the decision confirms the broad principles underpinning consultation and will give guidance to employers about what it expected of them. Consultation requires not merely 'going through the motions', but rather giving employees a genuine chance to understand and comment on changes.

The decision also demonstrates that the Fair Work Commission is willing to take a strict or interventionist approach to consultation questions. For example, the decision carefully analysed the actions of BHP and determined the 'cut off point' for when the consultation needed to take place to be valid under the *WHS Act*, as opposed to the enterprise agreement.

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77 *Workplace Relations Act 1996* (Cth) s 170GA.

78 *CFMEU v Newcastle Wallsend Coal Co Ltd* (n 46); *CFMEU v BHP Coal* (n 65); *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93; *BHP Mt Arthur* (n 1).

But the decision does not go far enough. As discussed in Part V, the authorities still fail to clearly set out the parameters of the duty to consult. This is due to a lack of certainty about both the scope of 'meaningful consultation' and the extent to which the general principles might inform a particular duty to consult in a single industrial instrument. *BHP Mt Arthur*, like the decisions that preceded it, made little attempt to explain what meaningful consultation would involve, or whether there was any legal underpinning for the requirement, other than the existence of statutory obligations.

It is not enough to say that consultation must be genuine and meaningful without positive guidance about what this means. It is clear that the actions of BHP were not sufficient in that case, but an employer in the same position today looking to avoid those errors would not know how much further they need to go to ensure that their consultation meets their legal obligations, without straying too far to the point of inefficiency. Courts and Tribunals explain their reticence to stray into this debate by saying that consultation must be determined 'case by case' and is an 'inherently flexible' concept.[79]

As long ago as 2002, Forsyth argued that more 'teeth' should be given to the statutory obligation to consult over redundancies by imposing more extensive *positive* obligations on employers.[80] This included requirements for ongoing provision of information about a company's financial status, and additional consultation over restructuring proposals that may threaten jobs, as well as enhanced remedies.[81] In the two decades since, that call to action has not been taken up despite the opportunity to do so in revisions to the *Fair Work Act* in 2009 and revised *Work Health and Safety Acts* across the states in 2011. Forsyth's proposal would involve positive obligations to give employees a voice in major workplace decisions, particularly those that involve workers being made redundant.

The cases and existing provisions focus on when a consultation obligation is triggered, or how to rectify the failure to consult, and to some degree the subject matter (such as workplace health and safety, or redundancy), but there is little if any guidance on *how* to conduct consultation.

Mechanisms such as European-style works councils still have their advocates,[82] but after two recent tranches of amendments to the *Fair Work Act*, the reality is that no legislative response is likely, and it is perhaps still true that 'workplace democracy remains one of the great unfulfilled promises of Australian labour law'.[83]

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79 *CEPU v QR Ltd* (n 31) 394–5.

80 Anthony Forsyth, 'Giving Teeth to the Statutory Obligation to Consult over Redundancies' (2002) 15(2) *Australian Journal of Labour Law* 177.

81 Ibid 177, 181–2. A clear example of limitations on remedies are those relating to the current obligation to consult over redundancies under the *Fair Work Act*, discussed in Part III.

82 See, eg, Perica (n 12).

83 Paul J Gollan and Glenn Patmore, 'Transporting the European Social Partnership Model to Australia' (2006) 48(2) *Journal of Industrial Relations* 217, 217.

Alternatively, if neither parliament nor Courts and Tribunals take up the offer to create such express, positive obligations, there might be room to develop those parameters using existing principles. The authors have elsewhere suggested that,[84] since the authorities on consultation 'stop short' of explaining what the obligation to consult might entail, we ought to look to established legal concepts (for example good faith and cooperation) as a potential alternative framework.

The *CPSU v Vodafone* case referred to 'bona fide' consultation without expanding on what that involved.[85] While good faith is a human virtue that cannot be ordered, good faith conduct guidelines, such as the *Fair Work Act* good faith bargaining requirements,[86] are a familiar legal concept. Of its own motion, the Fair Work Commission could develop good faith consultation guidelines,[87] in a manner similar to its recent decision to review other dispute resolution processes under the Act.[88]

There is a need for this type of guidance, because of the cases, the increase in individualised employment rights, the diversification of the nature and patterns of work post COVID19, and, as noted by Bray and Stewart in 2013, the diminishing legislative support for union forms of employee voice.[89]

It would also be constructive to move consultation away from the conflictual idea of needing a 'trigger' towards a more cooperative approach. It could be said that good faith creates a guiding ideal for cooperation, and therefore consultation. Good faith at least creates a framework for rational discussion.[90] Further, a deeper legal foundation for meaningful consultation may exist in the common law implied duties of good faith and cooperation.[91]

However, while the imposition of more extensive obligations on employers may be warranted from an employee protection perspective, there may be positives in the 'inherent flexibility' that exists under the current approach. Without a positive minimum limit to consultation, there is the opportunity for employers to decide what best suits each given change in a workplace. It is in employers' interests to offer consultation, and to do so genuinely and meaningfully. Employers and managers who fail to do so, will find that their

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84 Paul Lorraine and Giuseppe Carabetta, 'Good Faith and Cooperation as a Framework For Consultation' (Conference Paper, Australian Labour Law Association Annual Conference, 11 November 2022).

85 *CPSU v Vodafone* (n 13)

86 *Fair Work Act* (n 3) s 228.

87 Gollan and Patmore identified relevant features of 'good practice' consultation: Gollan and Patmore (n 83) 234–7.

88 For example, the Fair Work Commission proposed to amend model award terms to highlight the dispute processes for flexible work and unpaid parental leave: *Variation on the Commission's Own Motion – Flexible Work Amendments and Unpaid Parental Leave* [2023] FWCFB 76 (26 May 2023).

89 Mark Bray and Andrew Stewart, 'From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work' (2013) 34(1) *Adelaide Law Review* 21.

90 Lorraine and Carabetta (n 84).

91 Ibid.

employees do not join them in embracing workplace changes. They will also find themselves caught up in legal disputes, bringing lengthy negotiations, reputational damage and occasionally a trip to the Fair Work Commission. The current system serves to ensure that employers cannot force unpopular decisions onto employees without any consultation, while maintaining scope for managers to determine for themselves the appropriate level of consultation on a case-by-case basis.

APPENDIX – SAMPLE CONSULTATION PROVISIONS

A *Port Kembla Coal Terminal Limited Enterprise Agreement 2012–2015, Clauses 7 & 13.5*

7. Workplace Change and Consultation

7.1 Consultation over significant change or effect will occur where:

a. the Company is considering introducing a major change to production, program, organisation, structure, technology, shift arrangements, work organisation or the level of outsourcing in relation to its enterprise; and

b. the change, if implemented, is likely to have a detrimental or significant effect on employees.

7.2. The purpose of consultation is to:

a. Resolve issues, where possible, at the workplace and avoid unnecessary problems by identifying and discussing matters of actual or potential concern as close to the workplace as possible;

b. Improve the level of understanding between management, Employees and Employee Representatives by exchanging relevant information on a timely basis; and

c. Deliver an efficient decision-making process by ensuring Employees are aware of a review of their work area that could lead to significant change or effect on working arrangements and allowing Employees and Employee Representatives inputs to be taken into consideration through a process of consultation, prior to a final decision being taken by management.

7.3. The Company will give prompt and genuine consideration to matters raised by the relevant Employees and their Employee Representatives.

7.4. The Company will notify the relevant Employees and their Employee Representatives of the proposed change as soon as a decision has been made.

7.5. The consultation process may be modified by agreement between the parties.

7.6. Significant change or effect may include but is not limited to:

a. major changes in the composition, operation or size of the Company's workforce; or

b. the skills required; or

c. the significant restructuring of work organisation; or

d. proposals by the Company to outsource services or contract out services currently provided by Company Employees.

13.5 Redundancy

13.5.1. The Company undertakes that in managing manning levels to suit the business needs it will make use of redeployment and voluntary redundancy prior to implementing any forced redundancies.

13.5.2. If workforce reductions for Employees bound by this Agreement were to become necessary, they will be undertaken through the consultative process described in this Agreement.

13.5.3. The Company shall investigate all avenues to avoid forced redundancies, including the reduction of contractors, where the work performed by contractors can be performed by Employees of the Company, having regard to the skills and competencies of Employees and the nature of the work in question.

13.5.4. If a redundancy situation still exists after the above steps have been taken, the process for determining required compulsory redundancies within a classification will be through consultation, including taking length of service into account.

13.5.5. Should the need for redundancy arise, the PKCT standard severance package of four weeks pay in lieu of notice and three weeks pay per each year of service paid at the Special Purpose Rate shall apply, unless otherwise agreed or determined.

B *QR Limited Traincrew Union Collective Workplace Agreement 2009, Clause 36*

36 Consultation

36.1 For the purposes of this Agreement, consultation is a process:

- Aimed at getting individuals or groups to suggest or respond to proposals to be implemented without at the same time giving up management's rights to make the final decision in these matters. It provides an opportunity to present a point of view or state an objection; and

- Involves the timely exchange of relevant information so that the parties have the actual and genuine opportunity to influence the outcome.

The Company will not be obliged to disclose confidential information if that disclosure is contrary to the Company's interests.

36.2 The Company will consult with affected employees and, at the employees' election, their nominated representatives, over any proposed changes that will have an impact on employees' terms and conditions of employment. The matters over which the Company will consult include, but are not limited to:

- termination of employment
- changes in the composition, operation or size of the Company's workforce, or in the skills required
- the elimination or reduction of promotion opportunities, job opportunity or job tenure
- the alteration of hours of work
- the need for retraining or transfer of employees to other work or locations
- the restructuring of jobs.

36.4 The Company will consult:

- At the local level, if the proposed change is not expected to affect any other part of the Company
- At the business group or Company level where the change is expected to impact on employees more broadly.

36.5 The process of consultation will include:

- The timely provision in writing of all relevant information, including details of the change, the likely effects on employees, the reasons for the proposed change and, where relevant, a proposed implementation date
- Discussion on measures to avert or mitigate any adverse effects on employees
- Provision of reasonable resources, including work time, for employees to fully participate in the consultation process

- Genuine consideration of employees', and at the employee's election, their representatives' suggestions, ideas and contributions
- Genuine opportunity for employees and, at the employee's election, their representatives to affect the outcome.

36.6 Where the Company makes a final decision in relation to the matter subject to consultation, the Company will notify the affected employees and, at the employee's election, their representatives in writing. This notification will include final details of the proposed change and an implementation date. The implementation date will not be earlier than 5 working days from the date of the notification, unless safety concerns demand otherwise. In such cases, the notification will be signed by senior Company management.

C *Toll Group – TWU Enterprise Agreement 2013-2017, Clause 14*

14. Consultation on workplace change

(a) If Toll is considering workplace changes that are likely to have a significant effect on Transport Workers, it will consult with the Union and any Transport Workers who will be affected by any proposal.

(b) As soon as practicable Toll must discuss with the Union and relevant Transport Workers the introduction of the change, the effect the change is likely to have on the Transport Workers, the number of any redundancies, the persons or class of persons likely to be affected and any reasonable alternatives to the change or redundancy. Toll must discuss measures to avert or mitigate the adverse effect of the change on the Transport Workers.

(c) Toll will give prompt and genuine consideration to matters raised about the change by the affected Transport Workers and the Union.

(d) As soon as a final decision has been made, Toll must notify the Union and the Transport Workers affected, in writing, and explain the effects of the decision.

(e) In the event that a Dispute arises in respect to any decision, proposal or consideration to effect any change, the parties agree to follow the disputes procedure in clause 15, and until the Dispute is resolved in accordance with that procedure the status quo before the Dispute arose will be maintained and work will continue without disruption.

(f) A reference to a change that is 'likely to have a significant effect on Transport Workers' includes but is not limited to:

(i) the termination of the employment of Transport Workers; or

(ii) major change to the composition, operation or size of Toll's workforce or to the skills required of Transport Workers; or

(iii) the elimination or diminution of a significant number of job opportunities (including opportunities for promotion or tenure); or

(iv) the significant alteration of hours of work; or

(v) the need to retrain Transport Workers; or

(vi) the need to relocate Transport Workers to another workplace; or

(vii) the restructuring of jobs.

(g) With the prior approval of Toll and subject to clause 39, the Union may enter Toll's premises in order to consult with Transport Workers regarding a workplace change.

D *BMA Enterprise Agreement 2012 Clauses 32, 15*

32 Redundancy

32.1 Where a surplus of permanent Employees arises at a Mine during the life of the Agreement that cannot be addressed through natural attrition, the Company will consult with Employees and their Employee Representatives, about the possible need for redundancies, and if so:

(a) the means of minimising the number of redundancies; and

(b) the means of minimising the effect of the redundancies on Employees.

32.2 Any surplus will be addressed in one or more of the following ways:

(a) By voluntary redundancy, at the rate specified in clause 32.9; or

(b) By redeployment to another task within the Mine, which is appropriate to the skills and competencies of the Employees concerned, or through retraining; or

(c) Transfer of Employees who have the appropriate skills and competencies or who can be retrained within a reasonable period of time to:

(1) another position or other duties (which may be temporary) at a Mine which is within reasonable distance from the Employee's residence;

(2) a vacancy created by an Employee taking voluntary redundancy at a Mine which is within reasonable distance from the Employee's residence;

(3) another position or other duties (which may be temporary) at a Mine outside reasonable distance from the Employee's residence; or

(4) a vacancy created by an Employee taking voluntary redundancy at a Mine outside reasonable distance from the Employee's residence. ...

32.3 Where the surplus cannot be adequately addressed through 32.2(a), 32.2(b) or 32.2(c), then the Company may consider forced redundancies. In such a case, it shall investigate and consider all reasonable avenues to avoid such forced redundancies. This will include removal of contractors and labour hire, except where:

(a) There are contractual commitments that prevent this;

(b) The work performed by contractors or labour hire is considered to be specialist work of a non-permanent nature; or

(c) Employees are not readily able to perform the work.

32.4 Where voluntary redundancy is offered, the Company will have regard to its requirement to retain an appropriate mix of skills and competencies. Accordingly, not all applicants will necessarily be accepted for voluntary redundancy.

32.5 Where forced redundancies are necessary:

(a) The Company will determine the number of Employees to be made redundant and the spread of skills required for the efficient and effective operation of the relevant Mine; and

(b) To ensure that a Mine can be operated in the most productive and efficient manner, all Employees from within the Functional Work Area (as listed at clause 41) where a surplus exists will be interviewed to determine the Employees to be retained or retrenched.

32.6 The selection method for forced redundancies will involve a selection process that will be conducted by a panel trained in behavioural interviewing. The panel will include:

(a) An independent member agreed between the Company and the Unions; and

(b) A representative selected by the workforce.

32.7 A merit-based selection process will be undertaken by the panel which will take into consideration the following:

(a) Necessary skills mix required by the business;

(b) Individual skills and proficiency in those skills;

(c) Employment record/length of service ...

32.9 Redundancy Pay

Redundancy payments will be calculated at the rate of 13 weeks' base salary plus 2½ weeks' base salary per year of continuous service for the first 26 years of service, plus ...

For the purpose of this clause:

(a) One week's base salary will be equal to $1742 subject to clause 32.9(b) and clause 9 of Schedule 5; or

(b) In the case of Crinum Employees, one week's base salary will be as follows:

(1) Mine worker 7 Day Roster 12 Hour Shifts = $1997

(2) Section &/or Engineering Co-ordinators, 7 day roster 12 Hour Shifts = $22233.

32.10 Any payment under clause 32.9 is inclusive of any statutory entitlement an Employee may have to severance or redundancy or retrenchment pay.

32.11 Redundancy Relocation Assistance

15 Consultation on major workplace change

15.1 For the purposes of section 205 of the Act, the model consultation clause, as defined in the Fair Work Regulations 2009 (Cth), as amended from time to time, applies to any 'major workplace changes that are likely to have a significant effect on Employees'.

15.2 The model consultation clause does not apply to any major workplace changes implemented under this Agreement for which other consultation obligations are prescribed in this Agreement. In all circumstances, only a single consultation process will apply.

MODEL CONSULTATION CLAUSE:

(1) This term applies if:

(a) the Company has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise; and

(b) the change is likely to have a significant effect on Employees.

(2) The Company must notify the relevant Employees of the decision to introduce the major change.

(3) The relevant Employees may appoint a representative for the purposes of the procedures in this term.

(4) If:

(a) a relevant Employee appoints, or relevant Employees appoint, a representative for the purposes of consultation; and

(b) the Employee or Employees advise the Company of the identity of the representative;

the Company must recognise the representative.

(5) As soon as practicable after making its decision, the Company must:

(a) discuss with the relevant Employees:

(i) the introduction of the change; and

(ii) the effect the change is likely to have on the Employees; and

(iii) measures the Company is taking to avert or mitigate the adverse effect of the change on the employees; and

(b) for the purposes of the discussion — provide, in writing, to the relevant Employees:

(i) all relevant information about the change including the nature of the change proposed; and

(ii) information about the expected effects of the change on the Employees; and

(iii) any other matters likely to affect the Employees.

(6) However, the Company is not required to disclose confidential or commercially sensitive information to the relevant Employees.

(7) The Company must give prompt and genuine consideration to matters raised about the major change by the relevant Employees.

(8) If a term in this Agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the Company, the requirements set out in subclauses (2), (3) and (5) are taken not to apply.

(9) In this term, a major change is likely to have a significant effect on Employees if it results in:

- *(a) the termination of the employment of Employees; or*
- *(b) major change to the composition, operation or size of the Company's workforce or to the skills required of Employees; or*
- *(c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or*
- *(d) the alteration of hours of work; or*
- *(e) the need to retrain Employees; or*
- *(f) the need to relocate Employees to another workplace; or*
- *(g) the restructuring of jobs.*

(10) In this term, relevant Employees means the Employees who may be affected by the major change.

Rusty Weapons in a Digital Battlespace

Samuel White*

This article explores the evolving landscape of foreign interference in domestic affairs, particularly in the context of 'information operations' facilitated by the internet. The primary focus of the article is on the lawful authority to respond to external information operations, and how this authority may be shaped by international law. Specifically, the article explores the royal prerogative in two manifestations — the war prerogative, and external affairs prerogative — as a potential source of authority. In doing so, the article employs an analytical framework by Winterton, distinguishing between the 'breadth' and 'depth' of constitutional executive power. The article acknowledges the limited case law and debates surrounding these prerogatives' scope and triggers, and slight nuances between British and Australian jurisprudence. It discusses the relationship between the war prerogative and the existence of armed conflict and touches on how international law can support the exercise of the war prerogative through the 'public policy test'. Drawing from international legal perspectives, the article references United Nations resolutions from 1976 and 1981 that emphasise the importance of domestic legal remedies against information operations. It stresses the duty of states to combat the dissemination of false or distorted news that interferes with other states' internal affairs. In sum, the article concludes that, while countering IOs is a matter requiring domestic legal authority, international law can likely extend the ambit of the royal prerogative and should also, as a matter of public policy, apply to such campaigns.

> As Themistocles sailed along the coasts, wherever he saw places at which the enemy must necessarily put in for shelter and supplies, he inscribed conspicuous writings on stones, some of which he found to his hand there by chance, and some he himself caused to be set near the inviting anchorages and watering-places. In these writings he solemnly enjoyed upon the Ionians, if it were possible, to come over to the side of the Athenians who were risking all in behalf of their freedom; but if they could not do this, to damage the Barbarian cause in battle, and bring confusion among them.[1]

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1 Plutarch, '*Life of Themistocles*', in *The Lives of Noble Grecians and Romans*, tr John Dryden (Encyclopaedia Britannica, 1st ed, 1952) 98.

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> From operational experience, we find that we can often achieve the greatest cognitive effect by affecting the functionality and effectiveness of an adversary's systems over a period of time, rather than denying them entirely (as in some cases they can be quickly replaced).[2]

I Introduction

Foreign State and non-State actors attempting to interfere in the domestic affairs of others is not a new phenomenon; nor, too, is the use of information as a resource, environment and weapon in warfare.[3] From the Hellenes along the coast of Ionia to British signals intelligence, the act of trying to shape a target audience to affect its functionality and effectiveness remains a cost-effective grey-zone tactic. It is an increasingly open domain in which the spectrum of competition, conflict and crisis occurs,[4] and one in which new tactics, techniques and procedures are evolving behind opaque doors.

