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# The University of Queensland Law Journal

Volume 43(1) 2024

## ARTICLES



## THE 23RD WA LEE EQUITY LECTURE

# The University of Queensland Law Journal

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Volume 43 2024 Number 1

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

This issue may be cited as
(2024) 43(1) *University of Queensland Law Journal*

ISSN 0083–4041

# The University of Queensland Law Journal

Volume 43 2024 Number 1

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### Articles



### The 23rd WA Lee Equity Lecture

# LENDING ON THE EDGE: PAWNBROKING IN AUSTRALIA

LUCINDA O'BRIEN,* IAN RAMSAY† AND PAUL ALI‡

*In Australia, pawnbrokers are largely exempt from national consumer credit legislation. They are instead governed by state legislation, which affords very limited protection to consumers. This study outlines the current regulation of pawn lending and presents a qualitative profile of consumers who use pawn loans. In the absence of reliable industry data, it draws on case law, media reports, law reform submissions, previous qualitative studies and an online survey of consumers, conducted by the authors. The study argues that the light regulation of pawn lending creates a high risk of consumer harm and regulatory arbitrage by unscrupulous providers. It proposes law reforms and policy measures to address these risks and to provide more effective protection to consumers.*

## I INTRODUCTION

Pawn loans are a form of credit secured by a borrower's personal belongings.[1] Throughout the nineteenth century, pawnbroking enjoyed immense popularity, particularly among the poor in urban areas. It entered a period of sustained decline in the twentieth century, as the expansion of the welfare state reduced demand for short-term credit, and other products, such as credit cards, became more readily accessible. In the last two decades, pawnbroking has returned to prominence due to the international success of television programmes such as

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This research was partially funded by the Australian Government through the Australian Research Council (LP160100082). The authors thank Dr Malcolm Anderson for conducting the statistical analysis described in this article.

1 An essential feature of the transaction is that the item pawned remains in the possession of the lender until the loan is repaid. The lender has no legal right to pursue the debtor for repayment of the debt, interest or other fees, but may sell the pawned item to recoup these amounts if the loan is not repaid within the specified time: *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 257–8 [17] (McHugh, Gummow, Hayne and Heydon JJ), 274–6 [77]–[81] (Kirby J) ('*Palgo*').

DOI: 10.38127/uqlj.v43i1.8113

'Posh Pawn'[2] and 'Pawn Stars'.[3] These programmes often focus on the pawning of 'high-end assets such as jewellery, watches, art, handbags, cars [and] fine wine.'[4] In reality, however, the majority of pawnbroking customers remain low income earners, seeking small loans and using common, low-value items as security.[5] Consumer advocates have long expressed concern that pawn lending[6] leaves vulnerable consumers at risk of exploitation and significant harm.[7] They warn that the recent sharp increase in the cost of living has led to 'record levels' of pawn lending[8] as more consumers turn to pawnbrokers 'in desperation'.[9] Yet, despite this, Australian pawnbrokers are much less strictly regulated than most other providers of consumer credit. They are largely exempt from the requirements of the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCPA*').[10] They are primarily governed by state legislation, which affords very limited rights to consumers.[11]

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2 'Posh Pawn: the Reality', *Business Age* (online, 26 July 2022) <https://www.businessage.com/post/posh-pawn>.

3 Emily Nelson, 'Local Pawn Shops See More DVDs Than Diamonds', *The News Star* (online, 31 January 2010) <http://www.thenewsstar.com/article/20100131/LIFESTYLE/1310324>.

4 'Posh Pawn: the reality' (n 2).

5 See generally Nelson (n 3), and below Part IV.

6 Throughout this article, the terms 'pawn lending' and 'pawnbroking' are used interchangeably. The *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(1) defines a 'pawnbroker' as 'a person who carries on a business of lending money on the security of pawned goods'. Section 3A(2) provides that 'goods are pawned if the goods are taken into the possession of a lender of money for the purpose of the lender relying on possession of the goods as security for the repayment of the loan'. The *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 3(1) defines a 'pawnbroker' as 'a person who carries on the business of advancing money on the security of pledged goods'. The *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) sch 3 defines a 'pawnbroker' as a person who holds a pawnbroking licence and 'carries on the business of advancing, on interest or in expectation of profit or reward, an amount on the principal or collateral security of property taken by the person as a pawn'.

7 Taskforce on Industry Self-Regulation, Treasury, *Industry Self-Regulation in Consumer Markets* (Report, August 2000) ('*Industry Self-Regulation in Consumer Markets*') 37; Consumer Action Law Centre et al, Submission to Treasury, *Design and Distribution Obligations and Product Intervention Power* (15 March 2017) 21–3 ('CALC 2017 Submission'); Consumer Action Law Centre et al, Submission to Treasury, *Exposure Draft Consultation: Corporations Amendment (Design and Distribution Obligations) Regulations 2019* (10 October 2019) 4–5 ('CALC 2019 Submission').

8 Leke Oso Alabi and Siddharth Venkataramakrishnan, 'Pawnbroking Demand Hits "Record Levels" in UK', *Financial Times* (online, 13 August 2023) <https://www.ft.com/content/d4062163-04cf-43d3-84ea-22b50db9765f>. See also Sarah Marsh, '"We Had No Money": Desperate UK Public Increasingly Turning to Pawnbrokers to Make Ends Meet', *The Guardian* (online, 22 October 2023) <https://www.theguardian.com/money/2023/oct/21/we-had-no-money-desperate-uk-public-increasingly-turning-to-pawnbrokers-to-make-ends-meet>.

9 'Injunction Against Pawnbroker', *Star Weekly* (online, 17 November 2023) <https://brimbanknorthwest.starweekly.com.au/news/injunction-against-pawnbroker/>.

10 Pawn lenders are subject to ss 76 to 81 of the *National Credit Code* ('*NCC*') (a schedule to the *NCCPA*), prohibiting unjust transactions: *NCC* s 6(9). However, consumer advocates have stated that 'this protection is largely illusory for the vulnerable consumers targeted by these businesses because there is no accessible forum where a consumer can make a complaint': CALC 2017 Submission (n 7) 22.

11 See below Part III(C).

This article is the first scholarly study of pawn lending to be conducted in Australia.[12] It provides an overview of the history of pawnbroking and outlines the current regulation of the industry under Australian Commonwealth and state laws. In lieu of quantitative data regarding the size and characteristics of the industry as a whole, it draws on case law, media reports, previous qualitative research and law reform submissions by consumer advocates to present a qualitative profile of consumers who use pawn loans. It describes recent and ongoing regulatory action by the Australian Securities and Investments Commission ('ASIC'), in response to pawnbrokers' alleged breaches of the *NCCPA*. It also reports the results of an online survey of pawn loan users, conducted by the authors. Drawing on these sources, the article identifies potential risks to consumers arising from pawn loans. It argues that the light regulation of pawn lending creates a high risk of consumer harm, in the light of the extreme vulnerability of some consumers of pawn loans. It also contends that the anomalous treatment of pawn lending creates a risk of regulatory arbitrage, since it offers unscrupulous lenders a means of evading the scope of the *NCCPA*. The article outlines several law and policy reforms that would address these risks and provide more effective protection to consumers of pawn loans.

## II The History of Pawn Lending

Pawn lending is one of the oldest forms of consumer finance. It has been suggested that the practice of taking temporary possession of another person's goods, as security for money lent, originated in ancient Greece and Rome, or still earlier, in China up to 3,000 years ago.[13] Arrangements more closely resembling the modern, formal pawnbroking industry emerged in medieval Europe. Initially, the practice was unique to members of the aristocracy. In the thirteenth and fourteenth centuries, it was not uncommon for medieval monarchs to pawn their crowns, jewellery and even members of their entourage to raise funds for wars

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[12] In 2000, researchers in the Department of Accounting and Finance at the University of Melbourne produced a study of pawn lending based on original empirical research. This paper is available online: Nick Bienkowski and Kevin Davis, *The Pawnbroking Industry: Evidence From Victoria* (Report, June 1997). In 2010, researchers at the University of Queensland's School of Social Work and Human Services published a paper outlining the results of their empirical study of the 'alternative finance sector' in Queensland. While this study focussed on payday loans, it also collected some data regarding consumers' use of pawn loans: Gregory Marston and Lynda Shevellar, *The Experience of Using Fringe Lenders in Queensland: A Pilot Study* (Report, July 2010) 5, 49, 61. A subsequent peer-reviewed article, based on this research, referred only to payday loans: Lynda Shevellar and Gregory Marston, 'Exploring the Role of Fringe Lenders in the Lives of Queenslanders' (2011) 46(2) *Australian Journal of Social Issues* 205, 207.

[13] John P Caskey, *Fringe Banking: Check-Cashing Outlets, Pawnshops, and the Poor* (Russell Sage Foundation, 1994) ('*Fringe Banking*') 13; Kenneth Hudson, *Pawnbroking: An Aspect of British Social History* (Bodley Head, 1982) 21; Howard Karger, *Shortchanged: Life and Debt in the Fringe Economy* (Berrett-Koehler, 2005) 66.

and other affairs of state.[14] The first pawnbroking establishments serving 'the poorer classes' appeared in the fifteenth century, in central and Northern Italy.[15] These *monti di pieta* ('banks of pity') were run by a religious order on a non-profit basis.[16] They were intended to provide low-cost finance to the very poor and to counter the spread of 'usury' — that is, money-lending for profit, then regarded by the Catholic Church as a very grave sin.[17] Over time, municipal governments began to provide similar services.[18] Private pawnbroking businesses also sprang up around this time, wherever local laws permitted them to operate.[19] The advent of private pawnbroking led to the enactment of specific laws designed to regulate the industry, particularly through caps on interest.[20] Hudson writes that '[a]s early as the thirteenth century, charters specifying maximum interest rates were common' in continental Europe.[21] The first English laws relating to pawnbroking were enacted in 1603.[22] In 1757, 1784 and 1800, successive English Acts were introduced to subject pawnbrokers to licensing requirements and to impose limits on their interest rates.[23] Due to these restrictions, and the small profit margins on most pawn loans, it was necessary for pawnbrokers to operate on a large scale in order to be viable.[24] For this reason, pawnbroking became more common during the Industrial Revolution, as populations became more concentrated in urban areas.[25]

While there has been no history of pawnbroking published in Australia to date, the subject has been studied extensively in the United Kingdom,[26] and, to a

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14 Hudson writes that 'Edward III did this in 1340–1, when he sent the Earls of Derby and Northampton out of England, to spend several months confined in Malines and Louvain respectively, as pledges for his debts': Hudson (n 13) 27.

15 Ibid 28.

16 Ibid 28; Caskey, *Fringe Banking* (n 13) 13.

17 Wayne A M Visser and Alastair Macintosh, 'A Short Review of the Historical Critique of Usury' (1998) 8(2) *Accounting, Business & Financial History* 175, 178–9.

18 Caskey, *Fringe Banking* (n 13) 14; Edward Veitch, 'The Law o'the Brass Balls or the Regulation of the Pawn' (1992) 21 *Canadian Business Law Journal* 49, 53.

19 Caskey, *Fringe Banking* (n 13) 14.

20 Veitch (n 18) 53.

21 Hudson (n 13) 28.

22 Caskey, *Fringe Banking* (n 13) 14; Warren Swain and Karen Fairweather, 'The Legal Regulation of Pawnbroking in England, a Brief History', in James Devenney and Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press, 2012) 148.

23 Swain and Fairweather (n 22) 149–51.

24 Caskey, *Fringe Banking* (n 13) 16–17.

25 Hudson (n 13) 31–2.

26 See generally Beverly Lemire, 'Petty Pawns and Informal Lending: Gender and the Transformation of Small-Scale Credit in England, circa 1600–1800' in Kristine Bruland and Patrick O'Brien (eds), *From Family Firms to Corporate Capitalism: Essays in Business and Industrial History in Honour of Peter Mathias* (Clarendon Press, 1998) 112; Melanie Tebbutt, *Making Ends Meet: Pawnbroking and Working-Class Credit* (Leicester University Press,1983); Hudson (n 13); Swain and Fairweather (n 22).

lesser extent, in the United States.[27] Throughout the nineteenth century, pawnbroking enjoyed immense popularity in the United Kingdom and became a crucial financial resource for many low-income households. As Melanie Tebbutt writes, many pawnbrokers' typical clients were working-class women with large families. Such women relied on pawn lending to supplement and smooth out the irregular incomes earned by their male partners.[28] Pawning jewellery, furniture or clothes was a common solution to unexpected costs, such as a medical bill or a funeral, or a sudden decline in income due to the wage-earner's illness.[29] Items such as baby clothes or winter blankets were often pawned when they were not needed and redeemed when they were. For some households on extremely low incomes, pawning became a 'weekly … cycle'.[30] Tebbutt writes that, in some areas, workers would regularly pawn their best 'Sunday' clothes on Monday morning and redeem them on Saturday afternoon, when they received their wages.[31] In the poorest areas, loans were even smaller and of shorter duration, with some customers pledging their blankets in the morning and returning to redeem them at night, in exchange for a waistcoat.[32] Despite the extremely high interest rates attaching to such loans,[33] and the protests of 'civic-spirited citizens',[34] many working class people viewed pawn lending as a valuable service. Tebbutt explains that, in this period, pawning became a working class 'tradition', driven by practical necessity, as well as a profound distrust of financial institutions.[35] Rather than accumulate savings that would 'stand idle' in a bank account, habitual pawners often used surplus funds to buy expensive items such as watches, jewellery and furniture, with a view to their future pledge value. Such purchases afforded immediate utility and pleasure, while also serving as a form of insurance against future hardship.[36]

The second half of the nineteenth century has been described as 'the golden age of pawnbroking'.[37] During this period, the pawning of clothing declined, as the advent of mass production and more rapid changes in fashion reduced the value of such items.[38] However, the pawning of jewellery and other small, high-value items remained widespread, not only in the United Kingdom but in the

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27 See generally John Caskey, 'Pawnbroking in America: The Economics of a Forgotten Credit Market' (1991) 23(1) *Journal of Money, Credit and Banking* 85 ('*Pawnbroking in America*'); Caskey, *Fringe Banking* (n 13).

28 Tebbutt (n 26) 12.

29 Ibid 12.

30 Ibid 6.

31 Ibid 7.

32 Ibid 13.

33 Ibid 9.

34 Caskey, *Fringe Banking* (n 13) 19.

35 Tebbutt (n 26) 18.

36 Ibid 16–17.

37 Hudson (n 13) 53.

38 Caskey, *Fringe Banking* (n 13) 17.

rapidly expanding cities of the United States.[39] The popularity of pawn lending fluctuated during the twentieth and early twenty-first centuries. In the United Kingdom, pawning remained a common form of short-term credit until the conclusion of the Second World War and the election of Clement Attlee's Labour Government in 1945. From 1945 onwards, the creation the National Health Service and the significant expansion of the welfare state afforded greater economic security to low-income households,[40] reducing their reliance on pawn loans.[41] In the United States, the expansion of social security entitlements and public services contributed to a similar postwar decline in pawnbroking.[42] Over the course of the twentieth century, consumers also gained access to other forms of credit such as instalment purchases, cheque-cashing services,[43] credit cards and payday loans, further reducing reliance on pawn loans.[44] The decline in pawn lending was accelerated by the decreasing cost of many consumer goods, such as radios, televisions and stereos. Such items lost value quickly, due to rapid advances in technology, and were often large and difficult to store, making them undesirable pledges.[45] In the latter decades of the twentieth century, the industry continued to operate in the United Kingdom, but on a much reduced scale, prompting John Caskey to claim, in 1991, that it had effectively 'die[d] out'.[46] Yet, in 2012, Warren Swain and Karen Fairweather wrote that 'the cycle of decline ha[d] been reversed' and pawn lending had become 'a major industry once more'.[47]

In the United States, pawn lending experienced a dramatic revival much earlier, from the 1970s onwards.[48] According to some estimates, it doubled in size between 1985 and 2004.[49] Writing in 1991, Caskey observed that many United States pawn shops served as 'one-stop financial centers' for consumers, selling money orders, cashing cheques and 'handl[ing] customers' utility bill payments and income tax forms', as well as providing short term credit.[50] In contrast to the

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39 Ibid 16.

40 Kevin Jefferys, *The Attlee Governments 1945–1951* (Routledge, 1992) 20–4.

41 Hudson (n 13) 101.

42 Caskey, *Fringe Banking* (n 13) 30.

43 These businesses allow customers to exchange their paycheques or government benefit cheques for immediate cash, for a fee: ibid. Caskey describes these services as 'a uniquely American phenomenon': at 34. He notes that, in the United States after the Second World War, 'increasingly comprehensive social security and welfare systems led to large increases… in the number of people receiving government support checks', and that by the 1950s, it was also very common for United States employers to pay their employees' salaries by cheque: at 32.

44 Ibid 27–9, 31; Veitch (n 18) 50, 54; Swain and Fairweather (n 22) 143–4.

45 Caskey, *Fringe Banking* (n 13) 29.

46 Caskey, *Pawnbroking in America* (n 27) 86.

47 Swain and Fairweather (n 22) 144, 158.

48 Karger (n 13) 66; J Brandon Bolen, Gregory Elliehausen and Thomas W Miller, 'Do Consumers Need More Protection From Small-Dollar Lenders? Historical Evidence and a Roadmap for Future Research' (2020) 58(4) *Economic Inquiry* 1577, 1583.

49 Karger (n 13) 66.

50 Caskey, *Pawnbroking in America* (n 27) 88.

industry's decline in the United Kingdom, Caskey attributed the enduring popularity of pawn lending in the United States to the 'less comprehensive social support system' available to low-income Americans.[51] He speculated that demand for pawn loans grew in response to the deregulation of the United States banking industry and the use of increasingly sophisticated screening processes by mainstream institutions. Both contributed to an increase in the population of 'unbanked' Americans — those who cannot qualify for mainstream loans, or even access basic savings accounts.[52] Such consumers now account for approximately 5.9 million United States households, or 4.5 per cent of all United States households.[53] Caskey suggested that higher immigration from the 1980s onwards might also account for some of the renewed demand for pawn lending. He pointed out that, compared with other consumers, recent immigrants were more likely to have difficulty opening a bank account. He suggested that pawn lending might be particularly attractive to undocumented immigrants, who generally could not open bank accounts and might be reluctant to do so, since this would 'reveal their presence to immigration authorities'.[54]

## III Pawn Lending in Contemporary Australia

### A *The Current Market*

Unlike the United States and the United Kingdom,[55] Australia possesses almost no reliable public data regarding the size of its pawn lending industry, changes in the

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51 Caskey noted, however, that 'England abolished its pawnshop usury ceiling in the mid-1980s, and the industry has grown strongly in recent years': ibid 96–7.

52 Ibid 85–7. Howard Karger also wrote, in 2005, that the 'consolidation of the [United States] banking industry over the past 20 years ha[d] reduced the number of banks in low-income neighbourhoods, increased the focus of banks on corporate and high-income customers, and limited banks' interest in serving consumers with small accounts or less-than-perfect credit': Karger (n 13) 12.

53 Federal Deposit Insurance Corporation, *2021 FDIC National Survey of Unbanked and Underbanked Households* (Report, October 2022) 13 ('*2021 FDIC Survey*') <https://www.fdic.gov/analysis/household-survey/2021report.pdf>.

54 Caskey, *Fringe Banking* (n 13) 108–9.

55 For United States data see, eg, Consumer Financial Protection Bureau, *Consumer Use of Payday, Auto Title, and Pawn Loans: Insights from the Making Ends Meet Survey* (Report, 2019) <https://www.consumerfinance.gov/data-research/research-reports/consumer-use-of-payday-auto-title-and-pawn-loans-insights-making-ends-meet-survey/>; Federal Deposit Insurance Corporation, *How America Banks: Household Use of Banking and Financial Services* (Report, October 2020) <https://www.fdic.gov/analysis/household-survey/2019/2019report.pdf>; *2021 FDIC Survey* (n 53). For United Kingdom data, see Financial Conduct Authority, *Pawnbroking Sector Review* (Web Page, 10 July 2018) <https://www.fca.org.uk/publications/multi-firm-reviews/pawnbroking-sector-review>; Sara Davies and Andrea Finney, *Pawnbroking Customers in 2020: A Survey of Pawnbroking Customers* (Report, Personal Finance Research Centre, University of Bristol, July 2020) <https://www.bristol.ac.uk/media-library/sites/geography/pfrc/Pawnbroking%20Customers%20in%202020.pdf>.

industry over time, or the typical characteristics of pawn loan users. While there are prominent and active industry bodies in both the United States and the United Kingdom, there appears to be no national industry body in Australia.[56] State-based groups have occasionally engaged in media commentary,[57] and contributed to state law reform processes,[58] however they do not maintain websites and their details are not publicly advertised. The most authoritative data regarding the size of the industry appears in the law reform materials and Parliamentary documents published by state governments. However, such data only appears at infrequent intervals.[59] There are presently 158 licensed pawnbrokers operating in Victoria.[60] In 2020, there were 183 pawnbrokers licensed in New South Wales, a number that

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[56] In 2001, Victorian Parliamentary debates featured a reference to the Australian Pawnbrokers Association, which at that time 'represent[ed] about 30 stores': Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1720 (Carlo Furletti). The authors have been unable to find any more recent references to this organisation.

[57] 'Pawnbrokers Thriving as Poorest Hurt in Slowdown', *Sydney Morning Herald* (online, 1 July 2013) <https://www.smh.com.au/business/pawnbrokers-thriving-as-poorest-hurt-in-slowdown-20130701-2p5uh.html> (quoting the head of the Victorian Independent Pawnbrokers Association); Andrew Colley, 'NSW Pawnbrokers Baulk at New MAC Address Laws', *ITNews.com.au* (online, 8 March 2016) <https://www.itnews.com.au/news/nsw-pawnbrokers-baulk-at-new-mac-address-laws-416340> (quoting a spokesman from the New South Wales Pawnbrokers Association).

[58] See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2005, 17380–1 (Melinda Pavey) (referring to the Pawnbrokers Association of NSW); Explanatory Notes, Second-Hand Dealers and Pawnbrokers Bill 2003 (Qld) 5 (referring to the Queensland Pawnbrokers Association and the Pawnbrokers Industry Federation); New South Wales Department of Fair Trading, *Pawnbrokers and Second-hand Dealers Act 1996* (Final Report, 1996) 91 (referring to the Pawnbrokers Association of NSW). The NSW report noted that 'the current industry groups do not exhibit the necessary characteristics that are required for self or co-regulation, such as evidence of a strong industry group which covers a substantial number of industry members': at 33.

[59] The Victorian Government's *Second-Hand Dealers and Pawnbrokers Regulations 2008: Regulatory Impact Statement* is no longer published on the Government's website, though it can be obtained from Better Regulation Victoria on request: Victorian Government, *Regulatory Impact Statements* (Web Page, 16 May 2022) <https://www.vic.gov.au/regulatory-impact-statements>.) When the Victorian regulations were remade in 2018, no Regulatory Impact Statement was published, on the basis that the proposed regulations 'would not impose economic or social burden and were of a fundamentally declaratory or machinery nature': Parliament of Victoria, *Annual Review: 2018 Regulations and Legislative Instruments* (Report, August 2019) 33; *Subordinate Legislation Act 1994* (Vic) s 8(1)(a), (c).

[60] Email from Business Licensing and Registrations Team, Consumer Affairs Victoria to Lucinda O'Brien, 10 August 2023. In 2008, there were 120 licensed pawnbrokers in Victoria: Victorian Government, *Second-Hand Dealers and Pawnbrokers Regulations 2008: Regulatory Impact Statement*, 1. In 2001, it was suggested that of the 6,900 registered second-hand dealers in Victoria at that time, approximately 150 were operating as pawnbrokers. This was described as a 'guesstimate', as pawnbrokers were not required to obtain a specific form of licence distinguishing them from other second-hand dealers prior to 2001: Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1719 (Carlo Furletti). See also Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1727 (Gerald Ashman).

had 'consistently declined' over the preceding decade.[61] In 2004, there were 214 operating in Queensland.[62] In the absence of a prominent industry body, or current public data from state licensing authorities,[63] the most reliable insight into the present scale of the Australian pawnbroking industry comes from the annual reports of a single large chain, Cash Converters. This multi-national corporation earned an annual revenue of $245.9 million in Australia in the financial year ending in 2022. While the majority of this revenue was generated from the issuing of short-term loans, including payday loans, $27.7 million was generated from 'pawnbroking fees'.[64] In June 2022, Cash Converters owned 79 Australian stores and a significant network of franchises across the country.[65] Its most recent annual report revealed an increase in its pawn lending business in the financial year ending in 2022.[66]

## B *Commonwealth Regulation*

In Australia, pawn lenders are largely excluded from national consumer credit laws. Pawnbrokers are exempt from most sections of the *NCCPA*, provided that, in the event of a debtor's default, their 'only recourse is against the goods provided as security for the provision of the credit.'[67] This means that users of pawn loans enjoy far fewer consumer protections than users of consumer leases, payday loans or mainstream credit products such as credit cards or personal loans. Due to their exemption from the *NCCPA*, pawn lenders are not required to conduct

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61 At that time, according to a NSW Government Regulatory Impact Statement, pawnbrokers were 'widely distributed throughout the state' and were 'well established in regional areas', as well as in metropolitan Sydney. The Regulatory Impact Statement noted that '[h]istorically most businesses were local in their sphere of operation, but the internet and technological advancements have significantly widened the scope of many businesses': New South Wales Government, *Regulatory Impact Statement: Proposed Pawnbrokers and Second-hand Dealers Regulation 2020* (Report, July 2020) 22 ('*RIS*') <https://www.productivity.nsw.gov.au/sites/default/files/2020-09/Pawnbrokers%20and%20Second-hand%20Dealers%20Draft%20Regulation%202020.pdf>.

62 Queensland Government, *Regulatory Impact Statement: Second-Hand Dealers and Pawnbrokers Regulation 2004* (Report, 2004) 2. See also Explanatory Notes, Second-Hand Dealers and Pawnbrokers Bill 2003 (Qld) 5.

63 In August 2023, the authors contacted NSW Fair Trading to ask how many pawnbrokers were licensed to operate in New South Wales at that time. In January 2024, NSW Fair Trading advised that were 633 licences issued to pawnbrokers *and* second-hand dealers in New South Wales (without specifying how many were pawnbrokers): email from Property, Transport and Business Licensing, NSW Fair Trading to Lucinda O'Brien, 10 January 2024. In August 2023, the authors sought equivalent data from Queensland Fair Trading but were advised that this could not be provided.

64 Cash Converters International Limited, *Appendix 4E & Annual Report* (Report, 31 August 2022) 58 <https://www.cashconverters.com/wp-content/uploads/2022/09/02562443.pdf>.

65 Ibid 9.

66 Cash Converters International Limited, *FY 2022 Investor Presentation* (Presentation, August 2022) 13, 17 <https://www.cashconverters.com/wp-content/uploads/2022/09/02562447.pdf>.

67 See (n 10).

assessments of consumers' creditworthiness before providing loans, in accordance with the responsible lending obligations. They are not required to be members of an external dispute resolution scheme, such as the Australian Financial Complaints Authority ('AFCA'). This means that users of pawn loans have no recourse to a free and simple dispute-resolution forum in the event of a dispute with a lender. Pawn lenders were also excluded from the scope of the Design and Distribution Obligations introduced by the Commonwealth Government in 2019.[68] Under the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'),[69] pawn lenders are subject to general consumer protection provisions broadly replicating those contained in the Australian Consumer Law.[70] These provisions prohibit misleading, deceptive[71] or 'unconscionable' conduct,[72] or the making of 'false or misleading representations'.[73] They also require providers to act 'with due care and skill'.[74] Consumer advocates have argued that 'it may amount to unconscionable conduct for pawn loans to be continually extended resulting in long-term high-cost

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68 *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth); *Corporations Act 2001* (Cth) s 994B(3)(f); *Corporations Regulations 2001* (Cth) r 7.8A.20(9)(e). The Design and Distribution Obligations require all issuers and distributors of financial products (other than those exempted by the *Regulations*) to test their products, prior to releasing them to market, to ensure that they do not cause consumer harm. Issuers and distributors must also 'monitor consumer outcomes' and review their products regularly 'to ensure that consumers are receiving products that are likely to be consistent with their … objectives, financial situation and needs': Australian Securities and Investment Commission, *Regulatory Guide 274: Product Design and Distribution Obligations* (Regulatory Guide, December 2020) 4. In the Explanatory Statement accompanying the *Corporations Amendment (Design and Distribution Obligations) Regulations 2019*, the Treasury stated that '[t]he regulations exclude pawnbroking from the scope of the [Design and Distribution Obligations] on the basis that the regulation of pawnbroking is the responsibility of States and Territories': Explanatory Statement, Corporations Amendment (Design and Distribution Obligations) Regulations 2019 (Cth) 13.

69 The issuing of a pawn loan constitutes a 'financial service' for the purposes of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). This is because pawnbroking constitutes a 'credit facility' and is therefore a 'financial product' for the purposes of the *ASIC Act*. This broad category also includes credit cards, mortgages, guarantees, consumer leases, hire purchase arrangements and BNPL services: *ASIC Act* s 12BAA(7)(k); *Australian Securities and Investments Commission Regulations 2001* (Cth) r 2B(1)(c). Provision of a 'financial product' constitutes a 'financial service' under s 12BAB of the *ASIC Act*: see Hal Bolitho, Nicola Howell and Jeannie Paterson, *Duggan and Lanyon's Consumer Credit Law* (LexisNexis Butterworths, 2nd edition, 2020) 24.

70 *Competition and Consumer Act 2010* (Cth) sch 2, s 18. The *Australian Consumer Law* does not apply to financial products and services: *Competition and Consumer Act 2010* (Cth) s 131A; Bolitho et al (n 69) 24.

71 *ASIC Act* (n 69) s 12DA.

72 Ibid ss 12CA–12CC.

73 Ibid s 12DB. The *ASIC Act* also prohibits harassment and coercion (s 12DJ), bait advertising (s 12DG), referral selling (s 12DH), pyramid selling (s 12DK) and the unsolicited issuing of credit or debit cards (s 12DL), among other things.

74 Ibid s 12ED(1).

debt.'[75] To date, however, it appears that no pawnbrokers have been sanctioned for breaching their obligations under the *ASIC Act*.[76]

### C *State and Territory Regulation*

Pawnbrokers are regulated in every state and territory.[77] Some jurisdictions require pawnbrokers to hold a licence, while others merely require them to register with a relevant authority.[78] The original purpose of these state regimes was to prevent crime and disrupt the illegal trade in stolen goods.[79] When the *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) ('the NSW Act') was introduced, consumer protection was described as 'secondary' to its law-enforcement function.[80] In recent decades, however, the protective function of state pawnbroking legislation has assumed greater significance. In Parliamentary debates, there has been a shift in emphasis towards the needs of borrowers, who have been described as 'vulnerable',[81] 'unfortunate'[82] and in 'very desperate need'.[83] In 2005, the NSW legislature acknowledged that affording protection to pawn loan users was 'critical', since 'consumers who use the services of pawnbrokers are often amongst the most disadvantaged members of our

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75 Claire Rawlinson, 'Cash Converters Pays Customer $4,000 to Drop Legal Challenge to Pawnbroking', *ABC News* (online, 17 May 2016) <https://www.abc.net.au/news/2016-05-17/cash-converters-pays-customer-to-drop-legal-challenge/7421462> ('Cash Converters').

76 A search of the ASIC website in August 2023, using the search term 'pawn', yielded no information about enforcement of the *ASIC Act* obligations in relation to pawn lenders. ASIC's website publishes the details of recent enforcement action against pawn lenders for alleged breaches of the *NCCPA*. These are discussed in Part III(E).

77 See *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic); *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW); *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld); *Second-Hand Dealers and Pawnbrokers Act 1996* (SA); *Pawnbrokers and Second-Hand Dealers Act 1994* (WA); *Second-Hand Dealers and Pawnbrokers Act 1994* (Tas); *Pawnbrokers Act 1902* (ACT); *Consumer Affairs and Fair Trading Act* (NT).

78 The chief requirements of current laws in Australia's three most populous states are summarised in the Annexure.

79 A Law Reform Commission of Victoria ('LRCV') report notes that the 'primary objective' of the *Pawnbrokers Act 1958* (Vic) was 'crime prevention and control'. According to the LRCV, the *Pawnbrokers Act 1958* (Vic) sought to achieve this '(a) by establishing a system for vetting the character of licence holders; (b) by imposing obligations on licence holders about how they go about their work, for example, in relation to keeping record books and not selling or changing the nature of goods for specified periods after acquiring them; (c) by giving police special powers to inspect goods and records.' The LRCV noted that '[t]here is a widespread view that businesses dealing in used goods are a major outlet for stolen goods – or certainly would be if they were not carefully supervised': Victorian Law Reform Commission, *Second Hand Dealers, Marine Stores Dealers & Pawn Brokers* (Report, May 1988) 7.

80 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 April 1996, 438, quoted in *Palgo* (n 1) 280 [92] (Kirby J).

81 Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1725 (Elaine Carbines).