The United Nations has consistently emphasised the importance of domestic legal remedies to respond to the flow of information — in the 1976 *Resolution on Non-interference in the Internal Affairs of States*[5] and the 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.*[6] Both made clear and explicit references to information operations ('IOs') conducted through the technology of the time, such as broadcast media, which attempted 'campaigns of vilification' and 'subversion and defamation' in 1976,[7] as well as 'any defamatory campaign, vilification or hostile propaganda for the purpose of intervening or interfering in the internal affairs of other States' in 1981.[8] The Declaration, importantly, confirmed 'the right and duty of States to combat, within their constitutional prerogatives, the dissemination of false or distorted news which can be interpreted as interference in the internal affairs of other States' in a similar but distinct analogy to intelligence operations (with espionage not per se illegal under international law).[9]

It is these constitutional prerogatives — the residual powers left to the Crown by Parliament since 1688, and modified by Australia's constitutional framework[10] — with which this article is concerned. Although foreign IOs may occur *within* the State, these prerogatives can operate both domestically and externally. The author has discussed domestic prerogative authorities elsewhere,

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2 Ministry of Defence, *Responsible Cyber Power in Practice* (Report, 2023) 15–16.
3 John Keegan, *Intelligence in War* (Hutchinson Press, 2003).
4 See Samuel White, 'Digital Payback' (2022) 4(2) *Australian Journal of Defence and Strategic Studies* 235.
5 *United Nations General Assembly Resolution on Non-interference in the Internal Affairs of States*, GA Res 31/91, UN Doc A/RES/31/91 (14 December 1976).
6 *United Nations Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981).
7 United Nations General Assembly (n 5) preambular para 6.
8 Ibid annex, para II(j).
9 Ibid para III(d).
10 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) vol 1, 239.

in some depth.[11] However, little to nothing has been written from an Australian perspective on the lawful authority to respond to IOs that originate extra-territorially. While statute may provide some authority in some situations, it is always useful to look to the nebulous but often relied upon non-statutory executive power. Accordingly, this article looks from a Commonwealth perspective, on an oft-cited but oft-misunderstood lawful authority to respond to external threats — the royal prerogative. Such an analysis requires some historical exploration, as the prerogative is recognised by the common law but not created by it. The use of the prerogative — in particular the war prerogative — has its critics; as Lord Sumner stated about the war prerogative, 'to those who had to inspect the rusty weapons of the war prerogative in the summer of 1914 it must or should have appeared that some of them had become permanently unreliable.'[12] By using the most current threat of modern warfare to explore the oldest creature of the common law, the viability of Lord Sumner's statement can be assessed.

The scope of this article is therefore wide in one sense but narrow in another. It is wide in its discussion of non-statutory executive power, of which the war prerogative constitutes one recognised limb. It is narrow, however, in that it does not address how this aspect of the royal prerogative — which applies across the Commonwealth — is modified or abridged by separate constitutional or legislative provisions. At any rate, there is no statute that regulates the triggering of the war prerogative, or defines its ambit. The closest statutory abridgement is div 268 of the *Criminal Code* (Cth), which codifies war crimes. Nor does the paper engage with the critical question of when IOs may breach international law, and in particular whether they constitute coercion.[13]

The article utilises an Australian methodology for the analysis of executive power, designed by Winterton. It has become common practice to adopt the distinction, drawn by Winterton, between the 'breadth' and 'depth' of constitutional executive power.[14] This practice was adopted by Gageler J, who explains 'breadth' to relate to 'the subject-matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system',[15] whereas depth denotes 'the precise actions which the Executive Government is empowered to undertake in relation to those subject matters'.[16] Interwoven in the above examples of the royal prerogative are matters that have a wide breadth but limited depth (such as the ability to grant honours), or matters with limited breadth but exceptional depth

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11 See Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021).

12 *Burmah Oil Co v Lord Advocate* [1965] AC 75, 122 ('*Burmah Oil*').

13 See for an expert analysis Marko Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law' (2023) *American Journal of International Law* (forthcoming).

14 George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 21.

15 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 130 (Gageler J) ('*Plaintiff M68/2015*').

16 Ibid.

(such as the war prerogative). Depth can moreover be understood to limit the Commonwealth executive government's ability to undertake coercive activities. The reference to 'coercive activities' in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional documents such as the *Magna Carta* of 1215, *Petition of Right* of 1628, *Habeas Corpus Act* of 1640, *Bill of Rights* of 1689 and *Habeas Corpus Act* of 1816. As Brennan J observed in *Re Bolton; Ex parte Beane*:

> Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.[17]

These fundamental constitutional principles were developed in the context of historical struggles between the Crown and the Parliament in England, which resulted in the Parliament establishing limits on the executive government's non-statutory power in the Glorious Revolution of 1688 (an important and recurring touchpoint throughout this work). Critically, these limitations are most severe when it comes to the 'internal', rather than 'external', aspects of society. Focusing on domestic constitutional enablers and limitations is particularly important in this article. As discussed in more depth, international law offers guiding principles with respect to the exercise of constitutional executive power. It is not binding, however.[18]

Section II therefore addresses two potential sources of domestic constitutional authority for States 'to combat within their constitutional prerogatives': the war prerogative and the external security prerogative, rather than the external affairs power (as one jurist has remarked extra-curially to be of use).[19] This is because the royal prerogative applies both externally and internally and is therefore of more utility. These two limbs of the royal prerogative are important, but complicated. There is very limited case law on their breadth or depth (utilising Winterton's framework).[20] Legal writing on the war prerogative often relies upon outlying, eclectic cases and tends to focus on what triggers the war prerogative. What is clear, however, is that it does exist. By comparison, writings on the external security prerogative question its validity. Some British authority would appear to support the idea that the royal prerogative of external security exists outside of the war prerogative; others suggest it does not. Section

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17 (1987) 162 CLR 514, 520–1.

18 *Horta v Commonwealth* (1994) 181 CLR 183; *Polities v Commonwealth* (1942) 70 CLR 60.

19 Justice John Logan, 'Not A Suicide Pact: Judicial Power and National Defence and Security in Practice' (Speech, National Administrative Law Conference, 22 July 2022).

20 George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 115.

III of this article therefore represents one of the few written academic analyses of the breadth and depth of the external security prerogative in Australia.[21]

Section IV then addresses the critical question of whether, and to what extent, applicable international legal frameworks might limit the range of actions permissible under constitutional executive power. Here, British and Australian jurisprudence differ. Section IV necessarily covers both jurisdictions, highlighting that the use of the war prerogative does not mean that a state of armed conflict (with consequential international obligations) exists. It also does so to demonstrate how some international law can actually support an exercise of the war prerogative by applying the 'public policy test', and ultimately posits that the war prerogative can provide ample constitutional authority to empower Australia to respond to IOs without statute.

II The War Prerogative

The war prerogative is one of the oldest (if not the oldest), yet least understood and least discussed royal prerogatives. This is perhaps because the war prerogative is primarily *external*, and only affects the civil liberties of citizens (such as by allowing the government to prohibit trading with the enemy) in limited circumstances.[22] Most individuals affected by the war prerogative are foreign nationals, with limited access to Commonwealth courts.[23] This analysis must therefore rely upon limited sources and benefits from a comparative methodology with Commonwealth nations.

A *Breadth of the War Prerogative*

Within the Australian context, federalism is a critical lens through which the exercise of constitutional executive power must be interpreted. Luckily for any discussion of the war prerogative, the issue of federalism is not in contention. Although the duty to defend the country is not exclusive to the Commonwealth,[24] the constitutional framework and corresponding authority for an exercise of the war prerogative lies solely with the Commonwealth — in part because the Commonwealth holds the authority for use of the military, and in part because the war prerogative in the United Kingdom has historically fallen under the

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21 The only other being Cameron Moore, *Crown & Sword* (ANU Press, 2018).

22 *Donohoe v Schroeder* (1916) 22 CLR 362.

23 This problem was shared within the Courts of Chivalry, from which some of the war prerogative is descended: see Samuel White, 'The Late Middle Ages in Northern Europe' in Samuel White (ed), *The Laws of Yesterday's Wars* (Brill, 2022) 101.

24 *Carter v Egg and Egg Pulp Marketing Board for the State of Victoria* [1942] 66 CLR 557, 572 (Latham CJ), which overtook the original position in *Joseph v Colonial Treasurer of New South Wales* (1918) 25 CLR 32 ('*Colonial Treasurer*').

authority of the Prime Minister.[25] This is complemented by the constitutionally consigned position of Commander in Chief of the Australian Defence Force ('ADF') to the Governor-General, as the King's representative.[26]

The first major question with respect to the war prerogative (as the threshold for its enactment has never been authoritatively discussed) is whether a war is required in order to utilise its power. There is no clear case authority on the matter. As HV Evatt noted in his doctoral thesis, the right to declare war and peace was regarded as limited in Australia after Federation.[27] The wording of s 61 of the *Constitution* was ambiguous when it came to Australia's ability to take independent steps, and accordingly a declaration of war by the King on behalf of the British Empire in 1914,[28] and again in 1939,[29] was sufficient for Australia to also be at war. In 1939, Prime Minister Menzies remarked: 'Great Britain has declared war … [and] as a result, Australia is also at war.'[30] Australia, through the Governor-General, only declared war during World War Two.[31] All other external military operations since then, even if falling under the war prerogative, have been without a formal declaration. The High Court of Australia has consistently affirmed that constitutional executive power includes the power to declare peace or war.[32] It has not, however, addressed when it is enlivened.

Chitty's *A Treatise on the Law of the Prerogatives of the Crown* provides the starting point for a discussion of when the war prerogative is triggered. He wrote that

> What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion.[33]

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25 *Colonial Treasurer* (n 24) 47.

26 *Australian Constitution* s 68. See Samuel White, 'Taking the King's Hard Bargain' (2022) 96 *Australian Law Journal* 666.

27 Herbert Vere Evatt, *The Royal Prerogative* (Law Book, 1987).

28 Commonwealth, *Gazette*, No 50 (3 August 1914) 1335.

29 Commonwealth, *Gazette*, No 63 (3 September 1939) 1849.

30 Robert G Menzies, 'Wartime Broadcast' (Speech, Australian War Memorial, 3 September 1939).

31 Commonwealth, *Gazette*, No 251 (8 December 1941) 1849 (Finland, Hungary and Romania); No 252 (9 December 1941) 2727 (Japan); No 14 (14 January 1942) 79 (Bulgaria); No 198 (20 July 1942).

32 See, eg, *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffiths CJ), 452 (Isaacs J, Powers J agreeing); *Colonial Treasurer* (n 24) 45–6 (Isaacs, Powers and Rich JJ), 51 (Higgins J); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 442 (Isaacs J); *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2007) 233 CLR 259, 269 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 342 (Crennan J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 596 [260] (Kiefel J), 649 [484] (Keane J); *Plaintiff M68/2015* (n 15) 106 [164] (Gageler J); *A-G (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, 238 (Long Innes CJ).

33 Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Garland, first published 1820, 1978 ed) 49.

Chitty's position has been cited in previous Australian and British judgments in relation to the scope of this power.[34] However, British case law has also suggested that the war prerogative will be enlivened by the 'outbreak or imminence of war, provided that it carrie[s] with it the threat of imminent invasion or attack'.[35] War need not be an *actual* state of affairs. Yet that is about the extent of the jurisprudence on the war prerogative. There is a requirement then to undertake a legal historical analysis, to understand the breadth of the war prerogative.

1 Historical Basis

The search begins at the fall of the Western Roman Empire, AD 395. The collapse of the empire led to its division amongst successive Germanic tribal kingdoms. These kingdoms in turn applied their local, customary Germanic law to their new fiefdoms. For much of the Early Middle Ages, the lack of any centralised authority meant that there was something akin to the 'state of nature', as suggested by Hobbes.[36] Most means and methods of warfare, therefore, 'emanated in the Germanic custom of settling judicial disputes through *Blutrache* (vendetta) and *Farida* (feud)'.[37]

There are states of armed conflict that fall outside of 'war' as a construct because they are prima facie just — such as defence against an attack (an inherent right) or suppression of revolts. Central to this, however, is the definition of the concept of war.

In feudal Europe, when the English Crown had centuries of land ownership on the continent, public war was declared by the display of a prince's banner, spoils were allowed and captives could be taken for ransom.[38] Public warfare was operationalised through tactics designed to compel the other party to accept the validity of the claim. Such means and methods included forced contributions, arson, plunder, injuries against certain individuals, destruction of property, ransom and use of lethal force. As noted by Girt, Duke of Burgundy and an independent sovereign, discussing the use of burning and plundering around him:

> If my neighbour starts a quarrel with me,
> With fire burns my lands to cinders;
> And I, his, on all sides;
> If he steals my castles or keeps,

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34 For Australia, see *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J, Powers J agreeing); *Shaw Savill and Albion Co v Commonwealth* (1940) 66 CLR 344. For the United Kingdom, see *Crown of Leon (Owners) v Admiralty Commissioners* [1921] 1 KB 590, 603–4; *Burmah Oil* (n 12) 135 (Lord Hodson), 146 (Lord Pearce).

35 *Burmah Oil* (n 12) 115, 119 (Viscount Radcliffe).

36 Thomas Hobbes, *Leviathan*, ed Richard Tuck (Cambridge University Press, 1991) 89: life without government being 'solitary, poor, nasty, brutish, sharp'.

37 Udo Heyn, *Peacemaking in Medieval Europe: A Historical and Bibliographical Guide* (Regina Books, 1997) 21.

38 Ibid 87.

> Then so it goes until we come to terms,
> Or he puts me or I put him in prison.[39]

Procession through hostile territory — a *chevauchée* — demonstrated the justice and moral superiority of one's claim, and further undermined the position of an impotent noble unable to defend what they claimed to be theirs. The authority for this punishment operation fell under the right of the Crown to wage war.

Although the nature of warfare has changed— from the *chevauchée* to digital IOs — 'there is no particular authority that requires a declaration of war from the Crown for the war prerogative to operate'.[40] Moore holds that the question of whether or not the war prerogative applies as a legal framework for action taken is, at its highest, a domestic question.[41] In this, he is supported by the United Kingdom Parliament's Joint Committee on Human Rights, which concluded that it is clear that the war prerogative lawfully extends to situations outside of 'traditional armed conflict' (in this case, terrorism). Pertinently, it held that 'human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis.'[42]

This is a realistic approach, which should be promoted for a few reasons. First, it is clear that war as the sole construct for the authorisation of violence is no longer applicable. The High Court has reinforced this point through its constructions of the constitutional power to legislate with respect to 'defence' to include a domestic counter-terrorism measure in *Thomas v Mowbray*.[43] Second, although Government practice is not indicative of legality, Australia's engagement of troops overseas in war-like operations has occurred without a declaration of war for nearly 80 years.

The second reason to support the proposition that there is no need for a declaration of war is that the prerogative power is one that is amenable to evolution.[44] Thus, in situations where warfare is no longer declared but simply done, and where sporadic, large-scale violence has been replaced with consistent, non-kinetic harassment, it would be perverse that the war prerogative be frozen to a form and level of conflict that does not apply absent clear parliamentary intent.

The plenary nature of the war prerogative was central to the discussion in *Burmah Oil Co v Lord Advocate* ('*Burmah Oil*').[45] There, the House of Lords discussed the actions taken by the British forces in destroying oil fields, not in the heat of

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39 Quoted in Richard W Kaeuper, *Chivalry and Violence in Medieval Europe* (Oxford University Press, 1999) 177.
40 Moore (n 21) 219.
41 Ibid.
42 Joint Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing' (HL Paper 141, 27 April 2016) [2.40].
43 (2007) CLR 307.
44 George Winterton, 'The Prerogative in Novel Situations' (1983) 99(3) *Law Quarterly Review* 408.
45 [1965] AC 75.

battle, but as a strategic decision upon the expected fall of Rangoon. The question turned on whether the war prerogative required compensation, and the House of Lords found, in a 3:2 judgment, that, outside of direct combat, it did.

Lord Reid noted the medieval origins of the war prerogative, highlighting that '[i]n time of war the commander of the armed forces on the spot conducts a campaign as if it were being conducted by the prince in the medieval sense'.[46] Necessarily Lord Reid opined that '[t]he foundation of the prerogative right is a state of affairs (for example, imminent invasion) which gives rise to extreme necessity'.[47] There was thus:

> difficulty in relating the prerogative to modern conditions. In fact no war which has put this country in real peril has been waged in modern times without statutory powers of an emergency character … it would be impracticable to conduct a modern war by the use of the prerogative alone … a relic of a past age, not lost by disuse, but only available for a case not covered by statute.[48]

But Lord Reid was in the minority in this respect. Lord Pearce, with whom Lord Radcliff and Upjohn agreed,[49] opined:

> It is not possible that the war prerogative of the warrior King should dwindle to the right and duty of 'every man in a brown coat' (as Lord Thurlow expressed it) and should come into effect only when things are so desperate that the citizen may use his own initiative in improvising defences and burning stores. It would, indeed, be an odd state of affairs if the Crown had no power to blow up these oil wells at a damage of some millions of pounds for strategic reasons which demanded a knowledge of secret information and a consideration of the whole future conduct of the war, unless and until things had reached a pass at which the man in the street was entitled to blow them up [under the common law doctrine of necessity].[50]

There is much merit in this line of thinking. That the war prerogative only becomes empowered through necessity fails to accept the sui generis nature of warfare. To limit the war prerogative to instances where the enemy is at the gates fails to accept that the only reason they are stopped is because the gates were constructed; or, in other terms, a good offence requires a good defence. The war prerogative necessarily extends to preparation for, and response to, instances of war, rather than being enlivened during war. This is similar to the reasoning in High Court jurisprudence around s 51(vi) of the *Constitution.*[51]

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46 Ibid 79–80 (Lord Reid).

47 Ibid 81 (Lord Reid), citing with approval *Crown of Leon (Owners) v Admiralty Commissioners* [1921] KB 595, 597, 602–3.

48 *Burmah Oil* (n 12) 101 (Lord Reid).

49 Ibid 115 (Viscount Radcliffe), 166 (Lord Upjohn).

50 Ibid 144 (Lord Pearce).

51 *Lloyd v Wallach* (1915) 20 CLR 299, 304–5 (Griffiths CJ), 308 (Isaacs J); *Farey v Burvett* (1916) 21 CLR 433, 453 (Isaacs J); *Welsbach Light Company of Australasia v Commonwealth* (1916) 22 CLR 268; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 222 (Williams J) ('*Australian Communist Party Case*'); *Thomas v Mowbray* (2007) 233 CLR 307.

B *Depth of Action*

The war prerogative provides a potentially deep source of non-statutory power to undertake coercive activities. By its nature, a declaration of war would enable the Commonwealth executive government to direct ADF members and other defence officials to engage in conduct that would otherwise contravene ordinary civil and criminal laws, up to and including the use of lethal force against enemy combatants.[52]. As per *Burmah Oil*, it is possible to split the war prerogative's depth into two sub-branches: depth of power with respect to persons, and depth of power with respect to property. It is clear that the war prerogative authorises the use of lethal force against combatants and individuals. This article, however, does not intend to cover the use of the war prerogative to authorise the application of lethal force to an individual, in order to punish a state for conducting non-kinetic IOs. Plainly, it is an unsafe course of action to take and, while altering any cost–benefit analysis undertaken when planning operations against Australia, also carries a huge risk of escalation.

This article will instead focus upon operations against property — either acquiring property or destroying it. Quite relevantly for counter-IOs, with a specific focus on cyber-enabled operations, British courts have held that the war prerogative includes a limited right to acquire, destroy or otherwise interfere with private property.[53] However, this prerogative power is subject to two caveats.

First, British courts have held that the prerogative power to requisition private property has largely been displaced by legislation.[54] This is important, but not particularly relevant in responding to IOs. Legislation in the United Kingdom has authorised the taking of property for defence purposes since at least the beginning of the 18th century, although this acquisition has occurred within the United Kingdom.[55] Brittsh courts have described any residual prerogative power to acquire private property as a 'right to take and pay', and not an unfettered 'right to take'.[56] In Australia, this would be mirrored by the constitutional requirement that property be acquired by the Commonwealth government on 'just terms' both internal and external to Australia.[57]

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[52] See, eg, *Rahmatullah [No 2] v Ministry of Defence* [2017] AC 649, 812 [81] (Lord Sumption), [101], [104] (Lord Neuberger, Lord Hughes agreeing) ('*Rahmatullah*'); *A v Hayden* (1984) 156 CLR 532, 562 (Murphy J).

[53] *Burmah Oil* (n 12); *R (on the application of Miller) v Prime Minister* [2019] UKSC 41, [40]. See also *Johnston, Fear & Kingham & The Offset Printing Company Pty Ltd v Commonwealth* (1943) 67 CLR 314, 318–9 (Latham CJ).

[54] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 528 (Lord Dunedin), 539–40 (Lord Atkinson), 549, 554 (Lord Moulton), 575 (Lord Parmoor) ('*De Keyser's Royal Hotel*').

[55] Ibid 527 (Lord Dunedin), 539 (Lord Atkinson), 553 (Lord Moulton); *Burmah Oil* (n 12) 101 (Lord Reid), 121 (Viscount Radcliffe).

[56] *Nissan v Attorney-General* [1970] AC 179, 227 (Lord Pearce); *De Keyser's Royal Hotel* (n 55) 563 (Lord Sumner); *Burmah Oil* (n 12); *R (on the application of Miller) v Prime Minister* [2020] AC 373, 404 [40].

[57] See *Australian Constitution* s 51(xxxi); see also George Winterton, 'The Concept of Extra-constitutional Executive Power in Domestic Affairs' (1980) 7(1) *Hastings Constitutional Law Quarterly* 1, 10.

For example, in *Burmah Oil*, the House of Lords held that the United Kingdom executive government was required to pay compensation to the appellant company whose property was destroyed in Burma. Burma was a colony at the relevant time and the Court applied English common law when resolving these questions. The Court accepted that that the demolition of the appellant's property by British armed forces was lawfully carried out in the exercise of the Crown's prerogative powers in order to prevent the property falling into enemy hands.[58] However, the Court found that this prerogative power was subject to a requirement to pay compensation. The Court noted that it appeared that, for at least 300 years, the Crown had not asserted a right to take the property of its subjects without compensation.[59] This reflected the view that the burden of war should no longer be borne by individuals and should instead be borne by the state through the payment of compensation.[60] Lord Reid concluded that:

> even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defence without making any payment for it.[61]

The Court stated that there this is an exception to this principle where property is destroyed in the course of actual fighting operations or for the necessities of the battle.[62] This exception appears to align with the concept of combat immunity in international law.

C *Conclusion*

The war prerogative is thus both a lawful authority to undertake lethal force, destroy property and to interfere with civil liberties as well as a power that provides the *right* to exercise violence against combatants and property, in accordance with just norms and restrictions of the era. It is unclear how applicable *Burmah Oil* really is with respect to property that does not belong to a subject. However, the preceding analysis makes clear that the requirement for compensation and legislation is with respect to subjects and citizens, internally, rather than externally. *Burmah Oil*, alongside other case law, confirms that there exists a royal prerogative for war. It remains to be seen whether there is such clear authority for the external security prerogative, for operations against an undeclared enemy.

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58 Ibid 99, 104 (Lord Reid), 113–14, 116 (Viscount Radcliffe), 137 (Lord Hodson), 143 (Lord Pearce), 165 (Lord Upjohn).

59 Ibid 153 (Lord Pearce), 167–8 (Lord Upjohn). See also *De Keyser's Royal Hotel* (n 55) 525 (Lord Dunedin), 537 (Lord Atkinson), 573 (Lord Parmoor).

60 *Burmah Oil* (n 12) 104 (Lord Reid); *De Keyser's Royal Hotel Ltd* (n 55) 553 (Lord Moulton).

61 *Burmah Oil* (n 12) 102.

62 Ibid 103, 110 (Lord Reid), 149, 162 (Lord Pearce).

The United Kingdom Supreme Court has characterised these military operations against an undeclared enemy as a 'sovereign act', 'the sorts of things that governments properly do'.[63] Lord Sumption explained:

> The deployment of armed force in the conduct of international relations, or the threat of its deployment (express or implicit) is one of the paradigm functions of the state. The law vests in the Crown the power to conduct the UK's international relations, including the deployment of armed force in support of its objectives.[64]

A *chevauchée* against real property is no longer acceptable by modern international law and norms, but to proceed through hostile digital territory as a manner of retaliation, in order to demonstrate the justice and moral superiority of one's claim, remains a viable option to deter states. It would also seem in keeping with the manner in which the prerogative can evolve, consistent with *Re a Petition of Right*.[65] In that case, the suppliants were the owners of land used for the practice of aviation.[66] The Crown took possession of their land.[67] The issue was whether the suppliants were entitled to compensation for the possession of their land.[68] They submitted on several grounds that they were entitled to compensation, and the Crown submitted on various grounds that they were not entitled to compensation. One of those grounds included whether the prerogative could adapt to the novel situation that was in dispute in this matter — and specifically whether the prerogative could be used to take possession of an aerodrome free from any compensation, even though aerodromes were non-existent prior to the 1900s.[69] Warrington LJ phrased the question as whether the prerogative is limited to circumstances where the enemy is against the 'soil' of the country.[70]

It was held that the Crown had a prerogative right to take possession of any man's land for the defence of the Commonwealth free from any compensation,[71] and could be used to take possession of an aerodrome, even though aerodromes were non-existent prior to the 1900s.[72] Warrington LJ stated that the prerogative must vary with the 'advance of military science',[73] noting that to limit the prerogative to the soil of the country would be to render it practically useless for the *purpose* for which it was entrusted to the King.[74] Warrington LJ also stated that the only condition that must be satisfied to exercise the prerogative is that the act must be necessary for the public safety and defence of the realm, and that view

63 *Rahmatullah* (n 52) 799 [37] (Lady Hale, Lords Wilson and Hughes agreeing).
64 Ibid 88.
65 *Re a Petition of Right* [1915] 3 KB 649, 661 (Pickford LJ) ('*Re a Petition of Right*').
66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid 660 (Lord Cozens-Hardy M.R).
70 Ibid.
71 Ibid 666 (Warrington LJ).
72 Ibid 660 (Lord Cozens-Hardy M.R).
73 Ibid.
74 Ibid.

must be formed in good faith.[75] Similarly, Lord Cozens-Hardy MR held that the prerogative must change with the advancement of technology.[76] His Lordship noted that the prerogative applied to what is reasonably necessary for preventing and repelling an invasion at the present time.[77]

There is clear legal historical authority for the evolution of the war prerogative in this manner, without a requirement for declared war. So too would the power appear unabridged by any relevant Acts of Parliament. Its breadth and depth might be most analogous with the defence power — enlivened and at its full zenith with a declaration of war, but still functional without such.

III The External Security Prerogative

There may be situations in which the Australian Government wishes to treat a target as an enemy, even without a declaration of war.[78] In these situations, Australia can rely upon the external security prerogative, also known as 'an act of state'. This is 'an exercise of sovereign power'[79] outside of municipal jurisdiction, thus constituting a part of the Crown's prerogative in relation to foreign affairs.[80] This section will use the terms act of state and external security prerogative interchangeably.

Moore notes that, since 1945, most external security operations other than war have been undertaken under the authority of United Nations Security Council resolutions or international agreements.[81] This might be so, and provides international legal authority for those operations in a similar way to reciprocal access agreements, or Status of Forces Agreements (which are unlikely to erode the prerogative, as discussed further below). It is nevertheless important to highlight the domestic legal authority for these operations, noting Australia's dualist approach to international law. As such, sending officials overseas to engage in peacekeeping operations, training and support operations, or military operations, would arguably also be supported by the Commonwealth's prerogative power with respect to external affairs.

Within Australia, it is well recognised that the Commonwealth's non-statutory executive power extends to the conduct of relations with other countries, including entering into treaties and assuming international rights and

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75 Ibid.
76 Ibid.
77 Ibid.
78 See Dutch Minister of Foreign Affairs, *Letter to the Parliament on the International Legal Order in Cyberspace* (5 July 2019).
79 *Salaman v Secretary of State for India* [1906] 1 KB 613, 639 (Fletcher Moulton LJ).
80 William S Holdsworth, 'The History of the Acts of State in English Law' (1941) 41(8) *Columbia Law Review* 1313.
81 Moore (n 21) 253–4. The exception here is of course espionage and counter-espionage operations.

obligations under those treaties.[82] The extent to which this prerogative extends to external security, however, is not clear.[83] This is unsurprising, for the actual breadth and depth of an act of state is anything but clear. For some, it is a lawful authority for coercive action taken under the royal prerogative;[84] for others, it is a doctrine of immunity;[85] and for others, it is an aspect of non-justiciability.[86] The earlier interpretation is the focus for this article.

A *Breadth*

The logical starting point in addressing acts of state is to question when they apply, for the line between any operation of the war prerogative and an external security prerogative would appear narrow at best. As AV Dicey aptly noted:

> an act done by an English military or naval officer in a foreign country to a foreigner, previously authorised or subsequently ratified by the Crown, is an Act of State, but does not constitute any breach of law for which an action can be brought against the officer in an English court.[87]

Informing Dicey's views were two key cases. Both relate to British naval operations, and claims in tort arising from them, in the 18th century. The first case, *The Rolla*,[88] dates to 1807 and involved proceedings that were brought against an American ship for breaching a pacific blockade of Montevideo established by the Royal Navy. This pacific blockade was arguably below the threshold of war and was exercised in accordance with the prerogative of foreign affairs. It was held that there was sufficient legal authority for the use of force by the Royal Navy because the pacific blockade had been legitimised by the British government.

The second key case, the oft-cited *Buron v Denman* ('*Buron*'), was decided 40 years later.[89] Commander Joseph Denman engaged in a policy of punishment operations against slave ships along the West African coast, blockading river entry points and destroying slave markets. An action was brought against Denman by the Spanish merchants who had owned the slave ships destroyed. Denman was acquitted by the relevant English court, which found that there was no case to answer because the legality of the action was an act of state, which

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82 See, eg, *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369; *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677; *Al-Jedda v Secretary of State for Defence* [2011] 2 WLR 225, 253 ('*Al-Jedda*'); *Rahmatullah* (n 53) 792 [15] (Lady Hale, Lords Wilson and Hughes agreeing).

83 *Habib v Commonwealth* (2010) 183 FCR 62, 66 (Black CJ), 77 (Perram J) ('*Habib*').

84 Jerry Dupont, *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Rothman, 2001) xiii–xix; Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 14–16, 276–85.

85 Harrison Moore, *Act of State in English Law* (Rothman, 1987) 93–4.

86 Moore (n 21) 261.

87 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) 306.

88 (1807) 165 ER 963, [6] ('*The Rolla*').

89 (1848) 2 Ex 167 ('*Buron*').

could not therefore be questioned. Importantly, although Denman's actions were not done under a valid act of war, nor under any rule of international law at the time, the punishment operations were retrospectively supported by the British government.[90] The Crown was thus able, 'by virtue of its prerogative over foreign affairs … subject only to the risk of provoking war', to have a free hand 'in its dealings with aliens outside the jurisdiction of the English courts'.[91]

But are acts of state limited to actions against a foreign national? Most of the case law would appear to adopt the Diceyan approach to acts of state — that is, the lawful authority only extends to actions taken against those not subject to the relevant Crown. *Buron* makes clear that the act must be done to an alien:

> Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death, or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not.[92]

Although the issue of an act of state has never been raised in Australian case law, the High Court of Australia has emphasised that the external affairs prerogative is limited in its breadth to geographically external acts and matters. In the matter of *R v Burgess; Ex parte Henryi*,[93] Evatt and McTiernan JJ explained that the phrase 'external affairs' (in the context of the constitutional external affairs power) denotes 'the whole series of relationships which may exist between States in times of peace or war', including measures to promote friendly relations with other states.[94] They observed that 'this sphere of government is characterised mainly by executive or prerogative action, diplomatic or consular'.[95]

British case law also made clear that the alien must be outside of the territory of the Crown, for those residing within the territory are argued to owe temporary allegiance and be owed temporary protection.[96] However, recent British case law would suggest that this is not necessarily the case, and that the external security prerogative can provide a lawful authority for coercive action taken against subjects of the Crown.

The first relevant case is *Al-Jedda v Secretary of State for Defence* ('*Al-Jedda*').[97] Mr Al-Jedda was a dual Iraqi and British national, interned by British forces in Iraq in 2004. His internment, purportedly imposed for security reasons, was without charge or conviction. Some members of the United Kingdom's Court of Appeal believed that the operation, authorised under a United Nations Security

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90 Holdsworth (n 80) 1321.
91 Ibid.
92 *Buron* (n 89).
93 (1936) 55 CLR 608.
94 Ibid 648. See also 643–4 (Latham CJ).
95 Ibid 649.
96 *Johnstone v Pedlar* [1921] 2 AC 262.
97 *Al-Jedda*' (n 82).

Council Resolution, meant that the conduct was done under an act of state rather than the war prerogative. Relevantly, one member of the Court suggested that the Crown might be able to exercise its external security prerogative powers against its own subjects.[98]

This broad interpretation is not particularly persuasive, unless it is to be argued on the basis that he was detained as an Iraqi citizen, rather than a British citizen. To interpret the external security prerogative otherwise would be dangerous on policy grounds, has not found support in the case law, and risks evolving the prerogative above and beyond its historical limits.

Having found that the prerogative thus only applies to actions against a foreign state and foreign national, a second issue arises as to whether it applies to all acts of state, or to just some? One possible test was advocated by the English Court of Appeal in *Serdar Mohammed v Secretary of State for Defence* ('*Serdar Mohammed*').[99] Again, the matter related to internment and detention by British military forces, this time in Afghanistan. The question turned directly on whether the detention of Mr Mohammed for over 96 hours, without any other legal foundation, could be justified as an act of state. The Court found:

> Notwithstanding the fact that the subject matter may be justiciable, there will be circumstances in which it will be essential that our courts should have a residual power to bar claims founded on foreign law on grounds of public policy. Thus, for example, if *Buron v Denman* fell for decision today, the claim for compensation for loss of the claimant's slaves and damage to his slaving activities would unhesitatingly be rejected, if on no other ground, on the basis that property rights in slaves arising in foreign law should not be recognised and that to afford such a remedy in such circumstances would be offensive to the public policy of this country. However, we would expect that, in circumstances in which the claim is justiciable, such a bar on grounds of act of state would be infrequently applied, and the absence of decided cases supports this view.[100]

Relevantly, in supporting this 'public policy test', the Court then suggested that actions taken under the external security prerogative should be assessed to determine 'whether, in the particular circumstances of each case, there are compelling considerations of public policy which would require the court to deny a claim in tort founded on an act of the Executive performed abroad'.[101] Although the case related to entitlements to certain remedies, rather than canvassing the breadth of the prerogative, it is not difficult to apply the jurisprudential points from one point of law to the other — certain *jus cogens* (like slavery, torture, war crimes, the crime of aggression and crimes against humanity) will be excluded from the lawful authority of an act of state.

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98 Ibid 274 (Elias LJ).
99 [2015] EWCA Vic 843 ('*Serdar Mohammed*').
100 Ibid [349].
101 Ibid.

This test is not applied as a rule within Australia (in contradistinction to Canada),[102] although there is an attraction to the simplicity of a 'public policy' test. How then to quantify what really falls within the public policy of this country? In Moore's application of this principle, ADF members must exercise coercive action in accordance with applicable international legal authority for the operation, and should be in accordance with local law in doing so provided that it is not inconsistent with Australian public policy.[103] He goes on to state that Australia's legal obligations should inform this public policy,[104] presumably on the basis that international law regulates international relations. Moore's position therefore differs substantially to *Serdar Mohammed*, which may reflect a deep anti-slavery tradition in British jurisprudence that has not factored into Australian jurisprudence.[105] It has merit in reflecting and confirming Australia's sovereignty, which is only bound domestically by international law insofar as it is implemented in Australian domestic law.

If international law is implemented, then, or if Australian courts wish to rely upon international obligations to inform a public policy decision, it is important to canvas what international obligations may inform counter-IO campaigns. A starting point is the *International Covenant on Civil and Political Rights* ('ICCPR'), which could provide a clear basis for deterrence punishment operations in response to IOs.[106] The extent to which the ICCPR applies extraterritorially is open to debate, but it is a useful starting point.[107] Two particular articles are relevant: arts 19 and 25:

> **Article 19**
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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102 *Boardwalk Regency Corps v Maalouf* (1992) 51 OAC 64 (Ontario Court of Appeal). See further Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1) *Journal of Private International Law* 130.

103 Moore (n 21) 275.

104 Ibid.

105 *Serdar Mohammed* (n 99).

106 So too could art 1 and the right to self-determination: Michael Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 186.

107 See Beth Van Schaak, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 *International Law Studies* 20.

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 19 sweepingly captures possible media choices for IOs. Article 19(3) equally provides a wide ambit for Australia to define what 'reputation' may constitute and, clearly, sub-s (b) would provide a useful international legal handrail for any counter-IO operation. So too art 25(a) provides a rather large ambit for public policy arguments to be constructed. The freedom guaranteed under arts 19 and 25 was clarified in a *2017 Joint Declaration on Freedom of Expression*, which reads: 'Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.'[108] Overriding this, again, are necessary limitations by reference to (national) security.

Manipulation is a wide, rather than precise, term and could inform interpretations of public policy against interference, which an act of state would authorise. This public policy could be supported by other relevant international legal documents and theories (such as the right to self-determination)[109] and relevant case law. Recently, in *Parti Nationaliste Basque — Organisation Régionale D'Iparralde v France*,[110] the European Court of Human Rights accepted that prohibiting foreign states and foreign legal entities from funding national political parties pursued the legitimate aim of protecting 'institutional order'.[111] Specifically, a French branch of the Spanish Basque Nationalist Party was prohibited from collecting additional campaign funding. The Court placed particular emphasis on the potential for foreign interference and the right of a state to control its own elections.[112] This mirrors the *1976 Declaration of Non-*

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108 Human Rights Committee, *General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25)*, UN HRC, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [19].

109 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.

110 (European Court of Human Rights, First Section, Application No 71251/01, 7 June 2007) [43]–[44].

111 Ibid [44].

112 Ibid [48].

Interference in the Internal Affairs of States,[113] and the *1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*,[114] outlined above. These would all serve to inform and shape Australia's public policy. It is important to reiterate that the lawful authority for these punishment operations is still constitutional executive power. The United Kingdom Supreme Court confirmed this in *Rahmatullah [No 2] v Ministry of Defence* ('*Rahmatullah*').[115] This has been interpreted as meaning that the application of the act of state defence does not depend on establishing that the allegedly wrongful act or the wider military operation were lawful in international law.[116]

The High Court has previously held that United Nations Security Council resolutions would not provide a source of lawful authority for the Commonwealth executive government to undertake activities within Australia that would otherwise be unlawful.[117] However, that case did not consider executive actions undertaken outside Australia, which arguably raise different considerations. Accordingly, even if the Commonwealth's executive power is not subject to any requirement to conform to international law,[118] international law (including agreements and resolutions of international bodies) may be relevant to the substance of the prerogative power with respect to external affairs. It may assist in demonstrating that a particular overseas deployment involves an exercise of prerogative power with respect to external affairs. Accordingly, it might provide a basis for its exercise but not its scope.

B *Depth of Power*

There are real questions about the extent to which the Commonwealth executive government can exercise coercive powers abroad in reliance on the prerogative power with respect to external affairs. This is likely to depend on the specific facts and circumstances.

It might be possible to argue that certain coercive actions are supported by the prerogative power with respect to external affairs. Justice Logan has written extra-curially on the power and remarked that it may provide the authority for extra-territorial, summary executions of suspected terrorists of Australian citizenship.[119] The external affairs prerogative would most likely be able to provide a wide depth of power if supported by some form of international agreement (even if it were a secret exchange of letters within a regional

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113 United Nations General Assembly (n 5).

114 *United Nations Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981)..

115 *Rahmatullah* (n 52) [5] (Lady Hale, Lords Wilson and Hughes agreeing).

116 *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [56].

117 *Bradley v Commonwealth* (1973) 128 CLR 557, 583.

118 *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622, 634 [20].

119 Logan (n 19) 44.

partnership), which in turn could only be subject to challenges before the High Court of Australia. If questioned on which international legal framework it is relying upon, the Australian Government would at most be required to provide some form of affidavit.[120] The recent case of *Alexander v Minister for Home Affairs* has highlighted that this evidentiary issue may also be surmounted if a submission was made 'by a responsible government agency to a parliamentary inquiry'. In that case, Gageler J held that such material 'cannot be dismissed as beyond the scope of the material which might properly inform judicial identification of the purpose of a law'.[121] A report from the Australian Security Intelligence Organisation to the recent Select Senate Committee on Foreign Interference through Social Media would possibly suffice.[122]

For operations solely within Australia, and in contradistinction to the war prerogative, the ratio to be taken from *The Rolla* would suggest that,[123] although operations can occur below the threshold of war, lethal force may only be used in self-defence.[124] The ratio of *Buron* would not appear to alter the level of force that can be applied with respect to the destruction of property.[125] It would therefore appear to authorise distributed denial of service attacks, data manipulation and data destruction. The United Kingdom decision of *Al-Jedda* would suggest that it is viable to curtail individual liberties under the act of state doctrine,[126] while *Serdar Mohammed* would seem to suggest that, so long as a relevant public policy is underlying the conduct, then non-lethal coercive action can be taken.[127] These latter two decisions would also implicitly suggest that destruction of property — a lesser offence than curtailment of civil liberties — is a valid action under the external security prerogative.