82 Ibid 1729 (Peter Katsambatis).

83 Ibid 1723 (Ronald Best).

community'.[84] In 2001, the purposes of the *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) were amended, to include 'enhance[d] protection of consumers dealing with second-hand dealers and pawnbrokers' as an explicit purpose of the Act.[85] State and territory laws require pawnbrokers to confirm the identities of their customers, to keep detailed records and to produce these records on request. They also require pawnbrokers to provide their customers with a 'pawn ticket', setting out the fees and charges payable on pawn loans.[86] Most states impose limited additional rules with a view to protecting consumers. These include rules as to the minimum period that must elapse before a pawnbroker can sell pawned goods,[87] and a requirement that, when unredeemed goods are sold, any residual value must be repaid to the borrower.[88]

Since their enactment, most state laws have been subject to review and amendment.[89] In Victoria, for example, the State Government initiated reviews of its pawnbroking legislation in 1995 and again in 2000.[90] The first review led to the removal of a 48 per cent annual interest-rate 'cap'. The review found that the interest rate cap was causing 'unscrupulous pawnbrokers' to engage in various strategies designed to avoid the application of the *Second-Hand Dealers and*

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84 New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2005, 17379 (Tom Kelly).

85 *Second-Hand Dealers and Pawnbrokers (Amendment) Act 2001* (Vic) s 4; Victorian Government, *Second-Hand Dealers and Pawnbrokers Regulations 2008: Regulatory Impact Statement*, 2. By contrast, crime prevention remains the focus of the *Second-hand Dealers and Pawnbrokers Act 2003* (Qld). Section 3 states that its 'main objectives … are to — (a) regulate the activities of second-hand dealers and pawnbrokers; and (b) deter crime in the second-hand property market; and (c) help protect consumers from purchasing stolen property'. The *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) does not set out explicit purposes or objects. According to the 2020 Regulatory Impact Statement issued by the NSW Government, '[t]he implied objectives of the Act are to: limit the traffic in stolen goods through pawnbroker and second-hand dealer businesses; regulate the dealing in certain categories of second-hand goods at high risk of theft; require licensees to be more vigilant about clients who offer goods for sale or pawn, particularly for the documentation they produce to substantiate their identity and title; enhance the enforcement capability of NSW Police to combat property theft through the rapid provision of up-to-date information on the sale/pawn of second-hand goods; constrain the exercise of market power in respect of the provision of pawnbroking services; [and] facilitate the return of stolen property to rightful owners quickly and equitably.': see New South Wales Government, *RIS* (n 61) 4.

86 See, eg, *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 23(3)(a); *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 58; *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 28(5).

87 This is usually described as a 'redemption period': see, eg, *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 29; *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 60.

88 See, eg, *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 64.

89 See, eg, New South Wales Department of Fair Trading (n 58).

90 See, eg, Consumer Affairs Victoria, *Small Amount Lending Inquiry 2008* (Report, 2009) 9–10 ('*CAV Report*') <https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/small-amount-lending-inquiry-2008.pdf>. According to the *CAV Report*, the Victorian Government also 'invited views on the regulation of pawnbrokers, including whether any future regulation should extend the Consumer Credit Code to pawn broking businesses' in its 2005 review of consumer credit, but received no submissions on these matters: at 10. See also Consumer Affairs Victoria, *Regulating the cost of credit* (Research Paper, March 2006) i <https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/regulating-the-cost-of-credit-2006.pdf>.

*Pawnbrokers Act 1989* (Vic). This meant that some pawnbrokers' customers did not enjoy even the very limited consumer protections afforded them under the Act.[91] The second review led to the reinstatement of the rule, which had been abolished in 1997 by the previous Government, that any surplus value must be returned to the borrower, following the sale of unredeemed goods.[92] These amendments also banned the pawning of motor vehicles and empowered the Victorian Civil and Administrative Tribunal to hear disciplinary matters relating to pawnbrokers, impose fines and suspend or cancel a pawnbroker's registration.[93] The penalties for breaching state pawnbroking laws vary widely between jurisdictions. In Queensland, pawnbrokers may be fined up to $30,960 for operating without a licence.[94] In New South Wales the equivalent fine is $11,000.[95] In Victoria, acting as a pawnbroker without being registered carries a maximum penalty of $19,231.[96]

## D Palgo Holdings Pty Ltd v Gowans

Pawnbroking seldom features in the case law of Australia's appellate courts. In 2005, however, the High Court decision of *Palgo Holdings Pty Ltd v Gowans* ('*Palgo*')[97] offered a rare insight into the industry and the methods employed by some businesses to evade regulation. In *Palgo*, the High Court considered the application of the NSW Act to an enterprise trading as 'Cash Counters Byron' in Byron Bay, New South Wales. Cash Counters offered short-term loans secured by borrowers' personal items. In 'all but exceptional cases', these items were left on the lender's premises until the loans were repaid.[98] If borrowers defaulted on their loans, the items were sold.[99] The NSW Department of Fair Trading commenced legal action against Cash Counters, alleging that it had operated a pawnbroking business without a licence. Yet Cash Counters argued that its loans were in fact 'chattel mortgages' and therefore exempt from the application of the NSW Act. It pointed to the terms of its written agreement with customers, which referred to the goods as 'mortgaged property', and stated that the goods were left with Cash

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91 *CAV Report* (n 90) 9.

92 *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 23A; Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1720 (Carlo Furletti), 1726 (Elaine Carbines).

93 Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1726 (Elaine Carbines).

94 *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 6; Queensland Government, *Second-Hand Dealing and Pawnbroking Industry Breaches and Penalties* (Web Page, 24 October 2023) <https://www.qld.gov.au>.

95 *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 6; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

96 *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 5; Consumer Affairs Victoria, *Penalties — Second-Hand Dealers and Pawnbrokers* (Web Page, 30 June 2023) <https://www.consumer.vic.gov.au/licensing-and-registration/second-hand-dealers-and-pawnbrokers/penalties>.

97 *Palgo* (n 1).

98 Ibid 254 [8].

99 Ibid.

Counters 'in storage at [the] mortgagors [*sic*] request'.[100] The NSW Act did not define the terms 'pawned' or 'pawned goods'.[101] On appeal from the Local Court, Justice Sperling of the Supreme Court held that Cash Counters' agreements could be both pawn loans *and* chattel mortgages simultaneously.[102] Accordingly, Sperling J upheld the Local Court's finding that Cash Counters had provided pawn loans without a licence.[103] The Court of Appeal also upheld the Local Court's decision, stating that the mere production of 'a document which gave [Cash Counters] rights as a mortgagee' was 'not sufficient to prevent these transactions being fairly described as pledges or pawns'.[104]

In overturning these decisions, the High Court majority adopted a strict interpretation of the NSW Act, concluding that it did not apply to Cash Counters' loans. The majority concluded that the scope of the Act must be interpreted with reference to the clear and 'long-established' legal distinction between pawn loans and chattel mortgages.[105] It noted that, at common law, 'the right to detain the goods for the pledgee's security' was an essential component of a pawn loan, but that in the case of chattel mortgages, 'possession' of the goods by the lender 'is not essential'.[106] It rejected the lower courts' findings that the NSW Act applied to chattel mortgages, observing that this construction would require the term 'pawn' to include 'transactions which centuries of legal writing has distinguished as being different from a transaction of pawn or pledge.'[107] The majority observed that the NSW Act was 'only one of several Acts of New South Wales regulating the provision of credit to borrowers.'[108] Chattel mortgages were regulated under the *Bills of Sale Act 1898* (NSW) while other loans were governed by 'general legislation regulating the provision of consumer credit.'[109] It noted that some other statutes regulating pawnbroking, including the *Pawnbrokers Act 1902* (NSW), expressly extended their scope to include chattel mortgages.[110] In the absence of such

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100 Ibid 253–4 [5].

101 Cash Counters was alleged to have breached *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 6, which provided that '[a] person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person.'

102 Justice Sperling stated: 'It would be extraordinary if the legislature had intended that a transaction having all of the features of a pawnbroking transaction would not be covered by the legislation if the transaction contained the additional element that title in the goods passed to the lender. That would mean that ordinary pawnbroking transactions could be removed from the purview of the Act at the stroke of the pen, which cannot have been intended.' See *Palgo Holdings Pty Ltd v Gowans* [2002] NSWSC 894, [38].

103 Ibid [44].

104 Ibid [34] (Hodgson JA, Handley JA agreeing at [8], Heazley JA agreeing at [9]).

105 *Palgo* (n 1) 257 [16] (McHugh, Gummow, Hayne and Heydon JJ).

106 Ibid 258 [17].

107 Ibid 261 [24].

108 Ibid 262 [29].

109 Ibid 263 [31].

110 Ibid 259 [20].

provisions, it held, there was 'no evident reason to read the 1996 Pawnbrokers Act as designed to cover a field wider than its words mark out.'[111]

In dissent, Kirby J argued for a more expansive interpretation of the NSW Act, asserting that the Court 'should be on guard against any temptation to return to the dark days of literalism'.[112] Justice Kirby pointed out that many consumers who borrowed from Cash Counters believed they were engaging with a pawnbroker. One consumer stated that he left his goods at the store 'because he believed that was part of a normal hock transaction'.[113] Another 'stated that he assumed he had to leave the goods with [Cash Counters] "because that is the way a pawnbroker normally works"'.[114] His Honour argued that a technical and narrow definition of 'pawned goods' 'should not be used to assist those who use devices to circumvent the operation of the 1996 Act in frustration of the important social purposes it reveals'.[115] Within a month of the High Court's decision in *Palgo*,[116] the New South Wales Parliament amended the NSW Act.[117] The NSW Act now clearly states that its application depends upon 'the substance of the loan transaction rather than its form or other legal technicalities'.[118] The 2005 amendments stipulate that 'particular regard is to be had to the ordinary understanding of the borrower as to the nature of the loan transaction and the reason or basis on which possession of goods is given to the lender'.[119] Specifically, the amendments state that 'it does not matter that the terms of the loan transaction provide that the lender has taken possession of the goods at the request of or on behalf of the borrower or otherwise so as to give the appearance that the lender does not rely on possession of the goods as security for the repayment of the loan'.[120] The amendments also created a new regulation-making power to facilitate broader application of the NSW Act

111 Ibid 263 [31].

112 Ibid 265 [40].

113 Ibid 270 [57].

114 Ibid.

115 Ibid 281 [99]. In a subsequent 2005 decision, Kirby J noted that the Court had been 'persuaded' in *Palgo* 'to adopt a literal interpretation of the word "pawn" that prevented the attainment of the fairly obvious purpose of the New South Wales Parliament.' See *R v Lavender* (2005) 222 CLR 67, 102.

116 The High Court delivered its judgment in *Palgo* on 25 May 2005.

117 The *Pawnbrokers and Second-Hand Dealers Amendment Bill 2005* (NSW) was introduced into the NSW Legislative Assembly on 10 June 2005. The *Pawnbrokers and Second-Hand Dealers Amendment Act 2005* (NSW) passed both Houses on 23 June 2005 and received Royal Assent on 1 July 2005.

118 *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(3)(a).

119 Ibid s 3A(3)(b).

120 Ibid s 3A(3)(c). In the Explanatory Note accompanying these amendments, the NSW Government stated that the purpose of the changes was 'to reverse the effect of the decision of the High Court in *Palgo Holdings Pty Ltd v Gowans*' and to 'affir[m]' the interpretation adopted by the NSW Supreme Court, the NSW Court of Appeal and the dissenting judgment of Kirby J': Explanatory Note, Pawnbrokers and Second-hand Dealers Amendment Bill 2005 (NSW) 1–2. Identical provisions were inserted into the *Pawnbrokers and Second-Hand Dealers Act 1994* (WA) s 3A in 2006.

'in the event that the credit market develops new products … not anticipated by the legislation'.[121]

## E *ASIC Enforcement*

ASIC's website publishes relatively little information about its enforcement activity in relation to pawnbroking.[122] However in a media release dated 19 April 2023, ASIC stated that a Queensland lender and its employee had been 'charged in relation to engaging in credit activity without a licence' and that the employee 'ha[d] also been charged with engaging in conduct that contravened an order banning him from engaging in any credit activities.'[123] In April 2017, the Federal Court had issued fines totalling $776,000 to two companies based in Cairns, in northern Queensland, and to the director of both companies, for breaches of the *NCCPA*.[124] The companies had been operating in conjunction with a used car dealership to offer car loans to vulnerable consumers, with interest rates of 48 per cent and additional brokerage fees of up to $990.[125] The Federal Court found that the companies had breached the responsible lending provisions of the *NCCPA* and that one had engaged in unconscionable conduct and entered into unjust transactions. After the Federal Court handed down its decision, the media reported that the director of both companies continued to operate a pawnbroking business in Cairns.[126] The business purported to offer pawn loans, yet the terms of those loans allowed it to take 'debt recovery action' against borrowers in the event of default.[127] As noted above, pawnbrokers are exempt from the *NCCPA* on the condition that their 'only recourse' is to sell the goods offered as security, in the

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121 *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(4); New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 June 2005, 16965 (Alison Megarrity).

122 A search of the 'Newsroom' page on ASIC's website, conducted in August 2023, revealed only one media release relating to pawnbroking: Australian Securities and Investment Commission, 'Cairns Pawnbroker and Banned Employee Charged with Unlicenced Credit' (Media Release 23-100MR, 19 April 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-100mr-cairns-pawnbroker-and-banned-employee-charged-with-unlicenced-credit/> ('Cairns Pawnbroker Charged'). A search of the entire ASIC website, using the search term 'pawn', yielded only nine results. Of these, only the 19 April 2023 media release related to an enforcement action.

123 Ibid.

124 The Court also ordered the three defendants to pay costs totalling $420,000: *ASIC v Channic Pty Ltd (No 5)* [2017] FCA 363, [102].

125 Australian Securities and Investment Commission, 'Queensland Car Yard Lender Ordered to Pay over $1.2 Million After Breaching Consumer Credit Laws' (Media Release 17-108MR, 7 April 2017) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-108mr-queensland-car-yard-lender-ordered-to-pay-over-1-2-million-after-breaching-consumer-credit-laws/>.

126 Sharnie Kim, 'Cairns Salesman Fined for Misleading Vulnerable Consumers Continues to Work as Pawn Broker', *ABC News* (online, 21 June 2018) <https://www.abc.net.au/news/2018-06-21/cairns-lender-colin-hulbert-indigenous-loans-fines-qld/9893290>.

127 'Cairns Pawnbroker Charged' (n 122).

event of default.[128] A lender reserving the right to pursue borrowers by means of 'debt recovery action' may fall outside the scope of the exemption, making it subject to the *NCCPA*. ASIC's 2023 media release stated that 'the matter [wa]s being prosecuted by the Commonwealth Director of Public Prosecutions following an investigation by ASIC'.[129]

## IV Pawn Lending in Practice: Qualitative Data

This section provides qualitative evidence regarding the operation of the Australian pawn loan industry and the characteristics of pawn loan users. It draws on case law, consumer advocates' research and policy submissions, media reports and an online survey conducted by the authors.

### A *Case Law*

The case law offers some insights into the operation of some parts of the pawnbroking industry and the characteristics of its customers. In the 2005 *Palgo* decision, the Court heard that Cash Counters had provided loans ranging from $40 to $100,[130] typically for seven days.[131] Under the terms of one contract tendered in evidence, Cash Counters lent $70 for one week. The borrower agreed to repay $77 the following week.[132] With the exception of one loan secured by a customer's car, the loans described in *Palgo* did not exceed $100. One customer obtained a loan of $80, secured by a portable radio and a mobile phone. Another borrowed $60 on the security of a microwave and a set of speakers. One borrowed $40 using a ring as security and another borrowed $60 using a guitar.[133] Another case, heard in the NSW Supreme Court in the following year, involved a Wollongong pawnbroker accused of breaching its obligation to attach a label to each pawned item, under the NSW Act. The inventory of that pawn shop included 'a Sony Compact disc player, a Canon printer, a Panasonic cordless phone and a Squire Strat guitar.'[134]

The 2022 case of *Sam Pambris Super Fund Pty Limited v Kallidis*[135] afforded an insight into a very different segment of the industry. It involved a pawn lender

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128 *NCC* s 6(9).

129 In August 2023, ASIC's website stated that the matter was listed for mention on 20 September 2023: 'Cairns Pawnbroker Charged' (n 122).

130 *Palgo* (n 1) 270 [57].

131 Ibid 253 [4].

132 Ibid.

133 Ibid 270 [57].

134 *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402, 406 [10].

135 [2022] NSWDC 678.

whose business, Hock-A-Car Pty Ltd,[136] operated in Sydney from 2013 to approximately 2022. Hock-A-Car Pty Ltd provided pawn loans secured by motor vehicles,[137] at 20 per cent interest per month, equating to an annual interest rate of 240 per cent.[138] One pawn ticket, tendered in evidence, recorded a loan of $2,000 secured by a Toyota Corolla. The customer agreed to pay interest of $400 per month.[139]

## B *Previous Qualitative Research and Case Studies*

In 1997 and 2000, a national non-profit organisation conducted two qualitative studies of the Victorian pawnbroking industry.[140] The 1997 study was based on a survey of 73 pawn loan users and 50 consumer advocates, as well as 27 case studies gathered with the assistance of these advocates.[141] The study found that pawn loan users 'were typically in receipt of a pension or other government allowance' and used pawn loans to fund essential expenses, such as food, utilities and rent.[142] Some of the consumers surveyed said that they had used pawn loans to fund drugs, alcohol and gambling. The study found that, for many of these individuals, pawning goods was a '"last resort" measure', pursued after all other sources of funds had been exhausted. Nearly half of those surveyed said that they did not redeem the goods they pawned, while 'those who did often experienced considerable difficulties.'[143] On average, the consumers in this study estimated that they received a quarter of the value of the items they pawned, with average

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136 The business operated under several different names including A1 Hock-A-Car Sydney Pty Ltd, A1 Hock-A-Car Sydney No. 1 Pty Ltd and A1 Hock-A-Car Sydney No. 2 Pty Ltd: ibid [12]–[14].

137 Since 2001, the pawning of motor vehicles has been prohibited in Victoria: *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 23(1A). It is permitted under the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) and the *Second-hand Dealers and Pawnbrokers Act 2003* (Qld).

138 *Pambris Super Fund Pty Limited v Kallidis* [2022] NSWDC 678, [12]–[15].

139 Ibid [18]. The plaintiff gave evidence that 'a pawn ticket is a standard ticket, all pawnbrokers have the same ticket. Pawnbroking contracts are no longer than three months, they don't go into 12 month contracts, so therefore that's only there as a basis to give them a guide, so we don't charge 240% per annum because the contract expires in three months [*sic*] time unless the client wants to recontract their car which is very unlikely. And it's a standard pawn ticket, all pawnbrokers New South Wales wide have this amount of interest and that's how it works … I accept that it's high interest but it's governed by the Department of Fair Trading and pawnbroking has been around for a long time and it's short term lending and it's licensed': ibid [19].

140 Kristen Densley and Valerie Ayres-Wearne, *Fair Dealing? The Consumers' Experience of Pawnbroking in Victoria* (Report, Good Shepherd Youth and Family Service and Financial & Consumer Rights Council, March 1997) 1; Valerie Ayres-Wearne, *Money Lenders or Loan Sharks: The Consumers' Perspective on the Impacts of Deregulation of the Pawnbroking Industry and Other Legislative Amendments to the* Second-Hand Dealers and Pawnbrokers Act (1989) *Which Took Effect in January 1998* (Report, Good Shepherd Youth and Family Service, April 2000) 9.

141 These included financial counsellors, 'consumer support workers', emergency relief providers, No Interest Loans Network members, gambling counsellors and employees of supported accommodation services and community legal centres: Densley and Ayres-Wearne (n 140) 2.

142 Ibid.

143 Ibid.

loans ranging from $50 to $80.[144] While most were unaware of the interest rates attaching to their pawn loans, the authors estimated that their loans attracted rates ranging from 150 to 1,300 per cent per annum.[145] The study noted that many consumers 'expressed a high level of dissatisfaction with pawnbroking deals', expressing the view that they were 'ripped off' by pawnbrokers.[146] At the same time, they acknowledged their reliance on pawn loans '"to help them out in difficult circumstances" given their lack of alternative credit options.'[147]

In 2000, the same organisation published a further report evaluating the impact of reforms introduced in 1997 in Victoria.[148] These reforms 'had the effect of deregulating the pawnbroking industry' in Victoria by removing the requirement for pawnbrokers to obtain licences from local councils and abolishing the previous interest rate 'ceiling' of 48 per cent.[149] The reforms imposed new disclosure requirements on pawnbrokers, on the basis that access to more 'up-front' information about fees and charges would allow consumers to 'shop around to get the best possible deal.'[150] Based on a formal survey of 105 Victorian pawnbrokers operating at the time,[151] the study found evidence of widespread non-compliance with the new regulations.[152] It also found that, in the new regulatory environment of uncapped interest rates, 'market forces' had failed to protect consumers from paying very high rates. The study attributed this to the extreme vulnerability of many pawn loan users and the enduring status of pawnbrokers as lenders of 'last resort', when all other avenues have been exhausted.[153] To illustrate this, the report presented several case studies of pawn loan users.[154] A typical case study featured a 35-year-old man who pawned a chess set for $60. Over the ensuing six months, he paid a total of $100 in order to redeem

144 Ibid.

145 Ibid 3.

146 Ibid 3, 25, 48, 50.

147 Ibid 3.

148 Ayres-Wearne (n 140) 42.

149 Ibid i, 6. See also *Law and Justice Legislation Amendment Act 1997* (Vic); Explanatory Memorandum, Law and Justice Legislation Amendment Bill 1997 (Vic) 7; *CAV Report* (n 90) 9–10.

150 Victorian Government, Office of Fair Trading and Business Affairs, 'New Legislation to Clean up Pawnbroking Industry: Wade' (Media Release, 24 December 1997), quoted in Ayres-Wearne (n 140) 4.

151 Between September and December 1999, the author of this study identified 131 pawnbrokers operating in Victoria, though she was unable to verify this figure's accuracy. At that time, pawnbrokers were not distinguished from second hand dealers in the Victorian registration system: Ayres-Wearne (n 140) ii. This research also involved case studies, '[i]nformal discussions with pawnbrokers' and interviews with 'people on low-incomes who regularly pawn goods' and 'a range of community workers who come into contact with and assist people who pawn goods': at 10–11.

152 Ibid 78.

153 The study observed that many users of pawn loans are borrowing money to meet 'essential living costs … to provide needed cash flow for a struggling business or to finance a drug habit or gambling difficulties': ibid 80.

154 According to the study, '[t]he eighteen people who participated in this survey were known to Good Shepherd Youth and Family Service staff via their counselling and support work.': ibid 43.

the chess set.[155] Another involved a 24-year-old woman who pawned a video player for $60 and paid $85 to redeem it four weeks later.[156] One man, with 'no regular accommodation', pawned a radio worth $150 to obtain a $15 loan. He was unable to redeem the radio and it was sold by the pawn shop.[157] Several consumers profiled in the study admitted that they pawned their possessions because they had no other means of raising funds.[158] Many said they used the money to purchase drugs,[159] and one said he used it to access a detoxification programme.[160]

Since the publication of these reports, consumer advocates have continued to offer case studies illustrating the harms experienced by some vulnerable consumers as a consequence of using pawn loans.[161] In a submission to Treasury in 2017, a national coalition of consumer advocates stated that they 'regularly receive[d] complaints from consumers who have pawned goods to pay for basic necessities, or to fund drug and gambling addictions'.[162] They noted that goods pawned often had little monetary value, but great 'sentimental value' for the borrowers concerned. For this reason, 'desperate consumers' who could not repay their loans on time could often be persuaded to extend the loans, so as to avoid the permanent loss of their possessions. According to the advocates, 'the most disadvantaged Australians can end up paying significant amounts of interest … and become stuck in a debt spiral' through their use of pawn loans.[163] In a further submission in 2019, the advocates contended that some pawnbrokers 'target' vulnerable consumers with unfair contracts and 'exorbitant fees'.[164] They pointed out that some consumers of pawn loans 'end up paying more interest than the total value of the item.'[165] Both submissions included numerous case studies. One described a mother of seven who had taken out 76 pawn loans with effective annual interest rates ranging from 360 to 420 per cent per annum.[166] Another involved 'a middle-aged man with significant health problems', reliant on a

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155 Ibid 55.

156 Ibid 50.

157 Ibid 59.

158 Ibid 59.

159 Ibid 46, 50, 51, 55, 56. The report quoted one consumer who stated: 'When I was in an active drug addiction phase, I pawned and lost lots of stuff. Now I feel sad knowing just how much of my own stuff and things belonging to my family that I've lost': at 43.

160 Ibid 49.

161 *Industry Self-Regulation in Consumer Markets* (n 7) 37; CALC 2017 Submission (n 7); CALC 2019 Submission (n 7). See also Consumer Credit Law Centre SA, Submission No 33 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (9 November 2018) 14–15; Consumer Action Law Centre, Submission No 37 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (9 November 2018) 19–21 ('CALC Submission to Senate Inquiry').

162 CALC 2017 Submission (n 7) 20

163 Ibid 20–1.

164 CALC 2019 Submission (n 7) 4.

165 Ibid 4.

166 CALC 2017 Submission (n 7) 22–3.

Disability Support Pension.[167] The man had entered into 35 pawn loan contracts with 'a well-known pawnbroking franchise', 23 of them within a 15-month period. When he could not afford to redeem his pawned belongings, he 'often had to pay … interest charges for several months in order to keep [the] items on hold.' On several occasions, according to the advocates, the man 'purchased his own items back from the pawnbroker on laybuy at more than double the amount which was originally loaned to him.' In total, he paid the pawnbroker over $6,000, more than twice the sum of all his loans. He also lost several personal items, which were sold by the pawnbroker at a profit.[168]

Further examples of consumer harm have appeared in the media. In 2009, the national broadcaster reported claims from former customers and staff of a large pawnbroking chain that the company was 'thriving' on the 'desperation' of people addicted to drugs.[169] The report described one man, a long-term cannabis user, who pawned his PlayStation 3 to support his drug use. The man said the PlayStation had cost him $1,000. According to the report, he 'got $200' for pawning it, but 'had to pay almost twice as much to buy it back three months later.'[170] Another customer said that he had used the company at least 50 times to obtain money to buy drugs. He told the journalist that he and his friends would regularly steal garden equipment, including mowers and whipper snippers, and pawn it to fund their addictions. A former employee of the chain said that staff were aware that many customers were selling stolen goods to pay for drugs. A spokesman for the company did not dispute the claims, but insisted that this was a matter for the customer's 'discretion'. 'We don't take the role and we don't expect our staff to take the role to get behind the reasons why people use our services,' the spokesman said. [171]

In 2015, the ABC published a further report in which a Melbourne woman claimed that pawnbrokers were 'profiting off people's misery'.[172] The woman, a single mother, said that she regularly pawned her late mother's jewellery when 'in desperate need of cash'. She said that, at that time, she owed a total of $575 to her local pawnbroker, which belonged to a national chain. With a monthly interest rate of 35 per cent, or an effective annual rate of 420 per cent, these loans required monthly repayments of approximately $200. The woman said that she had

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167 This is an Australian social security payment for individuals who cannot work due to an enduring 'physical, intellectual or psychiatric condition': Services Australia, *Disability Support Pension* (Web Page, 2 November 2023) <https://www.servicesaustralia.gov.au/disability-support-pension>.

168 CALC 2019 Submission (n 7) 4.

169 Amy Simmons, 'Cash Converters "Thriving on Junkies"', *ABC News* (online, 1 December 2009) <https://www.abc.net.au/news/2009-12-01/cash-converters-thriving-on-junkies/1164554>.

170 Ibid.

171 The spokesman stated: 'Like every lending institution … the cash that we do lend is used for a variety of reasons that falls to the discretion of the customer': ibid.

172 Claire Rawlinson, 'Pawnbrokers Charging 420 Per Cent Interest on Unregulated Industry, "Profiting from Misery" Say Low Income Earners', *ABC News* (online, 16 July 2015) ('Profiting from Misery') <https://www.abc.net.au/news/2015-07-16/pawnbrokers-profiting-from-desperation/6622310>.

previously lost a diamond ring worth $4,000 after missing a repayment while she was in hospital. She originally pawned the ring for $400 and had already paid more than $700 in interest when she defaulted.[173] With the assistance of consumer advocates, the woman commenced legal action against the chain, arguing that it had engaged in unconscionable conduct, but discontinued the proceedings in exchange for a $4,000 settlement.[174]

### C *Survey of Australian Pawn Loan Users*

In 2019, the authors obtained ethics approval[175] to conduct an anonymous online survey of Australian consumers regarding their experiences using Buy Now Pay Later services ('BNPL'), payday loans and pawn loans. The authors focussed on these three products as they all provide access to small amounts of credit, over relatively short periods, and all are regulated differently from the credit products offered by major banks, such as credit cards and personal loans.[176] To varying extents, all three products are designed to appeal to low-income consumers,[177] and all have been criticised by consumer advocates, who argue that they

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173 Ibid.

174 See Rawlinson, 'Cash Converters' (n 75). See also Claire Rawlinson, 'Turning Points: Melbourne Women Face Traps Along Their Road to Recovery', *ABC News* (online, 16 July 2015) <https://www.abc.net.au/news/2015-07-14/turning-points-episode-4/6618316>. In 2015, the *Sydney Morning Herald* offered an alternative perspective on the pawnbroking industry in a profile of several customers attending a pawnshop in outer western Sydney. They included a Disability Support Pensioner who 'pawned her laptop, on which she was writing her memoir, for $100 every few weeks'; a man who regularly used pawn loans to pay for milk, bread, cigarettes and beer; and another customer who pawned a musical instrument for $80 to cover her rent and pay for groceries. The pensioner stated that pawn loans 'can be lifesavers for people'. The owner of the pawn shop 'said the majority of loans he issued were under $100 and more than half of his customers redeemed their items.' See Melanie Kembrey, 'Pawn Industry Faces Tough Competition but Remains a Quick Fix', *Sydney Morning Herald* (online, 9 May 2015) <https://www.smh.com.au/national/nsw/pawn-industry-faces-tough-competition-but-remains-a-quick-fix-20150507-ggvxex.html>.

175 Ethics approval was granted by the Law Human Ethics Advisory Group at Melbourne Law School on 7 June 2019.

176 BNPL is currently exempt from regulation under the *NCCPA*, though it is regulated under the *ASIC Act*: Australian Securities and Investment Commission, *Review of Buy Now Pay Later Arrangements* (Report No 600, November 2018) ('*Review*') 7, 15. Payday loans are subject to the general responsible lending obligations contained in the *NCCPA* but are also subject to additional, specific rules under the *NCC* (eg s 31A of the *NCC*, which imposes caps on the fees charged under a payday loan contract): Bolitho et al (n 69) 460, 452–3. As discussed above, pawn loans are largely exempt from the *NCCPA*, with the exception of ss 76–81 of the *NCC*, relating to unjust transactions (see Part III(B)).

177 See *Review* (n 176) 22–3, 26; Paul Ali, Cosima McRae and Ian Ramsay, 'Payday Lending Regulation and Borrower Vulnerability in the UK and Australia' (2015) 3 *Journal of Business Law* 223, 230–1.

exacerbate financial hardship.[178] The researchers conducted the survey in collaboration with a Sydney-based independent market research company, Pureprofile.[179] The survey contained 71 questions relating to respondents' use of pawn loans, payday loans and BNPL. Respondents could answer the questions in one, two or all three sections, depending on how many of these products they had used. Pureprofile recruited the survey participants from its 'panel' of consumers, who register for the express purpose of participating in research studies.[180] The research team requested 500 unique completed surveys from users of each product. The survey launched on 12 December 2019 and closed on 21 February 2020, having gathered 1,472 complete responses.[181] In collaboration with a consultant statistician, the authors employed statistical tests to analyse the survey data.[182]

There were some limitations to the survey data. The research company imposed quotas for gender, age and state or territory of residence, to increase the likelihood that respondents to the survey were broadly representative of the Australian population. To ensure that the survey reached its target of 500 responses in each wave, however, it was necessary to relax these stratification requirements. This led to some variation in the age and gender composition of the three unique groups.[183] A further limitation related to the sizes of some groups within the total sample of 1,472. In total, responses were gathered from 1,128 users of BNPL, 805 users of payday loan and 582 users of pawn loans. However, there was some overlap between these groups, as 31 per cent of respondents (459 individuals) had used two products, while 20 per cent (292 individuals) had used all three products. To maximise the accuracy of comparisons between these groups, the research team used 'unique' groups, being those who had used only

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178 See, eg, CALC Submission to Senate Inquiry (n 161); Financial Counselling Australia, Submission No 57 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (November 2018); Financial Rights Legal Centre, Submission No 31 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (November 2018).

179 Pureprofile recruits individuals to complete surveys on a wide range of topics. These individuals earn 'rewards' for completing surveys, with rewards calculated according to the amount of time taken to complete each survey. Rewards can be exchanged for cash, gift cards or movie tickets: see Pureprofile, *60-Second Guide to Earning* (Web Page) <https://www.pureprofile.com/60-second-guide/>.