However, in *Nissan v Attorney-General*,[128] several judges expressed reservations about whether the Crown's prerogative power with respect to external affairs would enable it to interfere with other persons' legal rights in the context of a peacekeeping mission. This case concerned the acquisition by British armed forces of a hotel in Cyprus for use as their headquarters. The House of Lords rejected an argument that this action was an 'act of state', but it was not necessary to determine issues regarding the scope of the Crown's prerogative powers.

Lord Reid stated that he saw 'great difficulty in holding that the prerogative [with respect to taking property in the context of war] can operate in foreign

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120 This surmounts the evidential issues in the *Australian Communist Party Case*(n 51).
121 *Alexander v Minister for Home Affairs* [2022] HCA 19, 42 [126] (Gageler J).
122 Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Select Committee on Foreign Interference through Social Media* (Report, August 2023) app 1, specifically: Submission 2 (Australian Security Intelligence Organisation) and Submission 5 (Australian Signals Directorate).
123 *The Rolla* (n 88).
124 (1807) 165 ER 963, [6].
125 *Buron* (n 89).
126 *Al-Jedda* (n 82).
127 *Serdar Mohammed* (n 99).
128 [1970] AC 179.

territory'.[129] Likewise, Lord Wilberforce had difficulty in seeing how the taking or destruction of a British subject's property in an independent territory could be justified by the exercise of the prerogative, given that the United Kingdom executive government enjoyed no sovereignty in Cyprus.[130] Lord Pearce reached the view that the prerogative could apply, at least against British subjects.[131]

More recently, in *Rahmatullah*, Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption expressed doubt about whether an appropriation of property, with or without compensation, could be an act of state outside the context of an active military operation.[132]

These British cases might suggest that, outside the context of war or warlike operations, it is questionable whether the prerogative with respect to external affairs provides a source of power to engage in executive actions that have a direct impact on civilians overseas. The external affairs prerogative is more properly interpreted as expanding the breadth, but not the depth, of executive power. In this respect, it is quite similar to the nationhood power under Australian constitutional executive power.[133] This is in juxtaposition to the war prerogative, which has an almost unlimited depth of power. In this respect, it is the 'sister' prerogative power to 'keep the peace of the realm'.[134]

IV Does International Law Limit the Prerogative?

There are a wide range of actions that could be taken to counter IOs, subject to abridgement of the prerogative by domestic statute. When addressing the limits of any actions taken under the framework of the war prerogative, an important difference between this article (concerned with externality) and the domestic operations under prerogative power is that the *Australian Constitution* does not necessarily limit any extraterritorial conduct of the ADF. Any limitations must therefore arise from domestic statute law, rather than constitutional law. This is particularly so considering that the external security prerogative, as explained above, is best interpreted as applying only to operations against foreign nationals and foreign states.

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129 Ibid 213.
130 Ibid 236.
131 Ibid 229.
132 *Rahmatullah* (n 52) 799 [36] (Lady Hale, Lords Wilson and Hughes agreeing), [94] (Lord Sumption).
133 Samuel White and Cameron Moore, 'Calling Out the ADF Into the Grey Zone' (2022) 42(1) *Adelaide Law Review* 479.
134 The prerogative of keeping the peace of the realm, which authorises domestic operations in the United Kingdom and Australia (to some extent) was held to be the same breath and depth as the war prerogative: see *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26 at 55 per Purchas LJ.

There are, of course, limits. Executive prerogative powers can be, and are, abridged by statute.[135] Most legislation in Australia with respect to the military is, however, internally focused.[136] Moore argues that legislation of general application, such as cybercrime legislation, should not apply to ADF actions carried out under the war prerogative because, as a matter of statutory construction, it is presumed that Parliament would not limit the prerogative powers of the Crown without express words.[137]

A similar argument is made with respect to external security operations conducted under the external affairs prerogative, though with less strength due to the difference in nature and scope between the war and external affairs prerogatives.[138] These interpretative arguments are weakened in the case of the cybercrime legislation, because specific exemptions are provided to certain intelligence agencies for actions done in the performance of agency functions but not for the ADF. The relevant legislation here is *Criminal Code Act 1995* (Cth) pt 10.6, which applies to all external offensive cyber operations. The Australian Signals Directorate have immunities conferred under the *Intelligence Services Act 2001* (Cth),[139] which the ADF do not currently enjoy. The lack of immunity may change soon.[140] While it might be possible for the Australian Government to order the ADF (as opposed to members of the National Intelligence Community, who are constrained by statute) to conduct these forms of operations externally despite the legislation to the contrary, and to rely upon a *nolle prosequi* movement from the relevant public prosecutor, this carries high legal risk.

The externally focused legislation is concerned with conduct during armed conflict, arising from implementation of various international humanitarian law conventions domestically.[141] These legislative provisions apply even when war is not declared, as contemporary discussions of alleged breaches by Australian Special Forces in Afghanistan demonstrate.[142] These provisions have only created criminal offences for conduct during warfare; they have not abridged the lawful authority to *conduct* warfare. It remains to be seen, however, if international law and international legal obligations constrain the breadth or depth (or both) of constitutional executive power.

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135 White (n 11) 44.
136 See the *Defence Act 1903* (Cth) generally.
137 Moore (n 21) 227. Moore relies upon *Barton v Commonwealth* (1974) 131 CLR 477.
138 Moore (n 21) 297–8.
139 *Intelligence Services Act 2001* (Cth) s 7.
140 *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Report, 4 December 2020). See 51 [3.103] for recommendations to do with ADF powers.
141 See *Criminal Code Act 1995* (Cth) div 268.
142 Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Final Report, November 2020).

A *The United Kingdom Position*

British courts have held that, even if the prerogative power with respect to war or external affairs is a source of legal authority, it does not provide a complete shield from legal liability or public law proceedings in light of international obligations. It remains to be seen if this is the Australian position.

In *Rahmatullah*, the United Kingdom Supreme Court considered that the act of state defence would be available in relation to acts done in the 'conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law)'.[143] For example, British courts have stated that a detainee may be able to seek a writ of habeas corpus to challenge the lawfulness of their detention in certain circumstances.[144]

Further, there are comments in *Rahmatullah* which suggest that certain types of coercive activities do not fall within the prerogative power, even in times of war and warlike operations. Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption considered that the act of state defence under English common law does not apply to acts of torture or to the maltreatment of prisoners or detainees.[145] Lady Hale also considered that these types of activities are not 'governmental' in character, and therefore are not immunised by the act of state defence.[146] Lord Sumption regarded these actions as beyond the scope of the prerogative power, stating:

> Given the strength of the English public policy on the subject, a decision by the UK Government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the Royal prerogative.[147]

Torture is of course prohibited by Australian statute,[148] so the issue raised by their Lordships would not appear in Australian courts. However, *Rahmatullah* would seem to raise three different tests:

(a) Was there torture?

(b) Was the conduct 'governmental'?

(c) Was the conduct consistent with a public policy test?

In the context of punishing states, and through the lens of aggressive deterrence theory outlined at the start of this article, tests (b) and (c) are highly applicable. Assessments of what is 'governmental' are likely to shift with society. Arguably,

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143 *Rahmatullah* (n 52) 799 [37] (Lady Hale, Lords Wilson and Hughes agreeing).

144 See, eg, *Al-Jedda* (n 82) [218]–[219], [222] (Elias LJ); *Mohammed v Secretary of State for Defence* [2017] HRLR 1, [101] (Lord Sumption and Lady Hale).

145 Ibid 799 [36] (Lady Hale, Lords Wilson and Hughes agreeing), [96] (Lord Sumption).

146 Ibid 799 [36].

147 Ibid 817 [96].

148 *Criminal Code Act 1995* (Cth) ss 268.13, 268.25, 268.73.

protecting Australian interests through an act of state will always be 'governmental' (if authorised) but the particulars of *Rahmatullah* and the alleged misconduct are accepted as the only authority in the area. To that end, some broad generalities can be drawn that might limit punishment operations: deliberately attacking civilians and civilian infrastructure; prolonged detention of civilians; and the use of prohibited weapons under international law (such as, through cyber means, releasing biological, chemical or nuclear material) are all likely to be held to fall outside the scope of the war prerogative by falling foul of consistency with public policy.

This mirrors the reasoning of Legatt J in *Alseran v Ministry of Defence*.[149] His Honour suggested that there are limits to the scope of the Crown's prerogative powers to engage in conduct that would harm civilians, even in the context of military operations, finding that it would be 'most surprising' if the United Kingdom executive government had authorised British armed forces to detain people in circumstances that are not permitted by international law.[150] Leggatt J observed:

> acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.[151]

B *The Australian Position*

There is very limited Australian case law dealing with these issues. This provides an interesting question of law. Although there is an argument to be made that the principle of legality could arguably incorporate international legal rights into domestic law,[152] this is not the place for its discussion.

There is only one particularly relevant precedent that can be applied, which is the Federal Court decision in *Habib v Commonwealth* ('*Habib*'). That case involved the alleged complicity by Australian intelligence agents in the cruel and inhumane treatment of Habib after his capture in Afghanistan. The Federal Court emphasised that the Commonwealth's prerogative powers with respect to external affairs would not authorise the Commonwealth to engage in crimes against humanity, or to breach Commonwealth legislation.[153] The earlier situation would be in breach of a public policy test at any rate (although arguably completely legal under the war prerogative) and the latter is a matter for domestic law. *Habib* does not, therefore, provide much guidance in determining the

149 [2017] EWHC 3289 (QB), [325].
150 Ibid [325].
151 Ibid [71].
152 Jamie Blaker, 'The Constitutional Principle of Legality' (2022) 44(4) *Sydney Law Review* 559.
153 *Habib* (n 83) [114], [124], [128] (Jagot J, Black CJ agreeing).

Australian position. It is clear that Australia's approach to interpretations of the royal prerogative (as opposed to the existence of an element of the royal prerogative) can differ from the British approach — *Barton v Commonwealth*[154] (which related to the test for abridgment) is a clear indicator of that. Currently, Australia's approach seems consistent with Moore's. Specifically, international law will inform public policy, but it will not provide a definitive limit to constitutional executive power.

How, then, should this power operate with respect to counter-IO campaigns? In the 1970s, the United Nations believed that responding to foreign interference is a matter for the constitutional prerogatives of States, but of course international law has developed since then. There is nothing prohibiting dual legal authorities for responding to foreign interference, but the focus of this paper has been on domestic law. It is clear that the war prerogative, and external affairs prerogative, both provide sufficient breadth and depth to respond to foreign interference. Some possible organs of the State — such as members of the National Intelligence Community — operate under the *Intelligence Services Act* and this statute necessarily abridges many of the prerogatives discussed in this paper. For the ADF, however, the non-statutory authority is much wider.

V Conclusion

This article has addressed the royal prerogative in its external aspects, rather than domestic (such as the power to keep the peace of the realm). In so doing, it has canvassed the thresholds for an exercise of the war prerogative as well as external security. The article was particularly concerned with the impact of international law on constitutional executive power. It found that Australia's and Britain's approaches to international law differ considerably. This was posited as being the difference between a written and unwritten constitution. Australian jurisprudence has been quite clear that international law can be a relevant consideration for matters of public policy, but has no binding impact on interpretations or exercises of the royal prerogative.

Sections II and III demonstrated that, although the war and external security prerogatives are often noted to be plenary, there are some domestic and international legal limits. British jurisprudence has held that the external security prerogative — the power that essentially allows the government to enact and enforce foreign relations — should as a matter of good public policy abide by international law. This has not been found to apply for the war prerogative. Section IV discussed that, through a deterrence perspective, if there is any question of credibility it is best to err on the side of caution. It is clear that international law can be of assistance in countering IOs (particularly in the

[154] (1974) 131 CLR 477.

international legal rights and obligations found within Articles 19 and 25 of the ICCPR, and relevant security exceptions). International law should also, as a matter of public policy, apply to counter-IO campaigns.

SCREEN SCRAPING IN AUSTRALIAN FINANCE

NATALIA JEVGLEVSKAJA* AND ROSS P BUCKLEY†

Millions of Australians give their online banking credentials to third parties so as to gain access to financial products and services enabled by the analysis of the data in their bank accounts. This practice of Screen Scraping ('SS') has contributed significantly to the rise of the FinTech industry. While the risks SS entails are significant, nowhere has the practice been formally outlawed despite the availability of safer data transfer arrangements under Open Banking regimes. We examine approaches to SS in the European Union, the United Kingdom and Australia, and argue that the practice should be prohibited here. Such a ban would have two salutary effects: it would protect consumers in financial hardship who use payday loans and it would accelerate uptake of the Consumer Data Right.

I INTRODUCTION

By 2017, when the Australian Government announced its intention to roll out an economy wide Consumer Data Right ('CDR'), over two million Australians were giving away their bank account login credentials to third parties.[1] These third parties 'scraped' data from a customer's internet banking interface and used it to offer financial products and services, in addition to, or in lieu of, the products and services offered by the customer's bank.[2] Colloquially known in finance circles as Screen Scraping ('SS'), this practice had boomed since 2001, when only perhaps 5000 Australians a year were using it.[3] SS gives businesses (mostly FinTechs) access to customer data without further identification vis-à-vis the account hosting bank and is now widely used globally. For example, as of 2021, more than

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† Australian Research Council Laureate Fellow and a Scientia Professor at UNSW Sydney. The authors gratefully acknowledge the financial support of the ARC Laureate Fellowship on regulating the data revolution (FL200100007). See 'The Financial Data Revolution: Seizing the Benefits, Controlling the Risks' (Web Page, 2023) <https://fintechrevn.org/>, and the expert research assistance of Katherine Cheng. These views are solely the authors' and not necessarily those of the Australian government or Research Council.

1 FinTech Australia, Submission No 182 to Productivity Commission, *Inquiry into Data Availability and Use: Open Financial Data* (August 2016) 4 ('FinTech Submission'); Treasury (Cth), *Report of the Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Report, December 2017) ('*Review into Open Banking*') 51, 72.

2 *Review into Open Banking* (n 1) 51.

3 Australian Securities and Investments Commission, *Account Aggregation in the Financial Services Sector* (Consultation Paper No 20, May 2001) 19 ('*Account Aggregation*').

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4 million Canadians — making up over 10 per cent of Canada's population — reportedly rely on financial services that employ SS technology.[4] In the US, the Financial Data Exchange ('FDX')[5] estimates that, as of 2020, data access and sharing for 65–85 million US consumers — 20–25 per cent of the population — was provided through shared customer login credentials.[6]

The advantages and downsides of commercial SS, aka 'digital data capture', have been thoroughly discussed.[7] Some regard it to be an outrageous practice that needs to be excised from finance as quickly as possible. Others maintain that SS enables delivery of novel products and services customers could not otherwise access.[8] Arguing that there is no evidence of consumer harm from SS, its proponents suggest the FinTech industry would be crippled should it be outlawed.[9] Banks accuse FinTechs of stealing their customers' data. FinTechs accuse banks of restricting access to information that should be controlled by customers.

Where SS is the only way to access customer data required for the provision of a service, opposition to a ban is, perhaps, understandable. If businesses reliant on data cannot access it, they cannot compete in the financial services market. However, competition, desirable as it is, should neither come at the expense of data safety and security nor facilitate exploitation of financially vulnerable members of our society.

Although the risks that SS entails for businesses and customers are real and serious, the practice has not been formally outlawed anywhere. Misconceptions abound that SS has been banned in Europe.[10] However, while the European Union ('EU') and United Kingdom ('UK') have commendably restricted the practice, it endures there, as we demonstrate. Jurisdictions that facilitate and regulate Open Banking and Open Finance, such as the EU, the UK, and Australia, expect SS to become redundant with the wider adoption of the Application Programming Interfaces ('APIs'), which underpin Open Banking and Open Finance and are a far

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4 Advisory Committee on Open Banking, *Final Report* (Report, April 2021) 7.

5 Financial Data Exchange ('FDX') is a non-profit, industry standards body, dedicated to unifying financial services around a common, secure, and interoperable technical standard for user-permissioned sharing of financial data: see Financial Data Exchange 'About FDX', *Financial Data Exchange* (Web Page, 2023) <https://financialdataexchange.org/FDX/FDX/About/About-FDX.aspx?hkey=dffb9a93-fc7d-4f65-840c-f2cfbe7fe8a6>.

6 Financial Data Exchange, Comments to Consumer Financial Protection Bureau, *Consumer Access to Financial Records: Advanced Notice of Proposed Rulemaking* (2020) 9.

7 See Part IV, below.

8 For various sources that oppose but also those that support Screen Scraping ('SS'), see Part IV, below.

9 Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Interim Report* (Report, September 2020) 145 [5.58], 146 [5.62], 152 [5.58] ('*Senate Select Committee Interim Report on Financial Technology and Regulatory Technology*').

10 See further n 40, below.

safer mode of data transfer.[11] Yet, the rollout of Open Banking is slow and inertia powerful.

We argue that Australia should, when the timing is propitious, explicitly outlaw SS to protect consumers experiencing financial hardship from unscrupulous non-bank lenders and to accelerate the implementation of CDR. Without regulatory intervention there is a real risk that the costs of accreditation under the CDR regime, inertia and path dependence, and the lure of the inappropriate use of data that SS offers, will all combine to see this practice endure well past when it is in the interests of consumers and the broader economy.

The article is structured as follows. Part II examines the origins of SS. Part III explores the legal and regulatory frameworks in the EU and the UK, in general for context, and specifically to debunk the myth that SS is banned in these jurisdictions. We also consider the lack of enthusiasm of the Australian Government (until most recently) to proactively regulate SS in Part III.[12] Part IV examines the upsides and downsides of SS, and Part V the arguments for its prohibition. Part VI concludes.

II Screen Scraping: Origins and Evolution

Scraping data,[13] including financial data, goes back to the emergence of 'data aggregation', also known as 'account aggregation', in the late 1980s in the US.[14] A select few wealthy clients of some US banks are reported to have been benefitting from data accumulation features that allowed for an easy account review since as long ago as the 1980s.[15] As more data was increasingly captured digitally at lesser cost, a new industry sprang up to make a unique value proposition to consumers, namely to 'aggregate their financial lives onto one web site'.[16]

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11 *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 144 [5.54]; The Australian Government the Treasury, *Statutory Review of the Consumer Data Right* (Report, 2022) 31 <https://treasury.gov.au/sites/default/files/2022-09/p2022-314513-report.pdf>.

12 See also Part VB below.

13 Screen Scraping ('SS') has many names. It is also referred to as 'data scraping', 'web scraping', 'web harvesting', or 'data harvesting'.

14 See Julia Gladstone, 'Data Mines and Battlefields: Looking at Financial Aggregators to Understand the Legal Boundaries and Ownership Rights in the Use of Personal Data' (2001) 19(1) *Journal of Computer and Information Law* 313, 315. See also Jennifer Aguilar, 'The Data Dilemma: Regulating the Lifeblood of Fintech Innovation' *Business Law Today* (Web Page, 8 April 2021) <https://businesslawtoday.org/2021/04/data-dilemma-regulating-lifeblood-fintech-innovation/>. See also Don Cardinal and Nick Thomas, 'Data Access Technology Standards: A History of Open Banking Data Access' in Linda Jeng (ed), *Open Banking* (Oxford University Press, 2022) 91, 94. See also Michael Kitces, 'The Six Levels of Account Aggregation #FinTech Solutions and PFM Portals for Financial Advisors', *Kitces.com* (Blog Page, 9 October 2017) <https://www.kitces.com/blog/six-levels-account-aggregation-pfm-fintech-solutions-accounts-advice-automation/>.

15 Gladstone (n 14).

16 Kimberly Wierzel, 'If You Can't Beat Them, Join Them: Data Aggregators and Financial Institutions' (2001) 5(1) *North Carolina Banking Institute* 457, 465.

Typically, national banks ('aggregator banks') provided aggregation services under their brand name through third parties specialising in gathering, storing and presenting data to the customer ('data aggregators').[17] The data could range from information available publicly online (such as travel or store specials and real estate information), personal account information (including credit cards and deposit accounts),[18] to non-financial information (such as balances from frequent flyer or other reward programs or data from utility and insurance companies).[19] To access personal information, aggregators relied on customer-provided usernames and passwords. To benefit from the service, a customer had to nominate websites and the information to be collected therefrom and share their user credentials for each. The advantage for the customer was obvious: they could access all of their nominated financial and other information in one place and needed to remember only *one* username and password.[20]

Banks were eager to offer account aggregation solutions to increase the usefulness of their banking services to customers. They saw it as an opportunity to leverage their position as trusted (financial) intermediaries and thus deepen their customer relationships.[21] Most importantly, banks soon realised that the choice for them may be 'either to aggregate or be aggregated', as the prospect of losing their customers to an aggregation service provided by a competing financial institution was real and daunting.[22] Furthermore, because data aggregation facilitated an overview of businesses the customer was using and consequently offered new marketing opportunities, independent account aggregation services soon penetrated the market with commercial propositions with which banks struggled to compete.[23]

Before long, the business model of account aggregation via data scraping spread to Australia and other jurisdictions, including South Korea, Japan, and Europe.[24] The Australian Securities and Investment Commission ('ASIC')

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17 Office of the Comptroller of the Currency, 'Bank-Provided Account Aggregation Services: Guidance to Banks' *Office of the Comptroller of the Currency* (Bulletin, 28 February 2001) <https://www.occ.gov/news-issuances/bulletins/2001/bulletin-2001-12.html> ('*Guidance to Banks*'). See also Wierzel (n 16) 458.

18 *Guidance to Banks* (n 17). See also Federal Financial Institutions Examination Council, 'E-Banking, IT Examination Handbook' (Handbook, August 2003) appendix D, D-1.

19 *Account Aggregation* (n 3) 7.

20 Ibid 9.

21 *Guidance to Banks* (n 17). See also Office of the Comptroller of the Currency, 'OCC Issues Guidance on Bank-Provided Aggregation Services' (News Release, 2 March 2001) <https://www.occ.gov/news-issuances/news-releases/2001/nr-occ-2001-22.html>.

22 See Gladstone (n 14) 314. See also Jeffrey Hirschey, 'Symbiotic Relationships: Pragmatic Acceptance of Data Scraping' (2014) 29 *Berkeley Technology Law Journal* 897, 921.

23 Gladstone (n 14) 315–16. See also Julie Williams, 'The Impact of Aggregation on the Financial Services Industry' (Speech, American Banker's 2nd Account Aggregation Conference, 23 April 2001).

24 While account aggregation could also be done via 'direct feed arrangement' with the financial institution hosting the data (ie, Application Programming Interfaces), this method was considered costly and time-consuming and, consequently, less attractive for aggregators. See *Account Aggregation* (n 3) 2, 15, 18, 21; Hiroshi Fujii et al, 'E-Aggregation: The Present and Future of Online Financial Services in Asia-Pacific' (Working Paper No 2002-06, Massachusetts Institute of Technology, September 2002) 2.

reported that seven account aggregation service providers were operating here by April 2001: two financial institutions, a stockbroker, a retail web-portal and two other businesses.[25] Marketing campaigns emphasised numerous benefits for consumers, above all the more efficient management of personal finances.[26]

Indeed, over time many areas of social activity have come to rely on data scraping: internet auctions,[27] search engines (Google, Bing, Yandex, etc), airline, vehicle and holiday-housing price aggregation,[28] targeted advertising,[29] website preservation,[30] academic research,[31] journalism,[32] and many more.[33] Data scraping has become an important part of providing 'user convenience' and saving time.

In the financial sector, data aggregators expanded their operational systems and moved to selling data-access services to a growing number of FinTechs who did not have capacity to collect the data themselves, but who, armed with that data, could potentially challenge the incumbents in the provision of financial products and services.[34] Today, companies that utilise SS for data aggregation do so for a range of reasons and use cases. Some access customers' bank accounts on an ongoing basis to provide investment products or financial management tools;

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25 *Account Aggregation* (n 3) 17.

26 See Jessica Aldred, 'Ninemsn Launches Account Master', *Internet News* (online, 11 December 2000) <https://www.internetnews.com/it-management/ninemsn-launches-account-master/>.

27 Trevor Jeffords, 'What Is "Screen Scraping" and Is It Lawful in Australia?' (2001) 12 *Computers and Law* 24. See also Michael Schrenk, *Webbots, Spiders, and Screen Scrapers* (No Starch Press, 2nd ed, 2012) 323.

28 Expedia, Orbitz, Kayak, Skyscanner, Booking.com, etc.

29 Sergey Ermakovich, 'How to Use Web Scraping for Marketing and Product Analytics', *Venturebeat* (online, 8 April 2022) <https://venturebeat.com/2022/04/08/how-to-use-web-scraping-for-marketing-and-product-analytics/>.

30 Adrian Brown, *Archiving Websites: A Practical Guide for Information Management Professionals* (Facet Publishing, 2006) 50–9. See also Digital Preservation Coalition, 'Preserving the Web' (Note, 13 September 2018) <https://www.dpconline.org/docs/knowledge-base/1861-dp-note-10-preserving-the-web/file>; Library of Congress, 'Saving the World Wide Web' (Web Page) <https://www.digitalpreservation.gov/series/challenge/web_harvest_challenge.html>.

31 Alex Luscombe, Kevin Dick and Kevin Walby, 'Algorithmic Thinking in the Public Interest: Navigating Technical, Legal, and Ethical Hurdles to Web Scraping in the Social Sciences' (2022) 56 *Quality and Quantity* 1023, 1024; Geoff Boeing and Paul Waddell, 'New Insights into Rental Housing Markets across the United States: Web Scraping and Analyzing Craigslist Rental Listings' (2016) 37(4) *Journal of Planning and Education and Research* 457, 459.

32 Rachel Goodman, 'Tips for Data Journalism in the Shadow of an Overbroad Anti-Hacking Law', *American Civil Liberties Union* (online, 13 October 2017) <https://www.aclu.org/news/privacy-technology/tips-data-journalism-shadow-overbroad-anti-hacking-law>. See also Nael Shiab, 'On the Ethics of Web Scraping and Data Journalism', *Global Investigative Journalism Network* (online, 12 August 2015) <https://gijn.org/2015/08/12/on-the-ethics-of-web-scraping-and-data-journalism/>.

33 See Han-Wie Liu, 'Two Decades of Laws and Practice around Screen Scraping in the Common Law World and Its Open Banking Watershed Moment' (2020) 30(1) *Washington International Law Journal* 28, 29; Andrew Sellars, 'Twenty Years of Web Scraping and the Computer Fraud and Abuse Act' (2018) 24 *Boston University Journal of Science and Technology Law* 372, 374.

34 However, banks still use SS too: see *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) [5.57]. See also Andres Wolberg-Stok, 'Open Banking Ecosystem and Infrastructure: Banking on Openness' in Linda Jeng (ed), *Open Banking* (Oxford University Press, 2022) 13, 17.

others access account information on a one-off basis, for example, to view transaction records as part of a loan assessment process.[35]

Two business models have emerged. SS can be undertaken by a FinTech offering the underlying service, such as a personal finance management tool ('PFM').[36] A customer will share her banking credentials with such a FinTech so it can retrieve her financial data from her bank, which the FinTech then typically stores along with the customer's ID and password in its database.[37]

The more common model, however, is where FinTechs use one of a small number of companies specialising in data aggregation to act as an intermediary between the FinTech and the customer.[38] This model limits the number of parties needing to hold a customer's credentials and include Plaid, Envestnet | Yodlee, Finicity, MX and others. These entities connect to financial institutions hosting customer accounts and collect, package and deliver the customer data to the FinTech.[39] This enables the FinTech to focus its time and resources on the development of core products and services.

III Legal Frameworks

The frequency and certainty with which industry and consumer rights organisations assert that SS has been generally outlawed in the EU and the UK is striking, given how wrong this assertion is.[40] While most expert commentary

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35 *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) [5.48]–[5.49].

36 Personal finance management ('PFM') tool is a software application that helps its users to manage their financial activities. PFM solutions range from transaction analysis and spending categorisation to personalised insights and recommendations, such as on savings or investments. See, eg, 'PFM Solutions for Banks', *Moneythor* (Web Page, 1 April 2021) <https://www.moneythor.com/2021/04/01/pfm-solutions-for-banks/>.

37 Financial Data Exchange, 'ABCs of the APIs' (Organization Overview, Financial Data Exchange, 2021) 3–5.

38 Ibid 3–4.

39 *Review into Open Banking* (n 1) 73; FinTech Submission (n 1) 4; Nizan Packin, 'Show Me the (Data about the) Money!' [2020] (5) *Utah Law Review* 1297. See also Rebecca Ayers and Suman Bhattacharyya, 'Why Screen Scraping Still Rules the Roost on Data Connectivity', *Envestnet Yodlee* (Blog Post, 18 June 2021) <https://www.yodlee.com/why-screen-scraping-still-rules-roost-data-connectivity>.

40 'Screen scraping has already been banned in the UK and Europe under Strong Customer Authentication rules': Julian Bajkowski, 'Screen Scraper Ban Touted to Weed out Data Predators', *ITNews* (online, 15 January 2020) <https://www.itnews.com.au/news/screen-scraper-ban-touted-to-weed-out-data-predators-536516>; 'Screen scraping has been banned in the UK and it's difficult to see the practice being allowed to continue in Australia for much longer once Open Banking is more mature': Den Burykin, 'Open Banking Pushback Shows Consumers Need Guidance', *Finextra* (online, 9 May 2022) <https://www.finextra.com/blogposting/22258/open-banking-pushback-shows-consumers-need-guidance>; '[U]nlike in the UK where screen scraping was first banned, it is still legal in Australia': Adatree, *Uncovering the Differences between Open Banking and Screen Scraping* (Report) <https://adatree.com.au/screen-scraping-open-banking-report#:~:text=Unlike%20screen%20scraping%2C%20Open%20Banking,these%20pu

rightly observes that restrictions are limited to payments, it often fails to differentiate between the three constitutive components of conventional SS practice, namely accessing customer account credentials, the technical process of 'scraping' data from the customer-facing online interface, and the impersonation of the customer.[41] The elements of impersonation and credential sharing are of most concern to the opponents of SS.[42] Only the element of impersonation, however, is no longer tolerated by the EU and the UK's frameworks, with the other two elements remaining, as is shown below. Importantly, in certain circumstances all three components of 'traditional' SS can no longer be employed. As we will demonstrate, where a bank has implemented a compliant, stress-tested, and widely-used API it can be exempt from the duty to establish a contingency mechanism under which customer data is accessed through 'conventional' SS. The value of this restriction remains significantly constrained, however, by its limitation to payment accounts.

This Part first examines legal and regulatory frameworks on the sharing of customer financial data in the EU and the UK and then discusses the stance on SS of the Australian government.

A *The EU Framework*

In the EU, Directive 2015/2366 on payment services in the internal market ('*PSD2*')[43] mandated the move to 'Open Banking' by creating a digital environment that enables customers to consent to third parties accessing their payment account information or making payments on their behalf.[44] Seeking to promote competition and innovation in the EU and EEA payment sectors, the

rposes%20than%20screen%20scraping.>. 'The Bank … suggests that the Inquiry examine if a ban on screen scraping … as has been introduced in the United Kingdom would support the financial sector's transition away from the practice': Reserve Bank of Australia, Submission to Treasury (Cth), *Inquiry into Future Directions for the Consumer Data Right* (23 April 2020) 3; 'Screen scraping has been banned in the UK and the EU under the Payment Services Directive 2 (PSD2)': Financial Rights Legal Centre and the Consumer Action Law Centre, Submission No 36 to Senate Select Committee, *Inquiry into Financial Technology and Regulatory Technology* (September 2019) 18.

41 See, eg, John Casanova and Max Savoie (eds), *Payment Services, Law and Practice* (Edward Elgar Publishing, 2022) 29. For correct and comprehensive analysis, see Han-Wei Liu, 'Shifting Contour of Data Sharing in Financial Market and Regulatory Responses: The UK And Australian Models' (2021) 10(3) *American University Business Law Review* 287, 294.

42 See Part IVA, below.

43 *Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing Directive 2007/64/EC* [2015] OJ L 337 ('*PSD2*'). *PSD2* came into force on 12 January 2016 (replacing an earlier regulation from 2009). It had to be transposed into national legislation by 13 January 2018: see art 115(1). On national transposition, see *National Transportation Measures Document 32015L2366* [2018].

44 While there is no one definition of Open Banking, from the European perspective, Open Banking, at a minimum, includes products and services based on the sharing of 'payment account data' as mandated by *PSD2* (n 43). See, eg, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data* [2020] COM 66, 30.

Directive opened them to a range of Payment Service Providers ('PSPs'), including non-bank entities — FinTechs — that offer consumer- or business-oriented payment services based on access to data from payment accounts.[45] Two new categories of such services were regulated and harmonised under PSD2: Account Information Services ('AIS') and Payment Initiation Services ('PIS'),[46] respectively offered by Account Information Service Providers ('AISPs'), and Payment Initiation Service Providers ('PISPs').[47]

AIS collect and consolidate data from a customer's online payment accounts held with multiple Account Servicing Payment Service Providers ('ASPSPs')[48] — usually banks — in a single place allowing her to better manage personal finances by analysing spending patterns and financial needs in a user-friendly manner.[49] Companies such as Mint in the US, Money Dashboard in the UK, and Frollo[50] in Australia are all now leading brands in this field.

Sofort in Germany and iDeal in the Netherlands pioneered business models in PIS. These payment services radically simplified online payments by acting as a 'bridge' between the customer's financial institution and the merchant's account.[51] Instead of using a credit card and paying credit card fees or going through the hassle of logging into their bank account and then filling in the recipient's account details and other information required for the purchase, the customer can have a facilitator initiate a payment from their account to a payee's account.[52] With PIS, the customer only needs to authenticate with their bank, select the preferred account and confirm a payment order directly through the service she is using.[53]

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45 Payment Service Providers ('PSP') is a broad term that includes banks and third parties providing selected financial services, including AIS and PIS: see *PSD2* (n 43) arts 1, 4(11), annex I. See also European Banking Federation, 'Guidance for Implementation of the Revised Payment Services Directive' (PSD2 Guidance, EBF, 20 December 2019) 6.

46 As defined in *PSD2* (n 43) arts 4(16) and 4(15) respectively.

47 As defined in *PSD2* (n 43) arts 4(18), 66, 4(19), 67 respectively. See also UK Finance, 'PSD2 Guidance: Open Access Guidance for Account Servicing Payment Service Providers' (Guidance, April 2020) [1.1].

48 For a definition of Account Servicing Payment Service Providers ('ASPSP'), see *PSD2* (n 43) art 4(17).

49 *PSD2* (n 43) Preamble, recital 28.

50 In July 2020, Frollo has been acquired by NextGen.Net, Australian market leader and innovator in lending technology: see Frollo, 'NextGen.Net Acquires Frollo to Lead the Way in Open Banking', (Blog Post, 7 July 2020) <https://frollo.com.au/blog/nextgen-acquires-frollo/>.

51 Gabriella Gimigliano, 'Title III, Chapter 2, "Authorisation of Payment Transactions" (Arts 64–77)' in Gabriella Gimigliano and Marta Božina Beroš (eds), *The Payment Services Directive II: A Commentary* (Edward Elgar, 2021) 146, 157 [9.036].

52 For illustration on how payment initiation through Sofort and iDeal works, see, eg, Sofort UK Ltd, 'Pay with Sofort', *Sofort* (Web Page, 2023) <https://www.sofort.com/pay-with-sofort/>; Sofort GmbH, 'SOFORT: Direct Payment via Online Banking' (Youtube, 18 August 2015) <https://www.youtube.com/watch?v=Tt-tN0944pE>; iDeal, 'What is iDeal?'(Web Page, 2023) <https://www.ideal.nl/en/consumers/what-is-ideal/>.

53 See 'Payment Services Directive: Frequently Asked Questions', *European Commission* (Web Page, 12 January 2018) <https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_15_5793>. See also Tink AB, 'What Is Payment Initiation, and What Is It Good for?', *Tink* (Web Page, 1 October 2020) <https://tink.com/blog/open-banking/what-is-payment-initiation/>.

The permissibility of SS by AISPs and PISPs became a subject of heated debate during the drafting of Regulatory Technical Standards ('RTS') under art 98(1) *PSD2*. These standards lay out specific requirements on secure authentication and communication between different actors in the *PSD2* payment ecosystem.[54] Charged with their development, the European Banking Authority ('EBA'), was inclined to ban SS.[55] However, the final decision-making power on the adoption of the standards was vested in the European Commission,[56] which — in response to industry concerns — allowed for several indirect means by which SS could continue. Specifically, from the date the RTS came into effect, ASPSPs had to enable access to customer accounts via one of the authorised methods: either a 'dedicated interface' or a modified version of the customer interface that meets the requirements of RTS.[57] Seeking to ensure technology and business-model neutrality, *PSD2* does not prescribe specific technologies or standards.[58] For dedicated interfaces, however, ASPSPs have generally regarded APIs as the preferred technology.

A modified customer interface refers to an online banking interface originally devised for authenticating and communicating with the ASPSPs' users (ie banks' customers) but modified in a way that would allow an AISP or PISP to identify itself to the financial institution operating the account.[59] Qualified certificates for electronic seals or qualified certificates for website authentication, commonly referred to as e-IDAS certificates, must be used for identification.[60] Such certificates should include all the information an ASPSP needs to identify an AISP or PISP and determine its authorisation status.[61] Accessing data through an adjusted customer interface created an opportunity to use SS in a new, modified

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54 *Commission Delegated Regulation (EU) 2018/389 Supplementing Directive (EU) 2015/2366 of the European Commission and of the Council with regard to Regulatory Technical Standards for Strong Customer Authentication and Common and Secure Open Standards of Communication* OJ L69/23 ('*RTS*'). 54

55 *PSD2* (n 43) art 98(1); European Banking Authority, *Final Report: Draft Regulatory Technical Standards on Strong Customer Authentication and Common and Secure Communication under Article 98 of Directive 2015/2366 (PSD2)* (Report No EBA/RTS/2017/02, 23 February 2017) 4. See also European Banking Authority, 'Opinion of the European Banking Authority on the European Commission's Intention to Partially Endorse and Amend the EBA's Final Draft Regulatory Technical Standards on Strong Customer Authentication and Common and Secure Communication under *PSD2* EBA/Op/2017/09' (Opinion, 29 June 2017) 8.

56 *PSD2* (n 43) arts 98(4), 10–14.

57 *RTS* (n 54) arts 30–1.

58 *PSD2* (n 43) art 98(2)(d).

59 *RTS* (n 54) preamble para 20 and art 30(1).

60 See *RTS* (n 54) art 34(1); *Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC* [2014] OJ L 257/73, arts 3(30), 3(39). On e-IDAS generally, see Douglas W Arner et al, 'The Identity Challenge in Finance: From Analogue Identity to Digitized Identification to Digital KYC Utilities' (2019) 20(1) *European Business Organisation Law Review* 66, 68.

61 UK Finance (n 47) 7–8.

form and is occasionally referred to as 'screen scraping plus' ('SS plus').[62] This is the point that is often overlooked: an AISP or PISP may still legitimately rely on a customer's personalised security credentials to employ automated methods of 'scraping' data, even though an AISP or PISP can no longer 'impersonate' the customer holding the account.[63]

Another backdoor means of SS that *PSD2* opened are the 'contingency measures' under art 33 that an ASPSP must take establishing a dedicated API. The contingency mechanism requirements are intended to ensure an AISP or PISP can access customer data through the online interface the customer has with their ASPSP in the event an API does not perform as required, or becomes unavailable (ie unplanned downtime), or when the system breaks down.[64] Compared to the practice of SS prior to *PSD2*, impersonation of the customer is no longer allowed when a contingency mechanism is triggered; an AISP/PISP must be able to identify itself towards the ASPSP.[65] However, the other two elements of 'traditional' SS — ie credential sharing and automated process of capturing data from user interfaces — remain intact under *PSD2*.[66]

An exemption from the obligation to adopt contingency measures may be granted by national authorities where an ASPSP has implemented an RTS compliant, stress-tested API used extensively for at least three months.[67] In such a scenario, an AISP or PISP would be barred from using SS technology in relation to customer payment accounts held by an exempted ASPSP.