180 Pureprofile pays these individuals a nominal amount to complete surveys on a wide range of topics. Payments are calculated according to the amount of time taken to complete a survey.

181 This does not include a small number of responses excluded due to their questionable authenticity or reliability. These responses were identified based on the respondents' answers to certain questions, as well as the respondents' IP addresses (with duplicate responses from the same address being excluded).

182 The data in Tables 1, 2 and 3 was analysed using the Chi-square test of independence. This test allowed the authors to compare the responses of various sub-groups to a single proposition.

183 It was difficult, for example, to obtain sufficient responses from those aged over 65. This is likely to be due, in part, to the fact that the survey was administered online. In the final sample, 7.6 per cent of all respondents were aged 65 or over. Respondents aged 65 or over accounted for 8.1 per cent of the total BNPL users, 1.7 per cent of payday loan users and 4.1 per cent of pawn loan users.

one product — pawn loans, payday loans *or* BNPL — for the purposes of statistical analysis. This left three smaller groups: 458 BNPL users, 152 payday loan users and 111 pawn loan users. These small sample sizes limit the extent to which the findings from the survey can be generalised to the wider population.

Despite these limitations, the survey offers some useful insights into the demographic and financial attributes of the pawn loan users who responded to the survey. Of the three 'unique' user groups in the survey, the pawn loan users were the least likely to own their homes. They were the most likely to live on incomes below $25,000 per year. They were the most likely to nominate completion of Year 10 as their highest qualification. These differences were statistically significant.[184] While not statistically significant, the data also suggested that pawn loan users were more likely to rely on social security as their main source of income and that they were the least likely to hold any credit cards. These findings are shown in Table 1.

*Table 1: Demographic and Financial Attributes (Unique Groups)*[185]

| | **Pawn only (per cent) (n = 111)** | **Payday only (per cent) (n = 152)** | **BNPL only (per cent) (n = 458)** |
|---|---|---|---|
| Home owner | 26 | 36 | 43 |
| Income less than $25,000 per year | 41 | 30 | 28 |
| Social security main source of income | 34 | 23 | 28 |
| Year 10 highest qualification | 23 | 13 | 14 |
| No credit cards | 46 | 32 | 38 |

[184] For the first, second and fourth rows of the demographic and financial attributes listed in Table 2, the Chi-square test of independence indicated a statistically significant difference between *at least one* group and the other two groups (or between all three groups), with a p-value of 0.05 or less (indicating a high degree of statistical significance). These results allowed the authors to conclude with reasonable certainty that, for most items, there was a statistically significant difference between the *highest* and the *lowest* result. The results in the third and fifth rows were not statistically significant, but were indicative. This means it is likely that they would have been statistically significant if the sample size had been larger.

[185] The results of Chi-Square tests of independence between the three groups were as follows: 'Home owner' statistically significant at 0.01 level (p = 0.003); 'Income less than $25,000 per year' statistically significant at 0.05 level (p = 0.021); 'Social security main source of income' *not* statistically significant; 'Year 10 highest qualification' statistically significant at 0.05 level (p = 0.048); 'No credit cards' *not* statistically significant.

These findings indicate that, in comparison with the BNPL and payday loan users in the sample, pawn loan users were socio-economically disadvantaged.

The survey data also offered evidence that pawn loans cause harm to some consumers. Of the three groups, pawn loan users were the most likely to report having experienced the following negative impacts, as a result of using the product: requesting more time to pay a bill; borrowing money from friends or family; 'going without' or cutting back on essential household items; and selling a personal possession. They were the least likely to state that they had experienced *none* of the specific adverse outcomes listed in the survey. These results were statistically significant.[186] These results are shown in Table 2.

*Table 2: Harms Experienced Following Use of the Product (Unique Groups)*[187]

| | **Pawn only (per cent) (n = 111)** | **Payday only (per cent) (n = 152)** | **BNPL only (per cent) (n = 458)** |
|---|---|---|---|
| Requesting more time to pay a bill | 27 | 21 | 8 |
| Borrowing money from friends or family | 30 | 24 | 8 |
| Going without or cutting back on essential household items | 25 | 21 | 13 |
| Selling a possession | 21 | 13 | 6 |
| None of the above | 27 | 29 | 69 |

Respondents were asked whether or not they intended to continue to use the product they had used. Pawn loan users were the least likely to say that they planned to keep using the product 'regularly' or 'occasionally'. More than half, 52 per cent, stated that they would not use pawn loans again. These results were statistically significant. They are shown in Table 3.

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186 In each row, the Chi-square test of independence identified a statistically significant difference between at least one group and at least one other group, with a p-value of 0.01 or less. This indicates a high degree of statistical significance.

187 Respondents were invited to select from a list 11 possible impacts, as well as a 12th option, 'None of the above'. Some were not applicable to those respondents in the 'unique' groups (since they asked about use of other products, eg, 'Purchased an essential item using Afterpay or another buy now pay later service', 'Borrowed money from a payday lender'). All results were statistically significant on Chi-Square tests of independence at the 0.01 level.

*Table 3: Intentions Regarding Future Use of the Product (Unique Groups)*[188]

| | Pawn (per cent) (n = 97) | Payday (per cent) (n = 136) | BNPL (per cent) (n = 427) |
|---|---|---|---|
| Plan to keep using regularly | 5 | 15 | 16 |
| Plan to keep using occasionally | 42 | 40 | 65 |
| Won't use again | 52 | 46 | 19 |

The survey data suggested that use of payday loans and BNPL was common among pawn loan users. Of the 582 pawn loan users who completed the survey (including those who had used more than one product), 64 per cent had also used payday loans and 67 per cent had also used BNPL.

# V Analysis and Recommendations

## A *Analysis*

### 1 *A Vulnerable Cohort at Risk of Harm*

Based on the data currently available, it appears that at a significant portion Australian pawn loan users are socio-economically disadvantaged and vulnerable to harm as a consequence of using pawn loans. In the course of Parliamentary debates, members of several state legislatures have acknowledged the acute vulnerability of some pawn loan users and the 'desperate need' that prompts many to take out a pawn loan.[189] This has been shown by qualitative research published in Victoria in 1997 and 2000; case studies published by consumer advocates in law reform submissions and the media; and the case law. These sources indicate that pawn loan users typically borrow small amounts, and that many of these consumers are vulnerable, due to factors such as homelessness, drug addiction, or reliance on a social security income that is insufficient to meet basic needs. Many of these consumers say they have no access to other forms of credit and use pawn loans to meet immediate, urgent expenses. Many express dissatisfaction with the fees attaching to pawn loans and the amounts they are

[188] Chi-Square Tests of independence between the three groups indicated statistical significance at the 0.01 level (df = 4; p = 0.000). As this question was not compulsory, some respondents did not answer, resulting in a slightly smaller sample size in each group.

[189] New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2005, 17379 (Tony Kelly); Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1723 (Ronald Best).

lent, relative to the market price or sentimental value of the goods they pawned.[190]

The authors' online survey offers further qualitative evidence that pawn loan users are a disadvantaged cohort, with respect to income, home ownership, workforce participation, educational attainment and access to mainstream credit (specifically, credit cards). Almost a quarter, 23 per cent, nominated Year 10 as their highest level of formal education.[191] Forty-one per cent said that they held no credit cards, indicating a degree of exclusion from mainstream financial products. Only 26 per cent were homeowners,[192] compared with 66 per cent of all Australian households.[193] Thirty-four per cent cited social security as their main source of income and 41 per cent lived on less than $25,000 per year. The pawn loan users in the survey exhibited many signs of disadvantage, even when compared with users of payday loans and BNPL services.[194] This finding correlates with recent United States research, which has found that pawn loan users are not only disadvantaged, relative to the general population, but that they are more disadvantaged than users of other 'fringe' financial products.[195] The pawn loan users were most likely to report adverse impacts, including borrowing money from friends or family, asking for more time to pay a bill or 'going without' essentials, as a consequence of using the product. They were also far more likely than users of payday loans or BNPL services to say that they did not intend to use the product again. It may be inferred that this was due, at least in part, to lower levels of satisfaction with the product. While these results must be treated with some caution, due to the small sample size, they offer further evidence that pawn loan use can entrench hardship for consumers whose financial position is already precarious.

### 2 *Lack of Transparency*

Despite the vulnerability of many pawn loan users, there is almost no public data available regarding the industry or its clientele. As noted above, the regulatory bodies responsible for pawn lending in Australia's three most populous states do not publish any data regarding the scale of the industry — either in terms of the number of businesses operating or the estimated number of pawn loan users in the population. The most reliable information regarding the number of

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190 See Densley and Ayres-Wearne (n 140) 3; Rawlinson, 'Profiting from Misery' (n 172).

191 See above Table 1.

192 See ibid.

193 Australian Bureau of Statistics, *Latest Release: Housing Occupancy and Costs* (Web Page, 25 May 2022) <https://www.abs.gov.au/statistics/people/housing/housing-occupancy-and-costs/latest-release>.

194 As discussed above, compared with the payday loan and BNPL users in the survey, pawn loan users were the least likely to own their own homes. They were the most likely to earn incomes below $25,000 and to cite Year 10 as their highest level of educational attainment.

195 Bolen, Elliehausen and Miller (n 48) 1589.

pawnbrokers in operation derive from Regulatory Impact Statements and other Parliamentary documents published in conjunction with changes to the law or regulations. However, these documents, appearing on a sporadic basis, do not provide any reliable insight into long-term trends in the industry. They provide no insight into the demographic profile of pawn lenders' customers.

### 3 *Lack of Access to Dispute Resolution*

This lack of transparency is compounded by the fact that, in the current regulatory environment, users of pawn loans must apply to a court to enforce their very limited consumer rights under the *NCCPA*. This process is 'far too complex, costly and intimidating for most people', according to advocates.[196] Even when a community legal centre assisted one of its clients to initiate legal proceedings against a Melbourne pawnbroker, in 2016, her 'history of social phobia and mental illness' prompted her to discontinue her claim, rather than endure the stress and scrutiny of a court case.[197] The absence of accessible, quick and simple avenues for enforcing the *NCCPA* effectively renders its protections illusory, while allowing pawnbrokers who contravene the law to avoid exposure.

### 4 *Risk of Regulatory Arbitrage*

It is apparent that some providers of short-term credit have, in the past, sought to evade their legal obligations under consumer credit laws by characterising themselves as pawnbrokers. In April 2008, prior to the enactment of the *NCCPA*, the Queensland Government introduced new restrictions on payday lending, including a 48 per cent cap on interest, fees and charges.[198] By August 2008, a Queensland newspaper reported that some outlets of a national chain were 'writing loans under pawnbroking laws' with effective annual interest rates of up to 420 per cent, and encouraging customers 'to buy a CD or DVD from the store … for only $1' to serve as collateral.[199] More recently, as discussed above, ASIC has alleged that a company in northern Queensland has purported to act as a pawnbroker while, in reality, providing credit services regulated by the *NCCPA*.[200] The company attracted significant media attention in 2018 after its director was 'fined $1.2 million for repeatedly signing up poor, Indigenous people in far north Queensland to exorbitant loans'.[201] According to consumer advocates, the director had been offering loans to people from the Aboriginal community of Yarrabah,

196 CALC Submission to Senate Inquiry (n 161) 19.

197 Rawlinson, 'Cash Converters' (n 75).

198 Explanatory Notes, Consumer Credit (Queensland) and Other Acts Amendment Bill 2008 (Qld).

199 Patrick Lion, 'Sky-High Loan Rates Exposed as Lenders Skirt New Law', *Courier-Mail* (online, 17 August 2008) <https://www.couriermail.com.au/news/queensland/bligh-looks-at-lending-loophole/news-story/3b927a6304beac073d471714e9739c37>.

200 'Cairns Pawnbroker Charged' (n 122).

201 Kim (n 126).

south of Cairns, since at least 2009. The director avoided paying his fine, and another order requiring him to pay $47,699 in compensation to affected consumers, by declaring bankruptcy. In 2018, when it emerged that he was working as a pawnbroker, ASIC stated that it would 'continue to monitor' the director's activities. Despite this, it appears that the individual in question was able to operate a business providing high-cost credit products, to a cohort of highly disadvantaged consumers, for up to five years after he was fined for serious contraventions of the *NCCPA*.[202] These reports suggest that the current exemption of pawn lending from the national legislative regime allows significant scope for regulatory arbitrage on the part of lenders seeking to skirt the edges of the *NCCPA*.[203]

### 5 *Risks Posed by Recent Amendments to the NCCPA*

Recent and impending changes to the *NCCPA* create a risk that demand for pawn loans will increase in Australia. These reforms are likely to create an expanding group of low-income consumers with no access to any form of credit other than pawn loans. Under new payday lending provisions introduced in December 2022,[204] a payday loan is 'presumed to be unsuitable' if the borrower has already taken out two payday loans within the preceding 90 days.[205] These provisions reduce the capacity for borrowers to 'roll over' loans, that is, to take out new and higher loans in order to repay old ones. Under the new provisions, payday lenders are also prohibited from offering loans that would result in the prospective borrower's repayments exceeding a prescribed proportion of their income.[206] Many Australian payday loan providers already offer pawn loans on the same premises, or via the same online platform. They also have extensive databases containing the details of previous customers, which may be used to market pawn loans.[207] In the light of the 'inextricable link between payday lending and

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202 The Federal Court found that many of the individuals who took out car loans with Channic 'endured difficult family circumstances, were of limited education … lacked financial literacy' and were in 'very difficult financial circumstances … [T]hey depended on [social security] benefits to keep their family going and they expended their benefit receipts virtually immediately once they were obtained': *ASIC v Channic Pty Ltd (No 5)* [2017] FCA 363, [26].

203 The Financial Rights Legal Centre ('FRLC') says it has 'heard many stories from consumers who were knocked back from a regulated credit contract to be referred to or directed to the pawnbroking entity that was co-located within the premises': Financial Rights Legal Centre, Submission to NSW Fair Trading, *Regulatory Impact Statement: Pawnbrokers and Second-hand Dealer Regulation 2020, July 2020* (28 July 2020) 13, 15–16 ('Submission to NSW Fair Trading').

204 *Financial Sector Reform Act 2022* (Cth); Consumer Action Law Centre, 'Consumer Protections for High-Cost and Harmful Payday Loans and Consumer Leases Finally Pass Parliament' (Media Release, 2 December 2022) ('Consumer Protections').

205 Explanatory Memorandum, Financial Services Reform Bill 2022 (Cth) 116–17.

206 Ibid 116, 118–19.

207 Cash Converters' recent presentation to investors notes that its database contains 'over 3.2 m[illion] unique customer records', offering it a 'competitive advantage' in the industry: Cash Converters International Limited, *FY 2022 Investor Presentation* (n 66) 4.

pawnbroking',[208] it is likely that some payday lenders will encourage these consumers to take out pawn loans in the event that they no longer qualify for payday loans. This has been the experience in New Zealand, where changes to responsible lending laws have made it more difficult for some consumers to obtain credit.[209] According to consumer advocates, pawn lending has increased significantly following these changes.[210] Further reforms, expected by the end of 2023, will also bring BNPL services within the *NCCPA*, reducing their availability to low-income consumers.[211] The tighter regulation of BNPL may stimulate still more demand for pawn loans, a prospect welcomed as an 'opportunity' by some members of the pawnbroking industry.[212] The rising cost of living will further compound this risk as increasing numbers of Australians resort to credit to meet essential expenses.[213]

## B *Recommendations*

### 1 *External Dispute Resolution for Pawn Loan Users*

Some consumer advocates maintain that lack of access to External Dispute Resolution ('EDR') is 'the most critical omission in the pawnbroking regulatory regime'.[214] In the United Kingdom, consumers of pawn loans can complain free of charge to the Financial Ombudsman Service if they are dissatisfied with the

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208 CALC 2017 Submission (n 7) 21.

209 Jenée Tibshraeny, 'Government Unveils Plans to Further Loosen Consumer Lending Rules', *NZ Herald* (online, 2 August 2022) <https://www.nzherald.co.nz/business/government-unveils-plans-to-further-loosen-consumer-lending-rules/STQ5GCUUOQQZJFDYSAEJUUJ7GU/>.

210 'Just last month, Tauranga financial mentor Shirley McCombe told government officials that pawn brokers were one of the forms of lending that was on the rise following the introduction of responsible lending rules that slowed finance company lending. "We now see clients struggling with multiple buy now, pay later schemes, organisations selling 'refurbished' items such as phones for exorbitant prices, but not charging interest, or pawn brokers who hold a family's precious heirlooms such as Tapa cloths and charge, 25%, 60% or even 90% interest per month," she said.' Rob Stock, 'The "3000-Year-Old" Pawn Industry is in the Commerce Commission's Sights', *Stuff* (online, 13 November 2022) <https://www.stuff.co.nz/business/money/130350099/the-3000year old-pawn-industry-is-in-the-commerce-commissions-sights>.

211 Stephen Jones, Treasury, 'Address to the Responsible Lending & Borrowing Summit' (Speech, Responsible Lending & Borrowing Summit, 22 May 2023) <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit>.

212 The company has advised investors that '[r]egulation risk for unregulated lending sectors (e.g. BNPL) presents opportunities': Cash Converters International Limited, *FY 2022 Investor Presentation* (n 66) 4.

213 Ferdi Botha, Melbourne Institute: Applied Economic & Social Research, *Taking the Pulse of the Nation: Australians using various measures to deal with higher cost of living* (Report, 21 September 2022).

214 Submission to NSW Fair Trading (n 203) 11.

conduct of a pawn lender.[215] In Australia, by contrast, pawnbrokers are not required to join an EDR scheme. Australian consumers of pawn loans must apply to a federal court if they wish to enforce their rights under the *NCCPA* or the *ASIC Act*.[216] State laws may be enforceable in state tribunals, offering a slightly less formal and less costly alternative. However, such tribunals do not always grant leave for lawyers to represent parties in hearings.[217] This means that consumers may be required to appear unrepresented, even if they have obtained advice from a community legal centre or Legal Aid office. This daunting prospect acts as a significant disincentive to pursue legitimate claims under state legislation. Consumer advocates argue that without accessible enforcement mechanisms, many of the legal obligations on pawnbrokers, such as the requirement to obtain a reasonable price when selling goods, are 'ineffective' in practice.[218] These advocates maintain that pawnbrokers should be required, under the *NCCPA* or state legislation, to become members of AFCA.[219] This national body, established in 2018,[220] has been lauded by consumer advocates as a 'world class' EDR scheme providing consumers with an 'extremely important alternative to the court system'.[221] Requiring membership of AFCA would afford pawn loan users a free and accessible forum in which to resolve their disputes with pawn lenders, and in appropriate circumstances, to obtain financial compensation for lenders' misconduct. AFCA publishes most of its decisions,[222] and is also required to

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215 Financial Conduct Authority, *How to Complain* (Web Page, 31 July 2023) <https://www.fca.org.uk/consumers/how-complain>. It should be noted that Financial Ombudsman Service appears to be underutilised by pawn loan users in the United Kingdom. In 2018, the Financial Conduct Authority estimated that the United Kingdom's pawnbroking industry served approximately 350,000 customers per year: Financial Conduct Authority, *Pawnbroking Sector Review* (n 55). Since then, the United Kingdom market has grown significantly: Oso Alabi and Venkataramakrishnan (n 8); Marsh (n 8). Yet of the 61,995 'new cases' determined by the Financial Ombudsman Service in 2022–23, only 28 related to pawnbroking. Pawnbroking had the 'lowest uphold rate' of products in the 'credit' category, with only 19 per cent of complaints being upheld: Financial Ombudsman Service, *Annual Complaints Data and Insight 2022/23* (Web Page, 14 June 2023) <https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data/annual-complaints-data-insight-202223>.

216 Submission to NSW Fair Trading (n 203) 11.

217 Ibid.

218 Ibid. This obligation applies to pawnbrokers in New South Wales and Victoria: see Part III(C).

219 Ibid. See also Victorian Law Reform Commission, *The Law Reform Longlist 2023: 77 Suggestions from the Community* (Report, August 2023) 25 <https://www.lawreform.vic.gov.au/publication/law-reform-longlist-2023/>.

220 See *Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth); Australian Financial Complaints Authority, Submission to Treasury, *Review of the Australian Financial Complaints Authority* (March 2021) <https://treasury.gov.au/sites/default/files/2021-11/c2021-147524-afca.pdf>.

221 Consumer Action Law Centre et al, Submission to Treasury, *Review of the Australian Financial Complaints Authority* (April 2021) 10 <https://treasury.gov.au/sites/default/files/2021-11/c2021-147524-cag.pdf>.

222 Australian Financial Complaints Authority, *AFCA Determinations Public Reporting* (Web Page) <https://www.afca.org.au/what-to-expect/search-published-decisions/public-reporting-of-determinations>.

identify and report 'systemic issues' emerging from its casework.[223] Compulsory membership of AFCA would therefore offer policymakers and the general public an insight into the operation of the industry.[224] It would help to identify areas in which state laws or the *NCCPA* require reform, to provide more effective protection for vulnerable consumers of pawn loans.

### 2 *ASIC Review of the Industry and Ongoing Data Collection*

As this study has demonstrated, there is at present almost no publicly available information regarding the size of the Australian pawnbroking industry, the extent of its customer base or the characteristics of these customers. Other than the case studies published by consumer advocates, and infrequent media reports, there is no public information about the impact of pawn loans on their customers. Given the risks posed by pawn lending, as suggested by the qualitative data presented in this study, it is important to address this gap in knowledge. ASIC should use its extensive information-gathering powers under the *ASIC Act* to undertake a national review of the industry, similar to its reviews of the BNPL industry published in 2018 and 2020.[225] Like these reports, an ASIC review of the pawnbroking industry could draw on business data obtained from providers, quantitative and qualitative data gathered from surveys and interviews with consumers, as well as consultations with consumer advocates and industry associations.[226] Such research would help state and Commonwealth policymakers to assess the need for reform to pawnbroking laws. In addition to this discrete review, ASIC should liaise with state regulators to gather and publish industry data on a regular basis. Such data could include the number of pawnbrokers operating in each state and territory and the number of disciplinary actions taken by state regulators in each reporting period, including fines imposed and licences cancelled due to non-compliance with state laws. Access to data of this nature would facilitate informed public policy debate over the pawnbroking industry and its impact on consumers.

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223 Australian Financial Complaints Authority, *Systemic Issues* (Web Page) <https://www.afca.org.au/about-afca/systemic-issues>; *Corporations Act 2001* (Cth) s 1052E.

224 The United Kingdom's Financial Ombudsman Service publishes many decisions regarding pawn lenders on its website. See, eg, Financial Ombudsman Service, *Decision Reference DRN-4180350* (Web Page, 17 August 2023) <https://www.financial-ombudsman.org.uk/decision/DRN-4180350.pdf>; Financial Ombudsman Service, *Decision Reference DRN-2169986* (Web Page, 23 November 2020) <https://www.financial-ombudsman.org.uk/decision/DRN-2169986.pdf>.

225 *Review* (n 176); Australian Securities and Investment Commission, *Buy Now Pay Later: An Industry Update* (Report No 672, November 2020) ('*Buy Now Pay Later*').

226 *Review* (n 176) 40–3; *Buy Now Pay Later* (n 225) 24–5.

### 3 *Further Measures to Address Regulatory Arbitrage*

There is currently a strong incentive for lenders to present themselves as pawnbrokers, governed by state legislation, to avoid the application of the *NCCPA*. Regulatory arbitrage is a longstanding problem in the context of 'fringe' financial products such as payday loans, consumer leases and other forms of short term lending.[227] Consumer advocates contend that unscrupulous businesses are adept at 'find[ing] ways to frame their services in ways that "fit" the gaps' in regulation.[228] ASIC's recent investigation of a Queensland provider, and the ensuing prosecution of this provider for breaches of the *NCCPA*, suggest that the current legal framework facilitates conduct of this kind.[229] This problem may be addressed, at least in part, by the recent incorporation of new anti-avoidance provisions into the *NCCPA*.[230] These 2022 amendments explicitly prohibit providers of payday loans and consumer leases from structuring their products in such a way as to avoid the application of the *NCCPA*.[231] These reforms have been welcomed by consumer advocates, who say they will give ASIC far greater capacity to 'tackle business models that repeatedly avoid the law through tricky contractual structures'.[232] The effectiveness of these reforms will depend on robust enforcement by ASIC. It will also depend on ongoing consultation with consumer advocates who have, in the past, alerted ASIC to misconduct in the industry.[233] To facilitate this, ASIC should devote appropriate resources to monitoring the pawnbroking industry and continue to liaise with consumer representatives who have direct contact with pawn loan users. As the High Court case of *Palgo* demonstrates, some pawnbrokers have taken steps to evade even their limited obligations under state laws by adopting unusual contractual structures. To address this, all Australian states should adopt provisions mirroring those of the current NSW Act, to make it clear that the application of

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227 See generally Paul Ali et al, 'Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm' (2013) 41(5) *Australian Business Law Review* 240; Lucinda O'Brien, Ian Ramsay and Paul Ali, 'Australia's Product Intervention Power and Protection from Consumer Harm: An Evaluation' (2022) 29(1) *Competition and Consumer Law Journal* 32.

228 Submission to NSW Fair Trading (n 203) 13. See also Stock (n 207).

229 'Cairns Pawnbroker Charged' (n 122).

230 *Consumer Protections* (n 204).

231 *Financial Sector Reform Bill 2022* (Cth) sch 4 pt 4; *National Consumer Credit Protection Act 2009* (Cth) ss 323A–323D.

232 Consumer Protections (n 204).

233 ASIC's website states that '[t]he Indigenous Consumer Assistance Network (ICAN) first brought ASIC's attention to the conduct that led to the charges [against the pawnbroker] in the Cairns Magistrates' Court [in 2023]. ICAN provides financial counselling services to Indigenous consumers in North QLD': 'Cairns Pawnbroker Charged' (n 122).

state pawnbroking law depends upon 'the substance of the loan transaction rather than its form or other legal technicalities'.[234]

## VI Conclusion

Australian consumers typically turn to pawn loans in situations of dire necessity. While there is at present almost no public data regarding the size of the industry, or the profile of its clientele, the quantitative evidence presented in this study suggests strongly that many pawn loan users are vulnerable low-income earners. These consumers tend to borrow small amounts, offering personal items such as jewellery, electronics and musical instruments as security. The research and policy submissions of consumer advocates contain numerous examples of people using pawn loans to fund drug addictions, gambling, or essential expenses such as food. The authors' online survey provides further evidence that, even compared with users of other 'fringe' financial products such as payday loans, pawn loan users are likely to be in precarious financial circumstances and to exhibit signs of social disadvantage. The survey also indicates that use of pawn loans can exacerbate consumers' pre-existing financial problems, causing them to fall behind with other payment obligations, go without essentials or seek further loans from friends or family.

In the light of the consistent evidence of harm caused by pawn loans, as documented by this study, it is difficult to rationalise the paucity of consumer protections for pawn loan customers under current state and Commonwealth law. Unlike payday loans and consumer leases, pawn loans are not subject to any restrictions on fees or interest rates. Pawnbrokers are not required to belong to an EDR scheme, meaning that their customers must apply to a court or tribunal to enforce their limited legal rights. Consumer advocates say that, as a consequence, these rights are almost never enforced. Recent regulatory action by ASIC, as well as anecdotal evidence provided by consumer advocates, suggests that the light regulation of pawn loans acts as an incentive for unscrupulous lenders to characterise themselves as pawnbrokers, in order to evade more stringent regulation under the *NCCPA*. Recent and impending changes to the *NCCPA*, which may reduce access to payday loans and BNPL services, create a heightened risk that some consumers will resort to pawn loans as a substitute.

To address this risk, and the wider problem of inadequate consumer protection in the pawn lending industry, the present study makes four recommendations. It concludes that, at a minimum, all Australian pawnbrokers should be required to belong to an EDR scheme such as AFCA. This would give consumers a meaningful avenue for enforcing their limited existing rights under

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234 *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(3)(a). As noted above, Western Australia has already incorporated these provisions into its pawnbroking legislation: see *Pawnbrokers and Second-hand Dealers Act 1994* (WA) s 3A.

the *NCCPA* and state legislation. It would have the additional advantage of providing policymakers and the wider community with greater insight into systemic problems in the industry and the types of harm suffered by pawn loan users. These insights would assist in identifying ways in which state and Commonwealth law could be amended, to provide more effective protection for pawn loan users. To address the almost total absence of reliable public data concerning pawnbroking, the authors recommend that ASIC undertake a detailed review of the industry and publish updated industry data on a regular basis. This would greatly improve transparency and facilitate informed debate over the regulation of pawn lending. Finally, noting the recent incorporation of new anti-avoidance provisions into the *NCCPA*, the authors conclude that ASIC should devote resources to the ongoing monitoring of the industry, in consultation with consumer advocates. This would enable ASIC to identify future attempts at regulatory arbitrage, on the part of unscrupulous providers, and to enforce the new anti-avoidance measures swiftly and effectively. They also recommend that all state and territory legislatures adopt provisions mirroring those introduced in New South Wales in 2005, to ensure that 'legal technicalities' cannot be exploited by pawnbrokers to evade the application of state laws.

## Annexure

### *Table 4: Key features of pawnbroking laws in Victoria, New South Wales and Queensland*

| Legislation and Regulations | Requirements for entry into the pawnbroking industry | Ongoing obligations of pawnbrokers |
|---|---|---|
| *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) and *Second-Hand Dealers and Pawnbrokers (General, Exemption and Record-Keeping) Regulations 2018* (Vic) | • Must be registered (s 5)<br>• Cannot be insolvent or subject to an order under the *Guardianship and Administration Act 2019* (Vic) (s 6)<br>• Cannot have been convicted of a 'disqualifying offence' (an offence involving fraud, dishonesty, violence or drug trafficking), have had a professional licence suspended or cancelled, or have been disqualified from a profession within the previous five years (s 6) | • Identify customers (s 19)<br>• Keep accurate records of every transaction (s 20)<br>• Retain goods for at least seven days before disposing of them (s 21)<br>• Accurately record the place in which goods are stored (s 21 A)<br>• Co-operate with police (s 22)<br>• Issue consumers a pawn ticket setting out the charges associated with the loan and the consumer's rights and responsibilities (s 23)<br>• Return to consumers any residual equity in unredeemed goods that are sold, if claimed up to 12 months after sale (s 23A)<br>• Offer the goods for sale 'as soon as practicable and so as to receive the best price reasonably obtainable' if the period of a loan expires and is not extended and pawned goods are unredeemed (r 24) |
| *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) and *Pawnbrokers* | • Must be licensed (s 6)<br>• Must be 'a fit and proper person to hold a licence' (s 8) | • Identify customers (s 15)<br>• Refuse 'any goods offered for sale or pawn if the |

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|---|---|---|
| *and Second-hand Dealers Regulation 2021* (NSW) | • Cannot have received a conviction in New South Wales or elsewhere for an offence involving dishonesty in the previous 10 years (8A)<br>• Cannot have been an undischarged bankrupt or the executive officer of a company in administration within the previous three years (s 8A)<br>• Cannot be 'mentally incapacitated' (s 8A) | licensee has reasonable grounds to believe that the goods concerned are not the property of the person by whom they are offered' (s 15(2))<br>• Keep detailed records, retain them for at least three years and produce them on request (ss 16-17, 28)<br>• Report 'suspicious goods' (s 19)<br>• Retain goods for at least 14 days (s 21)<br>• Issue each customer a pawn ticket containing an itemised list of fees and charges and a statement of the customer's rights and obligations (s 28)<br>• Permit redemption of goods for at least three months after they are pawned (s 29)<br>• Sell unredeemed goods 'in a manner conducive to securing the best price reasonably obtainable' (s 30)<br>• Return any 'surplus proceeds of the sale' to consumers, their representatives or executors, if claimed up to |

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|---|---|---|
| | | 12 months after sale (s 31)[235] |
| *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) and *Second-hand Dealers and Pawnbrokers Regulation 2004* (Qld) | • Must be licensed (s 6)<br>• Cannot be an insolvent under administration (s 7)<br>• Cannot have been convicted of a 'disqualifying offence' (including stealing, forgery, receiving stolen property or other fraudulent offences) within the previous five years (s 7)<br>• Cannot be subject to a 'control order' (s 7)[236] | • Keep a 'property register' (s 53) and provide information from the register to police on request (s 55)<br>• Provide a pawn ticket setting out the interest payable and the redemption period (s 58)<br>• Permit redemption of goods for at least three months after they are pawned (s 60)<br>• Maintain a trust account to hold the balance of proceeds of sale, minus any sums owed to the pawnbroker (s 60)<br>• Give notice of the imminent sale of pawned property by public auction[237] at least twice 'in a newspaper circulating |

[235] The FRLC contends this provision is regularly circumvented by pawnbrokers, through reliance on sub-s 31A(2)(a) of the NSW Act, which 'allows pawnbrokers not to …send a notice to the consumer advising that there is a surplus if the consumer has made a written request that they not be notified if there is a surplus.' The FRLC states that many pawn loan contracts contain 'standard, non-negotiable' terms 'designed… to circumvent s 31(A) of the Act and the requirement to notify consumers of a surplus': Submission to NSW Fair Trading (n 203) 6-7.

[236] Control orders were introduced into Queensland's *Penalties and Sentences Act 1992* (Qld) in 2016. They are court orders intended 'to prevent, restrict or disrupt an offender's involvement in serious criminal activity'. They may 'prohibit an offender from associating with certain people… from going to a certain place' or from working in particular occupations, including motor dealing, second hand dealing and pawnbroking: see Queensland Government, *Serious and Organised Crime Legislation* (Web page, 1 June 2017) <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/consultation-regulatory-reform/serious-organised-crime>; *Penalties and Sentences Act 1992* (Qld) pt 9D div 3.

[237] This notice requirement does not apply if the unredeemed property is sold 'at the place where the pawn was taken', or if the loan secured by the property was less than $40: *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) sub-ss 62(1), (2), 63(1).

| | | |
|---|---|---|
| | | generally in the area the property was pawned' before selling the property, after the expiration of the redemption period (ss 62, 63)<br>• Hold balance of proceeds of sale on trust for consumers for 12 months after sale (s 64)<br>• Give balance of proceeds of sale to the public trustee, to be placed in the unclaimed moneys fund, if not claimed by consumers within 12 months (s 64)<br>• Repay consumers the gross proceeds of sale, or a sum equivalent to 'the fair value of the property', if goods are sold prior to the expiration of the redemption period (s 66)<br>• Avoid acquiring goods from a person 'under the influence of alcohol or a drug' (s 69)<br>• Inform police if goods received 'may be stolen or unlawfully obtained' (s 71) |

# SUBSTANTIVE EQUALITY AND THE POSSIBILITIES OF THE QUEENSLAND *HUMAN RIGHTS ACT 2019*

ALICE TAYLOR*

*The passage of the* Human Rights Act 2019 *(Qld) ('*HRA 2019*') was a significant achievement, particularly in a state often known for its parochial conservatism and disinterest in, if not outright rejection of, human rights. The* HRA 2019 *is substantially based upon the human rights Acts in place in Victoria and the Australian Capital Territory. However, there are some small, but potentially important differences between the* HRA 2019 *and the corresponding state and territory equivalents. In this article, I focus on one of these differences: the definition of discrimination contained in the* HRA 2019*. Unlike the* Charter of Human Rights and Responsibilities Act 2006 *(Vic) the definition of discrimination in the HRA* 2019 *is not tied to the definition or grounds of discrimination in the state discrimination legislation. This small but important distinction could feasibly allow courts to define discrimination and the broader notion of equality in a more substantive manner, covering a wider variety of actions and conduct, and apply that wider definition to a broader range of attributes (commonly understood as 'grounds'). The purpose of this article is to consider the possibilities and potential challenges confronting Queensland courts in broadening the definition of discrimination in the context of* HRA 2019*. I argue that, though a substantive interpretation of discrimination and equality is challenging and requires a degree of 'creativity' on the part of judges, it is a challenge worth undertaking.*

## I INTRODUCTION

The manner in which the meanings of discrimination and equality have been interpreted by Australian courts has been consistently critiqued.[1] With respect to anti-discrimination statutes, while courts have accepted that such statutes should be interpreted purposively, and some explicitly state that the purpose of doing so is to achieve substantive equality, courts' interpretations have, for decades, often been criticised as narrow and formalistic.[2] In the context of

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1 See, eg, Margaret Thornton, 'Disabling discrimination legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 2; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 326–7; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 26.

2 Gaze, (n 1) 326–7; Rees, Rice and Allen (n 1) 26.

DOI: 10.38127/uqlj.v43i1.8123

constitutional law, the High Court's interpretation of the concept of discrimination has been criticised, not as narrow, but as broad to the point of abstraction and inefficacy.[3] Understanding the meaning, content and scope of the term 'equality' is important, as Mary Gaudron highlighted extra-curially long ago:

> It is only if the concept of 'equality' is given some comprehensible content that the objective embodied in the expression 'equal opportunity' can be fairly evaluated. It is only when the concept is given content that it is possible to determine whether, and to what extent the objective has been achieved. And, without some such content, it is impossible to make a critical appraisal of modern anti-discrimination legislation.[4]

Within that context, state and territory human rights schemes offer a new opportunity to reinterpret and re-engage with the underlying meanings of discrimination and equality within the Australian context. Since Bell J's decision in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* ('*Lifestyle Communities*'),[5] tribunals and courts in Victoria, the Australian Capital Territory ('ACT'), and Queensland have accepted that the right to equality contained in the state and territory human rights schemes is a right to substantive equality.[6]

Nevertheless, the meaning and scope of substantive equality within the Australian context remains elusive. Part of the reason for this is that, in Victoria, the meaning of discrimination is closely tied to its meaning in the state anti-discrimination scheme,[7] giving courts and tribunals less scope for independence or creativity in determining what attributes are protected from discrimination and inequality in the human rights context or the overarching meaning of the concept of discrimination. It is within this context that the *Human Rights Act 2019* (Qld) ('*HRA 2019*') provides a new opportunity. Unlike its Victorian counterpart, the *HRA 2019* does not tie the definition of discrimination in the *Anti-Discrimination Act 1991* (Qld) ('*ADA 1991*').[8] The purpose of this article is to interrogate the potential possibilities open to Queensland courts and tribunals to develop a substantive approach to equality and discrimination within the context of the *HRA 2019*. In undertaking this interrogation, I argue that, although an expansive and substantive interpretation of equality can be challenging and can

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3 Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29(2) *Sydney Law Review* 263, 263.

4 Mary Gaudron, 'In the Eye of the Law: The Jurisprudence of Equality' (Mitchell Oration, Adelaide, 24 August 1990).

5 (2009) 31 VAR 286 ('*Lifestyle Communities*').

6 *Islam v Director-General, Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27, 31 [155] (Mossop AsJ) ('*Islam*'); *Miami Recreational Facilities Pty Ltd* [2021] QCAT 378, 10–11[52]–[54] (Member Gordon) ('*Miami Recreational Facilities*').

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3 ('*Victorian Charter*'). Specifically, the definition of discrimination in the *Victorian Charter* is: 'Discrimination in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of the Act.'

8 *Human Rights Act 2019* (Qld) sch 1 (definition of 'discrimination') ('*HRA 2019*').

require a degree of creativity on the behalf of judges, it is a challenge worth undertaking.

This article canvasses the interpretation of equality in the human rights schemes in Victoria, the ACT and Queensland and outlines the possibilities provided by a more expansive definition of discrimination (within the right to equality in those schemes). In Part II, I start by outlining the case law from Victoria, the ACT and Queensland on the values that the right to equality is designed to enliven. In Part III, I look to three distinct aspects of the right to non-discrimination and equality: who is protected from discrimination (and thus provided a right to equality); what unlawful discrimination entails for the purpose of the state and territory human rights Acts; and, third, when can differential treatment be justified? In Part IV, I address some of the challenges that will continue to be faced in creating substantive equality jurisprudence. In particular, I highlight the relatively active and creative role that such an approach requires judges to adopt. I conclude by arguing that, though challenging, a substantive interpretation of discrimination and equality in the state and territory based human rights schemes has conceptual, jurisprudential, and practical benefits.

## II Equality in the Australian Human Rights Acts and Charters

As with all human rights, the starting point in the interpretation of the right to equality is its meaning and scope.[9] The general process for determining claims made pursuant to state and territory human rights Acts have three distinct stages of inquiry.[10] The first stage of the inquiry asks if the right has been engaged by the law, policy or act complained of.[11] The second stage interrogates whether the law, policy or act limits the right or rights that have been engaged,[12] and the third stage considers whether any limitation is nevertheless justified.[13]

How each of these stages is understood is, in part, dependent on the articulation through the legislative language and through the interpretation by court of the scope of the right in question.[14] Without appropriately considering the right's scope, it can be difficult to determine if a particular legislative provision or administrative action has engaged or limited the right.[15] Without the legislature or the courts articulating the importance or fundamentality of the right, it is

9 Kevin Bell, 'Certainty and Coherence in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (Research Paper, Faculty of Law, Monash University, 5 August 2021) 3.

10 *Baker v DPP (Vic)* (2017) 270 A Crim R 318, 331 [56] (Tate JA) ('*Baker*'). See also ibid 3; Alistair Pound and Kylie Evans, *Annotated Charter of Human Rights* (Thomson Reuters, 2nd ed, 2018) 54–5.

11 *Baker* (n 10) 331 [56] (Tate JA).

12 Ibid.

13 Ibid.

14 Bell (n 9) 6–7.

15 Ibid.

difficult to determine whether the interference has been justified.[16] The state and territory human rights schemes do not articulate the precise scope of the human rights that are protected.[17] Though the rights are modelled on international human rights instruments, predominately the *International Convention on Civil and Political Rights* ('*ICCPR*'),[18] they have not been directly imported and as such the meaning of these rights within the Australian context still needs to be determined.[19]

Each of the state and territory human rights Acts contains a right to equality. The right to equality in each Act is substantially similar, though there are some differences. The *HRA 2019* provides a right to equality in s 15. Section 15 of the *HRA 2019* provides for recognition and equality before the law. Section 15 provides individuals with the following rights:

(1) That every person has the right to recognition as a person before the law.

(2) That every person has the right to enjoy the person's human rights without discrimination.

(3) That every person is equal before the law and is entitled to the equal protection of the law without discrimination.

(4) That every person has the right to equal and effective protection against discrimination.

(5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.[20]

The individual provisions are modelled on Arts 2(1), 16(1) and 26 of the *ICCPR*.[21] There are some differences in the structure of the right in each of the state and territory Acts. For example, the *HRA 2019* separates the clauses relating to the equal protection of the law and the right to equal and effective protection against discrimination, which neither the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') nor the *Human Rights Act 2004* (ACT) ('*ACT Human Rights Act*') does.[22] Further, unlike the *ACT Human Rights Act* though as with s 8(4) of the *Victorian Charter*, s 15(5) of the *HRA 2019* specifically provides for special measures.[23]

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16 Ibid.
17 Kylie Evans and Nicholas Petrie, *Annotated Queensland Human Rights Act* (Thomson Reuters, 2023) 17.
18 Ibid 6.
19 Ibid 17.
20 *HRA 2019* (n 8) s 15.
21 Explanatory Notes, Human Rights Bill 2019 (Qld) 3.
22 *Victorian Charter* (n 7) s 8; *Human Rights Act 2004* (ACT) s 8.
23 *HRA 2019* (n 8) s 15(5).

The right to equality provides several different protections from unequal treatment. The right to recognition as a person before the law is modelled on Art 16(1). It ensures that all persons are entitled to their legal rights but does not confer a right to access the courts or capacity to act.[24] The right to enjoy human rights without discrimination is based upon Art 2(1) of the *ICCPR*. Similarly to the equality rights contained at Art 14 of the *European Convention on Human Rights* ('*ECHR*'), it does not provide a standalone right to non-discrimination but instead provides that there can be no discrimination in the application of a person's other rights and freedoms.[25] From *Lifestyle Communities*, it appears that, similarly to Art 14, there is no need for a breach of another right to be established. What matters is that the discrimination occurs within the 'ambit' of another right or freedom.[26] The right to equality before the law provides for formal equality between persons and is focused on procedural fairness in the administration of laws rather than the substance and content of the laws themselves.[27] In contrast, the second limb of s 15(3) and the entirety of s 15(4) require more than formal equality as tribunals and courts have recognised that vulnerable persons may need to be treated differently to achieve similar outcomes to those who hold more privileged positions in society.[28] Much of the case law is focused on the right to non-discrimination and the substantive meaning of discrimination within the human rights frameworks. Consequently, the link between the right to non-discrimination and the right to equality in this context will be the focus of this article.

Both the *Victorian Charter* and the *HRA 2019* explicitly indicate that measures adopted to overcome disadvantage caused by historical and continuing discrimination are not discriminatory. In *Parks Victoria (Anti-Discrimination Exemption)*, the Tribunal indicated that the special measures provision in the *Victorian Charter* may be narrower than that contained in the *Equal Opportunity Act 2010* (Vic) ('*EOA 2010*'), because the *Victorian Charter* special-measures provision required that the disadvantage *be caused* by discrimination rather than allowing for special measures generally.[29] In the ACT, though special measures are not explicitly mentioned in the *ACT Human Rights Act*, it is still nevertheless likely that measures adopted to overcome disadvantage will not amount to 'discrimination' given the commentary on Art 2(1) and Art 26 on which s 8 is based.[30] The manner in which the special-measures provisions are worded and are operationalised can distort the three-stage inquiry outlined above. To determine whether a particular

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24 *Lifestyle Communities* (n 5) 342–3 [278]–[279] (Bell J).

25 Ibid 343 [279]–[280].

26 Ibid 343 [280].

27 Ibid 343–4 [285]–[286].

28 Ibid 341 [265]–[268]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [249] (Tate JA) ('*Taha*').

29 *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238, [60] (Member Dea); *Re Stawell Regional Health (Anti-Discrimination Exemption)* [2011] VCAT 2423 [33]–[35] (Member Dea).

30 Human Rights Committee, *CCPR General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) [10].

measure is a special measure requires a decisionmaker to determine whether there is unequal treatment and if that unequal treatment is justified at the engagement step of the analysis.

### A *The Elusive Nature of Equality*

The underlying meaning, nature, and scope of the right to equality remains contested and somewhat elusive at an international, supranational and constitutional levels worldwide.[31] A question remains as to what is meant by the term 'equality' as understood in Australian law, both with respect to statutory anti-discrimination schemes and the state and territory human rights statutes. Within the human rights Acts, equality is both an underlying value as well as a fundamental right.[32] Equality is an abstract concept and can require different actions and different outcomes depending on what 'kind' of equality is the focus of analysis.[33] Equality can simply refer to the need to treat like persons 'alike' or what is often referred to as 'formal equality'.[34] It can require an equality of opportunity or of results, or it can require a variety of different responses to achieve 'substantive equality'.[35]

Formal equality is the basic principle that likes should be treated 'alike'.[36] Non-discrimination principles operate to achieve formal equality in two important ways. First, concepts like direct discrimination embed the notion that laws designed to combat discrimination aim to achieve the same treatment of everyone regardless of their circumstances.[37] By doing so, non-discrimination laws operate on the premise that, by treating individuals 'equally' with others, they will be judged on their individual abilities.[38] Second, traditionally, non-discrimination and equality rights operate by emphasising that certain characteristics (such as race, gender, age or disability) are not relevant differences that make persons unalike.[39]

There are a number of problems with utilising a formal equality approach to understanding equality and non-discrimination rights. One of those problems is that such an approach fails to appreciate the integral nature of an attribute to a person's sense of self and being. Formal equality also embeds the dominate

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31 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022) 1.

32 See, eg, *HRA 2019* (n 8) Preamble, s 15.

33 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 190.

34 Fredman (n 31) 9.

35 Ibid 16–23.

36 Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 464.

37 Ibid.

38 Ibid 465.

39 Ibid.

cultural construct (often white, male, able-bodied and heteronormative) as the standard to which others should be compared to when considering equal treatment.[40] A particular problem in a public law context is that the executive and the legislature are often required to make decisions that differentiate between persons. The question becomes whether or not this is justified. A formal equality model does not clearly assist with identifying the legitimacy of decisions that differentiate between persons, except upon the clearly identified specified grounds. For example, rules or policies that explicitly exclude people on the basis of gender or race are captured by a non-discrimination rule based upon formal equality. However, formal equality models fail to provide an answer to the question of legitimacy when a rule or policy is neutral in its language but creates or exacerbates disadvantages in effect.

To tackle this problem, a right to equality in other jurisdictions has been interpreted as requiring something more than equal treatment. However, there are still difficulties in conceptualising what a substantive approach to equality might require in practice. As Beverley McLachlin, the former Chief Justice of Canada, stated:

> Substantive equality is recognized worldwide as the governing legal paradigm. It is here to stay. We can count on it. But we must also recognize that it introduced a new difficulty that formal equality did not possess — the need to decide when a distinction is inappropriate or unjust. Substantive equality requires the court to determine whether a given situation is 'substantially the same' or 'substantially unlike' another. Here we find ourselves back in the uncertain sea of value judgements. … Relevance, disadvantaged groups, human dignity — these concepts and more attest to our search for a simple rule that will indicate whether a particular distinction treats persons in a way that is substantially the same or substantially different.
>
> Whatever words are used, drawing the line between appropriate and inappropriate, just and unjust distinctions, inevitably involves the courts in weighing and balancing conflicting values.[41]

There are various normative approaches that guide an approach to substantive equality. Some are focused on a singular principle or animating norm such as the protection of human dignity,[42] or the prevention of the perpetuation of stigma.[43] Other normative approaches have adopted a more expansive or pluralist account of substantive equality by considering the various and intersecting ways in which discrimination and inequality impact the individual on both a socio-economic and dignitary basis.[44] These accounts look to the ways in which equality laws can

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40 Ibid.

41 Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* 17, 21.

42 Denise G Réaume, 'Discrimination and Dignity' (2003) 63(3) *Louisiana Law Review* 645, 646.

43 Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing, 2017) 5–6.

44 Fredman (n 31) 29; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020) 11.

transform a society to remake structures to be more inclusive and accessible to marginalised groups.[45] Another group of scholars rejects the idea that equality should be considered a grounding principle for non-discrimination protection, arguing that the fundamental enlivening principle is one of individual liberty.[46]

## B *The Right to Equality in State and Territory Human Rights Acts: Formal, Substantive or Neither?*

As was highlighted in Part I, courts and tribunals have accepted that the purpose of equality provisions in the state and territory human rights Acts is to provide substantive equality. This purpose was first confirmed in *Lifestyle Communities*.[47] *Lifestyle Communities* concerned the appropriate interpretation of the exemption provision contained in the *Equal Opportunity Act 1995* (Vic) ('*EOA 1995*').[48] Section 83 of that Act allowed for exemptions to be granted by the Victorian Civil and Administrative Tribunal ('VCAT') to certain businesses or industries so that they were no longer required to comply with the provisions of the *EOA 1995*.[49] The applicant sought an exemption in order to build an over-50s accommodation village.[50] Without an exemption, refusing persons from accommodation on the basis of their age would be discrimination.[51] The question in *Lifestyle Communities* was what factors could be taken into account when making an exemption determination and how the exemption determination could be read consistently with ss 8(3)–(4) of the *Victorian Charter*.[52]

In his judgment, Bell J concluded that equality pursuant to the *Victorian Charter* required substantive equality rather than only formal equality. He stated:

> The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification. Equality means substantive equality, not just formal equality. Where differentiation is a measure for redressing disadvantage, it is not discrimination because it furthers equality.[53]

From Bell J's judgment in *Lifestyle Communities*, it appears that in this context, substantive equality enlivens the principle or value of human dignity. Justice Bell

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45 Fredman (n 31) 29.

46 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 130.

47 *Lifestyle Communities* (n 5) 311 [107] (Bell J), which was subsequently considered in *PBU v Mental Health Tribunal* (2018) 56 VR 141 ('*PBU*'); *Victoria v Turner* (2009) 23 VR 110; *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 ('*Bare*') [34]; *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 ('*Matsoukatidou*').

48 *Lifestyle Communities* (n 5) 290 [6]–[9] (Bell J).

49 Ibid 290 [6].

50 Ibid 290 [8]–[9].

51 *Equal Opportunity Act 1995* (Vic) s 8, as repealed by *Equal Opportunity Act 2010* (Vic) s 191.

52 *Lifestyle Communities* (n 5) 311 [107] (Bell J).

53 Ibid.

emphasised the importance of the inherent dignity of every human being, drawing on the decision of Judge Tanaka in his dissent in *South West Africa (Ethiopia v South Africa) (Second Phase*) *(Judgment)* and the judgment of Iacobucci J in *Law v Canada*.[54] Justice Bell also emphasised the importance of recognising the 'potential for personal and social development' as an underlying value of substantive equality.[55] Flowing from these underlying values, Bell J accepted that there was a distinction between differentiation that is utilised to redress disadvantage on the one hand, and differentiation that amounts to discrimination on the other.[56] He further clarified that affirmative action or compensatory measures can be justified on the basis that they are focused on providing equal opportunities and results for otherwise marginalised and disadvantaged groups.[57]

In the context of *Lifestyle Communities*, Bell J concluded that interpreting s 83 of the *EOA 1995* consistently with the *Victorian Charter* required the Tribunal to determine either that the exemption constituted a special measure and was consistent with s 8(4) of the *Victorian Charter* because the purpose of the exemption was to promote the interests of a disadvantaged group,[58] or alternatively would need to be justified pursuant to s 7(2) of the *Victorian Charter*.[59]

### C *The Link Between Equality and Discrimination in the State and Territory Human Rights Acts*

Since *Lifestyle Communities*, judges and tribunal members have emphasised that the *purpose* of the right to equality as provided for in the state and territory schemes is to provide substantive rather than formal equality.[60] Nevertheless, the capacity to utilise human rights instruments to achieve substantive equality will depend on how the rights to equality and non-discrimination are interpreted.

Each of the state and territory schemes have a different approach to the definition of discrimination. In the *Victorian Charter*, discrimination is mentioned in ss 8(2)–(4). Discrimination is defined in s 3. The definition of discrimination in the *Victorian Charter* is:

> Discrimination in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 2010* [*EOA 2010*]) on the basis of an attribute set out in section 6 of the Act.[61]

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54 Ibid 311–12 [108]–[110], citing *South West Africa (Ethiopia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6, 297; *Law v Canada* [1999] 1 SCR 497, 530 [53].

55 *Lifestyle Communities* (n 5) 347–8 [312].

56 Ibid 290 [4], 311 [107].

57 Ibid 314 [118].

58 Ibid 357 [375]–[377].

59 Ibid 357 [374].

60 See, eg, *PBU* (n 47) 174 [113]; ); ); *Matsoukatidou* (n 47) 641 [53]).

61 *Victorian Charter* (n 7) s 3.

In the *ACT Human Rights Act*, s 8(2) states that '[e]veryone has the right to enjoy his or her human rights without distinction or discrimination *of any kind*' (emphasis added). Section 8(3) states that '[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination *on any ground*' (emphasis added). Discrimination is not defined in the *ACT Human Rights Act*.

In s 15 of the *HRA 2019*, the right to non-discrimination is in similar terms to that in the *Victorian Charter*. The *HRA 2019* does define the term 'discrimination' but utilises different wording to the *Victorian Charter*. The definition of discrimination provided for in the *HRA 2019* is as follows:

> Discrimination, in relation to a person, *includes* direct discrimination or indirect discrimination, within the meaning of the *Anti-Discrimination Act 1991*, on the basis of an attribute stated in section 7 of that Act.[62]

The important distinction between this definition and that in the *Victorian Charter* is the inclusion of the word 'includes'.[63] By incorporating the word 'includes' the definition is not only limited to what is provided for in the *ADA 1991* but can also go beyond the meaning and provisions in the *ADA 1991* to provide for newer conceptions of discrimination, expand the grounds or attributes that are protected and the extent to which justifications or exceptions are understood and incorporated into the definition of discrimination.

The direct link between the definition of discrimination in the *Victorian Charter* and the *EOA 2010* has two significant limitations. First, discrimination is limited to the attributes set out in the *EOA 2010* and cannot be broadened to include other groups that are similarly disadvantaged to those protected in the *EOA 2010*. Second, the definition of discrimination is the same as, and is governed by the same limitations as apply to, the definition contained in the *EOA 2010*, and is required to be consistent with the interpretation of the non-discrimination provisions in the *EOA 2010*. However, while the definition of discrimination and the attributes that were protected from discriminatory conduct in the *Victorian Charter* are defined by reference to the *EOA 2010*, the Supreme Court of Victoria accepted in *Director of Public Prosecutions (Vic) v Natale* ('*Natale*') that the concept of discrimination is not defined with reference to the specific exceptions that are contained in the *EOA 2010*.[64]

In both the ACT and in Queensland, courts or tribunals have accepted that the definition of discrimination is broader than that contained in the *Victorian Charter*. In *Islam v Director-General Justice and Community Safety Directorate (No 3)* ('*Islam*'), Mossop AsJ accepted that s 8 of the *ACT Human Rights Act* and the

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62 *HRA 2019* (n 8) sch 1 (emphasis added).

63 Scott McDougall, 'Making Rights Real: The Promise and Potential Pitfalls of the *Human Rights Act 2019* (Qld)' (2020) 32(1) *Bond Law Review* 115, 127.

64 *DPP (Vic) v Natale* [2018] VSC 339 37–8 [88]–[89]. ('*Natale*').

definition of discrimination was broader than that contained in the *Victorian Charter*.[65] In particular, he noted that s 8(3) prohibited discrimination on 'any ground' — broadening its scope to attributes not captured by the list of protected attributes in either Art 26 of the *ICCPR* or (implicitly) in the *Discrimination Act 1991* (ACT).[66] In Queensland, tribunal members have cautiously accepted that the definition of discrimination in the *HRA 2019* is broader than that found in the *Victorian Charter*.[67] In *Miami Recreational Facilities Pty Ltd* ('*Miami Recreational Facilities*'), Member Gordon expanded upon what this broader definition of discrimination may entail in the context of the *HRA 2019*:

> It remains to be seen whether the combination of section 15 and this definition of 'discrimination' protects persons from discrimination of a type outside the *ADA* [*1991*]. The use of the word 'includes' in the definition of discrimination suggests that it is a human right not to suffer other types of discrimination not covered by the *ADA* [*1991*]. One obvious possibility is that it might be a human right in Queensland not to suffer discrimination in contravention of Commonwealth legislation. The protection here is against 'discrimination' and not against 'unlawful discrimination'. Discrimination is only unlawful if in an 'area' covered by the *ADA* [*1991*]. This means that the protection in section 15 is very wide.[68]

While s 15 of the *HRA 2019* and its broader implications have not been considered in significant detail by a higher court, Member Gordon's statements do raise the possibility that s 15 could be interpreted broadly, with expansive implications with respect to which grounds or attributes are captured by the *HRA 2019*, the meaning of discrimination (as compared to unlawful discrimination) and the areas in which the right to equality and non-discrimination could apply to.

## III The Architecture of Discrimination: Grounds, Duties, and Justification

International, constitutional, and statutory equality laws all have a central architecture that distinguishes discrimination and equality laws as an area of law.[69] These involve identifying personal characteristics of those whom the law protects, the duties or obligations that duty-bearers hold to those who are entitled to protection, and any justifications for conduct which distinguishes or discriminates between persons.[70]

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65 *Islam* (n 6) 31 [154].
66 Ibid 31 [154]–[155].
67 *Terrace-Haven Pty Ltd* [2022] QCAT 23, 13 [54] (Member Sammon) ('*Terrace-Haven*'); *Miami Recreational Facilities* (n 6) 10–11 [52]–[54] (Member Gordon).
68 *Miami Recreational Facilities* (n 6) 10–11 [52]–[54].
69 Khaitan (n 46) 46–7.
70 Ibid.

In Australia, statutory discriminatory laws are prescriptive, with a closed list of grounds or attributes for protection, technical definitions of discrimination, and a specific list of exceptions rather than general justifications or defences, which might broadly apply to all conduct and duty-bearers. As highlighted above, the state and territory human rights schemes all (to varying extents) have the potential for broader definitions and more expansive applications. In this Part, I canvass the possibilities of this potential breadth with respect to the three central features of discrimination and equality laws architecture: grounds, duties, and justification.

## A *Grounds*

A criticism of statutory discrimination laws is that they provide protection to a closed list of 'grounds', which are necessarily exclusionary and cannot account for all unfair differential treatment on the basis of a specific attribute of a claimant.[71] One solution to the limitations of discrimination law based on specific 'grounds' would be to adopt a version of discrimination law that is not reliant on grounds as a defining concept.[72] In criticising a grounds-based system, some advocate for a root-and-branch change to the structure of discrimination law to focus on socio-economic disadvantage and redistributional justice rather than recognitional justice focusing on specific attributes.[73] In this conception, discrimination and equality laws should focus primarily on matters of economic justice and social inclusion rather than specific identity factors. But, as others such as Atrey and Moreau have concluded, such an approach would be misguided. Grounds continue to be a centrepiece or an integral part of the architecture of discrimination law.[74] A grounds-based approach defines the disadvantage that people face due to their membership of certain groups and allows for a clearer identification of the disadvantage that discrimination law can redress.

A closed list of grounds can create difficulties in providing substantive equality for a range of groups. One difficulty has been seen in Victoria in the application of the *Victorian Charter* to persons who may be disadvantaged, but do not have an attribute that is protected by the *EOA 2010*. In Victoria, *EOA 2010* covers 20 attributes which include: race, sex, disability, age, gender identity, sexual orientation, physical features, and care responsibilities, amongst other status grounds. The *EOA 2010* also protects associates of persons with those attributes from discrimination.[75] In *Matsoukatidou v Yarra Ranges Council*

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71 Fredman (n 31) 172–5.

72 Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81(4) *Modern Law Review* 598, 617.

73 Ibid 617.

74 Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019) 147; Moreau (n 44) 42.

75 *Equal Opportunity Act 2010* (Vic) s 6 ('*EOA 2010*').

('*Matsoukatidou*') it was accepted that demonstrating that one has a protected attribute is a core component of an equality claim under the *Victorian Charter.*[76]

In *Matsoukatidou*, the complainants were a mother and daughter who brought an action for reinstatement of an appeal from orders made in the Magistrates Court.[77] The hearing was conducted quickly and the appeal was dismissed.[78] The complainants had both been charged with certain offences against the *Building Act 1993* (Vic).[79] At the original hearing, the complainants were self-represented and were fined.[80] The complainants appealed to the County Court of Victoria. At the County Court hearing, the complainants continued to be unrepresented.[81] It was accepted that neither understood the proceedings and were provided with limited assistance.[82] The appeal in the County Court was dismissed.[83].[84] The complainants sought judicial review of the decision and raised questions of law as to the application of the *Victorian Charter*.[85] In particular, they asked whether the County Court was obliged to comply with ss 8 and 24(1) of the *Victorian Charter* in the conduct of the hearing.[86] Drawing on his judgment in *Lifestyle Communities*, Bell J concluded that s 8(3) had three elements of operation: a requirement for 'equality before the law', which required tribunals and courts to apply and administer laws equally; a requirement for every person to have equal protection of the law without discrimination; and equal and effective protection against discrimination.[87] However, as Bell J had concluded in *Lifestyle Communities*, the latter two elements were limited by the definition of 'discrimination' provided for in the *EOA 2010*.[88] In *Matsoukatidou*, the limitations of s 8(3) were stark because of the differences in the attributes held by the two women.[89] While one of the complainants (Maria) was disabled, the other (Maria's mother, Betty) was not (and had no other relevant attributes).[90] While one could argue that Betty was an associate of Maria's as her mother and thus possibly captured by the *EOA 2010*, Betty's difficulties in court were not related to the fact that she was associated to Maria. Consequently, she was not considered to have a relevant attribute. Thus, one of the women was protected by s 8(3) and the other was not. As put by Bell J:

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76 *Matsoukatidou* (n 47) 643 [59] (Bell J).
77 Ibid 627 [1]–[5].
78 Ibid.
79 Ibid 627 [1].
80 Ibid.
81 Ibid [3].
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid 634 [33].
87 Ibid 636–7 [37]–[44], 640 [50]–[52].
88 Ibid 641 [53]–[55].
89 Ibid 643 [59]–[61].
90 Ibid.

> As it happens, Maria has a disability protected by the limited definition of discrimination that is incorporated by reference. Fortunately, her equality rights are fully protected in the circumstances by the other elements of the right (the third is pertinent). The circumstances of Maria's mother, Betty, are otherwise identical and, it might be thought, demand a like response under the human right to equality. Unfortunately, she is not protected by the other elements of the right in s 8(3) because of the limited definition of discrimination. The inconsistent manner in which the substantive aspect of the equality right in s 8(3) applies in the facts of this case thus gives right to cause for reflection.[91]

While Betty had no protected characteristics, she was nevertheless still in a vulnerable position because she was unable to speak English. However, an inability to speak English has rarely been found to be a relevant characteristic or another attribute and is not protected independently by the *EOA 2010*.[92] The reflection that Bell J appears to be requesting is one that considers why two people who were in different, but similarly disadvantageous positions cannot be equally protected by the *Victorian Charter*.[93]

*Matsoukatidou* is a demonstration of a common critique of the use of grounds in discrimination law, which is that they are often few, exclusive, and isolated. The problem with grounds and their limited and isolated exclusivity is that individuals and groups with many forms of disadvantage entitled to protection under discrimination law, struggle to have their claims accepted. In *Matsoukatidou*, this is highlighted by the fact that both women are vulnerable as litigants but for different reasons: Maria's disability and Betty's inability to speak English. Due to the limited nature of grounds in the *EOA 2010*, Maria's claim could be accepted, and she should have been entitled to reasonable adjustments in the manner that the hearing was held, but Betty was not. While in some cases, such as *Natale*, the Supreme Court of Victoria has accepted that a disadvantage, such as an inability to speak English effectively, was a characteristic, or an incident, of a protected attribute,[94] in other cases claimants have failed in their claims, in part because they do not have a protected characteristic pursuant to the *EOA 2010*.[95]

Both the *ACT Human Rights Act* and the *HRA 2019* provide an opportunity for an expansion of the grounds that underpin the other statutory schemes. The expansive nature of the *ACT Human Rights Act* was identified by Mossop AsJ in *Islam*, though not necessarily in favourable terms. In *Islam*, the discriminatory

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91 Ibid 643 [59].