B *The UK Framework*

The legal foundation for the UK Open Banking framework is formed by pt 2 of the *Retail Banking Market Investigation Order 2017* ('*CMA Order*')[68] and pt 7 of the *Payment Services Regulation* ('*PSR*'),[69] which translated *PSD2* into UK legislation. The *CMA Order* established an Open Banking Implementation Entity ('OBIE') to

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62 Ibid 16 [8.5]; Arab Regional Fintech Working Group, 'Open Banking Regulatory Principles' (Report No 164, Arab Monetary Fund, March 2021) Annex. See also Adam Polanowski and Przemysław Gruchała, 'Can a User's Account Be Accessed Through Screen Scraping?', *Newtech.law* (online, 15 March 2019) <https://newtech.law/en/can-a-users-account-be-accessed-through-screen-scraping/>.

63 Ruth Wandhöfer, 'Title IV, Chapter 5 "Operational and Security Risks and Authentication" (Arts 95–98)' in Gabriella Gimigliano and Marta Božina Beroš (eds), *The Payment Services Directive II: A Commentary* (Edward Elgar, 2021) 190, 200 [12.076]. See also PTJ Wolters and BPF Jacobs, 'The Security of Access to Accounts under the PSD2' (2019) 35(1) *Computer Law and Security Review* 29, 36–7.

64 *RTS* (n 54) art 33(1).

65 Ibid art 33(5).

66 UK Finance (n 47) 7–8.

67 *RTS* (n 54) art 33(6). See also European Banking Authority, 'Guidelines on the Conditions to Benefit from an Exemption from the Contingency Mechanism under Article 33(6) of Regulation (EU) 2018/389 (RTS on SCA & CSC)' (Final Report No EBA/GL/2018/07, European Banking Authority, 4 December 2018).

68 *Retail Banking Market Investigation Order 2017* (UK) ('*CMA Order*'). The order is made under the *Enterprise Act 2002* (UK) ('*Enterprise Act*').

69 *Payment Services Regulation 2017* (UK) ('*PSR*').

create standards for data sharing (UK Open Banking Standards).[70] These standards were required to cover APIs, data formats, and security as well as governance arrangements and customer redress mechanisms,[71] and to not 'include provisions that are incompatible with the requirements in *PSD2*'.[72] The *PSR* imposes data-sharing obligations on 'account servicing payment service providers' ('ASPSP)' — ie data holders or banks — with respect to requests made by AISPs and PISPs — ie accredited data recipients.[73]

Regulations 69(2)(a) and 70(2)(a) of the *PSR* mandate that ASPSPs must comply with RTS, which also provide the basis on which the UK Open Banking Standards are approved for compliance with the *PSR* for a UK bank. The backdoors to SS have thus been entrenched in the UK's regulatory framework as a rule.[74] Since 14 September 2019,[75] AISP or PISP access to customer payment account information had to be enabled via either a dedicated interface or a modified version of the customer interface that meets the requirements of RTS.[76] Where an ASPSP chooses to provide access via a dedicated interface, it must have contingency measures in place. An exemption from the obligation to provide a contingency mechanism can be granted by the Financial Conduct Authority ('FCA') — the regulator of the UK Open Banking framework — to a financial institution showing it has implemented an RTS compliant, stress-tested, and widely-used API.[77] Thus, unless the financial institution holding customer data has established open API channels and is exempt from the duty to provide for a contingency mechanism, an AISP or PISP can access customer data using customer credentials and SS technology, provided it identifies itself towards the ASPSP.

C *Limitations of the EU and the UK Frameworks*

Both the EU's and the UK's frameworks remain limited in one significant respect, which may retain the attractiveness of and, arguably, even the need for SS. *PSD2*

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70 *CMA Order* (n 68) art 10.1.

71 Ibid (n 61) art 10.2. See also Open Data Institute and John Fingleton, *Open Banking, Preparing for Lift Off* (Report, July 2019) 23.

72 *CMA Order* (n 68) art 10.2.

73 *PSR* (n 69) rr 2, 69–70.

74 Financial Conduct Authority, 'Payment Services and Electronic Money: Our Approach' (Report, November 2021) 234ff.

75 Note, however, that due to a range of technical challenges faced by industry in implementing different *RTS* requirements, the Financial Conduct Authority has shifted the deadline for the full compliance with *RTS* several times with the most recent date being set to 30 September 2022: see Financial Conduct Authority 'Strong Customer Authentication', *Financial Conduct Authority* (Web Page, 15 February 2023) <https://www.fca.org.uk/firms/strong-customer-authentication>.

76 Specifically, articles 30 and 34-36: see Financial Conduct Authority (n 74) 235.

77 Ibid 236.

is focused on payment accounts[78] and applies to payment services provided within the EU and EEA. The UK framework is similarly limited to payment systems. The *CMA Order* requires access to be given to transaction information for personal current account products[79] and business current account products.[80] The *PSR* adds to this list the requirement to give access to data from a 'payment account', ie 'an account held in the name of one or more payment service users which is used for the execution of payment transactions'.[81] In the view of the FCA, payment accounts include 'current accounts, e-money accounts, flexible savings accounts, credit card accounts and current account mortgages.'[82] Mortgage and loan accounts, fixed-term deposit accounts and cash-savings accounts are not subject to the UK framework.[83]

Even where the exchange of customer payment account data between a bank and a FinTech runs well via an API, it provides only partial insight into a customer's overall financial situation. As a consequence (unless a data holder provides access to other customer accounts beyond the PSD2 mandate), businesses offering, for example, consumer loans will not be able to access the information on customers savings and investment habits, unless they resort to SS, which offers visibility of all data held in the online banking channel.[84]

In short, as a matter of law, the prohibition of SS in the EU and the UK is limited to accessing *payment* account data *without* identification toward the account holding institution. Even though a closer inspection of payment accounts may reveal *some* data on the existence of and the amount of outgoings to other accounts, such as loan or mortgage accounts, these insights will always be partial and as such do not affect the scope of the limitation. In practice, the requirement of authentication is only extended to scenarios where data is scraped from non-payment accounts, such as savings or mortgage accounts, in a way that inadvertently captures data from payments accounts.[85] Accessing payment

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78 A payment account is defined in article 4(12) of *PSD2* as 'an account held in the name of one or more payment service users which is used for the execution of payment transactions'. 'The RTS only covers payment accounts in the scope of PSD2': see also European Commission, 'Payment Services Directive (PSD2): Regulatory Technical Standards (RTS) Enabling Consumers to Benefit from Safer and More Innovative Electronic Payments' (Memo, 27 November 2017).

79 Including personal current accounts (with or without an overdraft facility), basic bank accounts, packaged accounts, reward accounts, student or graduate accounts and youth accounts: *CMA Order* (n 68) art 12.4.1.

80 Including business current accounts and 'standard tariff unsecured business overdrafts': *CMA Order* (n 68) art 12.4.2.

81 *PSR* (n 69) s 2.

82 Financial Conduct Authority (n 74) 213.

83 Ibid. See also Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority, 2013) PERG [15.3].

84 Ayers and Bhattacharyya (n 39); Nilixa Devlukia, 'PSD 1, 2, 3: We Are out of the Starting Blocks with a Marathon Ahead', *The Papers* (Blog Post, 27 July 2022) <https://thepaypers.com/expert-opinion/psd-1-2-3-we-are-out-of-the-starting-blocks-with-a-marathon-ahead--1257721>.

85 European Banking Authority 'EBA Responses to Issues XIV to XX Raised by Participants of the EBA Working Group on APIs under PSD2' (Document, 26 July 2019) <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2545547/09da22b1-19a8-4538-949b-3eb4e28ded2e/Fourth%20set%20of%20issues%20raised%20by%20EBA%20WG%20on%20APIs.pdf?retry=1>.

account data via SS *upon identification* towards the ASPSP remains lawful in both jurisdictions. Finally, *PSD2* contains no sunset clause either for the requirement to provide a modified customer-facing interface, or for 'contingency measures' under art 33 *PSD2*, suggesting the hybrid model of accessing customer data is likely to remain for now.[86] Importantly, both jurisdictions are yet to regulate SS in relation to non-payment accounts. As a matter of practice, PISPs and AISPs may need to accommodate different access methods — APIs for payment accounts and customer-facing user interfaces for non-payment accounts — unless ASPSPs equally offer (open) API access to the latter.

Whether a review of PSD2 will change the existing state of affairs remains to be seen. In May 2022, the European Commission commenced a consultative process to assess whether *PSD2* remains fit for purpose or needs revision. In June 2023, the European Commission ('EC') published its proposals for a new regulation intended to replace PSD2 — the Payment Services Regulation ('EU PSR') — and a new directive that focuses specifically on the licensing and authorisation of payment and e-money institutions ('*PSD3*').[87] While the proposed EU PSR places a stronger emphasis on the ASPSPs' obligation to provide dedicated interfaces (ASPSPs shall have in place *at least one dedicated interface* for the purpose of data exchange with AISPs and PISPs)[88] and establishes minimum standards for availability and performance of open banking APIs,[89] it nonetheless allows AISPs and PISPs to access payment accounts data via an interface that the ASPSPs use for authentication and communication with their users where dedicated interfaces become unavailable, thus leaving a backdoor for the use of SS upon identification towards the ASPSP.[90] One should also bear in mind that, regardless of the review outcome, the UK's departure from the EU means the relevance of the EU legislation to the UK framework will diminish and the UK Open Banking framework will continue developing on its own terms.[91]

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86 TrueLayer notes that the contingency mechanism 'remains heavily used in some EU markets where bank APIs are still not functioning well': TrueLayer 'Response to Statutory Review of the Consumer Data Right' (Document, 20 May 2022) 23 <https://treasury.gov.au/sites/default/files/2022-09/c2022-314513-truelayer.pdf>.

87 As mandated under *PSD2* (n 43) art 108. See also *Proposal for a Regulation of the European Parliament and of the Council on Payment Services in the Internal Market and Amending Regulation (EU) No 1093/2010* and *Proposal for a Directive of the European Parliament and of the Council on Payment Services and Electronic Money Services in the Internal Market Amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC*.

88 *EU PSR*, art 35(1) (emphasis added).

89 *EU PSR*, arts 35(3) and 36.

90 *EU PSR*, preamble para 57 and art 38. See also Sigrid Hansen, 'New draft Payment Services Regulation: Overview of the Main Differences from PSD2', *EY* (Web Page, 29 June 2023) <https://www.ey.com/en_be/financial-services/new-draft-payment-services-regulation-overview-main-differences-from-psd2>.

91 The UK formally ceased to be a member state of the EU on 31 January 2020 with the transition period ending on 31 December 2020. '[I]t is intended that the PSD II will eventually be replaced by Open Banking after Brexit': Victoria Dixon (ed), *Goode on Payment Obligations in Commercial and Financial Transactions* (Sweet & Maxwell, 4th ed, 2020) [5]–[77].

D *Consumer Data Right*

Customer-data sharing in Australia is governed by the Consumer Data Right ('CDR') framework, which was established under the *Treasury Laws (Consumer Data Right) Act 2019* (Cth) ('*CDR Act*').[92] The CDR differs fundamentally from other data-sharing regimes — including in the EU and the UK — in two fundamental respects: (i) it is not limited to sharing of payment account data and extends to other financial accounts,[93] and (ii) most importantly, it is designed to apply across many sectors of the economy. Initially rolled out in banking (where CDR is referred to as 'Open Banking'), the regime has been extended to the energy and telecommunications sectors, as well as to non-bank lenders.[94] An earlier decision to extend the CDR to 'open finance' — including superannuation and general insurance — has, however, been recently put on hold to allow the CDR time 'to mature', to allow the improvement of the quality of CDR data and also to ensure that the existing framework is functioning as efficiently as possible.[95]

The CDR statutory framework includes four core components: (i) the *CDR Act* as enabling legislation; (ii) CDR Designation Instruments issued under Part IVD of the *CDR Act*, which designate sectors of the Australian economy for the purposes of the CDR; (iii) CDR Rules; and (iv) Consumer Data Standards.

The *CDR Act* created a new Part IVD of the *Competition and Consumer Act 2010* (Cth) ('*CCA*'),[96] which outlined the overarching objectives and principles of CDR, set out the role and functions of the regulatory bodies charged with establishing and enforcing CDR rules, enshrined minimum privacy protections and empowered the Treasurer to apply CDR to economy sectors.[97] As mentioned, sector designation occurs through CDR Designation Instruments. For example,

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92 *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) ('*CDR Act*').

93 Such as savings accounts, call accounts, term deposits, cheque accounts, debit card accounts, mortgage offset accounts, personal loans, trust accounts, foreign currency accounts, and others: see Australian Competition and Consumer Commission, 'Consumer Data Right: Phasing' (Document, December 2020) <https://www.accc.gov.au/system/files/20-64FAC_CDR_Phasing_D07.pdf>.

94 Note, however, that the implementation of the CDR in the telecommunications sector has been paused in mid-2023, to allow the regime to mature in finance and energy first. See Consumer Data Right, 'Consumer Data Right Newsletter' (26 May 2023) *Consumer Data Right Updates.*

95 *Consumer Data Right (Energy Sector) Designation 2020* (Cth); *Consumer Data Right (Telecommunications Sector) Designation 2022* (Cth); *Consumer Data Right (Non-Bank Lenders) Designation 2022* (Cth). See also Consumer Data Right, 'Consumer Data Right Newsletter' (26 May 2023) *Consumer Data Right Updates*; Australian Government, *Government Statement in Response to the Statutory Review of the Consumer Data Right* (Government Response, June 2023) 8 ('*Government Statement*'). See further The Australian Government the Treasury, 'Strategic Assessment: Outcomes' (Report, Treasury, January 2022) 1 ('*Strategic Assessment*'). See also Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness* (Inquiry Report No 91, 21 December 2018) 40. On Open Finance developments in the EU and the UK, see Ross P Buckley, Natalia Jevglevskaja, and Scott Farrell, 'Australia's Data Sharing Regime: Six Lessons for Europe' (2022) 33(1) *King's Law Journal* 28, 30.

96 *Competition and Consumer Act 2010* (Cth) ('*CCA*').

97 The Australian Government the Treasury, 'Consumer Data Right Overview' (Booklet, September 2019) 9 <https://treasury.gov.au/sites/default/files/2019-09/190904_cdr_booklet.pdf> ('CDR Booklet').

the *Consumer Data Right (Authorised Deposit Taking Institutions) Designation 2019* (Cth) designated the banking sector.[98] Then, the CDR Rules regulate the scope of data to be shared within a designated sector and the circumstances in which data sharing is required, ie in response to a valid consumer request and subject to consumer consent.[99] The rules also set out privacy safeguards and regulate the use of data.[100] Finally, Consumer Data Standards stipulate the technical requirements by which data needs to be provided to consumers and accredited data recipients ('ADRs') within the CDR system.[101] Indeed, many aspects to handling CDR data require standardisation under the framework: the format and description of CDR data; the collection, use, security and disclosure of CDR data; the process for obtaining and withdrawal of authorisations and consents; consumer experience data standards, and many others.[102]

No explicit prohibition on SS is contained in the CDR framework. It does not include an obligation on data holders to establish a modified customer interface or ensure availability of a 'fallback mechanism' in the event dedicated interfaces fail to work as intended or experience a downtime.

The CDR's silence on SS was its drafters' deliberate choice back in 2017, when the government commissioned the Review into Open Banking in Australia to identify the most appropriate model for the national market and recommend the regulatory framework under which it would operate.[103] After considering a series of submissions that focused on the risks and opportunities presented by SS, the review found that SS had become the FinTech industry's default way of gaining authorised access to customer's financial data given that data sharing agreements with banks that would allow FinTechs to receive customer data via secure portals, such as dedicated interfaces, were, at best, few and far in between.[104] Crucially, the review concluded that Open Banking should neither endorse nor prohibit SS — as banning SS would remove an important market-based check on its design — but should aim to make the practice of SS redundant by facilitating a more efficient data-transfer mechanism.[105]

Subsequently, several significant consultative processes also turned their attention to the question of SS. In 2020, both the Senate Select Committee on

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98 *Consumer Data Right (Authorised Deposit Taking Institutions) Designation 2019* (Cth).

99 See *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth) ('*CDR Rules*'). Under CDR, 'consumers' include both individuals and businesses entities: see *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) s 56AI(3) ('*CDR Act*'); Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019 [1.100], [1.101].

100 *CDR Rules* (n 99) Part 7. See also Treasury, 'Statutory Review of the Consumer Data Right' (Issues Paper, March 2022) 4.

101 Ibid.

102 *CCA* (n 96) s 56FA(1). See also *CDR Rules* (n 99) r 8.11 and Part 8. For detailed information on these standards, see Data Standards Body, *Consumer Data Standards V1.23* (Electronic Standards) <www.consumerdatastandards.gov.au>.

103 *Review into Open Banking* (n 1) 121–2.

104 Ibid 72.

105 Ibid x, 72, 84.

Financial Technology and Regulatory Technology[106] (later renamed as the 'Select Committee on Australia as a Technology and Financial Centre'),[107] and the Inquiry into Future Directions for the Consumer Data Right,[108] were in agreement that, for the time being, maintaining the status quo was preferable to taking regulatory action.[109] In response to the proposal by the Reserve Bank of Australia ('RBA') to examine whether a ban on SS would support the financial sector's transition away from the practice, the Inquiry admitted, however, that for *payment initiation services* the eventual prohibition of SS would be in the interests of consumers.[110] Indeed, without proper safeguards, 'payment initiation', aka 'action initiation' or 'write access', could enable a third party to act in ways contrary to the consumer's express instructions, causing her substantial harm.[111] Yet, in contrast to the EU and the UK frameworks, which specifically regulate payment initiation, CDR is currently limited to 'read access', meaning that, while consumers are able to share data with third parties, they cannot instruct them to take actions on their behalf. This, too, was the drafters' conscious decision: action initiation was viewed as premature and likely to endanger the framework's acceptance.[112] The Australian government was particularly mindful that, for CDR to succeed, consumers must first gain confidence in their data being accessed and shared securely and only for the purposes to which they have consented.

In response to the Inquiry the government announced, in December 2021, that it would 'expand the functionality of the CDR regime to include support for consumer-directed third-party action initiation' in the banking sector.[113] Indeed, the bill proposing to extend the CDR framework to introduce action initiation was finally introduced into Parliament in November 2022 and, in May 2023, the Senate Economics Legislation Committee presented its report on the bill and

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106 The Committee was tasked to inquire into and report on the opportunities for Australian consumers and business arising from financial technology ('FinTech') and regulatory technology ('RegTech'), the barriers to the uptake of these technologies and the regulatory and other initiatives necessary to promote these technologies in Australia: see *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 1.

107 'Select Committee on Australia as a Technology and Financial Centre', *Parliament of Australia* (Web Page, 18 March 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology>.

108 The inquiry was tasked to make recommendations on how to expand the CDR's functionality in a manner that promotes innovation with the consumer interests in mind: see The Australian Government the Treasury, *Inquiry into Future Directions for the Consumer Data Right* (Report, Treasury, October 2020) viii ('*Inquiry into Future Directions*').

109 See *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 220 (Recommendation 22). See also *Inquiry into Future Directions* (n 108) 36, 96–7.

110 *Inquiry into Future Directions* (n 108) 97 (emphasis added).

111 'Read access is the ability for a third party to download or view specific information held by the data holder, while write access is the ability for the third party to give the data holder instructions to take actions': ibid 18, 20.

112 *Review into Open Banking* (n 1) 109.

113 This will enable third party 'payment initiation' as well as 'general action initiation', including switching between products and services, opening or closing an account, updating details, etc: see Australian Government, 'Government Response to the Final Report of the Inquiry into Future Directions for the Consumer Data Right' (Response, 14 December 2021) 2 <https://treasury.gov.au/publication/p2021-225462>.

recommended that it be passed.[114] At the time of writing it is hard to tell, however, when the use of action initiation will become widespread. In the Inquiry's view, a ban on SS will only be timely once payment initiation achieves 'a broad coverage' of banks and accounts.[115]

The Labor government that came to power in Australia in May 2022 asserted its full support for the CDR regime.[116] However, the volume of data being shared via Open Banking has not been made public in Australia, making it hard to assess the extent to which SS remains a serious contender to APIs in the context of financial data access and sharing.[117] The ACCC guidance for the industry from March 2021 notes only that businesses collecting data via both channels must be transparent with consumers as to how the data is collected and which protections apply.[118] Given that Australia has not yet formally phased out SS, it is safe to assume it remains a popular practice.[119]

IV SS – To Use or Not to Use?