92 *EOA 2010* (n 75) s 6. Though in *Natale* the Supreme Court concluded that an inability to speak English well was a 'characteristic' of the applicant's national origin: *Natale* (n 64) [90] (Bell J). For a broader discussion of an inability to speak English and minority language claims: see Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in United Kingdom, Canada and Australia* (Bloomsbury Publishing, 2023) 71–3; Alice Taylor, 'Anti-Discrimination Law as the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*' (2021) 42(2) *Adelaide Law Review* 405.

93 *Matsoukatidou* (n 47) 643 [59]–[61].

94 *Natale* (n 64) 32 [71] (Bell J).

95 *She v RMIT University* [2021] VSC 2, 30 [114] (Incerti J).

conduct was alleged to be based upon a recognised attribute — religion. Nonetheless, Mossop AsJ went on to highlight the breadth of protection offered by s 8(3) of the *ACT Human Rights Act*:

> However, the drafting of s 8(3) is such that the grounds of discrimination are not limited to those identified in the example. Nor are they limited to grounds which might be considered socially inappropriate forms of discrimination. A prohibition on 'discrimination on any ground' would, prima facie, prevent discrimination on grounds such as lack of intelligence, laziness, propensity to violence, unpleasantness of personality, lack of personal hygiene or poor grooming unless such discrimination involved a 'limit set by laws' which were justified under s 28 of the *HR Act*.[96]

Associate Justice Mossop seemed to indicate that there should be some limitation on the types of grounds that may be captured by s 8(3) but is not explicit as to the method that could be adopted to identify such limitations.

In Queensland, early case law from the Queensland Civil and Administrative Tribunal ('QCAT') seemed to suggest that the use of the term 'includes' in connection to the definition of discrimination provided in the *HRA 2019* gives courts and tribunals the scope to identify new and emerging grounds for protection from discrimination in a human rights context.[97] In contrast to the *Victorian Charter*, which has a closed list of grounds, or the *ACT Human Rights Act*, which leaves grounds almost entirely open, the *HRA 2019* appears to provide a semi-open list that requires reasoning by analogy to expand the list of grounds from that which appears in the *ADA 1991*. These suggestions from QCAT have been further bolstered by the decision by the Supreme Court of Queensland in *Austin BMI Pty Ltd v Deputy Premier* ('*Austin BMI*').[98] In *Austin BMI*, the Supreme Court of Queensland considered the meaning of the term 'discrimination', though in connection with the right to take part in the conduct of public affairs without discrimination contained in s 23 rather than s 15. When considering the meaning of discrimination within the context of s 23 and the *HRA 2019* more generally, Freeburn J accepted that the definition of discrimination in the *HRA 2019* was inclusive rather than exhaustive.[99]

Such an approach was consistent with the *ACT Human Rights Act* but differed from the *Victorian Charter*.[100] Justice Freeburn accepted that, with respect to determining the attributes captured by the definition of discrimination, the approach that should be adopted in determining new attributes should be one of analogy. As he highlighted:

> The legislature, in choosing to tie the definition of 'discrimination' to the definition in the *Anti-Discrimination Act 1991* in a non-exclusory way, must be taken to have left the

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96 *Islam* (n 6) 31 [156].
97 See, eg, *Miami Recreational Facilities* (n 6).
98 [2023] QSC 95 ('*Austin BMI*').
99 Ibid 83 [317].
100 Ibid.

> door open for an analogous grounds of discrimination. In other words, in linking the definition of 'discrimination' to the definition of the same concept in the *Anti-Discrimination Act*, but not directly adopting that definition, it is reasonable to infer that Parliament intended for the definition to read as allowing an analogous ground of discrimination.[101]

When determining whether additional or new attributes should be captured for protection from discrimination, the court should look to the list of attributes contained in the *ADA 1991* to consider analogous grounds which could be captured by this broader definition.

The various definitions (or lack of definitions) in each of the statutory schemes gives a different approach to determining the recognised grounds. In Victoria, there is no capacity for additional attributes to be added for protection unless these are first added to the *EOA 2010*. In the ACT, there is no limitation to the attributes that can be captured, but as *Islam* highlights, courts are also given no guidance as to what is or is not captured. As highlighted in *Austin BMI*, while simply expanding discrimination law to cover more attributes or grounds would be useful, the flexibility in the definition of discrimination in the *HRA 2019* provides judges with a greater opportunity than simple additions. The flexible wording allows for a greater degree of interrogation of the underlying rationale for attributes to be protected, whether attributes should be protected symmetrically and how courts can utilise discrimination law to determine intersectional claims of discrimination.

Such an interrogation is important because, while it is possible to conceive the *HRA 2019* as paving the way for new and analogous attributes to be added for protection, there remains a question as to the appropriate test to determine discrimination law's coverage. Traditional understandings of discrimination law have often focused on the immutability of protected attributes or characteristics.[102] Historically, attributes were often granted protection from discrimination because they were attributes that were irrelevant to the decision being taken, were not chosen and could not be changed.[103] The early legislative interventions to prohibit discrimination indicate an emphasis on immutability as these early pieces of legislation often covered attributes such a race and sex, all of which were thought to be immutable.[104] In the coverage of these immutable characteristics there is often a degree of symmetry with equal protection granted to those who have suffered from historical disadvantage and exclusion and to those who have not.[105] The exception to this rule is the attribute of disability, which has generally been given asymmetrical protection.[106]

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101 Ibid 83 [318].
102 Michael P Foran, 'Grounding Unlawful Discrimination' (2022) 28(1) *Legal Theory* 3, 22–3.
103 Jessica A Clarke, 'Against Immutability' (2015) 125(1) *Yale Law Journal* 2, 13–14.
104 Ibid 8–9.
105 Foran (n 102) 33.
106 See, eg, *Disability Discrimination Act 1992* (Cth) ss 5–6.

While discrimination law's early coverage may have begun with a focus on immutable characteristics, immutability is no longer a clear indicator for protection both from a descriptive and conceptual perspective.[107] From a descriptive perspective, the reach of discrimination law has extended far beyond the traditional bounds of immutability.[108] In the *ADA 1991*, immutable characteristics such as race are captured but protected grounds also include religious belief, political opinion and trade union activity.[109] All of these characteristics involve a degree of personal choice but Parliament has not deemed that to be a justification for discriminatory treatment. From a more conceptual perspective, even for attributes that were traditionally considered to be immutable, this assumption appears to be less certain.[110] For example, a person's gender is now alterable. Given the malleability of the definition of sex in the *ADA 1991*, there is no reason to suggest that sex is necessarily an immutable characteristic.[111] Additionally, immutability, or even constructive immutability, fails to appreciate the distinctly different disadvantages and prejudice that different people face due to the attributes that they have.[112]

Consequently, an expanded and more nuanced understanding of the kinds of disadvantage that equality is intended to address needs to operate. This nuance can be provided in judgments, rather than through the strictures of legislative language. Instead of a focus on a single feature such as immutability as an indicium of inclusion, a substantive and flexible approach to grounds could consider a range of factors that indicate a certain characteristic, attribute or group should be granted protection. By utilising a range of factors, a court has the capacity to understand the impact and lived experience of disadvantage that a right to equality can be utilised to ameliorate.[113] This approach looks to whether a group of persons suffer from disadvantage that is pervasive and substantial. A possible way to adopt such an approach is provided by the dissenting judgment of L'Heureux-Dube J in *Egan v Canada* ('*Egan*').[114] In *Egan*, L'Heureux-Dube J emphasised the need to focus on the effects of disadvantage and connect the law to 'real people's real experiences'.[115] The approach suggested by L'Heureux-Dube J is to consider whether a group of persons is socially vulnerable as compared to another group because of a range of factors including historical disadvantage, stereotyping, social prejudice and marginalisation.[116] Such an approach both

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107 Clarke (n 103) 27.
108 Ibid.
109 *Anti-Discrimination Act 1991* (Qld) s 7 ('*ADA 1991*').
110 Clarke (n 103) 27.
111 *ADA 1991* (n 109) sch 1, in which 'sex' is left undefined as a concept.
112 Clarke (n 103) 27.
113 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010) 11.
114 [1995] 2 SCR 513.
115 Ibid 552.
116 Ibid 554–5.

appreciates the contextual nature of the disadvantage a right to equality could ameliorate and provides an independent and interactive system to broaden the scope of equality provision's reach to new and emerging grounds.[117]

## B *Duties*

The second step of an analysis of discrimination is to consider what conduct constitutes discrimination. As with the interpretation of grounds, the *Victorian Charter* defines discrimination consistently with the definitions provided for in the *EOA 2010*.[118] The consequence of this is that, pursuant to s 8 of the *Victorian Charter*, both direct and indirect forms of discrimination are captured and there is a requirement for reasonable accommodations in some circumstances such as on the basis of disability in employment, education, the provision of goods and services, and for caring responsibilities in the workplace.[119] The prohibition of 'any discrimination' in the *ACT Human Rights Act* is presumably broader than this and could capture conduct not otherwise considered unlawful discrimination pursuant to the *Discrimination Act 1991* (ACT).[120] In Queensland, the definition of 'discrimination' again indicates that it 'includes' unlawful discrimination as defined in the *ADA 1991* but, as was indicated in *Miami Recreational Facilities*, is not necessarily limited only that specific conduct.[121]

Tying the definition of discrimination to that contained in the statutory discrimination schemes can be limiting. Depending on the scheme, the definitions of both direct and indirect discrimination can be highly technical, and courts have emphasised that conduct must be defined as either direct or indirect rather than both.[122] Considering the earlier definition of direct discrimination contained in the *EOA 1995*, which required a comparator, in *Castles v Secretary of the Department of Justice* ('*Castles*') the claimant brought a claim against the Department of Justice for failing to allow her to continue IVF treatment whilst she was a low-security inmate.[123] Among other Charter claims, the claim was based on s 8(2) of the *Victorian Charter*.[124] The discrimination that the complainant argued existed in her case was direct discrimination on the basis of a disability, which was her infertility.[125] To prove direct discrimination on the basis of disability, pursuant to the *EOA 1995*, she was required to prove, first, that she had been treated 'less favourably' than a fertile female prisoner in otherwise

117 Ibid.
118 *Victorian Charter* (n 7) s 3.
119 *EOA 2010* (n 75) ss 8–9, 19–20, 22, 22A, 40, 45.
120 *Islam* (n 6) 31 [154].
121 *Miami Recreational Facilities* (n 6) 10–11 [52]–[54] (Member Gordon).
122 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 253 [16] (Bromberg J).
123 (2010) 28 VR 141, 145 (Emerton J).
124 Ibid 155.
125 Ibid.

materially similar circumstances and, second, that her infertility was a 'substantial reason' for her less favourable treatment.[126] Justice Emerton concluded that the complainant could prove neither of these elements.[127] He concluded that fertile female prisoners would have the same difficulties conceiving while in prison and thus there was no 'less favourable' treatment and that even if there was 'less favourable' treatment, the complainant's disability was not a substantial reason for this to exist.[128]

The interpretation of 'discrimination' as defined in s 8(2) was consistent with the terms of the *EOA 1995* and anti-discrimination jurisprudence but does not further the goals of substantive equality. In particular, the decision with respect to the 'less favourable' treatment applies a narrow formal conception of equality rights and allows for the state to adopt a 'levelling-down' approach to equal treatment. Levelling-down occurs where a person's solution to disparity in treatment is to subject everyone to the same detrimental treatment or outcome.[129] In this case, because the fertility rights of all female prisoners was impeded, the complainant could not prove that she was treated 'less favourably' than other female prisoners.

Some of the problems identified in the reasoning in *Castles* have been resolved with the substantial amendments made to anti-discrimination legislation in Victoria in the *EOA 2010*, which allow for an interpretation more consistent with substantive equality. For example, direct discrimination now focuses on the 'unfavourable' treatment rather than 'less favourable' treatment of the complainant, removing the need to demonstrate that their treatment was less favourable than a similarly placed comparator.[130] Utilising the 'unfavourable' test in *Castles*, the complainant may have been able to demonstrate that not allowing her to access fertility treatments was unfavourable treatment because the question as to whether or not it was offered to other inmates would not have necessarily been relevant to the claim of direct discrimination.

It can be useful to conceive of discrimination as encompassing more than 'direct' and 'indirect' discrimination. A shift away from understanding these concepts as mutually exclusive allows for a doctrinal consideration and a 59econceptualization of discrimination to better reflect substantive equality. In *Austin BMI*, Freeburn J accepted that the concept of discrimination could be expanded from what was contained in the *ADA 1991*.[131] Again, he concluded that the definition was not entirely open and needed to still be informed by concept of discrimination contained in the *ADA 1991*:

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126 Ibid 164–5.
127 Ibid 165.
128 Ibid.
129 Fredman (n 31) 10.
130 *EOA 2010* (n 75) s 8.
131 *Austin BMI* (n 98) 83 [318].

> In my view, Parliament's use of the legislative device of defining the term 'discrimination' as including the concept of discrimination in the *Anti-Discrimination Act* means that these principles apply. *First*, the use of the word 'includes' means that the incorporation of the definition of 'discrimination' in the *Anti-Discrimination Act* is not intended to be exhaustive. *Second*, conduct qualifying as 'discrimination,' by applying the ordinary use of that word, but beyond the definition of 'discrimination' in the *Anti-Discrimination Act*, may be comprehended. *Third,* to say that the concept of 'discrimination' includes various matters is a way of giving at least some meaning to the term; the concept of 'discrimination' cannot have some meaning independent of the meaning that it is given by the legislature.[132]

Again, as with the consideration of the attributes captured by the *HRA 2019*, the meaning of the concept or duties that non-discrimination entails are informed by that contained in the *ADA 1991*, but they are not limited by such a definition, leaving scope for a broader interpretation of non-discrimination in the *HRA 2019* that is nevertheless informed by existing approaches in Australian anti-discrimination law.

One of the more potentially transformative approaches to non-discrimination duties pursuant to the state statutory schemes is a broader incorporation of an accommodation-duty or a duty to make reasonable adjustments. In some of the statutory discrimination schemes, there are some requirements to make adjustments or accommodations on the basis of disability (and a limited right for adjustments for caring responsibilities in an employment context in the *EOA 2010*).[133] Accommodations and adjustments are considered as part of a substantive equality framework in that they require rules, regulations and practices to be adjusted to accommodate the needs of others.[134] Accommodations and adjustments can be individual, in the sense that a rule or practice is amended so that a singular person, or a group of people, are able to participate and engage in a different manner to that originally anticipated.[135] Alternatively, accommodations and adjustments can involve abolishing the rule or requirement entirely for everyone to better enable access for all regardless of any attribute that they may hold.[136] Accommodations and adjustments can be transformative and are a key aspect of substantive equality because they require decision makers to question the underlying basis and need for a rule or requirement and consider whether there are any alternatives that provide opportunities for better engagement and access to those who are often marginalised and excluded.[137]

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132 Ibid 83 [320] (emphasis in original).

133 See, eg, *EOA 2010* (n 75) ss 19–20, 22, 22A, 40, 45.

134 Fredman (n 31) 42–4.

135 Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit' (1996) 75(3) *Canadian Bar Review* 433, 435.

136 Ibid.

137 Fredman (n 31) 42–4.

Accommodations and adjustments are fundamental to disability discrimination and are a core aspect of the *United Nations Convention on the Rights of Persons with Disabilities* ('*CRPD*').[138] In the Australian context, accommodation and adjustments are predominately understood with respect to disability discrimination. However, there is no conceptual or practical reason that accommodations and adjustments should *only* be relevant to disability discrimination. In other jurisdictions, notably in North America, the requirement to make reasonable accommodations or adjustments did not emerge in the context of disability discrimination, but instead in the context of discrimination on the basis of religious belief where individuals could not comply with a variety of workplace requirements with respect to hours and uniforms due to their religious beliefs.[139] In Victoria, there has been an attempt to broaden the scope of reasonable adjustments to those with caring responsibilities in a workplace context but, thus far, these have not been interpreted in an expansive manner.[140]

That the right to equality incorporates the need for accommodations and adjustments has been acknowledged for some time in the case law. In *Victorian Police Toll Enforcement v Taha* the Victorian Court of Appeal concluded that:

> The second limb of s 8(3) protects substantive equality, one that accommodates difference. This is a principle of equality that recognises uniformity of treatment between different persons may not be appropriate or adequate, but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally.[141]

The benefits and possibilities of understanding the right to equality contained in the state and territory human rights schemes can be seen in the QCAT decision of *SF v Department of Education* ('*SF*').[142] In *SF*, the applicant wished to home school one of her children due to that child's disability.[143] To do so, the complainant had to register with the Queensland Education Department. As part of the registration process, the applicant had to provide an address with a street number, street name and town name to the Department.[144] The applicant could not do so as she had been required to move due to domestic violence and had a reasonable fear and belief that her ex-partner would be able to find her and her children if she provided her address to the Education Department.[145] She claimed the requirement to provide her address in order to register for home schooling

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138 Anna Lawson, *Disability and Equality Law in Great Britain* (Hart Publishing, 2008) 3.

139 Ravi Malhotra, 'The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective' (2007) 23(1) *Washington University Journal of Law and Policy* 1, 18.

140 Bill Swannie, 'Reasonable Accommodation of Employees' Parenting and Carer Responsibilities: A Human Rights Perspective' (2022) 48(2) *Monash University Law Review* 208, 209.

141 *Taha* (n 28) 70–1 [210] (Tate JA).

142 [2021] QCAT 10.

143 Ibid 3 [1]–[2] (Member Hughes).

144 Ibid.

145 Ibid.

breached her and her child's rights to equality as well as her right to privacy and reputation.[146] In a decision on the merits, QCAT determined that the original decision that the applicant provide her address was not the preferable and correct decision .[147] She had provided necessary details to ensure that the Department had the capacity to contact her, and she had a reasonable fear for herself and the safety of her children if her address was disclosed.[148] While not explicit in the decision, Member Hughes does, in a sense, provide an accommodation or an adjustment for the applicant due to her circumstances to ensure that her human rights are upheld.[149] The rule or requirement that required a specific address for home schooling purposes was found to create an unequal outcome for the applicant and her children and thus could be interpreted in a broad manner to allow for a variation in practice to accommodate the applicant's specific circumstances and vulnerabilities.[150]

Providing accommodations and adjustments for a range of attributes has a particular benefit in a public and statutory law context because there are necessarily policies, practices and procedures which can place already marginalised individuals in a more vulnerable position. In the case of *SF*, while she could have had protection from discriminatory conduct in Queensland as an 'associate' or parent of a child with a disability, the reason for her vulnerability and inability to comply with the Education Department's requirements was that she had been a victim of domestic violence (currently not a recognised ground under the *ADA 1991*). The decision in *SF* both appears to provide protection on a ground not otherwise specified in the *ADA 1991* and provides for a degree of accommodation and adjustment which is also not specified in the *ADA 1991*.

### C *Justification*

The final aspects of the concepts of discrimination and equality that can be reinterpreted and potentially expanded are the justifications and defences to discriminatory conduct. In statutory discrimination and equality Acts in Australia, there is no general justification or defence for directly discriminatory conduct. Instead, there are a multitude of exceptions contained in the Acts related to specific entities, grounds, and areas in which the conduct occurred.[151] In *Miami Recreational Facilities*, when discussing the more expansive definition of discrimination, Member Gordon raised the prospect of a narrower approach to

146 Ibid 11–12 [43]–[44].
147 Ibid 13 [48].
148 Ibid 13 [47]–[48].
149 Ibid 13 [49].
150 Ibid 14 [52]–[53].
151 Rees, Rice and Allen (n 1) 162.

justification, noting that the specific exemptions for directly discriminatory conduct may not apply:

> One example can demonstrate the change. Under the *ADA* an educational authority may operate a school for students of a particular religion and exclude students of other religions. This is because although such an act is directly discriminatory, it is not a contravention of the *ADA* because of an exemption which says that discrimination of this sort is not unlawful. But now, since every person has a human right to effective protection from discrimination whether or not it is unlawful under the *ADA*, the operation of such a school would be a limitation of that human right for those excluded. On a legal challenge therefore, the education authority would have to show that it was justified under the tests of the *Human Rights Act* to exclude students of other religions from the school.[152]

While, as Member Gordon foreshadows, it may be that the various specific exemptions or exceptions in the *ADA 1991* could be narrowed when considering an equality claim pursuant to the *HRA 2019*, it is also possible that the courts could interpret a broader right of justification, which applies to direct discrimination, indirect discrimination or a more unified model of discrimination. In Australia, as in other jurisdictions such as the United Kingdom and the European Union, there has generally been a reluctance to create a general justification clause for direct discrimination.[153] This is because there are concerns that a general justification clause will be used to justify a broad array of discriminatory conduct on the basis of cost, economic efficiency or customer preference, lessening the impact of non-discrimination measures.[154]

On the other hand, jurisdictions such as Canada have long had a general justification provision for both claims made pursuant to s 15 of the *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') and pursuant to the statutory human rights codes.[155] At least with respect to the statutory schemes, having a general justification provision for discriminatory conduct has not led to a lessening of discriminatory protections.[156] Instead, the approach to the codes provide a structured test that focuses not on whether the claimant can prove discriminatory conduct, but on whether or not the claimant can be better accommodated and if the discriminatory conduct can be justified on another basis.[157]

It is important to recognise that, when considering s 15 of the *HRA 2019*, the justification of measures that treat persons differently can be considered at two

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152 *Miami Recreational Facilities* (n 6) 11 [55].

153 Fredman (n 31) 251.

154 Ibid.

155 See, eg, *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') ss 1, 15; *Canadian Human Rights Act*, RSC 1985, c H-6, s 15.

156 Denise Réaume, 'Defending the Human Rights Codes from the *Charter*' (2012) 9 [Spring] *Journal of Law and Equality* 67, 68.

157 Ibid.

separate steps of the analysis. The first is considering whether the measure is designed to assist or advance persons who have historical and continuing disadvantage due to discrimination on the basis of an attribute that they hold.[158] If the measure is deemed to have this purpose, then s 15(5) would apply and the right to equality would not be limited.[159] If s 15(5) did not apply and a measure was considered to limit the right to equality as provided for in s 15, then it may nevertheless be justified pursuant to s 13.[160] Section 13(1) provides that human rights can be limited where such limitations are reasonable and 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[161] Section 13(2) provides a list of factors which may be relevant when considering whether or not a limitation of a human right is justified.[162] The application of ss 13–15 could be considered somewhat circular given that any justification of a limit to a right to equality must be justified on the central principle of equality.[163] As a matter of reasoning, it would seem odd that a judge could find that a measure limited the right to equality pursuant to s 15 but was nevertheless justified in a free and democratic society based on the foundational value of equality. The challenge that this may present has yet to emerge in Victoria or the ACT so it remains to be seen if this circularity will pose a problem for justification analyses in the future.

Much of the focus on justifications for discriminatory treatment has been in VCAT and QCAT's administrative capacity to approve exemptions from the state anti-discrimination schemes to allow for conduct which could otherwise be considered unlawful discrimination pursuant to the state anti-discrimination laws. In *Lifestyle Communities*, Bell J confirmed with respect to the *Victorian Charter* that when determining whether to grant a temporary exemption pursuant to the *EOA 1995* (and then later the *EOA 2010*) the tribunal must be mindful of its administrative functions pursuant to the *Victorian Charter* and make determinations consistently with its terms.[164] In *Re Ipswich City Council* ('*Re Ipswich*'), Merrell DP of the Queensland Industrial Relations Commission ('QIRC') agreed that the same approach applied when considering temporary exemption applications made pursuant to the *ADA 1991*.[165] Necessarily when determining temporary exemptions to the application of the *ADA 1991*, the right to equality and discrimination is engaged.[166] Deputy President Merrell accepted that making a determination that was compatible with human rights required him to consider

158 Evans and Petrie (n 17) 120; *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164, 7–8 [35] (Member Traves) ('*Fernwood*').
159 Evans and Petrie (n 17) 120.
160 *Fernwood* (n 158) 7–8 [35] (Member Traves).
161 *HRA 2019* (n 8) s 13(1).
162 Ibid s 13(2).
163 Ibid.
164 *Lifestyle Communities* (n 5) 295 –7 [33]–[47].
165 [2020] QIRC 194, 8–9 [25] ('*Re Ipswich*').
166 Ibid 15 [50].

whether the granting of the exemption would not limit a human right, or alternatively, if it did limit a human right, whether it did so in a manner and only to the extent that it was reasonable and demonstrably justified in accordance with s 13.[167]

In Queensland, thus far, s 15 has been predominately considered by QCAT and the QIRC within the context of exemption applications. A common reason for organisations to apply for temporary exemptions is to ensure that hiring programs or the provision of specialist services for underrepresented groups, such as women or Aboriginal and Torres Strait Islander persons, will not be challenged as discriminatory on the basis of sex or race pursuant to the *ADA 1991* on the basis that they disadvantage men or people who are not Aboriginal or Torres Strait Islander.[168] While such programs are likely to be found to be non-discriminatory as they are affirmative action measures targeted at groups which have suffered from historical marginalisation, exclusion and discrimination, organisations often want the security from possible complaints that temporary exemptions provide. Such cases have been considered with respect to the application of section 15 of the *HRA 2019* to the *ADA 1991*. For example, in *Re Ipswich*,[169] *Fernwood Womens Health Clubs (Australia) Pty Ltd*,[170] and *Re Protech Personnel Pty Ltd*,[171] temporary exemptions to the *ADA 1991* were granted so that the organisation could provide specialised employment opportunities for women in professions in which there is a low representation of women or alternatively provide specialist services for women.[172] In *Sunshine Coast Regional Council [No 2]*,[173] and *Re Mackay Regional Council* ('*Re Mackay*'),[174] exemptions were granted to specialist tourism programs and employment training programs for Aboriginal and Torres Strait Islander persons where the Tribunal found that such programs were designed to combat discrimination and disadvantage otherwise faced by Aboriginal and Torres Strait Islander people.[175] In *Re Mackay*, the Tribunal accepted that the rights contained in ss 15(3)–(4) are engaged in the determination of whether to grant the exemption.[176] However, as the right contained in s 15(5) was also engaged in these decisions, the temporary exemptions where not discrimination and there would be no breach of s 15.[177] As

167 Ibid 13 [44].
168 Rees, Rice and Allen (n 1) 54.
169 *Re Ipswich* (n 165) 3 [1] (Merrell DP).
170 *Fernwood* (n 158) 2 [2] (Member Traves).
171 [2022] QIRC 29, 3 [12] (Merrell DP).
172 See, eg, *Re Ipswich* (n 165) 17–18 [56] (Merrell DP).
173 [2021] QCAT 439, 2 [1] (Member Sammon) ('*Sunshine Coast Regional Council*').
174 [2022] QIRC 64, 2 [1] (Power IC) ('*Re Mackay*').
175 *Sunshine Coast Regional Council* (n 173); *Re Mackay* (n 174).
176 *Re Mackay* (n 174) 9–10 [29]–[33] (Power IC).
177 Ibid.

such, there was no need for the Tribunal to consider the operation of s 13 when granting the exemptions.[178]

Another common reason for requesting an exemption from the *ADA 1991* relates to the requirement of some organisations to comply with the USA's *International Traffic in Arms Regulations* ('*ITAR*'),[179] which denies access to specified controlled defence articles by certain countries and their nationals. Organisations that require access to controlled defence articles consequently require exemptions from the *ADA 1991* in order to discriminate in employment on the basis of race and nationality.[180] Thus far, the QIRC has found that the use of s 113 in this context is consistent with the *HRA 2019*.[181]

A more contentious area for temporary exemptions has been with respect to housing designated specifically for persons over a specific age, most often the age of 50.[182] The issue in the case law is demonstrating that the exemption can be justified on the basis of a special need for older persons to find affordable accommodation.[183] The difficulty can be establishing that the need for affordable accommodation is particular and peculiar to older persons in Australia rather than an experience that impacts many persons regardless of age.[184]

What is noticeable in the case law from both Victoria from *Lifestyle Communities* onwards and in Queensland since the *HRA 2019* commenced operation is that, pursuant to their administrative responsibilities articulated in the human rights statutes, tribunals are providing a robust analysis in justifying the granting or refusal of an exemption. This analysis involves balancing the various rights and interests of those who benefit from the exemptions (notably persons wanting accommodation in an age-segregated community), those who would not (predominately younger people also struggling to find affordable housing) and the community as a whole in creating age-inclusive spaces. A useful and recent illustration of this balancing approach is *Burleigh Town Village Pty Ltd*.[185] The applicant, a manufactured-home-park provider, applied for an exemption to the provisions of the *ADA 1991* in order to provide accommodation solely to persons aged 50 and older.[186] Drawing on *Miami Recreational Facilities*, the Tribunal accepted that, in determining the exemption application, it was

178 Ibid.

179 22 CFR § 120 (2003).

180 For more information on *ITAR* and discrimination law, see generally Simon Rice, 'Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law' (2011) 10(2) *Canberra Law Review* 97.

181 *Re Leidos Australia Pty Ltd* [2021] QIRC 229; *Re Cobham Aviation Services Australia Pty Ltd* [2022] QIRC 326.

182 See, eg, *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 ('*Burleigh Town Village*'); *Terrace-Haven* (n 67); *Miami Recreational Facilities* (n 6).

183 *Burleigh Town Village* (n 182) 10 [58] (Member Roney QC).

184 Ibid 11 [67].

185 Ibid.

186 Ibid 2–3 [1]–[4].

important to balance the rights and interests of a variety of parties.[187] The applicant articulated their interest as that of those over 50 who wished to live in the village with other persons over the age of 50 as 'the right to live in a protected environment for senior citizens to create a positive, safe and friendly environment of like-minded individuals at the same stage of life', following the conclusions in *Miami Recreational Facilities*.[188] On the other hand, the Tribunal accepted the concerns of the Queensland Human Rights Commission that housing affordability is a concern for persons of all ages in Queensland and segregated-housing on the basis of age is based on negative and unfair stereotypes about young people that does not support the creation of an age-friendly society more generally.[189] Weighing all these various factors, the Tribunal declined to grant the exemption.[190]

The decision can be contrasted with the two previous decisions to grant an exemption to Burleigh Town Village in 2011 and 2017.[191] Those decisions were much shorter and simply accepted the need for affordable accommodation for older Australians without robust interrogation of the broader equality ramifications for other groups in society. Comparing and contrasting the decisions pre- and post- the *HRA 2019* indicates that the Act has focused the Tribunal's attention, in its administrative capacity at least, on the need for proportionality, justification and balancing with respect to non-discrimination and equality rights.

## IV The Challenges of Substantive Interpretation

In Part III, I canvassed the potential expansions of the right to non-discrimination and equality that the state and territory human rights Acts could provide. In each jurisdiction there is the capacity for a substantive interpretation of the right to equality. However, I argued that the capacity for nuanced expansion was possible to a greater extent in the ACT and Queensland because in both jurisdictions the definition of discrimination is not tied to the definitions provided in the state anti-discrimination schemes. This affords an opportunity for a greater array of attributes to be captured, and a different and more nuanced understanding of discriminatory conduct and how it can be justified. However, in this Part I will consider the potential challenges of the proposed substantive interpretation. While it has been accepted that the right to equality in Australia is a right to substantive equality, there are challenges to interpreting equality 'substantively' from both a conceptual and doctrinal basis. The conceptual

187 Ibid 18 [105]–[112].
188 Ibid 16 [96].
189 Ibid 16–17 [98]–[99].
190 Ibid 24 [158].
191 *Burleigh Town Village Pty Ltd* [2011] QCAT 646; *Burleigh Town Village Pty Ltd* [2017] QCAT 161.

challenges as to the underlying meaning of equality were canvassed in Part II and relate to aligning the interpretive reasoning to an underlying conception of equality. The challenges from a doctrinal perspective include building a body of case law from the ground up in a broader jurisdictional context that has been historically considered to be 'reluctant about rights',[192] and which still has comparatively limited experience with human rights statutes.

In terms of drawing on the jurisprudence from other states and territories, as judges from both the ACT and Victoria have acknowledged, in both jurisdictions judges have been at the forefront of developing the body of human rights jurisprudence.[193] While there are the beginnings of a substantive interpretation of equality in the human rights statutes in Victoria and the ACT, due to the limitations in both of those Acts, Queensland judges do require a degree of creativity to engage with the possibilities and potential that the definition of discrimination in the *HRA 2019* provides. Compounding this challenge is the fact that, as has been commented many times previously, and highlighted earlier in this article, anti-discrimination statutes in Australia have often been interpreted narrowly, and not particularly 'substantively'.[194] As such, there is little from those bodies of case law to support a broader and more substantive right to equality and non-discrimination that Queensland judges can necessarily draw upon.