Although the range of services enabled by SS have evolved and diversified significantly since the end of the 1990s, many of the arguments for and against SS are not new. Incumbent institutions (banks) and new entrants (FinTechs) often find themselves at opposite ends of the arguments. Perhaps unsurprisingly, almost every single argument has been met with a counterargument.

A *The Downsides of SS ('Long Live APIs!')*

The arguments against SS are many. The foremost is that handing over user credentials is an inherently unsafe online behaviour, which runs counter to good IT security practices and the explicit security advice provided by governments and

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114 *Treasury Laws Amendment (Consumer Data Right) Bill 2022*; Consumer Data Right, 'Consumer Data Right Newsletter' (26 May 2023) *Consumer Data Right Updates.*

115 *Inquiry into Future Directions* (n 108) 97.

116 See Stephen Jones MP, Assistant Treasurer and Minister for Financial Services, 'Happy First Birthday, CDR!', *Consumer Data Right Newsletter* (1 July 2022). See also James Eyers, 'Open Banking Still Has Teething Problems after Two Years', *Australian Financial Review* (online, 5 July 2022) <https://www.afr.com/companies/financial-services/open-banking-still-has-teething-problems-after-two-years-20220704-p5ayt0>.

117 Eyers (n 116).

118 See ACCC Team OLD, 'Guidance on Screen-Scraping', *Consumer Data Right* (Web Page, 23 March 2021) <https://cdr-support.zendesk.com/hc/en-us/articles/900005316646-Guidance-on-screen-scraping>; Joseph Brookes, 'ACCC Warning on "Screen Scraping" and CDR Data', *InnovationAus.com* (online, 23 March 2021) <https://www.innovationaus.com/accc-warning-on-screen-scraping-and-cdr-data/>.

119 'The consultation process revealed that there is still significant use of screen scraping in sectors both within and outside the CDR': The Australian Government the Treasury, *Statutory Review of the Consumer Data Right* (Report, September 2022) 28 ('*Statutory Review of the Consumer Data Right*'). See also TrueLayer (n 86) 10.

most businesses to consumers.[120] Where the third party possesses user credentials, it has nearly unlimited control over the customer's account: it can access data it has not been authorised to access, execute financial transactions without the permission of the customer, and even change the customer's authentication credentials thereby locking them out of their own accounts.[121] Moreover, extending user credentials to a third party inevitably creates a larger surface area for cyberattacks, including phishing attacks and unwanted profiling.[122] As a rule, businesses relying on SS will need to submit the customer credentials in unencrypted form to the server from which the data is to be scraped.[123] As a result, risks of fraud and unauthorised access to customers' accounts are compounded, as their login credentials are exposed in multiple places.

A further argument against SS is that the security and reliability of FinTechs does not compare with the security and reliability of the financial institutions hosting the accounts and issuing the user credentials.[124] In Australia, for example, CBA has argued that customers who have used the services of FinTechs relying on SS are at least twice as likely to experience digital fraud, compared to customers who do not share their account credentials.[125] Even though CBA could not prove that customer losses were caused by sharing personalised user credentials with third parties, it identified a 'very concerning correlation', which suggested that customers who had logged onto their online accounts via intermediaries were more likely to experience fraud.[126]

Giving third parties access details to one's bank account also amounts to a breach of the banks' customer terms and conditions and — in Australia — places customers at risk of losing their protections under the E-Payments Code. The E-Payments Code administered by ASIC applies to consumer electronic payment transactions as set out in cl 2.5 of the Code (including electronic card transactions, telephone banking, certain online transactions and online bill payments, direct debits and others).[127] Although a voluntary code of practice, it is adhered to by most banks, credit unions and building societies along with a number of non-

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120 Evidence to Select Committee on Financial Technology and Regulatory Technology, Senate, Parliament of Australia, Melbourne, 30 January 2020, 33 (Xavier Shay); Evidence to Select Committee on Financial Technology and Regulatory Technology, Senate, Parliament of Australia, Melbourne, 30 January 2020, 13 (Lisa Schutz).

121 Bank for International Settlements, *Report on Open Banking and Application Programming Interfaces* (Report, November 2019) 9.

122 Amanda Cliffe, 'To What Extent Does European Law Ensure a Level Playing Field for Fintechs in the Payment Services Sector?' (2022) 18(1) *European Competition Journal* 168, 174.

123 GoCardless, 'Screen Scraping 101: Who, What, Where, When?', *The Open Banking Hub* (Web Page, 19 July 2017) <https://openbankinghub.com/screen-scraping-101-who-what-where-when-f83c7bd96712>.

124 Jane Winn and Benjamin Wright, *The Law of Electronic Commerce* (Wolters Kluwer, 4th ed, 2021) 7–130.

125 James Eyers, 'CBA Says Using Fintechs Exposes Customers to Account Fraud', *The Australian Financial Review* (online, 16 March 2020) <https://www.afr.com/companies/financial-services/cba-says-using-fintechs-exposes-customers-to-account-fraud-20200316-p54amd>.

126 Ibid.

127 Australian Securities and Investments Commission, *ePayments Code* (2 June 2022).

banking businesses.[128] Under the E-Payments Code, consumers must not voluntarily disclose passcodes to anyone, including a family member or friend, and if they do so, they may be liable for damages that occur as a result of handing over their credentials.[129] While a breach of the passcode security requirements in itself is insufficient to impose liability for losses from an unauthorised transaction on a consumer, a consumer is liable where a service provider can prove on the balance of probability that they contributed to a loss through fraud, or breaching the pass code security requirements.[130]

One problem, however, is that consumers may not even realise they lose protection under the E-Payments Code. As noted by the Review into Open Banking in Australia, in some instances 'the way in which a request for a customer's bank login details is made means that customers may not even be aware they have given their login details to someone other than their bank.'[131] Alternatively, a consumer may naively presume the legality of credential sharing. She may think that, because a FinTech engaged in SS collects data from her financial institution, there would be a legal relationship between the two entities that requires or validates the consumer's cooperation.[132] Either way, the consumer is being exploited to an extent unfathomable under data-sharing arrangements via APIs, which ensure transparency in the way consumers are able to grant and revoke access to their data and which ensure consumers know how, when and for what purposes their data is used.[133]

There is broad agreement in the industry that SS has historically been relied upon out of necessity rather than because it is an elegant technology design for data sharing.[134] SS is largely regarded as a slow and unstable method of data collection, which is frequently prone to errors. Specifically, SS methods are based on navigating whole web pages, requiring a lot of data to be downloaded and processed to get a few sought-after pieces of information. They are thus much slower than APIs, which establish a direct connection between a data holder and a data recipient.[135] In fact, assessments claim that processes that take SS tools up to ten minutes can be completed in seconds by using dedicated interfaces.[136]

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128 Ibid.

129 See *ePayments Code* (n 127) cls 11.1–11.2, 12(2)(a). See also *Review into Open Banking* (n 1) 72, which notes '[h]anding over login credentials to enable screen scraping may be a violation of the bank's terms and conditions, meaning the customer may be liable if their credentials were to be compromised.'

130 *ePayments Code* (n 127) cl 11.2.

131 *Review into Open Banking* (n 1) 52.

132 *Account Aggregation* (n 3) 26.

133 Adatree (n 40).

134 *Review into Open Banking* (n 1) 72.

135 See Tonia Berglund, 'From Screen Scraping to Open Banking', *Australian Broker* (Web Page, 1 July 2021) <https://www.brokernews.com.au/features/opinion/from-screen-scraping-to-open-banking-277582.aspx>.

136 Kelly Read-Parish, 'Open Banking vs Screen Scraping: Looking Ahead in 2019', *Finextra* (Web Page, 4 January 2019) <https://www.finextra.com/blogposting/16494/open-banking-vs-screen-scraping-looking-ahead-in-2019>.

Further, SS is a workaround rather than a dedicated solution. It requires maintaining a unique script for each dedicated data source (ie for each individual bank). Should the bank's platform change ever so slightly (for example, a button on the online user interface is moved from one part of the page to another), SS won't work, thereby necessitating a re-write of the script by the developer to re-establish the connection.[137] The need to repeatedly fix connectivity issues resulting from web updates means that the end-user is likely to experience unstable performance.[138] Lastly, SS runs on image processing, and is therefore argued to be prone to errors.[139]

Understandably, incumbents oppose SS because of their inability to control how much data (including 'collateral data'), and how often data, is scraped. SS places enormous demands on the IT infrastructure of financial institutions, increasing costs and operational risk. In the US, for example, data aggregators like Plaid and Mint have been found to make up to 20 per cent of a typical bank's traffic and typically log in 2.5 times as often as real users.[140] Some sources suggest that data aggregators may even represent up to 25 per cent of financial institutions' total traffic.[141] This problem of burdening the servers of the data host does not arise with APIs.

Opponents of SS also argue that allowing the practice to continue undermines the potential success of Open Banking by creating a two-tiered system where less trustworthy operators are likely to prefer using SS.[142] Indeed, Open Banking regimes impose stringent cybersecurity and privacy protection requirements, which businesses using SS can circumvent.[143] As aptly pointed to by the ACCC, this means that businesses using unregulated data-sharing methods such as SS 'have a lower regulatory burden than those whose businesses involve

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137 Cardinal and Thomas (n 14) 94; Vitor Urbano, '5 Reasons Why You Should Say NO to Screen Scraping', *Nordigen* (Web Page, 6 October 2021) <https://nordigen.com/en/blog/5-reasons-why-you-should-say-no-screen-scraping-when-using-open-banking/>; *Review into Open Banking* (n 1) 72.

138 Roland Mesters, 'Can We Please Stop Using Screen Scraping for Bank Connectivity?', *Finextra* (Web Page, 14 December 2021) <https://www.finextra.com/blogposting/21403/can-we-please-stop-using-screen-scraping-for-bank-connectivity>. See also MX Technologies, 'Screen Scraping Vs. Bank APIs: What's the Difference?', *MX Blog* (Web Page, 4 August 2020) <https://www.mx.com/blog/screen-scraping-vs-bank-apis-whats-the-difference/>.

139 Deepa Bhat, 'Screen Scraping vs API: 10 Questions to Understand the Differences', *Medium* (Web Page, 12 October 2018) <https://medium.com/yapily/screen-scraping-vs-api-10-questions-to-understand-the-differences-dc63fe19e3ed>.

140 F5, 'Easiest Way to Manage Financial Aggregators', *Video* (Web Page, 27 October 2022) <https://www.f5.com/solutions/financial-aggregators>.

141 Olov Renberg, 'Fintech Aggregators and Open Banking: Service Enablers or an Unfortunate Backdoor for Fraud?', *BehavioSec* (Blog Post, 8 December 2021) <https://www.behaviosec.com/blog/fintech-aggregators-and-open-banking-service-enablers-or-an-unfortunate-backdoor-for-fraud/>.

142 Financial Rights Legal Centre and the Consumer Action Law Centre (n 37) 16. See also TrueLayer (n 83) 11.

143 TrueLayer (n 86) 10.

CDR data.'[144] Indeed, to secure optimum data safety for consumers, primarily accredited entities are allowed to share customer data via Open Banking.[145] However, why would a FinTech want to undergo a time-consuming and costly process of accreditation and be subject to stringent data access, handling and transfer obligations, if data can be freely accessed via SS? Opponents of SS therefore warn of its capacity to split the FinTech sector into businesses which adhere to higher standards and security requirements and those that do not.[146]

Last but not least, it is argued that investing in SS is a waste of financial resources because SS will become a defunct technology.[147]

B *The Advantages of SS ('Long Live SS!)*

Proponents of SS, however, insist that the technology should be retained. SS has long been regarded as an effective tool to address significant information asymmetry in finance and drive competition.[148] Historically, incumbent players — banks — treated customer data as their own by capturing and siloing it on their servers.[149] This created substantial barriers for new market entrants who needed the data to successfully shape their product and services portfolios and drive their businesses. SS has helped to remove those barriers, behind which the banks were sheltering, and enable FinTechs to better compete.[150] In turn, incumbents have been pushed to improve their own service offerings. As a result, some view SS as the single most important driver of use-case development globally.[151]

As data transfer technology, SS has been favoured by businesses for a range of reasons, the foremost being business convenience and efficiency at a relatively low cost. A FinTech with a customer's account credentials does not need to enter into contractual arrangements with the account-holding institution to access customer data.[152] Without account credentials, a FinTech needs to negotiate data access via structured data feeds – ie APIs – which is time-consuming and costly.

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144 Australian Competition and Consumer Commission, Submission to the Treasury, *Statutory Review of the Consumer Data Right* (May 2022) 3 <https://treasury.gov.au/sites/default/files/2022-09/c2022-314513-australian_competition_and_consumer_commission.pdf>.

145 See *CCA* ss 56BB(d), 56BH; *CDR Rules* (n 99) rr 1.9, 5.12; *PSR* (n 69) pts 2, 3.

146 Financial Rights Legal Centre and the Consumer Action Law Centre (n 40) 17.

147 Ibid 18.

148 Illion, Submission to the Treasury, Parliament of Australia, *Inquiry into Future Directions for the Consumer Data Right* (11 May 2020) 4.

149 Note that as a matter of law, no property rights in data exist, merely the right to control it. See, eg, Heiko Richter, 'The Power Paradigm in Private Law' in Mok Bakhoum et al (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Regulation of Personal Data* (Springer, 2018) 527, 553. See also Thomas Tombal, *Imposing Data Sharing Among Private Actors: A Tale of Evolving Balances* (Wolters Kluwer, 2022) [63]. See also World Bank, 'Ownership: Who owns personal data?' *World Development Report* (Web Page, 2021) <https://wdr2021.worldbank.org/spotlights/who-owns-personal-data/>.

150 *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 145 [5.57].

151 Arab Regional Fintech Working Group, 'Open Banking Regulatory Principles' (Report No 164, Arab Monetary Fund, March 2021) 13.

152 Cliffe (n 122) 174.

Where API connections are not available, the service to the customer cannot be provided at all and the customer is lost. Even where APIs are 'open' — that is, characterised by their free or low-cost availability to third parties and a relatively standardised format[153] — building connections to APIs, testing and maintaining those connections requires investment of money and time.[154] Indeed, some argue that building API connections is more difficult than developing APIs, particularly where the goal is to connect with multiple financial institutions in multiple markets.[155]

To illustrate, there are currently three main API standards in Europe — STET PSD2 API framework, UK Open Banking Standard, and Berlin Group's NextGenPSD2 XS2A Framework Standard — each with different specifications or requirements for its region which then are often further particularised by individual banks.[156] Whereas each ASPSP has, at most, one API to implement, AISPs and PISPs must implement a large number of APIs, depending on their current services and market coverage.[157] Monitoring the API connections for downtime, upgrades, and improvements also results in significant and ongoing work which compels many businesses to outsource these tasks to external providers.

Accreditation requirements may also incentivise recourse to SS. In Australia, for example, the time and money that needs to be invested to obtain accreditation under the CDR (and thus be able to share customer data via standardised APIs) are argued to be barriers too steep for many FinTechs to overcome. Smaller companies and start-ups thus often prefer to rely on SS.[158]

In contrast, the technical set up for receiving data via SS is said to be fast, as it bypasses the data holder's systems and data-sharing permissions.[159] Most importantly, SS is argued to offer access to both larger volumes of, and more granular, data.[160] This data can be stored digitally in a data collector's database (be it a service providing FinTech or a data aggregator acting as an intermediary) and accessed without restriction for as long as customer credentials do not change or permission for data access is not revoked.[161] In comparison, connecting via

153 Cardinal and Thomas (n 14) 93.

154 Tink AB, 'Why Connecting to Open Banking APIs Is Not as Simple as It Seems', *Tink* (Web Page, 19 August 2021) <https://tink.com/blog/open-banking/complexities-behind-open-banking-connections/> ('Connecting to Open Banking APIs'); Ayers and Bhattacharyya (n 39).

155 Tink AB (n 154).

156 Ibid. See also Andrei Cazacu, 'PSD2: Does Europe Need a Single API Standard?', *TrueLayer* (Blog Post, 13 July 2022) <https://truelayer.com/blog/psd2-does-europe-need-a-single-api/>.

157 World Bank, 'Technical Note on Open Banking: Comparative Study on Regulatory Approaches' (Technical Note, 2022) 21. See also Inna Oliinyk and William Echikson, 'Europe's Payments Revolution: Stimulating Payments Innovation while Protecting Consumer Privacy' (Research Report No 2018/06, Centre for European Policy Studies, September 2018) 3.

158 Berglund (n 135). See also Natalia Jevglevskaja and Ross P Buckley, 'The Consumer Data Right: How to Realise This World-Leading Reform' (2022) 45(4) *University of New South Wales Law Journal* 1589 ('The Consumer Data Right').

159 Adatree (n 40).

160 *PSD2* (n 43); Wandhöfer (n 63) 192–3 [12.020].

161 Financial Data Exchange (n 37) 5.

dedicated interfaces may well be less attractive, as banks may not only limit the data that is accessible through APIs, but also reduce the connection speed or API's availability.[162]

Business advantages, however, are not the sole grounds that SS proponents use to defend it. Alleged consumer benefits are brought into the debate too. When employed by responsible actors that have safeguards in place to duly protect consumer data, SS has been argued to be a viable technology that is 'valued by consumers'.[163] It also helps them realise their autonomy, since consumers have a right to decide whether they want their data to be shared via SS or via alternative techniques.[164] Some businesses argue that, if consumers are given a choice between using a quicker digital assessment processes based on SS and a manual paper-based assessment, which takes considerably longer, over 80 per cent of consumers choose the faster, digital option.[165]

Finally, the retention of SS practices has been defended on the grounds that they offer a benchmark against which to judge the success of Open Banking. In Australia, for example, the Review into Open Banking emphasised that allowing competing approaches would provide an important test of the design quality of Open Banking: 'Should those competing approaches become more actively used than those specified under Open Banking, this will provide a valuable signal to regulatory authorities that the design of Open Banking may need to be revisited.'[166] Besides, some project that there will be a broad range of complementary use cases for SS even when Open Banking has been fully implemented.[167] For example, SS may be needed to supplement API-derived data, where the level and quality of the latter proves insufficient or poor (for instance, SS may be used to help clean and correct Open Banking data parcels and perform data reconciliation[168]), or to provide a redundancy fail-safe in an event that the APIs of the financial institution hosting the customer account are offline or do not function properly.[169]

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162 Wolters and Jacobs (n 63) 35.

163 Illion (n 148).

164 Ralf Ohlhausen, 'Why the EBA Is Wrong about Screen Scraping, and How It Will Hurt European Fintech', *inFinite Intelligence* (Web Page, 3 April 2017) <https://www.bobsguide.com/articles/why-the-eba-is-wrong-about-screen-scraping-and-how-it-will-hurt-european-fintech/>.

165 Illion, Response to a Question on Notice to Senate Select Committee on Financial Technology and Regulatory Technology, *Inquiry into the Current State of Australia's FinTech and RegTech Industries* (17 February 2020) 2. See also *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 146 [5.63].

166 *Review into Open Banking* (n 1) 10. See also Illion (n 148) 4.

167 Berglund (n 135).

168 FinTech Australia, Submission No 19 to Senate Select Committee on Financial Technology and Regulatory Technology, *Australia as a Technology and Financial Centre* (September 2019) 35.

169 Illion (n 148) 5.

V SS – To Ban (Full Stop)

As Australia continues its march towards an economy in which an increasing volume of consumer data is shared, the hybrid model where data can be derived from both SS and dedicated interfaces appeals to many businesses.[170] In their opinion, it is critically important that SS continues to be available to consumers and their service providers into the foreseeable future.[171]

To those who disagree, they respond that today's business models typically limit the number of parties that need to hold customer credentials to renowned aggregation firms (such as MX, Finicity, Envestnet | Yodlee, Plaid, and others) that provide their services to a large number of FinTechs and (allegedly) use encryption and bank standard security measures to keep customer data safe.[172] Some even suggest that SS technology has evolved so considerably that, from a security standpoint, little difference exists between SS and data access via APIs.[173] Crucially, these businesses contend that no significant evidence of consumer detriment or security breaches occurring because of SS can be demonstrated to date.[174]

Admittedly, when questioned about SS at a public hearing of the Senate Select Committee on Financial Technology and Regulatory Technology, ASIC Commissioner Sean Hughes confirmed that ASIC was not aware of any evidence of consumer loss occurring from SS.[175] It is equally worth noting that reliance on APIs is not always risk free. An Akamai report has found that, from May to October 2019, credential stuffing[176] attacks on the financial services industry targeted APIs, often accounting for 75 per cent or more of the total login attacks against

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170 See, eg, ibid 5. Finder, Submission to the Treasury, *Statutory Review of the Consumer Data Right* (May 2022) 10.

171 Illion (n 148) 5. Finder (n 170).

172 *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 145 [5.57], 146 [5.60]. See also *Review into Open Banking* (n 1) 73. See also United States Department of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech and Innovation* (Report, 2018) 37, 87. On the impact of big data aggregation businesses on the future of data sharing generally, see Dan Awrey and Joshua Macey, 'The Promise & Perils of Open Finance' (2023) 40(1) *Yale Journal on Regulation* 1, et seq.

173 See, eg, arguments offered by Illion and RAIZ Invest Limited to the *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 145–6 [5.57]–[5.61]. See also Kathy Shi, 'ASIC & ACCC: Screen Scraping Is a Valid Method of Data Sharing', *Basiq* (Blog Post, 9 March 2020) <https://basiq.io/blog/asic_accc_screen_scraping_is_a_valid_method_of_data-sharing/>.

174 See, eg, statement by RAIZ Invest Limited: '[s]creen scraping has existed in Australia for over 5 years. It is widely used by many companies, including ANZ and Xero with no reported security or fraud issues in those 5 years': RAIZ Invest Limited, Submission No 29 to Senate Select Committee on Financial Technology and Regulatory Technology, *Australia as a Technology and Financial Centre* (September 2019) 4.

175 *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 146 [5.62].

176 Credential stuffing is a type of cyberattack in which attackers use lists of compromised user credentials to obtain access to a system: see Imperva, 'What Is Credential Stuffing', *Imperva* (Web Page, 2023) <https://www.imperva.com/learn/application-security/credential-stuffing/>.

financial services.[177] Breaches frequently occur where API authentication is poorly implemented, allowing attackers to assume legitimate users' identities.[178]

With data quality under CDR being another issue calling for improvement, FinTechs have yet another card to play in defence of SS.[179] The Financial Data and Technology Association ('FDATA') notes, for example, that many of its members frequently complain about poor quality data and delays in receiving data.[180] Yet the argument that the security of data transfers by SS equals that of transfers by dedicated interfaces fails to persuade. There may not yet have been significant consumer losses from SS, but this does not mean they are improbable. Personalised security credentials, if shared with perceived benevolent actors, can be readily compromised by malicious third parties and exploited to the detriment of the customer. The greater the amount of consumer financial account and transaction data collected and retained by data aggregators, the greater the potential damage to consumers from a data breach.[181] Where businesses employing SS technology offer 'action initiation' as opposed to merely 'read access' solutions, the harm to consumers is likely to be even greater.[182]

A *SS Facilitates Predatory Lending*

Most importantly, the advantages of SS sit largely with the business community, not consumers, who are left vulnerable to having their data exploited in ways of which they are unaware. The argument that SS exists because of 'consumer demand' and 'consumer convenience' as a hassle-free way of obtaining financial services, such as small loans, is unsustainable. Faced with a choice between manually collecting, organising and presenting the required financial data in a format preferred by the lender, or letting the latter obtain and collate the data, some consumers will hand over their banking credentials, and some will not. Yet when consumers are excluded from accessing mainstream credit lines and the only available providers use SS, no true choice exists for consumers between obtaining credit and keeping their credentials safe.[183] Such a scenario does not demonstrate conscious consumer 'demand' or choice. It is unlikely that many Australian consumers would choose SS were they also given the option of sharing their data via more secure dedicated interfaces as under Open Banking.

In the light of the general expectation that Open Banking will make the practice of SS obsolete in due course, one may question the value of an explicit ban

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177 Akamai, 'Financial Services: Hostile Takeover Attempts' (Report Volume 6, *State of the Internet / Security Reports*, February 2020) 2.

178 Accenture, 'Catching the Open Banking Wave' (Report, *Accenture*, 2021) 14.

179 *Statutory Review of the Consumer Data Right* (n 119) 31, 7 (finding 2.1).

180 Financial Data and Technology Association, Submission to the Treasury, *Statutory Review of the Consumer Data Right* (April 2022) 17; Finder (n 170) 6.

181 United States Department of the Treasury (n 172) 37.

182 *Review into Open Banking* (n 1) 108.

183 Financial Rights Legal Centre and the Consumer Action Law Centre (n 40) 17.

on this method of data collection. However, CDR's full implementation in banking and finance, which commenced in July 2020,[184] will seemingly take many more years. The process is slow, and it is consumers who bear the brunt of the potential adverse effects of SS in the meantime. Unlike other jurisdictions, Australia's FinTech industry is heavily reliant on SS.[185] One of its most concerning uses is in the lending sector, where the practice is prevalent throughout the small loans market, such as payday lending.[186]

The demand for such small loans from providers other than major banks and credit societies expanded rapidly in the late 1990s, as data aggregation by SS began to proliferate, and the provision of such loans by banks and credit societies began to decline.[187] Personal circumstances, such as adverse credit history or unemployment, restrict the ability of many Australians to access mainstream credit products. In the case of payday loans, however, these restrictions generally do not apply. Most payday loans are 'small amount credit contracts' under the *National Consumer Credit Protection Act 2009* (Cth), that is loans to consumers of up to $2,000 where the credit provider is not an authorised deposit-taking institution ('ADI') and the contract term is between 16 days and 12 months.[188] Payday loans are characterised as a form of emergency finance.[189] The *Caught Short Interim Report*, for example, found that poverty pervades the lives of most borrowers of payday loans who 'live in such impoverished circumstances that notions of customer choice lose meaning'.[190]

Data shows that, between April 2016 and July 2019, over 4.7 million individual payday loans were taken out by around 1.77 million households worth approximately AUD $3.09 billion.[191] This constitutes a not insignificant share of the global payday loan market, which in 2021 was valued at USD $33.5 billion, and is projected to reach USD $42.6 billion by 2028.[192] While there are caps on fees that loan providers may charge, such as a one-off establishment fee of not more than

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184 Phase 1 of the CDR implementation in open banking: see Australian Competition and Consumer Commission, 'Consumer Data Right' (Phasing, December 2020) <https://www.cdr.gov.au/sites/default/files/2021-01/CDR%20phasing%20table%20-%20January%202021.pdf>.

185 FinTech Australia, Submission to the Treasury, *Review into Open Banking in Australia* (September 2017) 5.

186 Financial Rights Legal Centre and the Consumer Action Law Centre (n 40) 10.

187 Paul Ali, Cosima McCrae and Ian Ramsay, 'The Politics of Payday Lending Regulation in Australia' (2013) 39(2) *Monash University Law Review* 411, 418.

188 See *National Consumer Credit Protection Act 2009* pts 1–2.

189 Senate Economics References Committee, *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (Report, 22 February 2019) 2. See also Marcus Banks et al, *Caught Short: Exploring the Role of Small, Short-Term Loans in the Lives of Australians* (Final Report, August 2012) 32.

190 Marcus Banks, *Caught Short: Exploring the Role of Small, Short-Term Loans in the Lives of Australians* (Interim Report, September 2011) 8, 23 ('*Caught Short Interim Report*').

191 Consumer Action Law Centre, *The Debt Trap: How Payday Lending Is Costing Australians* (Report, November 2019) 4.

192 Vantage Market Research, '2022 Statistics: Payday Loans Market Will Surpass USD 42.6 Billion at 4.1% CAGR Growth', *GlobeNewswire* (Web Page, 3 May 2022) <https://www.globenewswire.com/en/news-release/2022/05/03/2434258/0/en/2022-Statistics-Payday-Loans-Market-Will-Surpass-USD-42-6-Billion-at-4-1-CAGR-Growth-Vantage-Market-Research.html>.

20 per cent of the loan amount and a monthly account keeping fee of not more than 4 per cent of the loan amount,[193] the monthly fee does not reduce over time as the loan is repaid but applies every month to the original amount borrowed. As a result, depending on the loan duration, the equivalent interest rate is often around 100 per cent per annum, and at times very much higher.[194]

With payday loans increasingly obtained online,[195] consumer-rights organisations warn that:

> some nonbank lenders obtain consumer's bank account passwords to screen scrape financial data. In so doing they hold on to these passwords and use them at later times to identify if a bank account is low in funds. If the account *is* low in funds they then proceed to spam the consumer with direct marketing material offering further high cost loans. While access to quick credit may lead to benefits for some consumers, the reality is that this unscrupulous behaviour pushes many people into a spiral of debt.'[196]

The asymmetry of power and information between a financially vulnerable consumer and a payday lender with access to their financial information is considerable. Even if the lender is not exploitative or fraudulent, the customer may be ill-informed, unsuspecting, or unable to properly evaluate the loan offer.[197] Certainly, payday lending addresses the financial needs of *some* consumers who are able to pay off the loan on time. But this industry is not built upon these responsible, savvy consumers. It is built upon the ignorant and the vulnerable, who become over-indebted and trapped, and upon the stream of late fees and other charges their credit contracts impose upon them. Overall, the practice is deeply exploitative and harms far more Australians than it assists. While banning SS is not going to prevent payday lending, it will, at the least, make it harder to prey on consumers low in cash. When predatory lenders no longer have access to information as to the state of a customer's account, they will need to compete on equal terms with other lenders under the CDR. Lenders with less 'aggressive' loan conditions will hopefully win customers thereby potentially bringing down fees and interest rates on payday loans in the long term.

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193 Australian Securities and Investments Commission 'Loans and Credit Cards', *Australian Securities and Investments Commission* (Web Page, 27 October 2022) <https://asic.gov.au/for-consumers/loans-and-credit-cards/>.

194 Consumer Action Law Centre (n 191) 6.

195 While only 5.6 per cent of payday loans originated online in 2009, the figure was expected to hit 85.8 per cent in 2019: see Consumer Action Law Centre (n 191) 4.

196 Financial Rights Legal Centre, Financial Counselling Australia, and Consumer Actions Law Centre, Submission to the Treasury, *Consumer Data Right: Sectoral Assessment for Non-Bank Lending* (14 April 2022) 5. See also Consumer Action Law Centre (n 191) 4, which notes that 'over a five-year period, around 15% of payday loan borrowers fall into a debt spiral.'

197 Financial Rights Legal Centre and the Consumer Action Law Centre (n 40) 12.

B *SS Slows the Rollout of the CDR*

Another reason for regulatory intervention on SS is the problem of industry inertia which, if not addressed, may slow the implementation and acceptance of the CDR. Joining the regime involves meeting stringent regulatory requirements to ensure that consumers develop trust and confidence in the system. Without an outright ban, organisations who may consider data sharing via CDR as 'too hard', such as payday lenders or debt management firms, will continue relying on SS without regard for the consumer.[198] The facts on the ground appear to prove this assumption. In 2017, FinTech Australia found that many FinTech companies were 'happy with existing screen scraping solutions, and [were] likely to continue to use these solutions even when alternative technology was available'.[199] In 2020, the Senate Select Committee on Financial Technology and Regulatory Technology confirmed that the technology was *widely used* by banks, lenders, financial management applications, personal finance dashboards, and accounting products.'[200] As of 2021, only 7 per cent of FinTechs in Australia had become Accredited Data Recipients ('ADRs').[201] A further 25 per cent intended to follow suit, while others were planning on participating in the CDR regime via an intermediary.[202]

While some service providers are starting to replace collecting customer data by SS with accessing information through the CDR,[203] the numbers remain conspicuously low. Only a handful of FinTechs in Australia are ready and willing to turn their back on SS for most use cases. Frollo, for example, recently announced that it has phased out SS for the major big four banks in Australia — Australia and New Zealand Banking Group ('ANZ'), Commonwealth Bank ('CBA'), National Australia Bank ('NAB'), and Westpac.[204] Generally thought of as the best

198 Liu (n 41) 327. See also Jill Berry, 'If the Australian Government Truly Cares about Privacy, then It's Time to Ban Screen Scraping', *Startup Daily* (Web Page, 7 March 2022) <https://www.startupdaily.net/topic/data/if-the-australian-government-truly-cares-about-privacy-then-its-time-to-ban-screen-scraping/>.

199 FinTech Australia, Submission to the Treasury, *Review into Open Banking in Australia* (September 2017) 8.

200 *Senate Select Committee Interim Report on Financial Technology and Regulatory Technology* (n 9) 143 [5.50].

201 May Lam and Malia Forner, 'Australian Fintech Sector Creating Jobs and Raising Capital, with Sights Set on Overseas Markets', *EY* (Web Page, 20 October 2021) <https://www.ey.com/en_au/economics/australian-fintech-sector-creating-jobs-and-raising-capital>.

202 Ibid. The inaugural version of the CDR Rules set out one general level of accreditation – the 'unrestricted' level – which provides access to all CDR data within scope for banking. On 30 September 2021, the rules were amended to introduce the sponsored level of accreditation, which permits a person to seek accreditation at a new 'sponsored' level if they have arrangements with an accredited person with an unrestricted level of accreditation (a 'sponsor'): see generally Australian Government, 'Accreditation Guidelines: Version 3' (Guidelines, February 2022) <https://www.cdr.gov.au/sites/default/files/2022-02/CDR-Accreditation-guidelines-version-3-published-16-February-2022.pdf>.

203 Productivity Commission, '5-Year Productivity Inquiry: Australia's Data and Digital Dividend' (Inquiry Interim Report No 2, 23 August 2022) 46.

204 Frollo, 'Frollo Phases out Screen Scraping in Favour of Open Banking', *Frollo* (Blog Post, 9 August 2022) <https://frollo.com.au/blog/phasing-out-screen-scraping/>.

money-management app,[205] and one of the first FinTech companies accredited under CDR, it added that it would progressively phase out screen scraping for other banks 'until it's only used for banks and products not covered under the CDR'.[206]

That SS can be regulated is demonstrated by the approaches to this practice taken in the EU and UK discussed above. Their limitation to payment accounts notwithstanding, the EU and UK frameworks serve as a precedent from which the Australian government can draw both insight and inspiration. As explained previously, where an account-holding institution is exempt from providing a contingency mechanism, AISPs and PISPs are barred from using SS technology in relation to customer payment accounts (ie both with or without identification towards the ASPSPs). While exact numbers are hard to find, some sources suggest that many banks indeed benefitted from the said exemption suggesting that the impact of *PSD2* on SS may be larger than expected.[207] In the UK in particular, the number of API calls surged significantly: from 12 million a day in February 2020 to 24 million a day a year later, and up to 31 million a day in February 2022, or 860 million calls for the month.[208] The UK experience in particular shows that even partial phasing out of SS can act as a spur to ensure that APIs perform well and the ecosystem grows rapidly and with due attention to data quality.[209]

As noted previously, the Inquiry into Future Directions for the Consumer Data Right observed that the prohibition on SS would be desirable once action initiation under CDR is fully implemented as a viable alternative. Likewise, the *Statutory Review of the Consumer Data Right* recommended that SS be banned in sectors where the CDR is functioning as intended.[210] Commendably, the Australian Government has most recently indicated that it will consult on policy options for regulating SS, commencing in the banking sector and starting with the release of a discussion paper in the second half of 2023.[211] For the reasons presented in this article, and given the government's commitment to the success of the CDR,

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205 Ava Crawford, 'Meet Frollo: Australia's Best Money Management App of 2022', *Mozo* (Web Page, 17 March 2022) <https://mozo.com.au/neobanks/articles/meet-frollo-australia-s-best-money-management-app-for-2022>.

206 Frollo (n 50) (emphasis added).

207 Tink AB, 'What the EBA Putting Its Foot Down on PSD2 API Obstacles Really Means', *Tink blog* (Blog Post, 2 March 2021) <https://tink.com/blog/open-banking/eba-opinion-psd2-api-obstacles-fallback-exemptions/>. See also European Banking Authority, 'EBA Calls on National Authorities to Take Supervisory Actions for the Removal of Obstacles to Account Access under the Payment Services Directive', *European Banking Authority* (Web Page, 22 February 2021) <https://www.eba.europa.eu/eba-calls-national-authorities-take-supervisory-actions-removal-obstacles-account-access-under>. See also TrueLayer (n 86) 10.

208 James Eyers, 'Loan Process Stripped Back by Open Banking', *The Australian Financial Review* (Sydney, 12 April 2022).

209 TrueLayer (n 86) 11.

210 *Statutory Review of the Consumer Data Right* (n 119) recommendation 2.1.

211 Australian Government, *Government Statement in Response to the Statutory Review of the Consumer Data Right* (Government Response, June 2023) 6. See also Australian Government, *Screen Scraping – Policy and Regulatory Implications: Discussion Paper* (August 2023) 3 <https://treasury.gov.au/sites/default/files/2023-08/c2023-436961-dp.pdf >.

assessment of, and the decision on how best to, address the problem of SS in Australia should not be postponed for too long. Importantly, an advance indication from government on how and when a ban is likely to be implemented would offer certainty and time for businesses to move away from SS and provide stronger incentives to invest in transitioning to the CDR.[212]

VI Conclusion

SS has mattered historically. At the dawn of the FinTech industry, many businesses facing the unwillingness of incumbents to share customer data were forced to choose between SS and having no data access. Understandably, they chose SS. Had FinTechs waited for the banking industry to develop and open their APIs, there may have been no FinTech sector in Australia at all or it may well have had far fewer compelling products and services to offer.

As shown in this article, many FinTechs and data aggregators associate SS with business convenience, efficiency and low costs. They argue they serve their customers by eliminating the need for tedious manual data sharing and offering more reliable services, as SS cannot be blocked by account-holding institutions as readily as can data access via APIs. Crucially, however, SS gives these businesses control over when and how much data to scrape and allows them to exploit the data primarily for their own benefit rather than for the benefit of consumers. By avoiding CDR accreditation requirements, proponents of SS have a lower regulatory burden than businesses using the CDR. Not least for this reason, preserving the current hybrid model — where data can be derived from either SS or APIs — appeals strongly to many screen scraping businesses. They argue the technology should, at the minimum, be retained as a redundancy fail-safe for when APIs are not working.

The arguments against SS, in our opinion, are far more persuasive. SS remains an innately dangerous online practice, which gives third parties virtually unrestricted access to, and control over, customers' financial accounts. These customers are at an increased risk of digital fraud and of forfeiting their protections under the E-Payments Code. The government repeatedly warns consumers to protect and not hand over their online user credentials to third

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212 Ibid.

parties.[213] With more than 80 per cent of Australians preferring to bank online,[214] it is inconsistent and dangerous to allow Australian FinTechs to actively encourage customers to ignore this advice.[215]

From a technical perspective, SS is a slow and unreliable method of data collection, which has traditionally been employed due to the lack of a better alternative, but which is now long overdue for retirement.

From a consumer perspective, SS encourages unsafe data practices by consumers and harms many directly, as it enables payday lenders to target specific consumers precisely when they are most acutely financially vulnerable, pushing them into unsustainable spirals of debt.

From a business perspective, SS enables an inertia that, in the longer term, will not serve commerce or the broader economy in Australia. FinTechs and others will continue to rely on SS from this inertia and their unwillingness to make the investment required to be accredited under the CDR. This will inevitably slow the take up of the CDR. Yet the CDR is one of Australia's most ground-breaking and important reforms.

Throughout history, water and sanitation engineers have saved more lives than the medical profession. When fully rolled out and operational, the CDR will safely deliver the water the modern economy requires to thrive, which is data, and will impose hygiene standards upon the businesses that, as accredited data recipients, hold the data.[216] SS will delay the rollout of a world-leading reform, which in time will offer much to the living standards of all Australians.[217]

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213 'Do not share your passphrases with anyone and be aware of your surroundings when using them in public': Australian Cyber Security Center, 'Creating Strong Passphrases', *Australian Signals Directorate* (Web Page, October 2021) <https://www.cyber.gov.au/acsc/view-all-content/publications/creating-strong-passphrases>/. '[D]on't share your myGov sign in details with anyone': Australian Government, 'How You Can Protect Your MyGov Account', *myGov* (Web Page, 27 October 2022) <https://my.gov.au/en/about/privacy-and-security/security/how-you-can-protect-your-mygov-account>.

214 Australian Banking Association, 'Banking Customers Continue Shift to Digital', *Australian Banking Association* (Web Page, 19 October 2021) <https://www.ausbanking.org.au/banking-customers-continue-shift-to-digital/>.

215 See also Financial Rights Legal Centre and the Consumer Action Law Centre (n 40) 14.

216 Natalia Jevglevskaja and Ross P Buckley, 'A World-Leading Sanitation System for Our Digital Economy: The Consumer Data Right' (2023) *Australian Business Law Review* (forthcoming).

217 Jevglevskaja and Buckley, 'The Consumer Data Right' (n 158).