Frequently, the capacity for an expansive interpretation of human rights by judges has been critiqued on the basis that it could descend into 'judicial activism'.[195] The critique of judicial activism is that this approach takes the judge beyond the legitimate scope of the role of the judiciary, and their decision may be based upon personal values or views rather than based upon legal rules or principles.[196] While it has long been established that judges are not merely 'oracles',[197] the extent to which judges can legitimately adopt an expansive approach is still debated. When considering their role, judicial officers have remarked that judging can involve a degree of 'creativity' in judicial interpretation or expansion to human rights where the conclusions and approach align to community expectations or core and underlying values of the Australian legal system.[198]

Extra-curially, some former senior members of the judiciary have commented that the value of equality is an underlying and core value of the

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192 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195.

193 Bell (n 9) 5.

194 See, eg, Thornton, (n 1) 2; Gaze (n 1) 326–7; Rees, Rice and Allen (n 1) 26.

195 Jeffrey Goldsworthy, 'Tom Campbell on Judicial Activism' (2017) 42(1) *Australian Journal of Legal Philosophy* 247, 247–8.

196 Ibid 248. See also Thornton (n 1) 1.

197 Lord Reid, 'The Judge as Law Maker' (1972) 12(1) *Journal of the Society of Public Teachers of Law* 22, 22.

198 See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J).

Australian legal system.[199] However, as discussed in Part II, while equality and non-discrimination may be considered fundamental and underlying values of both the Australian legal system and underlying the human rights Acts, this assertion does not assist in articulating what such an underlying value provides. Though potentially considered underlying values, there is little interrogation of their meaning and scope in the broader case law. As such, as values, they remain abstract without fixed borders or substance that could be utilised in developing an approach to the concept as understood in the *HRA 2019*. Human rights Acts expand the scope for judges to interpret legislative provisions consistently with human rights. By passing human rights Acts, the legislature has provided the opportunity for consideration of the meaning of these underlying values of the Australian legal system. Particularly, with respect to non-discrimination and equality, it provides benefits to litigants and individuals by interrogating and capturing the range of disadvantages that a right to non-discrimination and equality is intended to ameliorate and provides a language and understanding as to what these terms mean as values within the context of the Australian legal system. Such an interrogation can still be linked and understood with reference to decades of anti-discrimination law and jurisprudence, but as emphasised by Freeburn J in *Austin BMI*, it is not confined to the technical language of the anti-discrimiantion statutes such as the *ADA*.[200]

## V Conclusion

In this article, I have canvassed the possibilities and the potential challenges provided by the open definition of discrimination in the *HRA 2019*. Though in Victoria, in particular, it is accepted that the *Victorian Charter* is designed to provide for substantive rather than formal equality, its capacity to achieve this aim is limited by its definition of discrimination, which is inextricably tied to the attributes and definition of discrimination in the *EOA 2010*. This has created limitations in the attributes that are captured for protection by the *Victorian Charter* and the definition of discriminatory conduct. In Queensland, the early case law has accepted that the right to equality contained in s 15 does provide a right to substantive equality, drawing on the Victorian case law. The case law also accepts that the definition of discrimination could a support a broader and more expansive definition of the discriminatory conduct as provided for in the *ADA 1991*. I considered what this broader and more expansive definition could entail with respect to the attributes that are captured, the definition of discrimination, the areas of operation, and the capacity for justification, canvassing a range of different options for interpretation. Nevertheless, while initially there appears to

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199 See, eg, James Allsop, 'The Judicialisation of Values' (Speech, Law Council of Australia and Federal Court of Australia FCA Joint Competition Law Conference Dinner, 30 August 2018) 1.

200 *Austin BMI* (n 98) 83 [317].

a willingness to engage with the possibilities that the *HRA 2019* provides, there are still difficulties from conceptual and doctrinal perspectives in developing a substantive jurisprudence on the meaning and scope of equality and discrimination. It remains to be seen whether or not he Queensland judiciary will take up his opportunity.

# MAPPING THE BOUNDS FOR INTEGRATION OF BLOCKCHAIN TITLES IN A TORRENS SYSTEM

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*As land becomes increasingly expensive in Australia fewer people can afford it, with consequences for wealth distribution and housing. Real estate, in particular the family home, has formed a foundation for Australians' wealth over many decades, but the possibility of home ownership has been deteriorating in recent years. Alternative proposals for property investment include issuing fractions of land title on blockchain with parallel registration in the land registry. While such proposals are technically feasible, they are silent as to the means of integrating the blockchain ledger with the land administration system. As the land administration system comprises multiple statutory processes, this article uses the Queensland system as a case study, to analyse the relevant statutes in terms of the integration of a fractionalised blockchain titles system. The aim is to identify the law reform necessary to achieve a high level of integration of fractionalised land titles on a blockchain, within an existing land administration system — without detracting from the policy goals of that system.*

## I INTRODUCTION

As land becomes increasingly expensive in Australia fewer people can afford it, with consequences for wealth distribution and housing. Real estate, in particular the family home, has formed a foundation for Australians' wealth over many decades. However, between 1981 and 2016, those with a real property mortgage (an indicator of land ownership) fell from more than 60 per cent of the population, to 45 per cent. In addition, for the poorest 20 per cent of the population, home ownership fell during that period from 63 per cent of the population to only 23 per cent.[1]

So long as land remains a key component of Australian household wealth, there is an inherent paradox: wealth is maximised for those who have land through a buoyant market supporting high values, yet high prices act as barriers

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1 Brendan Coates and Carmela Chivers, 'Home Ownership Now the Great Divider of Australian Society', *Sydney Morning Herald* (Online, 19 September 2019) <https://www.smh.com.au/national/home-ownership-now-the-great-divider-of-australian-society-20190919-p52syz.html>.

DOI: 10.38127/uqlj.v43i1.8089

to entry into that same market. Consequently, there is interest in measures that support affordable land ownership.

Various asset structures have emerged as an indirect means of investment in land. They generally involve acquisition of shares or units in a landowning entity, with dividends payable based on capital gains or rental returns. Such products do not, however, comprise land ownership as such.[2] By contrast, in late 2019, the South Australian government announced a proposal to release *fractions* of a land title where each fraction is 1/20 of the title. The fraction would be held in common with other investors who would each receive a proportion of the rent, and the capital gain on the land. These *fractionalised* interests would be traded using blockchain technology, as well as being registered in the land title registry. These interests were to be called 'bricklets'. This novel means of issuing land titles would, theoretically, provide the security of ownership of land but at a price that would be affordable to many more people.

In our initial analysis of the proposal, we identified that the issue and trading of blockchain-based bricklets would be technically possible.[3] However, using Graglia and Mellon's framework,[4] we also identified that the proposal failed to provide for even a low level of integration of the bricklet blockchain into the existing land administration system. According to Graglia and Mellon, the lower the level of integration, the weaker the use-case for a blockchain. To fully analyse the potential for integration of a blockchain-based system of fractionalised land titles requires a deeper understanding of the relationship between land title and administrative structures that facilitate it.

In this article, following from our initial analysis, we examine the land administration system itself to identify more clearly the data infrastructure that surrounds land title. Our aim is to analyse the capacity of a (theoretical) bricklet-style fractionalised title on a blockchain to integrate with a land administration system.

Part II explains land in terms of data, where that data collectively comprises a land administration system. Part III then provides a survey of the literature to identify the conceptual foundations and goals of a contemporary land administration system, focusing on those of a developed economy.[5] Part IV builds on the conceptual foundation developed in Part III by identifying the foundation and goals of land administration in the Australian context, before applying this understanding to the statutory framework of Queensland's land administration system. It uses the Queensland system as a case study of the state's

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2 Francina Cantatore, Kate Galloway and Louise Parsons, 'Fractionalised Land Interests: More Questions Than Answers' (2020) 28(2) *Australian Property Law Journal* 39, 48.

3 Cantatore, Galloway and Parsons (n 2) 50.

4 J Michael Graglia and Christopher Mellon, 'Blockchain and Property in 2018: At the End of the Beginning' (2018) 12(1–2) *Innovations: Technology, Governance, Globalization* 90.

5 See generally Henri AL Dekker, *The Invisible Line: Land Reform, Land Tenure Security and Land Registration* (Routledge, 1st ed, 2016).

representation of land as data, mapping it onto the recognised standards of effective land administration systems. This part reveals the extent of data involved in land titling as part of a land administration system, providing a foundation on which to assess the feasibility of integrating a blockchain title scheme, canvassed in Part V. Our contention is that land title is dependent not only on principles of property, or a single data point known as 'title', but rather is part of an extensive network of data, which poses a significant challenge for the introduction of new titling technologies. Consequently, any proposal to represent land title on a blockchain requires integration within the broader land administration system.

## II Land as Data

As a precursor to analysing the features of a land administration system, this Part explains how the law depends upon the conception of land as data. While real property law in Australia is concerned with land title, it is well recognised that title alone cannot exist without an information infrastructure:[6] the land administration system. That system includes the land register, which is the 'official record … of rights on land or of deeds concerning changes in the legal situation of defined units of land'.[7] The register in turn depends on spatial information and multiple other datapoints relevant to identifying land and the rights subsisting in it. This is frequently termed the cadastre: 'a methodically arranged public inventory of data concerning properties within a certain country or district, based on a survey of their boundaries'.[8] Despite the materiality of the thing that is owned, possessed, or otherwise put to use (ie, land), interests in land in Australia exist in the abstract realms of data. One consequence of its representation as data is that land has become readily and securely fungible, representing its key role within the nation's financial and socially constructed infrastructure.[9]

The primary unit of land tenure, and therefore of land administration, is the land parcel[10] — the product of what Dekker describes as 'invisible lines' across the

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6 See Simon Winchester, *Land: How the Hunger for Ownership Shaped the Modern World* (William Collins, 2021).

7 Jaap Zevenbergen, 'A Systems Approach to Land Registration and Cadastre' (2004) 1(1) *Nordic Journal of Surveying and Real Estate Research* 11, 11 ('A Systems Approach').

8 Ibid.

9 See generally, Sarah Keenan, 'Property: Changing Formations of Having and Being' in Simon Stern, Maksymilian Del Mar and Bernadette Meyler (eds), *The Oxford Handbook of Law and Humanities* (Oxford University Press, 2019) 539; Sarah Keenan, 'The Transfer of What? Electronic Conveyancing and the Destabilisation of Property' (2023) 5(1) *Law, Technology and Humans* 11, 15 ('Destabilisation of Property').

10 International Federation of Surveyors, *FIG Statement on the Cadastre* (FIG Publication No 11, 1995); Dekker (n 5) 27.

landscape.[11] It is accepted that there is no possibility of tenure — of any kind — without first identifying the area of the earth's surface attaching to the relevant rights.[12] The spatial dimensions of the parcel exist both as a measure and as fixed points, situating the parcel in relation to other parcels and as an absolute location on the earth. A 'metes and bounds' description was traditionally used to this end, according to features of the natural landscape, but increasingly sophisticated surveying tools now render lot boundaries by GPS as an ostensibly absolute reading. Of note, however, is that even GPS technology is variable due to alterations in the earth's axis. The Queensland government, for example, is currently fixing the datum to accommodate a shift in Australia's continental tectonic plate of some 7cm per year,[13] highlighting the need for ongoing maintenance of spatial data in the interests of accuracy, and therefore confidence, in the system.

While bounds might be fixed solely with reference to geospatial coordinates, the cadastre generally encompasses survey plans as a visual representation of the parcel's spatial dimensions.[14] The survey plan captures not only absolute and relative locational data, but also differential usage such as roads and easements, some landscape features such as creeks and rivers, and unique parcel identifiers that provide a reference point for tenure and other interests and purposes.[15] The unique parcel identifiers on the plan of survey link the physical parcel of land to property in that parcel, as well as to operations of the State such as taxation, land distribution, planning, and other regulation. Kalantari et al identify four principal subsystems that represent these datasets: land mapping, land registry, land development and land valuation.[16]

Data concerning a single parcel of land forms part of a state's digital cadastral dataset[17] and relates to data for all other parcels. This data is captured, used, and shared by many departments of executive government, and interrelates with private sector activities such as conveyancing, building and land development, and the financial sector.

Collectively, this data and the activities concerning it comprise the land administration system.

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11 Dekker (n 5) 27–8.

12 Jo Henssen, 'Basic Principles of the Main Cadastral Systems in the World' (Seminar Paper, Committee 7 – Cadastre and Rural Land Management, International Federation of Surveyors, 16 May 1995) 7–8.

13 'GDA2020 in Queensland', *Queensland Government Department of Resources* (Web Page, 21 July 2023) <https://www.resources.qld.gov.au/data-mapping/initiatives/gda2020-queensland>.

14 *Land Title Act 1994* (Qld) s 49A ('*LTA*'): 'A lot defined in the plan [of subdivision] is created as a lot when the plan is registered'.

15 *Survey and Mapping Infrastructure Act 2003* (Qld) s 46 ('*Survey and Mapping Infrastructure Act*').

16 Mohsen Kalantari et al, 'An Interoperability Toolkit for e-Land Administration' (Conference Paper, Centre for Spatial Data Infrastructures and Land Administration, 9–11 November 2005) 1 ('Interoperability Toolkit').

17 Ibid.

## III Best Practice in Land Administration Systems

Divergent approaches to land administration systems have been recognised.[18] The two key variables in evaluating the effectiveness of a system appear to be the principal purpose of the state's regulation of land — and thus its land administration system — and the history, or cultural approach to land within any given society.[19]

For example, a principal concern expressed in the global literature over recent years, in the face of changing climate and rapid industrial development, has been the relationship between a land administration system and how that system upholds land management priorities that support agriculture and therefore food security.[20] Related to protecting the farming capacity of land is the question of environmental protection,[21] and the distribution of access to land.[22] These priorities are, however, not central to the primary concern of Australian land administration systems. Like other western nations, governmental administration of land in Australia tends to prioritise economic outcomes, which are perhaps best exemplified by the cornerstone of private land administration, the Torrens register. Keenan, for example, describes the 'speed and efficiency' of the Torrens system and the shoring up of security interests attendant on the move to e-conveyancing.[23] Generally, economic goals are achieved through systematised access to accurate and guaranteed title generating trust in the land market and, consequently, ready access to credit through mortgaging land.[24] While property rights aligned with the cultural, political and historical norms of a jurisdiction are the building blocks of land tenure and the register component of

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18 As canvassed, eg, in S Enemark, I Williamson and J Wallace, 'Building Modern Land Administration Systems in Developed Economies' (2005) 50(2) *Journal of Spatial Science* 51.

19 See generally, Evrim Tan et al, 'A Capacity Assessment Framework for the Fit-for-Purpose Land Administration Systems: The Use of Unmanned Aerial Vehicle (UAV) in Rwanda and Kenya' (2021) 102 *Land Use Policy* 105244; Ian P Williamson, 'Land Administration "Best Practice" Providing the Infrastructure for Land Policy Implementations' (2001) 18(4) *Land Use Policy* 297.

20 See, eg, Georgina Rockson, Rohan Bennett and Liza Groenendijk, 'Land Administration for Food Security: A Research Synthesis' (2013) 32 *Land Use Policy* 337; Rohan M Bennett et al, 'Land Administration For Food Security' in Jaap Zevenbergen, Walter de Vries and Rohan Bennett (eds), *Advances in Responsible Land Administration* (CRC Press, 1st ed, 2015) 37; Peter H Verburg et al, 'Land System Change and Food Security: Towards Multi-Scale Land System Solutions' (2013) 5(5) *Current Opinion in Environmental Sustainability* 494.

21 See Diana Stuart, 'Constrained Choice and Ethical Dilemmas in Land Management: Environmental Quality and Food Safety in California Agriculture' (2009) 22(1) *Journal of Agricultural and Environmental Ethics* 53.

22 See, eg, Stig Enemark et al, *Fit-or-Purpose Land Administration* (FIG Publication No 60, 2014); Stig Enemark, 'Land Administration Systems' (Conference Paper, Map World Forum, 10–13 February 2009).

23 Keenan, 'Destabilisation of Property' (n 9) 13, 14.

24 As argued by Hernando de Soto, 'A Tale of Two Civilizations in the Era of Facebook and Blockchain' (2017) 49(4) *Small Business Economics* 729.

a land-administration system, in a modern society credit structures might also be included.[25]

A land-administration system that prioritises economic considerations, such as those in Australia, will generally involve a process of registration that can facilitate legally enforceable rights. This is especially important in supporting an active real estate market. To achieve a sustainable system protecting property interests, however, requires adequate information for policymakers,[26] which demands a holistic approach to the cadastre. The system's data interoperability with both public and private systems, and the imperative for ready access to data by different stakeholders, are common themes in the literature.

Oukes et al offer a case study of The Netherlands by way of example, describing the process involved in updating its cadastre, land registry, and mapping agencies' information systems.[27] They identify core design considerations including information and data model design, including information exchange, laws and regulations, delegations and responsibilities, and interoperability.

Similarly, Austria has traditionally relied on an elaborate system of land administration to support its highly secure land titling system.[28] In the late 1990s, Austria deployed technology to combine data from various government and judicial agencies. Despite enhanced efficiency through more interoperable land data, Zevenbergen observes that it remains expensive, bureaucratic, and over-decentralised. Enhancements are only likely to be undertaken where stakeholders perceive an imperative to do so.[29]

In the case of Switzerland, Steudler and Williamson found a comprehensive cadastre, a very decentralised system with high private sector participation, good cooperation between public and private sectors, well-established data modelling techniques, a conceptually strong basis for a national spatial data infrastructure, a reputation for reliability and security, and a regular and comprehensive review strategy.[30] Despite these strengths, they also observe weak cooperation between the public, private, and academic sectors, weak horizontal cooperation between federal offices regarding spatial data, competition between different interest groups, low digitisation of cadastral data, and copyright and privacy issues.[31]

In contrast to these observations of European jurisdictions, Australian land administration systems are largely integrated within each state and territory —

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25 Dekker (n 5) 32.

26 Such as the systems approach described in Zevenbergen, 'A Systems Approach' (n 7).

27 Peter Oukes et al, 'Domain-Driven Design Applied to Land Administration System Development: Lessons from the Netherlands' (2021) 104 *Land Use Policy* 105379.

28 Jaap Zevenbergen, *Systems of Land Registration: Aspects and Effects* (Netherlands Geodetic Commission, 2002) 152–8.

29 Ibid.

30 D Steudler and IP Williamson, 'Evaluation of National Land Administration System in Switzerland' (2005) 38(298) *Survey Review* 317, 329.

31 Ibid.

although they stand alone within each jurisdiction. Australian jurisdictions have moved towards e-land administration in the last 30 years,[32] including the shift to digital titles, digital lodgement of survey plans, online access to survey plan information,[33] and, most recently, the introduction of electronic conveyancing. The automation of Australian registers has enhanced the interoperability of the cadastre,[34] and, despite early concerns about electronic titling,[35] has seen wide acceptance among stakeholders.

Despite the state-based systems, the public–private cooperative venture of e-conveyancing, discussed below, has facilitated greater interoperability between jurisdictions. E-conveyancing is an information technology platform interlinked with the electronic register of each participating state and territory,[36] evidencing the tolerance of Australian stakeholders to expand and embrace technological advances in the interests of enhanced economic efficiency in land administration. Digitising the land administration system makes more information available to stakeholders. In Australia, where efficiency in the real estate market is a prime driver of advances in land administration, an integrated system reduces the information cost of real estate transactions,[37] at least for certain stakeholders.[38]

As Kalantari et al observe, however, digitisation of constituent data does not guarantee interoperability of subsystems as their implementation can be isolated to one subsystem rather than designing overall harmonisation of data between all subsystems. Further, the extent of their interoperability is constrained by the extent of data exchange.[39]

The time taken to implement Australia's e-conveyancing system illustrates the challenges in designing a register that is interoperable both beyond state lines[40] and through integration of additional data. In the next Part, we use Queensland as an example to set out the principal datasets comprising its land-administration system.

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32 For a description of e-land administration, see Mohsen Kalantari et al, 'Toward e-Land Administration: Australian Online Land Information Services' in *Proceedings of the SSC* (Spatial Sciences Institute, 2005) ('Toward e-Land Administration').

33 Kalantari et al, 'Interoperability Toolkit' (n 16) 1.

34 For a case study in interoperability, see Hamed Olfat et al, 'Moving Towards a Single Smart Cadastral Platform in Victoria, Australia' (2020) 9(5) *ISPRS International Journal of Geo-Information* 303.

35 Sharon Christensen and Amanda Stickley, 'Electronic Title in the New Millennium' (2000) 4(2) *Flinders Journal of Law Reform* 209, 233.

36 See description in Keenan, 'Destabilisation of Property' (n 9) 15.

37 See generally, A Dawidowicz, A Radzewicz and M Renigier-Bilozor, 'Algorithm for Purposes of Determining Real Estate Markets Efficiency with Help of Land Administration System' (2014) 46(336) *Survey Review* 189.

38 See, eg, Keenan, 'Destabilisation of Property' (n 9) 17.

39 Kalantari et al, 'Interoperability Toolkit' (n 16) 7.

40 As analysed in, eg, Eugene Clark, 'E-Conveyancing in Australia: An Important Step Along the Journey to E-Government' (2011) 21(1) *Journal of Law, Information and Science* 62; Peter Rosier, 'Electronic Conveyancing in Australia: Recent Developments' (2020) 94(3) *Australian Law Journal* 172.

## IV Land Administration Framework in Queensland

There are six principal types of land title in Australia — Torrens title; strata title (reliant upon Torrens, but with its own features); Crown land title; Aboriginal and Torres Strait Islander tenures including native title; old system title; and possessory title.[41] This article focuses on the application of the land administration system in the context of freehold in fee simple only. Although only constituting approximately 30 per cent[42] of the Australian land mass, the freehold estate (comprising Torrens and including strata title) is the predominant form of landholding in the most populous areas of the nation. Given the size and economic importance of the market in freehold land in Australia,[43] and the highly developed nature of the system of which the Torrens register forms part, our investigation focuses on the freehold land administration system.

Using Queensland as a representative case study, this Part provides an overview of the State land administration system to identify its purpose and cultural context relating to freehold title; the subsystems involved; and the extent of the three baseline standards of a land administration system: registration, data interoperability, and access to data. It starts by briefly outlining the current Australian context for land administration.

### A *Purpose and Context of the Freehold Land Administration System*

Through the English assertion of the common law in the Australian colonies, land tenures before the introduction of the Torrens system were held under 'old system' title, unless and until it was converted to Torrens title.[44] A primary disadvantage with old system title was that title information was privately held. The system relied on the landowner to retain the deeds relating to dealings with the lot granted, and to provide current and historical deeds to a purchaser as evidence of title. In the colonies, where land grants and a market in land were essential for emerging economies, privately held land information resulted in complex conveyancing processes and significant scope for error and fraud.[45]

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41 Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 801.

42 'National Land Account, Experimental Estimates', *Australian Bureau of Statistics* (Web Page, 22 June 2021) <https://www.abs.gov.au/statistics/environment/environmental-management/national-land-account-experimental-estimates/latest-release>. See also 'Climateworks Centre', *Land Use Futures: Freehold* (Web Page, 2023) <https://climateworkscentre.org/land-use-futures/australias-land-use>.

43 See, for example, the growth of the Western Australian property market, detailed in Landgate, *Annual Report* (Report, 2022–23), 48 <https://www.landgate.wa.gov.au/siteassets/documents/about-us/strategic-plans-and-annual-reports/landgate-22-23-annual-report.pdf>.

44 In Queensland, all land has been converted to Torrens Title and no old system land remains as a result of compulsory conversion under the *Property Law Act 1974* (Qld) pt 18 div 4 ss 250–4A.

45 Anne Wallace, Michael Weir and Les McCrimmon, *Real Property Law in Queensland* (Thomson Reuters, 5th ed, 2020) 278.

The Torrens system, introduced in South Australia in 1858, centralised land titling information to reduce the cost of information access and to shore up the accuracy of the titling information held. The system depends upon a centralised and accessible register of land data, including the cadastre and all interests. To operate on a title required matching data in the government ledger with a duplicate instrument of title or dealing. The combination of state-managed and guaranteed land data with the indefeasibility of the recorded interest created certainty in commercial dealings, supporting the objectives of secure land titles and economic growth, both in the early days of the State and into the present.[46] It did so through introduction of 'title by registration',[47] conferring on the registered proprietor of an interest in Torrens title land a government guaranteed indefeasible title to that interest.[48] The system was adopted throughout Australia,[49] and is regulated by each individual state and territory.

In a major development in the management of land data, the physical ledger and paper title were replaced in Queensland by the automated titles system with the advent of the *Land Title Act 1994* (Qld) ('*LTA*'). Paper titles are no longer available and all freehold land data is electronic.

To date, proposals recommending a uniform Torrens title code Australia-wide have not been implemented.[50] Consequently, land administration has been dealt with pursuant to the systems of each state and territory. Jurisdictional differences are also reflected in regulation of the transfer of land and conveyancing systems. In all states and territories, conveyancing of both old system and Torrens land has traditionally occurred face-to-face, a method used in Queensland for over 150 years,[51] until February 2023, when e-conveyancing was introduced as the standard method of conveyance.[52]

## B *Land Administration Systems and Subsystems*

Given the background of the Torrens focus on economic development through a central government register of interests supported by associated land data, the starting point for analysing Queensland's land administration system lies in three agencies responsible for surveying and mapping, land registration, and land

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46 Tim Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) 13 *American University International Law Review* 647, 658–9.

47 *Breskvar v Wall* (1971) 126 CLR 376, 381 (Barwick CJ).

48 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 613 (Mason CJ and Dawson J).

49 Edgeworth (n 41) 824.

50 As reported in, eg, Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1(2) *Australian Property Law Journal* 114; Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 1(2) *Australian Property Law Journal* 135; Edward Kerr, 'Property Law: Uniformity of Laws' (1993) 1(2) *Australian Property Law Journal* 145.

51 Wallace, Weir and McCrimmon (n 45) 291.

52 *Land Title Regulation 2022* (Qld) reg 2: 'This regulation commences on 20 February 2023'.

valuation.[53] Kalantari et al characterise these within four main *sub*systems of the overall land administration system: land mapping, land registry, land development and land valuation. These subsystems map on to higher level *systems* objectives of regulation of land development, the control of land use, land taxation, and resolution of disputes involving land.[54]

The volume of spatial data generated by the Queensland land administration system is significant and relies on multiple administering agencies. The diversity of regulation in the four key areas identified would require further examination to ascertain the extent of their integration. We note, for example, the comprehensive study of Victorian statutes undertaken by Bennett, Wallace and Williamson to estimate the number of provisions that authorise the creation of statutory encumbrances, and to provide a system for classifying them.[55] The authors identified 514 Federal Acts, 620 Victorian Acts and 11 local laws that authorised the creation of types of 'property rights, restrictions or responsibilities' affecting interests in land.[56]

This more modest analysis highlights, for our purposes, the cornerstone legislation establishing the framework for Queensland's land administration system.

For the Queensland system supporting freehold titles, Table 1 summarises the key statutes involved in achieving the system's higher objectives, based on their objects. Each forms a step in developing an infrastructure for achieving the system objectives.

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53 See generally, Peter F Dale and John D McLaughlin, *Land Administration* (Oxford University Press, 1999). The authors take the approach that, in the new land-management paradigm, the core functions of land administration remain organised around three sets of agencies responsible for surveying and mapping, land registration, and land valuation.

54 Kalantari et al, 'Interoperability Toolkit' (n 16).

55 Rohan Bennett, Jude Wallace and Ian Williamson, 'Organising Land Information for Sustainable Land Administration' (2008) 25(1) *Land Use Policy* 126 ('Organising Land') 128. See also Pamela O'Connor, Sharon Christensen and Bill Duncan, 'Legislating for Sustainability: A Framework for Managing Statutory Rights, Obligations and Restrictions Affecting Private Land' (2009) 35(2) *Monash University Law Review* 233, for a discussion of the research.

56 Bennett, Wallace and Williamson, 'Organising Land' (n 55) 128; Rohan Bennett, Jude Wallace and Ian Williamson, 'Achieving Sustainable Development Objectives Through Better Management of Property Rights, Restrictions and Responsibilities' (Conference Paper, Expert Group Meeting on Incorporating Sustainable Development Objectives into ICT Enabled Land Administration Systems, 9–11 November 2005) 9.

*Table 1: Queensland Statutes Reflecting Land Administration Objectives*

| | Objects | Develop-ment | Land use | Taxation | Dispute Resolu-tion |
|---|---|---|---|---|---|
| *Land Act 1994* (Qld) s 4 | '[L]and to which this Act applies must be managed for the benefit of the people of Queensland by having regard to the following principles — ... land evaluation based on the appraisal of land capability and the consideration and balancing of the different economic, environmental, cultural and social opportunities and values of the land[;] ... allocating land for development in the context of the State's planning framework, and applying contemporary best practice in design and land management[;] ... when land is made available, allocation to persons who will facilitate its most appropriate use that supports the economic, social and physical wellbeing of the people of Queensland[;] ... efficient, open and accountable administration[;] ... a market approach in land dealings, adjusted when appropriate for community benefits arising from the dealing'. | X | X | | |
| *Land Title Act 1994* (Qld) s 3(a) | '[T]o define the rights of persons with an interest in registered freehold land'. | | X | | X |
| *Body Corporate and Community Management* | Section 2 provides that the primary object of the Act is to 'provide for flexible and contemporary communally | X | X | | X |

| | Objects | Develop-ment | Land use | Taxation | Dispute Resolu-tion |
|---|---|---|---|---|---|
| *Act 1997* (Qld) ss 2–4 | based arrangements for the use of freehold land'. Section 4 provides that the secondary objects of the Act are 'to promote economic development'; 'to encourage tourism potential'; 'to provide … consumer protection for owners and buyers'; 'to ensure accessibility to information about scheme issues'; 'to provide an efficient and effective dispute resolution process'. | | | | |
| *Planning Act 2016* (Qld) s 3(1) | '[T]o establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning…, development assessment and related matters that facilitates the achievement of ecological sustainability'. | X | X | | |
| *Coastal Protection and Management Act 1995* (Qld) ss 3(c)–(d) | To 'ensure decisions about land use and development safeguard life and property from the threat of coastal hazards; and encourage the enhancement of knowledge of coastal resources and the effect of human activities on the coastal zone'. | X | X | | |
| *Land Tax Act 2010* (Qld) | The long title of the Act provides that it is '[a]n Act about land tax and for related purposes'. | | | X | |
| *Local Government Act 2009* (Qld) s 3(b) | To '[p]rovide for 'a system of local government in Queensland that is accountable, effective, efficient and sustainable'. See also Part 3: Roads and other infrastructure. | | | X | |

| | Objects | Development | Land use | Taxation | Dispute Resolution |
|---|---|---|---|---|---|
| *Water Act 2000* (Qld) s 2(a)(i)–(ii) | '[T]he sustainable management of Queensland's water resources and quarry material by establishing a system for — the planning, allocation and use of water; and the allocation of quarry material and riverine protection'. | X | X | | |
| *Foreign Ownership of Land Register Act 1988* (Qld) | The long title of the Act provides that it is '[a] n Act to provide for the disclosure of foreign ownership of land'. | | X | | |

The *Land Act 1994* (Qld) ('*Land Act*') provides the foundation of the land administration system in a number of ways. First, it establishes what land is. It distinguishes tidal waters that are owned by the State,[57] and reserves minerals, quarry materials and public purpose land for the State.[58] Secondly, it empowers the Executive to grant unallocated State land in fee simple as well as reserves and rail land,[59] and to dedicate roads.[60] This Act establishes the legal framework necessary for the creation of titles and physical infrastructure that support land development, use, and taxation.

Once a grant is made, land can be brought onto the Torrens register, pursuant to the *LTA*.[61] In defining the nature of a title and the process for its creation,[62] the Land Act also responds to the need for establishing priority of interests and thus the orderly transmission of interests in land to avoid disputes. Similarly, the *Body Corporate and Community Management Act 1997* (Qld) ('*BCCM Act*') provides for the creation of community title schemes whereby a freehold lot is comprised within part of a building and is brought into being through registration on the Torrens register. It regulates the use of common areas within community title schemes, and the relationships and potential disputes between owners within a scheme.

The use to which all 'flat' land might be put is regulated under the *Planning Act 2016* (Qld) ('*Planning Act*') — including use of land for the creation of a

57 *Land Act 1994* (Qld) ch 1 pt 4 ('*Land Act*').
58 Ibid ch 2 pt 2.
59 Ibid ch 2 pt 1.
60 Ibid ch 3 pt 2.
61 *LTA* s 47.
62 Ibid ss 173, 178, 180–2, 184.

community title scheme. While the *Planning Act* does not have any direct bearing on the title to land or interests in it,[63] it generates data about land use and consequently the development of that land. Land is also regulated under the *Coastal Protection and Management Act 1995* (Qld), to the extent that it can limit the development of land where it interferes with coastal environments. Inclusion of this legislation in the framework illustrates the capacity for integration of environmental protection and land use data.

Finally, the *Land Tax Act 2010* (Qld) fulfills the object of taxation based on land and is intrinsically connected to other land data as part of the wider land administration system. The *Local Government Act 2009* (Qld) also provides for taxation, in the form of rates.[64] It is implicated in the land administration system through the requirement to levy rates on all 'rateable land' (ie, all land within a local government area that is not exempt).

There are two further Acts we have included as part of the system level of land administration in Queensland. The first is the *Water Act 2000* (Qld), which regulates the use of water — a resource that is owned by the State and not by the titleholder.[65] The Act provides for the keeping of a register of interests in water and, to the extent that water is physically connected with land more broadly, it regulates the use and development of land per se.

Second is the *Foreign Ownership of Land Register Act 1988* (Qld), which regulates land ownership in a different way from planning and resource statutes. It requires the recording of interests owned by foreign owners, and thereby affords the State an oversight mechanism on titles, with potential implications also for development, taxation, and even land distribution.

These last two examples are slightly more distant from what might be considered core to the systems of land administration, yet they are intuitively part of the overarching structures that govern land overall. They also indicate that there are likely to be other statutes, not included in this analysis, which may, through specific and targeted provisions, affect the governance of land. To this extent, we acknowledge that this list is open to wider engagement with the statutory regulation of land.

Having outlined the systems of land administration, we turn now to the subsystems. These are necessary components of the systems, in that mapping and registry support the use of land, valuation supports taxation, and so on. In the statutory framework, some Acts already mentioned as contributing to the system also support the subsystem and are therefore repeated in Table 2.

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63 Kate Galloway, 'One Tale of Property, in My Own Words' (2018) 27(1) *Griffith Law Review* 157, 166.

64 *Local Government Act 2009* (Qld) ss 92–4.

65 *Water Act 2000* (Qld) s 26.

*Table 2: Subsystems within the Queensland Land Administration System*

| Act | Objects | Mapping | Registry | Develop-ment | Valuation |
|---|---|---|---|---|---|
| *Survey and Mapping Infrastructure Act 2003* (Qld) s 3(1) | '[D]eveloping, maintaining and improving the State survey and mapping infrastructure'; 'maintaining and improving cadastral boundaries throughout the State and information held by the department about the boundaries'; 'coordinating and integrating survey and mapping information'; 'improving public access to survey and mapping information'. | X | X | | |
| *Property Law Act 1974* (Qld) | The long title of the Act provides that it is '[a]reform the law relating to conveyancing, property, and contract'. | | X | | |
| *Land Title Act 1994* (Qld) s 3(a)–(b) | '[T]o define the rights of persons with an interest in registered freehold land; and to continue and improve the system for registering title to and transferring interests in freehold land'. | X | X | | |
| *Land Valuation Act 2010* (Qld) s 4 | To 'provide for how land is to be valued'. | | | | X |
| *Planning Act 2016* (Qld) s 3(1) | '[T]o establish an efficient, effective, transparent, | | | X | |

| Act | Objects | Mapping | Registry | Develop-ment | Valuation |
|---|---|---|---|---|---|
| | integrated, coordinated, and accountable system of land use planning ..., development assessment and related matters that facilitates the achievement of ecological sustainability'. | | | | |
| *Environmental Protection Act 1994* (Qld) s 3 | '[T]o protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends'. | | | X | |
| *Water Act 2000* (Qld) s 2(a)(i)–(ii) | To provide for 'the sustainable management of Queensland's water resources and quarry material by establishing a system for — the planning, allocation and use of water; and the allocation of quarry material and riverine protection'. | | X (s 168) | X | |
| *Local Government Act 2009* (Qld) s 3(b) | Provide for 'a system of local government in Queensland that is accountable, effective, efficient and sustainable'. See also Chapter 3, Part 3: Roads and other infrastructure. | | | X | |

As noted in Part I, the interoperability of land data with both public and private systems, and the imperative for ready access to data by different stakeholders, are important concerns for the effective operation of a land administration system. For ease of reference and viewed in relation to the four subsystems identified above (land mapping, land registry, land development, and land valuation) the next Section identifies the interrelationship of datasets created by each statute.

### C *Primary Legislation Functions*

The foundation of land data is land mapping, undertaken under the *Survey and Mapping Infrastructure Act 2003* (Qld) ('*Survey and Mapping Infrastructure Act*').[66] The Act establishes a series of State datasets that establish administrative area boundaries, remotely sensed images, digital cadastral data, and the survey control register.

The core unit of management is that of the administrative area boundary, used to define a dataset based on information that is provided by a public authority,[67] providing an example of communication between, or interoperability of data from, administering bodies (state and local government). These boundaries relate also to the remotely sensed images of land and coastal waters of the State retained in the remote images database.[68] This data may also support survey and mapping infrastructure including the cadastre.[69] In turn, the State cadastral dataset is integral to the identification of each lot, achieved through recording a unique description of the land (its real property description) and the approximate coordinates for the corners of the parcel together with graphical representation of roads, natural features forming a boundary of land, and the approximate coordinates of the roads and natural features. All unique survey marks relevant to the cadastre are also recorded.[70]

Survey and mapping data is integral to the operation of the second subsystem, the land registry, pursuant to the *LTA*.

The land registry includes the freehold land register.[71] The Registrar may record in the freehold land register anything the registrar is permitted to record by any Act, as well as anything that they consider needs to be recorded to ensure the freehold land register is an accurate, comprehensive, and usable record of

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66 *Survey and Mapping Infrastructure Act 2003* (Qld) s 3 ('*Survey and Mapping Infastructure Act*').

67 Ibid ss 48–9.

68 Ibid s 50.

69 See ibid s 131 for evidentiary provisions about remotely sensed images. The image needs to show: the location of the area; a feature or point, or location of a feature or point in the image; the date and time of when the image was taken and the approximate scale of the image.

70 Ibid s 51.

71 *LTA* (n 62) s 7.

freehold land in the State (of Queensland).[72] There is, therefore, a broad potential scope for the recording of land information.

At a minimum, the registrar must record in the freehold land register the particulars necessary to identify: (a) every lot brought under the Act; (b) every interest registered; (c) the names of each person who has held a registered interest; and (d) all instruments registered in the register and the timing of lodgement and registration.[73]

While 'interest' is defined broadly in the *Acts Interpretation Act 1954* (Qld) sch 1, the *LTA* restricts it to interests that are capable of registration.[74] Such instruments are detailed within the body of the *LTA* and include survey information that is generated pursuant to the *Survey and Mapping Infrastructure Act*. The instruments that are lodged to notify the interest created also form part of the data recorded under the *LTA*.[75]

While not generating an interest in land as such, the Registrar of Titles must also maintain a Foreign Ownership of Land Register,[76] recording the details of a 'foreign person' who acquires or disposes of an interest in land. This register details additional particulars of the interest holder, thus relating directly to the *LTA* provisions.

The key legislation enabling land development is the *Planning Act*.[77] In guiding land use planning for future development in Queensland and setting out a system for determining if and how development may occur, planning depends intrinsically on the mapping and titling data of the land administration system. There is a range of spatial mapping data available to the public, including interactive maps and map products.[78] In this sense, data from various agencies operates within government but is available externally to stakeholders.

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72 *LTA* (n 62) s 29.

73 *LTA* (n 62) ss 28(1)(a)–(c), (e).

74 These include a fee simple alienated by the State: s 47. See also *Property Law Act 1974* (Qld) s 20; s 60 (a transfer of a lot or of an interest in a lot); ss 109–10 (an interest as trustee); s 111 (an interest as a personal representative after the death of the registered proprietor); s 112 (a transfer to a beneficiary under the terms of a will); s 49A (a plan of subdivision — for further information see pt 4 div 3); s 64 (lease of a lot or part of a lot — for further information see pt 6 div 2; Land Title Practice Manual (Queensland) (Manual, 21 June 2021) pt 7 ('QLTPM')); s 72 (a mortgage — for further information see pt 6 div 3; QLTPM pt 2); s 82 (an easement — for further information see pt 6 div 4; QLTPM pt 9); s 99 (a title by an adverse possessor); s 97E (a profit à prendre); s 116 (a writ of execution); ss 54A–J (a building management statement); a statutory covenant under s 97A of the *LTA* in favour of the State or local government (for further information see pt 6 div 4A; QLTPM pt 31); s 97O (carbon abatement interest — for further information see pt 6 div 4C; QLTPM pt 36).

75 *LTA* (n 62) ss 31, 175.

76 *Foreign Ownership of Land Register Act 1988* (Qld) ss 2, 11(1).

77 See also *Planning Act 2016* (Qld); *Planning Regulation 2017* (Qld); *Planning (COVID-19 Emergency Response) Regulation 2020* (Qld); *Planning and Environment Court Act 2016* (Qld); *Planning and Environment Court Rules 2018* (Qld); *Regional Planning Interests Act 2014* (Qld).

78 See 'Mapping', *Queensland Government: Planning* (Web Page, 10 November 2023) <https://planning.statedevelopment.qld.gov.au/planning-framework/mapping>.

The cornerstone legislation in the final subsystem, land evaluation, is the *Land Valuation Act 2010* (Qld) ('*Land Valuation Act*'). This Act establishes a digital valuation roll for each local government area,[79] including information derived from the register: the owner's details; the land area, location, and description; and a property identification number for each parcel.[80] It adds information including its valuation date; its date of effect; the land's value; and the amount of the site improvement deduction (if any).

While the *Land Valuation Act* relies on data from other subsystems, it also shares information it creates, signalling its role in intra-governmental interoperability. Land valuations are used by other governments and government departments to calculate land tax,[81] and in making and levying rates.[82] Valuation data may be shared with the Commonwealth and other State departments[83] and the Valuer-General must give the Commissioner of State Revenue, any relevant administering body and the relevant local government a copy of the roll document or the parts of it that the entity requires.[84]

In a further illustration of interoperability, data also flows in the other direction. The Commissioner of State Revenue, Registrar of Titles, Registrar of the Supreme Court and every public service officer must give any information relating to the performance of their functions that the Valuer-General requires.[85] So too must local government allow the Valuer-General to take details from local government's valuation-related documents.[86]

While other subsystems are apparent, the data flows described here signify extensive interoperable databases supporting the subsystem of valuation that in turn supports the system of land taxation. An increasing imperative to address environmental and social objectives,[87] for example, may generate further integration of additional datasets into existing systems.[88]

Despite a degree of interoperability between the datasets identified, they exist largely within a single jurisdiction. Interoperability is, therefore, a question of degree that depends upon the goals of any land administration system. Given our interest in the feasibility of an interoperable blockchain, we pose the question of the feasibility of a national land administration system. By way of example, the last decade has seen a move towards land administration data interoperability between states, with the implementation of e-conveyancing.

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79 *Land Valuation Act 2010* (Qld) ss 180, 207(1)(c) ('*Land Valuation Act*').
80 Ibid s 181(1).
81 *Land Tax Act 2010* (Qld) ss 16–17.
82 *Land Valuation Act* (n 81) s 6.
83 Ibid ss 184(a)–(b).
84 Ibid s 203.
85 Ibid s 243.
86 Ibid s 244(1).
87 O'Connor, Christensen and Duncan (n 55) 233.
88 Bennett, Wallace and Williamson, 'Organising Land' (n 55) 126–7.

## D *Interstate Interoperability: E-Conveyancing*

While the change from a physical register to electronic data might intuitively signal enhanced interoperability of a land administration system,[89] it was not until the introduction of e-conveyancing in 2014 that interstate data interoperability was put to the test. To create national uniformity in conveyancing transactions and obviate the need for buyer and seller (or their representatives) to be physically present, a private provider established a digital platform for property transactions, allowing New South Wales and Victoria to implement e-conveyancing in 2014, followed by Queensland in 2015.[90] The model, based on the success of electronic conveyancing systems in jurisdictions such as Ontario and British Columbia in Canada, and New Zealand[91] as well as Singapore, is currently operational in five states — Queensland, New South Wales, Victoria, South Australia and Western Australia — following extensive input by Australian industry stakeholders.[92]

The scheme is established by three key components: Electronic Conveyancing National Law ('EC National Law'),[93] Operating Requirements, and Participation Rules, which collectively contain provisions designed to align the titling aspects of the partner jurisdictions' land administration systems, in a way that minimises fraud and protects the integrity of both the system and land titles. It reduces information costs in qualifying transactions by introducing interjurisdictional interoperability, and by 'providing a common legal framework' that 'enables documents in electronic form to be lodged and processed under land titles legislation of each participating jurisdiction' without 'derogat[ing] from the fundamental principles of the Torrens system of land title, such as indefeasibility of title'.[94]

E-conveyancing has been described as 'a faster and more efficient and cost effective method of conveyancing', as long as opportunities for fraud are

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89 Rohan Bennett, Jude Wallace and Ian Williamson, 'Integrated Land Administration in Australia: The Need to Align ICT Strategies and Operations' (Conference Paper, Proceedings of SSC 2005 Spatial Intelligence, Innovation and Praxis: The National Biennial Conference of the Spatial Sciences Institute, September 2005) 1.

90 Ibid.

91 Summarised in Sharon Christenson, 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (2004) 11(4) *Murdoch University Electronic Journal of Law* 1 <http://classic.austlii.edu.au/au/journals/MurdochUeJlLaw/2004/37.html>.

92 Wallace, Weir and McCrimmon (n 45) 291. See also Peter Rosier, *Understanding National E-Conveyancing* (LexisNexis Butterworths, 2014) xi–xii.

93 *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld) s 4 ('*Electronic Conveyancing National Law (Queensland)*'); *Electronic Conveyancing (Adoption of National Law) Act 2013* (Vic); *Electronic Conveyancing (Adoption of National Law) Act 2013* (Tas); *Electronic Conveyancing National Law (South Australia) Act 2013* (SA); *Electronic Conveyancing (National Uniform Legislation) Act 2013* (NT); *Electronic Conveyancing Act 2014* (WA). Australian Capital Territory has not joined the national scheme.

94 See, eg, *Electronic Conveyancing National Law (Queensland)* s 5(1).

prevented.[95] Under the EC National Law, to implement a digital national conveyancing system, the Registrar in each participating jurisdiction is authorised to operate (or to authorise another entity to operate) an Electronic Lodgement Network ('ELN')[96] and to provide rules governing its operation.[97] The ELN functions as a clearinghouse for land data sourced from each registry, effectively extending the reach of a jurisdiction's land administration system. In a departure from the longstanding tradition of government control of land data, the three approved Electronic Lodgement Network Operators ('ELNOs') are all private companies.[98] Extending stakeholder access to data held by each registry through enabling an online transaction fully integrated between parties to a transaction, 'electronic conveyancing in participating States has been described as the single biggest change to conveyancing practice since the introduction of the Torrens system'.[99]

E-conveyancing 'aims to deliver a system that will minimise manual procedures, be quicker than traditional conveyancing, eliminate the need for physical interaction between participants, and deliver a more certain outcome'.[100] In a prime example of the reduction of transactional friction arising from information costs, the system provides advantages to purchasers because there is no delay between paying the funds and lodging the documents for registration.[101] It also has the benefit of stricter requirements to verify identity and the right to deal which reduces the opportunity for fraud.[102]

A modern land registration system 'must provide security of tenure for the land holders, it must encompass and recognise the significant land rights that impact on the majority of the population, and in its use it must be trusted'.[103] Achieving this requires three proof requirements: proof of identity, proof of ownership, and authority to deal.[104] Although proof of identity has been addressed by the ELNO system, Thomas et al raise concerns about risks associated with meeting the second and third requirements in e-conveyancing,[105] and suggest

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95 See Rouhshi Low, 'Opportunities for Fraud in the Proposed Australian National Electronic Conveyancing System: Fact or Fiction?' (2006) 13(2) *Murdoch University Electronic Journal of Law* 225–6.

96 An ELN enables the lodging of registry instruments and other documents in electronic form.

97 See, eg, *Electronic Conveyancing National Law (Queensland)* ss 5(2), 13–22.

98 Wallace, Weir and McCrimmon (n 45) 293.

99 Ibid 297.

100 Lynden Griggs, 'Consumer Issues: It's a New Day, It's a New Dawn, It's a New Life' (2016) 6(2) *Property Law Review* 117, 117.

101 Jessica Beckman, 'Changes in Property Transactions: Out with PAMDA, In With e-Conveyancing' (2016) 36(1) *Queensland Lawyer* 18; Ibid.

102 See, eg, PEXA, Sympli and LEXTECH. See also Wallace, Weir and McCrimmon (n 45) 297.

103 Wallace, Weir and McCrimmon (n 45) 4.

104 Rod Thomas, Lynden Griggs and Rouhshi Low, 'Electronic Conveyancing in Australia: Is Anyone Concerned About Security?' (2014) 23(1) *Australian Property Law Journal* 1, 3.

105 Ibid 7.

ways in which to limit risk by drawing an analogy with the transfer of shares on the Australian Stock Exchange.[106]

To date, NSW, Victoria, South Australia, and Western Australia have mandated the use of e-conveyancing for most standard transactions. Queensland had implemented e-conveyancing on a piecemeal basis on two approved ELNOs: PEXA and Sympli.[107] However, e-conveyancing became mandatory for certain transactions in Queensland since early 2023.[108] In sum, the introduction of e-conveyancing has been a slow process fraught with difficulties, inconsistencies, and delays, which, even once fully implemented, will still have to allow for exempted transactions.

In terms of data interoperability, the case study of e-conveyancing facilitating land data flows between jurisdictions illustrates the challenges of introducing and operating a national digital platform that relies on the cooperation of state and territory agencies and legislators to support a uniform approach. Although the roll-out has been lengthy and inconsistent, it has achieved a measure of success, being implemented in various stages in five states and territories to date.[109] E-conveyancing has made data instantly accessible, and in this way can be regarded as successfully achieving this objective, paving the way for further initiatives building on its infrastructure. The challenge of integrating the subsystems to achieve a holistic, operational result would prove more complex, because of the complex interrelations between various datasets. The challenge would be compounded by politics, evidenced by Queensland's recent plan to include interstate landholdings in calculating land tax, and New South Wales's rejection of the plan.[110]

Whether the introduction of blockchain is a conceivable way to achieve better integration is discussed below.

## V Integration through Blockchain Land Titles

Conceiving of land titles as data paves the way for the application of digital technologies to collect, store, organise and retrieve that data. A digital system offers greater scope than an analogue one to connect data sources and thus achieve greater efficiencies and, potentially, more ambitious goals for a land administration system. Our interest lies in analysing the capacity of a blockchain

106 Ibid 9.

107 See 'eConveyancing', *Titles Queensland* (Web Page) <https://www.titlesqld.com.au/elodgment-econveyancing/electronic-conveyancing/>.

108 *Land Title Regulation 2022* (Qld) reg 2.

109 Wallace, Weir and McCrimmon (n 45) 291.

110 Rachel Riga, 'Queensland Government Shelves Controversial Land Tax Changes as Treasurer Defends Policy' *ABC News Online* (online, 30 September 2022) <https://www.abc.net.au/news/2022-09-30/queensland-land-tax-government-shelves-changes-after-opposition/101491332>.

system to achieve fractionalised land titles, which coheres with the land administration system itself.

Blockchain technology is a data-driven system that has been implemented in some jurisdictions to run land titling systems.[111] A blockchain system provides an algorithmic record of all transactions effected and recorded on the blockchain. These are stored on a public or shared ledger between nodes or users of the blockchain system.[112] Using blockchain technology to record and facilitate real property transactions is an attractive concept, because of the benefits of the uniquely secure blockchain database, which can provide a time-stamped and secure register[113] of transactions. All transactions ever completed on the blockchain are permanently and immutably recorded, providing tamper-free and transparent evidence of transactions through the unique technical functioning of a blockchain, which is superior to other digital systems. These include the combination of the blockchain hashing function and use of cryptography.

While in one sense a blockchain might simply serve as a ledger akin to an analogue or even digitised Torrens system, it offers greater capability to integrate financial and other commercial systems into pure land administration. In addition, conceptualising land as a digital token has generated innovative approaches to the financialisation of real property itself.

This Part first introduces fractionalised real property as a digital (data) manifestation of land title, before analysing the feasibility of its integration into a land administration system.

### A *Fractionalisation of Real Property and Tokenisation on a Blockchain*

Beyond merely substituting a digital ledger for an analogue one, we are interested here in the creation of land interests as digital tokens that are freely tradeable on a blockchain. Our model is the 2019 South Australian 'Bricklet' scheme,[114] which would involve a system of fractionalisation of property rights in individual

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111 See, eg, Georg Eder, 'Digital Transformation: Blockchain and Land Titles' (Conference Paper, 2019 OECD Global Anti-Corruption and Integrity Forum, 20–21 March 2019). The Select Committee on Australia as a Technology and Financial Centre has recommended that the National Cabinet 'consider supporting a blockchain land registry initiative as a pilot project for Commonwealth-State cooperation on RegTech': see Senate Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Second Interim Report* (Report, April 2021) ix [7.59].

112 Lynden Griggs et al, 'Blockchains, Trust and Land Administration: The Return of Historical Provenance' (2017) 6(3) *Property Law Review* 179, 183.

113 Cantatore, Galloway and Parsons (n 2) 42. See also Muharem Kianieff, *Blockchain Technology and the Law: Opportunities and Risks* (Informa Law, 2019) 38.

114 This scheme was announced by then South Australian Premier, David Ridgway in September 2019. See David Ridgway, 'SA-based Innovation to Revolutionise Property Investment Bricklet by Bricklet' *Mirage News* (online, 23 September 2019) <https://www.miragenews.com/sa-based-innovation-to-revolutionise-property-investment-bricklet-by-bricklet/>.

apartments in two new residential towers, enabling up to 20 individual owners to become co-owners of fractions of a single apartment with the benefit of Torrens title.[115] The Bricklet scheme envisaged increased affordability of real property and easier access to the economic benefits of property ownership for individual private owners.[116] Of interest here is that blockchain technology would be used to record ownership and to enable quick and easy transactions with the registered interests.

The Bricklet scheme capitalised on the notion of property as data and coupled it with the unique capacity of blockchain technology to deal with data commensurate with the security and reliability required in real property transactions. The scheme foreshadowed a possible future of real property transactions as seamless data exchanges where payment is made through a data exchange using digital currency. Two important concepts effectively underpinned the proposal — *fractionalisation*, signalling potentially different real property rights; and *tokenisation*, referring to the use of blockchain technology not only to effect and reflect fractionalisation, but also to facilitate all aspects of the land administration system involved in transactions with the 'fractions', or 'bricklets', as they were referred to.

Although the published Bricklet proposal did not provide conceptual and technical details, it appears as if each fraction of each lot was intended to be recorded both as a digital asset on a private permissioned blockchain for the scheme and also in the land title register.[117] For the scheme to operate practically, it would have been necessary for the relevant land titles registry to also be included as a participant on the blockchain,[118] together with other key stakeholders such as the developer of the new residential towers, the subsequent owners of the fractionalised interests, and any tenants.[119]

To make such a scheme work, each fraction would require 'a specific folio identifier corresponding to its encoded coin identifier (for example, Bricklet 1 in Lot 1 in Scheme X)'.[120] The participants would likely have used a token representing each fraction on the blockchain. As we pointed out in 2020:

> Ownership could in principle be transferred seamlessly if blockchain integration is complete including the capacity to perform identity checks. The transaction of purchase and sale is effected through cryptography and hashing, and the proof of work is confirmed by all nodes in the network. Funds are transferred automatically when set algorithmic conditions have been satisfied from the wallet of the incoming owner to the wallet of the outgoing owner through a smart contract.[121]

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115 Ibid.
116 Ibid.
117 Cantatore, Galloway and Parsons (n 2) 49.
118 Ibid.
119 Ibid.
120 Ibid.
121 Ibid.

Although this Bricklet scheme has not come to fruition, the combined use of fractionalisation of land title, and tokenisation of a tangible asset to render it digital, on a blockchain, is still a desirable possibility. Our interest lies in whether a tokenised land title system, such as that proposed by the Bricklet proposal, would fit within the standards of a land administration system optimised for blockchain. In particular, we analyse registration of real property, access to data, and true interoperability through full integration of blockchain into the land administration system.

The Blockchain Property Registry Adoption Levels created by the Future of Property Rights program, New America, and reproduced by Graglia and Mellon in 2018 serve as the framework for the balance of the analysis in this article. The levels can be summarised as follows:

| Description of integration | Level |
|---|---|
| No integration | 0 |
| Blockchain recording of documents relating to the transaction | 1 |
| Blockchain used to record progress of a transaction | 2 |
| Smart contracts used for payment escrow | 3 |
| Blockchain replaces central database | 4 |
| Rights in a single parcel of land disaggregated and managed via blockchain | 5 |
| Fractional rights (ie, fractional rights on a given parcel of land) managed via blockchain | 6 |
| Peer-to-peer transactions without intermediaries | 7 |
| Interoperability through merger of different blockchain registries | 8 |

While e-Conveyancing is an example of digital integration of data within a land administration system, the current level of blockchain integration in Queensland (and Australia) is level zero. In a land administration system where ownership is linked to and derived from registration, and where the rights of property owners are guaranteed by the State, the transfer of crypto tokens representing the interest in land will unlikely be sufficient to transfer property rights.[122]

We identify six key issues requiring attention to integrate fractionalised land interests into a land administration system, emphasising facets of interoperability according to Graglia and Mellon's framework.

We suggest that, beyond the digital token's identifying information, to reach the threshold of data required to identify the spatial location of the tokenised asset, the blockchain must respond to the subsystems of land mapping, registry, land development and land valuation.[123]

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122 See Graglia and Mellon (n 5) 103, referring to the work of European scholar(s).

123 Kalantari et al, 'Interoperability Toolkit' (n 16) 7.

### 1 *Creation of Blockchain — The Registry Subsystem*

The first four levels of integration of a blockchain with the land administration system are linked to the creation of a blockchain to serve as the system, or at least part of it. At its simplest, the blockchain may be used to satisfy the registry subsystem: to record documents, to record the progress of a transaction, or to act as a secure but comprehensive database. This alone would take blockchain integration up to Level 4 in the scale proposed by Graglia and Mellon. As evidenced by the complex interaction of the Queensland statutes providing the backbone of land administration, details of the requirements for access, viewing, and transacting by different stakeholders would need to be built into the blockchain register as well as being specified in the core land administration legislation set out in Tables 1 and 2.[124]

We note, further, that an interoperable blockchain system requires integration of payment and should include a payment system subject to regulatory control by the Payment Systems Board of the Reserve Bank of Australia. Access and operation standards as well as security requirements would be dealt with on a national level.

### 2 *Legal Characterisation of Land as Data (Tokenisation)*

While the land administration system provides the infrastructure that supports a property interest in land, the threshold question of property is brought into question when land dealings are transformed from digitised to digitalised transactions.

To progress to Level 5 of the Graglia and Mellon scale of integration of blockchain in land administration systems, rights in parcels of land must be 'disaggregated'.[125] Parcels of land would be linked to crypto tokens to enable transacting on the blockchain. Legal certainty, the very rationale behind a land administration system, is required to enable effective tokenisation. Given ongoing analysis of the legal status of crypto-assets within the established common law categories of property, there may be insufficient conceptual certainty at this stage to satisfy this requirement.[126] Furthermore, the legal nature

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124 Given the creation of novel rights, there would be consequential amendments required to legislation providing rights and remedies associated with interests in land. This analysis is beyond the scope of this article.

125 Graglia and Mellon (n 5) 98.

126 See, eg, United Kingdom Law Commission, *Digital Assets: Consultation Paper* (Consultation Paper No 256, 28 July 2022) ('*Digital Assets: Consultation Paper*'). See also United Kingdom Law Commission, *Digital Assets: Final Report* (Report No 412, 27 June 2023) ('*Digital Assets: Final Report*'), in which the Law Commission of England and Wales acknowledges the importance of further developments in the common law to accommodate digital assets. Law reform recommendations were targeted and limited, focussing on enhancing legal certainty.

of crypto tokens that may be used in property tokenisation is not yet settled.[127] The Australian approach to date has been pragmatic, focussing primarily on the manner in which crypto assets generally should be regulated for protecting consumers or users,[128] and the emphasis to date has been on financial products rather than the implications for land administration more broadly.

Of note, a blockchain alone does not have the characteristics of a Torrens land register. The distributed ledger is not a 'definitive record of (superior) legal title to a crypto-token'.[129] 'The state of the distributed ledger or structured record may provide a definitive record of the links between transactions within the crypto-token system, but this provides a factual, as opposed to legal, account of the world'.[130] A crypto token has been described by the Australian Commonwealth Treasury as 'a unit of digital information that can be "exclusively used or controlled" by a person'.[131] The United Kingdom Law Commission similarly considered that 'control plays an important (although not determinative) role in the overall analysis as to the legal effect of a transfer of a crypto-token'.[132] The 'link between a given crypto-token and the linked external thing would likely be evidential only' and the crypto-token itself would 'confer no additional legal rights' to its holder.[133] Unlike the existing land administration system that encompasses the Torrens register, a blockchain without more, will not afford legal title.

Legislation would thus be needed to make a crypto-token based register of land effective, to strengthen the 'evidentiary power of the record and any transfer formalities'.[134] In reality, the situation remains complex, because if 'the subject of the link is a tangible thing … [it is] more difficult legally to prevent the transfer of the external thing separately to a (legal or factual) transfer of the crypto-token'.[135] This difficulty may be less pronounced in real property compared to movable

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127 'There is currently no consensus — either in Australia or globally — on the meaning of key concepts in the crypto space. A single concept may have varied and conflicting meanings across industry, academia, and government institutions': see Australian Government Treasury, *Token Mapping* (Consultation Paper, February 2023) 11 [23] ('*Token Mapping*').

128 See, eg, Australian Government Treasury, *Crypto Asset Secondary Service Providers: Licensing and Custody Requirements* (Consultation Paper, 21 March 2022).

129 United Kingdom Law Commission, *Digital Assets: Consultation Paper* (Consultation Paper 256, 28 July 2022) 244 [13.2].

130 Ibid 245 [13.8].

131 Australian Government Treasury, *Token Mapping* (n 133) 13 [33].

132 United Kingdom Law Commission, *Digital Assets: Consultation Paper* (n 129) 268 [13.95]. Note that Australia has a functional approach to financial regulation and that crypto assets are not 'excluded or "carved out" from Australia's financial services regulatory framework': see Australian Government Treasury, *Token Mapping* (n 133) 11 [18]. What a crypto token is linked to will likely affect its classification as a form of property: at 37–8.

133 United Kingdom Law Commission, *Digital Assets: Consultation Paper* (n 129) 287 [14.22].

134 United Kingdom Law Commission, Digital Assets: Summary of Consultation Paper (Consultation Paper) 13 [1.68] <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2022/07/Digital-Assets-Summary-Paper-Law-Commission-1-1.pdf>.

135 Ibid, 15 [1.70].

physical objects such as diamonds or gold bars, but if land title is fractionalised and tokenised, additional difficulties arise.

At present, unlike a land title, a crypto-token itself may not 'embody' legal rights. Although it is feasible to develop principles allowing for the instrument to embody the rights it records,[136] other models such as negotiable instruments depend on possession and, for example, transfer of title through possession. In a blockchain, 'possession' is a more complex concept.

In practice, therefore, there is a risk that the values of the physical land and the crypto-token it represents may diverge. It is difficult to see how this problem can be overcome without legislative intervention. Legislative changes to invest the data with property rights would enable the *tokenisation* envisaged by the Bricklet proposal and enable integration as envisaged by Graglia and Mellon up to Level 5 (and further).

To create the legal infrastructure necessary to build a viable blockchain registry as a land administration subsystem would require an overhaul of the key Torrens statutes in Queensland. At a minimum, amendments would be necessary to:

- the *LTA* to allow setting up the blockchain register and articulating its data composition, as well as explaining the process by which title is derived; and
- the *BCCM Act* to reflect changes to the *LTA*.

The *Land Act* would also require consideration in terms of the creation of the estate in fee simple and whether this comprehends the tokenisation of real property. This is conceptually interesting given an estate in fee simple is itself a description of the rights in land rather than the land itself.

As with all aspects of a land administration system, to work, these changes would require stakeholder approval and adoption.

### 3 *Creating the Legal Framework for Fractional Property Rights (Fractionalisation)*

Apart from co-ownership under a tenancy in common or joint tenancy, there is no recognised means of recording fractional rights directly on Torrens title. Existing forms of co-ownership reflect a legal relationship between people

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136 See International Institute for the Unification of Private Law, Digital Assets and Private Law Working Group, *Draft UNIDROIT Principles on Digital Assets and Private Law*, Doc No 2 Study LXXXII/W.G.8, 8th sess, 8–10 March 2023. See also generally the work by the International Institute for the Unification of Private Law, 'Law and Technology: UNIDROIT Work and Instruments in the Area of Law and Technology', *UNIDROIT* (Web Page, 2023) <https://www.unidroit.org/law-technology/>. See generally also United Kingdom Law Commission, *Digital Assets: Consultation Paper* (n 129).

generally known to each other. Fractionalisation would permit the free acquisition and disposal of real property held in common with strangers.

Alternatives to true fractional ownership of land currently depend on legal vehicles such as trust, corporate structures, or in the case of company title, a combination of a corporation and leasehold rights. To reach Level 6 on the Graglia and Mellon scale of integration, and recognising the foundation of property in a land administration system, *fractionalisation* would have to be legally possible and protected.

Interoperability in this context includes the system of dispute resolution not only between token-holders and the rest of the world, but also as between those who hold fractionalised interests in the same physical parcel.

Legislative creation of a different type of land interest, reflected on the blockchain through a crypto-token, would support Level 6 integration. When the fractionalisation occurs through operation of the blockchain, a higher level of integration of blockchain usage in real estate would be achieved.

### 4 *Digital Peer-to-Peer Transactions*

E-conveyancing provides one example of a digital system for peer-to-peer transactions. The principles behind this system would be relevant for achieving Level 7 integration on the Graglia and Mellon scale. However, to achieve integration beyond land dealings to all systems and subsystems of land administration would require more stakeholders to have access to the blockchain, including government departments for purposes of identity authentication, tax, land development, and even the court system, which may have to apply a remedy in determining a dispute. Payment — whether in fiat currency or via cryptocurrencies — would also have to be secured over the blockchain.

### 5 *International Interoperability*

Graglia and Mellon describe true interoperability and the ultimate integration of blockchain technology in real property transactions as 'something of a Holy Grail — interoperability between multiple blockchain-enabled registries and levels of jurisdiction — whether it is Santa Clara and San Mateo counties, the Netherlands and Spain, or China and the US' would be the highest level to which blockchain integration may be taken in real estate.[137] The ultimate would be:

> an actual peer-to-peer transaction between two blockchain-enabled registries. From a technology perspective, this would require some standardization of what defines a property on a blockchain between registries and blockchain firms in order to have a unified definition for a physical space and its associated rights. The political and legal challenges to such transactions would be significant. The vision here entails the

[137] Graglia and Mellon (n 5) 102.

> world's property being managed on a large hybrid blockchain that came together by virtue of its interoperability.[138]

This visionary approach is shared, albeit at a less sophisticated academic level, by operators who see opportunities for individuals to diversify their investments by making micro-investments internationally without bureaucratic red tape. For example, a person may be a joint owner of a property in Canberra in which they reside but may also own a fraction of three apartments in London, Mumbai and Barcelona (for an investment of say $20,000 each), which earns a proportionate rental income that is paid directly into a bank account linked to the blockchain, after deduction of proportionate maintenance and administrative costs. As trading over the blockchain takes minutes not weeks, buying and selling online as prices fluctuate becomes as easy as transferring money on an app on your mobile phone. To achieve this level of data interoperability, more than the current proposed principles for a legal framework proposed by the UNIDROIT working group will be required.[139]

At this level though, the ideals of a land administration system would be fulfilled.

### 6 *Removal of Other Constraints*

Although these may not have been expressly mentioned in the Graglia and Mellon framework of integration, the successful integration of blockchain in real estate to Level 8 would depend on overcoming several other obstacles. In many critical instances, the draft UNIDROIT principles resort to national legal principles, and the unencumbered transacting across borders may not eventuate.

Political considerations are evident even in creating an Australian e-conveyancing system. Government stakeholders may be sensitive to foreign investment in real property, and control over the extent of foreign ownership.

International and domestic criminal activity generate concerns about money laundering and terrorism financing in cross-border transactions under the Financial Action Task Force principles,[140] another barrier to an idealised full integration.

Given the public–private nature of blockchains, stakeholders such as governments may be hesitant to divest themselves of control over record correction. Similarly, the judiciary may express concerns if the courts lose control of civil remedies. These concerns are more than practical in nature, going to the fundamentals of government and the role of the state in private transactions between citizens.

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138 Ibid.

139 International Institute for the Unification of Private Law (n 136).

140 Financial Action Task Force, *High-Level Principles and Objectives for FATF and FATF-style regional Bodies*, (FATF Reports, February 2019) 1.

In conclusion, using the framework of Graglia and Mellon, the existing land administration system of Queensland would require a significant transformation even to reach some of the lowest levels of blockchain integration. Issues such as stamp duty could be an additional barrier to tokenisation without government buy-in on a national level. The existing e-Conveyancing system as detailed above provides a pathway to national integration but has also pointed to the limitations of the existing national integration of property transfer.

## VI Conclusions

A land administration system forms a data-driven ecosystem that facilitates land ownership and land dealings. It provides a web of data connections between processes of the state and those of private actors. These connections are vital for a system to achieve its core purposes.

Traditionally, the purpose of a land administration system in Australia has been to facilitate the efficiency and effectiveness of land transactions. Already there are emergent systems within which data are informing the development of sophisticated environmental management, beyond the foundation goal of a record of land title. It is not difficult to imagine an expansion of the core features of a land administration system to promote and protect sustainable land use and accommodate environmental considerations.

In Queensland, the statutes at the heart of the land administration system can be categorised according to recognised subsystems of land administration. These statutes work together through the movement of data about land. And, if land is data, there is scope for the application of new technologies to innovate in the way in which land is dealt with. To this end, we analysed the potential of fractionalised, tokenised land interests, held on a blockchain, to meet the needs of a contemporary land administration system.

Using Graglia and Mellon's scale of blockchain integration, our analysis reveals that while a fractionalised blockchain is technically feasible, there is considerable work to be undertaken to justify a blockchain serving land administration as an entire system. Although baseline data management might appear to be relatively simple, to serve land administration more broadly would require a series of sophisticated and complex statutory interventions that would disrupt the current systems.

These would require, first, creation of a public–private blockchain, protocols for access and security, and the means of payment. Importantly, the legal nature of the tokenised interest remains unresolved. Where a land administration system is expressly designed to facilitate certainty, the novelty of the interest represents a fundamental stumbling block for any tokenised approach to land administration.

While theoretically exciting, the concept of fractionalised land title on a blockchain is not yet evolved enough to satisfy the principles of the land administration system.

# The Impossibility of Non-Criminal Punishment by Courts in the Australian Federation

Emily Hammond*

Garlett v Western Australia *[2022] 96 ALJR 888 ('*Garlett*') was a missed opportunity for the High Court of Australia to confirm a simple proposition: the scheme for the exercise of separated judicial power laid down in Ch III of the* Constitution *precludes any non-criminal punishment by courts. In* Garlett*, all but one Justice rejected or doubted that Ch III has this effect. This article identifies and resolves two points of contention that have impeded recognition that Ch III categorically precludes non-criminal punishment by courts. In doing so, it demonstrates that Ch III's exclusive vesting of separated judicial power in courts supports a more 'joined up' way of thinking about permissible court functions across the Australian federation than was seen in* Garlett*.*

## I Introduction

This article addresses whether, as a matter of constitutional doctrine, it is permissible for an Australian court to administer measures that are 'punishments' by the accepted legal definition, on the basis of a predictive risk criterion and not a person's breach of the law by past acts. Coercive preventive justice regimes are an increasingly prominent feature of law-making in Australia and are becoming more far-reaching and intrusive.[1] *Fardon v Attorney-General (Qld)* ('*Fardon*')[2] and *Minister for Home Affairs v Benbrika* ('*Benbrika [No 1]*')[3] upheld laws authorising judicial orders for preventive detention in respect of specified forms of criminal offending that pose a significant and serious risk to public safety. More recently, *Garlett v Western Australia* ('*Garlett*')[4] upheld a Western Australian law authorising judicial orders for preventive detention in respect of

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1 *Garlett v Western Australia* (2022) 96 ALJR 888, 921–3 [165]–[167] (Gordon J) ('*Garlett*').

2 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*').

3 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 ('*Benbrika [No 1]*').

4 *Garlett* (n 1).

DOI: 10.38127/uqlj.v43i1.7979

an extremely wide variety of criminal offences including robbery. The fate of constitutional challenges to coercive preventive justice regimes might appear to indicate that the judiciary chapter of the *Constitution* imposes no substantive restriction on courts' involvement in coercive preventive justice. But this is not correct. As this article will show, there is a solid doctrinal foundation for recognition that Ch III entrenches a national prohibition on courts administering punishment on a basis other than breach of the law by past acts ('non-criminal punishment'). For reasons elaborated later, this restriction on court functions under Commonwealth and state laws alike preserves the integrity of Ch III's primary separation rule — vesting judicial power exclusively in courts.[5] Clear judicial recognition of a categorical national prohibition on courts administering non-criminal punishment would declutter analysis of the constitutionality of preventive justice regimes. Of course, such recognition would not pre-empt the necessary evaluative judgments on whether an involuntary hardship imposed by court order is properly characterised as a punishment. And since this question of characterisation involves an evaluative judgment on which judicial views may well differ, recognition of the categorical prohibition may not produce different outcomes in Ch III challenges to preventive justice regimes. Nonetheless, clear recognition of the starting point for analysis will allow for a more principled 'joined up' way of thinking about the issues across the national integrated court system than has been established in the cases to date.

In *Garlett*, only Gageler J (as his Honour then was) recognised that Ch III entrenches a categorical prohibition on courts administering non-criminal punishment. The six other members of the Court demurred, for two quite distinct reasons. In one camp, Edelman J and possibly Gordon J considered that there is no necessary antagonism between the nature of separated judicial power and non-criminal punishment. For Edelman J most clearly, separated judicial power extends to non-criminal punishment if there is sufficient justification.[6] In another camp, Kiefel CJ, Keane, Steward and Gleeson JJ recognised that separated *Commonwealth* judicial power cannot be applied to impose punishment on a basis other than breach of the law by past acts. However, their Honours rejected,[7] or doubted,[8] that Ch III denies *state* capacity to authorise courts to administer non-criminal punishment.

This article will address and resolve the two distinct points of contention, evident in *Garlett*, that have impeded wider judicial recognition that Ch III categorically invalidates any law (Commonwealth or state) that purports to

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5 The article's argument for a prohibition on state power to legislate non-criminal punishment by courts (Part IV below) would apply with equal force to the Australian territories with their own courts: see generally James Stellios, *The Federal Judicature: Chapter III of the Constitution* (2nd ed, LexisNexis, 2020) 596–9 ('*The Federal Judicature*').

6 See discussion in Part II(D) below.

7 *Garlett* (n 1) 902 [40] (Kiefel CJ, Keane and Steward JJ).

8 Ibid 950–4 [293]–[309] (Gleeson J).

authorise courts to dispense non-criminal punishment. On the first point of contention, raised most clearly by Edelman J, the article argues it should now be regarded as settled that Commonwealth judicial power does not extend to non-criminal punishment. This reflects the prevailing judicial understanding of the nature of separated judicial power, as applied by majorities in a succession of cases including *Garlett*.

This leaves the second point of contention seen in *Garlett*: can a limitation on the nature of separated Commonwealth judicial power generate an identical restriction on the capacity of *all* Australian polities to legislate court functions? This touches on the complex interaction of federalism and separation of judicial power in Ch III doctrine.[9] As is well-known, Ch III imposes distinct restrictions on Commonwealth and state legislative power. There are two key restrictions on the Commonwealth:

- The Commonwealth cannot confer judicial power on non-courts ('the primary separation rule').[10]
- The Commonwealth cannot confer any non-judicial powers on federal courts, beyond what is strictly ancillary to the exercise of judicial power ('the *Boilermakers* restriction', arising from *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*')).[11]

Ch III does not expressly restrict the functions that states can confer on their courts, or state authority to confer judicial power on non-courts. However, the iterative evolution of Ch III doctrine has identified two restrictions on state legislative power:

- States cannot confer functions on their courts that are incompatible with their status as repositories for separated Commonwealth judicial

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9 See further discussion in Parts III–V below. Competing themes of federalism and judicial power are contextualised and critiqued in Gabrielle Appleby, Anna Olijnyk, James Stellios and John Williams, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021). For analysis favouring a stronger federal orientation in Ch III doctrine see, eg, Brendan Lim, 'Attributes and Attribution of State Courts: Federalism and the Kable Principle' (2012) 40(1) *Federal Law Review* 31. For critique of the foundations for integration see, eg, Stephen McLeish, 'The Nationalisation of the State Court System' (2013) 24(4) *Public Law Review* 252.

10 As established in *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 ('*JW Alexander*'). See also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ); *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 88–90 (Isaacs J); *British Imperial Oil Co v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73, 96–8 (Dixon J).

11 (1956) 94 CLR 254 ('*Boilermakers*'); affirmed *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529 (Privy Council) ('*Boilermakers PC*'). 'Bare' non-judicial functions are 'functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto': *Boilermakers*, 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

power ('the *Kable* restriction', arising from *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')).[12]

- States cannot confer judicial power in federal subject-matters on non-courts ('the *Burns* restriction', arising from *Burns v Corbett* ('*Burns*')).[13]

The emphasis given to federal dimensions of Ch III doctrine gives rise to the contention, seen in *Garlett*, as to whether, and if so by what rationale, Ch III implies the same limits on Commonwealth and state authority to confer functions on courts. It is conspicuous in the position of the four *Garlett* judges who recognise that the Commonwealth cannot legislate for non-criminal punishment by courts (because that lies outside the realm of separated judicial power) but do not recognise this restriction applies to the states (because states can invest their courts with functions that go beyond the realm of separated judicial power). This reflects a way of thinking about Ch III doctrine that centres federal distinctions, including that between the *Boilermakers* restriction on Commonwealth laws and the *Kable* restriction on state laws. To this point, the article proposes shifting focus, when analysing laws concerning court functions, to Ch III's primary separation rule, which makes separated judicial power exclusive to courts. It proposes recognition that this primary separation rule generates an overarching constraint on Commonwealth and state capacity to legislate court functions.[14] That constraint can be expressed this way: the primary separation rule precludes courts[15] engaging in any functions incompatible with the essential characteristics of separated judicial power. This *is* an evaluative restriction on functions courts can perform (because the essential characteristics of separated judicial power are derived from a purposive understanding of the primary separation rule, and not all of those essential characteristics are absolutes). But it is *not* subject to calibration by reference to whether the function is conferred by the Commonwealth or a state. Simply put, Ch III's vesting of judicial power exclusively in courts would be undermined if those courts performed any functions incompatible with the essential characteristics of separated judicial power. Non-criminal punishment is one such function, being antithetical to the

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12 (1996) 189 CLR 51 ('*Kable*').

13 (2018) 265 CLR 304 ('*Burns*'). Specifically, the majority view that this is a limitation derived from Ch III's exhaustive scheme for the exercise of judicial power on the field described by ss 75 and 76 (and *not* an effect of *Judiciary Act 1903* (Cth) provisions overriding inconsistent State laws conferring State jurisdiction on non-court tribunals).

14 This is *not* proposed to the exclusion of the separate, secondary *Boilermakers* restriction on Commonwealth power. That restriction has a separate and distinct role that supplements, but does not sustain, the implication drawn of practical necessity from the first separation rule. See below Part V(B).

15 While it is not something I can address in detail in the constraints of this article, I see no reason why the article's arguments would not also inform the operation of well-established Ch III constraints on Commonwealth and State capacity to confer functions on judges in their personal capacity. See generally, Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *University of New South Wales Law Journal* 756.

nature of separated judicial power. As the article will show, centring the integrity of Ch III's primary separation rule in thinking about the Ch III scheme can support a more coherent and integrated understanding of that scheme's implications for Commonwealth and state capacity to legislate court functions.

The article proceeds as follows. Part II addresses the state of authority on whether the *Constitution* permits non-criminal punishment by courts. Specifically, it shows that it has been recognised by majorities in a succession of cases that the Commonwealth cannot authorise non-criminal punishment by courts. This resolves one point of contention in *Garlett*, raised by Edelman J's recognition of a permissible category of court-administered 'protective or preventive punishment'. Parts III and IV address the second area of contention seen in *Garlett*, arising from differing judicial views on whether the same incapacity to legislate for non-criminal punishment by courts applies to the Commonwealth and states. Part III argues that Commonwealth incapacity to so legislate derives from Ch III's primary separation rule, vesting judicial power exclusively in courts. The crux of the argument is that the integrity of the primary separation rule would be undermined if courts undertook Commonwealth functions incompatible with the essential characteristics of separated judicial power. Part IV argues that the same incapacity applies to the states by reason of the well-established '*Kable* restriction' on state legislative power. Finally, Part V frames the resolution of the points of contention about non-criminal punishment as an opportunity to drive a more integrated way of thinking about Ch III restrictions on the functions that Australian parliaments can validly confer on courts.

As will become evident, the article relies on Gageler J's (dissenting) reasons in *Garlett* for an account of the bearing of anterior common law thought about state power to punish on the constitutional nature of separated judicial power. It also supports Gageler J's conclusion that Ch III denies both the Commonwealth and states power to legislate for non-criminal punishment by courts. But it diverges from Gageler J's explanation of the foundation in Ch III for the restriction on the Commonwealth. Gageler J derives this from the *Boilermakers* restriction (which precludes the Commonwealth vesting non-judicial power on courts, other than for performance of functions strictly incidental to their exercise of judicial power). His Honour explains that the *Boilermakers* restriction has an overlapping operation to the *Kable* restriction when it comes to non-criminal punishment. The article's argument more emphatically centres Ch III's primary separation rule (separated judicial power is exclusive to courts) as the source of the national prohibition.

## II Commonwealth Judicial Power Does Not Extend to Non-Criminal Punishment

This Part argues that Commonwealth judicial power does not extend to non-criminal punishment.[16] This is the predominant[17] judicial understanding, as seen in a succession of cases on Commonwealth power to authorise detention (which is by default characterised as a punishment) on a non-criminal basis. There would not seem to be any obvious compelling reason to revisit this categorical limit on Commonwealth judicial power.

### A *'Non-Criminal Punishment'*

'Non-criminal punishment' is here used in the sense associated with a specific anterior common law principle regarding state power over subjects. The principle is one that denies state power to impose punishment on a basis other than breach of the law by past acts. Australian authorities cite AV Dicey in support of this traditional common law principle: every subject 'may with us be punished for a breach of law, but he can be punished for nothing else'.[18]

Reflecting this Diceyan rejection of state power to impose 'non-criminal punishment', any measure that is properly characterised as a 'punishment' can only be imposed by the state for breach of a legislated general norm of conduct by past acts. Importantly, the binary criminal/non-criminal, when used in this context, does not incorporate the entire disciplinary distinction between criminal and civil law and process. The Diceyan principle of concern here does not imply that the state can only punish through an adjudicative process that meets what may be thought of as the standard or minimum incidents of criminal process.[19] Rather, it denies state power to punish on any basis other than an adjudicative determination of breach, by past acts, of a generally-applicable norm of conduct prescribed by law.[20]

This Diceyan rejection of non-criminal punishment applies to any state power to impose involuntary hardship on the subject that is properly

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16 To be clear, this Part outlines judicial authority for this as a bare proposition, deferring analysis of its foundation in Ch III to Part III; and analysis of its significance for the states, and broader institutional integrity jurisprudence in Parts IV and V respectively.

17 As mentioned in Part II(D) below, Edelman J rejects this understanding and Gordon J's position is ambiguous.

18 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (Liberty Classics, 10th ed, 1959) 202 cited in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ) ('*Lim*'); *Benbrika [No 1]* (n 3) 91 [19] (Kiefel CJ Bell, Keane and Steward JJ); *Garlett* (n 1) 916 [129] (Gageler J).

19 Compare Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35(1) *Federal Law Review* 25, 27–8.

20 Of course, this substantive limit works congruently with procedural safeguards arising from the vesting of judicial power exclusively in courts. See, eg, *Garlett* (n 1) 917 [132]–[133] (Gageler J).

characterised as punishment according to established constitutional doctrine. As recent cases have confirmed, constitutional doctrine on this point is concerned with substance and not mere form. This characterisation is apt if the statutory purpose is itself punitive, in that it seeks to denounce and deter crime.[21] But it may also be apt even if there is no punitive statutory purpose evident. Specifically, if the hardship imposed is one that is traditionally viewed as a punishment, this default characterisation will apply unless the law is reasonably capable of being seen as necessary for a legitimate non-punitive purpose.[22] For present purposes, it suffices to note that the Diceyan rejection of non-criminal punishment applies to any hardship that falls within this comprehensive constitutional conception of punishment. As will now be discussed, there is broad and long-standing authority that the Diceyan rejection of non-criminal punishment is embedded as an essential characteristic of separated Commonwealth judicial power.

## B Lim *and the Inherited Conception of Punishment as an Exclusive Judicial Function*

To locate the prevailing understanding, it is necessary to start with the influential observations on the nature of punishment as an exclusively judicial function by Brennan, Deane and Dawson JJ (Mason CJ agreeing) in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').[23] *Lim* upheld a Commonwealth law authorising detention without judicial order, of persons falling within a statutory criterion for liability to detention. The validity of the law rested, critically, on the Court's determination that the detention it authorised was non-punitive, being reasonably capable of being seen as necessary for a legitimate non-punitive migration purpose (preventing admission of non-citizens into Australian territory pending the making of a decision as to whether or not they will be allowed entry).[24] Relevant to the present discussion, the joint judgment observed:

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21 See *Alexander v Minister for Home Affairs* (2022) 401 ALR 438 463–4 [106]–[111] (Gageler J), cf 456–7 [80]–[84] (Kiefel CJ, Keane and Gleeson JJ) ('*Alexander*'). This sense of punishment is consistent with that applied by Edelman J: at 498–9 [238]–[246]; *Benbrika [No 1]* (n 3) 158 [204]; *Garlett* (n 1) 942–3 [250]–[251].

22 This reflects that Ch III is concerned with substance and recognises that certain hardships of themselves ordinarily constitute punishment unless that default characterisation is, exceptionally, displaced. In relation to detention, see *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, especially at 1013 [28], 1015 [39]–[40] (the Court) ('*NZYQ*'); and in relation to citizenship-stripping, see *Jones v Commonwealth of Australia* (2023) 97 ALJR 936, 946 [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 952–3 [76]–[77], 956–7 [95] (Gordon J) ('*Jones*'). Corporal and capital punishments would likely also attract a default punitive characterisation, see *Alexander* (n 21) 454 [72] (Kiefel CJ, Keane and Gleeson JJ).

23 *Lim* (n 18).

24 Ibid 33–4 (Brennan, Dawson and Deane JJ; Mason CJ agreeing), 46 (Toohey J), 65, 71 (McHugh J). See now *NZYQ* (n 22) 1013–14 [30]–[33], 1016–17 [48]–[49].

> [P]utting to one side … exceptional cases … the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[25]

This observation — by conventional shorthand, 'the *Lim* principle' — comprises three interlocking claims about state power under 'our system of government':

(i) Adjudication and punishment of criminal guilt is an exclusively judicial function.

(ii) Detention is ordinarily penal or punitive (a default characterisation of detention).

(iii) Punishment is permissible only for criminal guilt.[26]

As the *Lim* joint judgment recognises, this anterior common law conception of state power is brought to bear on judicial interpretation of the *Constitution*. It bears emphasising that this is well-established in relation to the first-mentioned claim — that adjudication and punishment of criminal guilt is an exclusively judicial function. The influence of this anterior common law understanding on the conception of Commonwealth judicial power is well-established.[27] There is no dispute that it informs the meaning of 'judicial power' as a constitutional term in the Australian *Constitution*.[28] In this regard, the *Constitution* allocates powers 'whose character is determined by traditional British conceptions' and the distribution of governmental functions as between those powers follows established British constitutional practice.[29]

What of the second and third-mentioned claims about state power nested in the *Lim* principle? Are these, too, integrated into the conception of punishment as an exclusive judicial function that informs interpretation of the *Constitution*? The

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25 *Lim* (n 18) 27 (Brennan, Dawson and Deane JJ; Mason CJ agreeing).

26 As is made clear in context, this proposition goes to the nature of judicial power, and is distinct from Ch III provisions making judicial power exclusive to courts.

27 Authorities include: *JW Alexander* (n 10) 444 (Griffith CJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 340–1 [14]–[16] (Kiefel CJ, Bell, Keane and Edelman JJ); *Alexander* (n 21) 453–4 [70]–[71] (Kiefel CJ, Keane and Gleeson JJ), 476 [158] (Gordon J), 497 [235]–[237] (Edelman J). There are two recognised historical exceptions for punishment of offences to maintain discipline in the armed forces, and punishment of contempt of parliament. Neither of these exceptions involves any departure from what is of present interest, namely the Diceyan rejection of non-criminal punishment.

28 Relevantly, this is accepted by the two judges who do not expressly recognise that the Diceyan rejection of non-criminal punishment is embedded in the nature of judicial power, Edelman J and Gordon J: see *Benbrika [No 1]* (n 3) 130–1 [134], 141 [160] (Gordon J), 148 [181], 159–61 [205]–[209] (Edelman J). See also *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899, 914 [60] (Gordon J), 920 [89]–[90] (Edelman J) ('*Benbrika [No 2]*').

29 *Boilermakers* (n 11) 276–7 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

doctrine that detention is ordinarily penal or punitive is secure, as is the general principle that this default characterisation is displaced only if detention is reasonably capable of being seen as necessary for a legitimate non-punitive purpose.[30] Judicial application of the default characterisation has been contested, but its existence and salience to the operation of Ch III has not.[31] As *Lim* and later cases on Commonwealth administrative detention make clear, a default punitive characterisation of detention is so closely associated with the inherited conception of punishment as an exclusively judicial function that it too is drawn into the application of Ch III's strict institutional separation of Commonwealth judicial power. This is not a strict logical or analytical necessity. Rather, the default punitive character carries forward because the anterior common law evolved in such a way that this limit on state power to detain is hardwired into the inherited conception of punishment as an exclusive judicial function.[32]

This indicates something important about the conception of punishment as an exclusive judicial function referenced in *Lim*. Namely, that it embeds at least one of the related understandings of state power articulated in the *Lim* joint judgment. It stands to reason that the same dynamic could embed the Diceyan rejection of non-criminal punishment in the constitutional conception of punishment as an exclusive judicial function referenced in *Lim*. And it stands to reason that, as such, it too could be hardwired in the conception of punishment that informs the nature of Commonwealth judicial power. Yet it was not until *Benbrika [No 1]* that the Court had cause to squarely address this point.

## C Benbrika [No 1] *and* Garlett *as Authority that Commonwealth Judicial Power Does Not Extend to Non-Criminal Punishment*

*Benbrika [No 1]* is significant at the level of principle because it clarifies that the totality of the inherited common law conception of state power to punish referenced in *Lim* — and specifically, the Diceyan rejection of non-criminal punishment — informs the scope of Commonwealth judicial power. This understanding of the relevant limit on Commonwealth judicial power was

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30 See *Benbrika [No 1]* (n 3); *NZYQ* (n 22).

31 The judicial method of evaluating non-criminal detention has been subject to extensive comment and critique, see for example Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Noncriminal Detention' (2012) 36(1) *Melbourne University Law Review* 41; McDonald (n 19); Andrew Foster, 'The Judiciary and Liberty: Assessing Competing Rationales for the Lim Principle' (2022) 33(3) *Public Law Review* 226 ('The Judiciary and Liberty') and the other commentary mentioned therein.

32 Cf *Benbrika [No 1]* (n 3) 108 [66]–[67] (Gageler J).

subsequently endorsed by a majority in *Garlett*, albeit as a step in the analysis of an impugned State law.[33]

### 1 Benbrika [No 1] *and* Garlett

*Benbrika [No 1]* and *Garlett* upheld the validity of laws authorising courts to impose non-criminal detention — that is, detention imposed on a basis other than breach of the law by past acts. In both cases, the regimes in question authorised a court to order a period of post-sentence detention if satisfied of an unacceptable risk that a prisoner would commit a specified kind of criminal offence if released at the conclusion of their custodial sentence. And in both cases, a majority of the High Court held that the regime in question was appropriately tailored to a non-punitive purpose.

*Benbrika [No 1]* considered div 105A of the *Criminal Code Act 1995* (Cth), which empowers a court to make an order that a terrorist offender,[34] nearing the completion of a term of imprisonment for a terrorist offence, be detained for a further period after the expiration of their sentence.[35] Five judges held that div 105A was wholly valid (Kiefel CJ, Bell, Keane, Steward JJ; Edelman J writing separately). Gageler J held that the law was valid only to the extent that the offences to be prevented by the making of an order involve doing or supporting or facilitating a terrorist act.[36] Gordon J held that the regime was wholly invalid.[37]

*Garlett* considered the *High Risk Serious Offenders Act 2020* (WA) ('*HRSO Act*'). Under this Act, the Supreme Court of Western Australia may order that a 'serious offender under custodial sentence' be detained post-sentence for an indefinite term for control, care or treatment.[38] Five members of the Court held that the impugned law was valid (Kiefel CJ, Keane, Steward JJ in joint reasons; Edelman J and Gleeson J giving separate reasons). Gageler J and Gordon J again dissented.

The constitutional challenges in *Benbrika [No 1]* and *Garlett* failed for a simple reason. The respective majorities held that div 105A and the *HRSO Act* are

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33 Further judicial authority for this perspective on separated judicial power can be found in the late 2023 cases concerning Commonwealth executive power to detain and remove citizenship: see *Benbrika [No 2]* (n 28) 909 [35]–[36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ* (n 22) 1013 [28] (the Court).

34 A person convicted of offences referred to in s 105A.3(1)(a), who has been in continuously in custody since being convicted, and will be at least 18 years old at the expiration of their sentence.

35 *Criminal Code Act 1995* (Cth) s 105A.7. The government party who applies for the order (the Australian Federal Police Minister) bears the onus of satisfying the Court of these and other matters. Section 105A.8 mandates that the Court have regard to matters including expert reports in relation to the prisoner, the risk they pose, and the scope for managing the risk in the relevant state or territory corrective services. Section 105A.13 prescribes the civil evidence and procedure rules for continuing detention order proceedings.

36 *Benbrika [No 1]* (n 3) 108 [64], 120–1 [100]–[102].

37 Ibid 122 [109], 147 [177]–[178].

38 *High Risk Serious Offenders Act 2020* (WA) s 7(1), see *Garlett* (n 1) 898 [17] (Kiefel CJ, Keane and Steward JJ).

appropriately tailored to a legitimate protective purpose.[39] That the majorities characterised these impugned laws as non-punitive might suggest some weakening in the default punitive characterisation of detention, at least as it applies to detention by courts exercising judicial power.[40] Whether this is the case, and with what implications for the design of preventive justice regimes, are important questions.[41] For present purposes, however, the salient aspect of *Benbrika [No 1]* and *Garlett* is unaffected by the strength of the default characterisation of detention. That salient aspect is the crystallisation of a predominant judicial perspective that Ch III denies the Commonwealth authority to legislate for non-criminal punishment by courts. All judges sitting on these cases considered that the Commonwealth cannot validly legislate for courts to administer non-criminal *detention* unless that detention is appropriately tailored to a protective purpose.[42] Moreover, a majority of Justices considered that this is because non-criminal *punishment* is incompatible with the essential nature of separated Commonwealth judicial power. In fact, six of the eight judges who sat on *Benbrika [No 1]* and *Garlett*[43] recognised that the relevant substantive entrenched limit on Commonwealth preventive justice regimes is that Commonwealth judicial power does not extend to non-criminal punishment. In other words, the constitutional conception of separated Commonwealth judicial power incorporates the Diceyan rejection of non-criminal punishment referenced in *Lim*.

### 2 *Kiefel CJ, Bell, Keane and Steward JJ*

In a helpful clarification, the *Benbrika [No 1]* plurality, comprising Kiefel CJ, Bell, Keane and Steward JJ, differentiate 'the *Lim* principle'[44] from what their Honours' label the '*Lim* general proposition' — that detention under Commonwealth authority is ordinarily entrusted to Ch III courts.[45] This is an important reminder that the constitutional understanding of state power to punish expressed in *Lim*

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39 *Benbrika [No 1]* (n 3) 97–104 [36]–[48] (Kiefel CJ, Bell, Keane and Steward JJ), 168–72 [224]–[231] (Edelman J); *Garlett* (n 1) 902–5[45]–[56] (Kiefel CJ, Keane and Steward JJ), 944–8 [260]–[281] (Edelman J), 954–5 [310]–[314] (Gleeson J).

40 Cf *Garlett* (n 1) 913 [110], 919 [150] (Gageler J).

41 Questions about the threshold for detention to escape its default punitive characterisation; and the rationale for the default characterisation, have been explored extensively in commentary on the constitutionality of Commonwealth immigration detention: see above n 31. The more recent judicial application of the reasonable necessity test to immigration detention in *NZYQ* (n 22) and to citizenship stripping in *Jones* (n 22) must also now be factored in.

42 *Benbrika [No 1]* (n 3) 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ), 112–13 [76]–[78] (Gageler J), 147 [177] (Gordon J), 169 [226] (Edelman J); *Garlett* (n 1) 950 [292], 950–1 [294] (Gleeson J). See also 919–20 [151]–[152] (Gageler J).

43 There was a change of composition of the Court between *Benbrika [No 1]* and *Garlett*, with Bell J's retirement and Gleeson J's appointment.

44 *Benbrika [No 1]* (n 3) 90–1 [18] (Kiefel CJ, Bell, Keane and Steward JJ).

45 Ibid.

is anterior to Ch III's strict institutional separation of judicial power. As the *Benbrika [No 1]* plurality states, a doctrinal understanding of adjudicating criminal guilt as an exclusive judicial function is not unique to Ch III but rather has 'a long pedigree under our inherited common law tradition', going back to William Blackstone and Sir Edward Coke.[46] Building on this distinction, their Honours emphasise that the core of the *Lim* principle is the rejection of state power to punish other than for breach of the law. This is traced, as it was in *Lim*, to 'Dicey's celebrated statement that every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of the law, but he can be punished for nothing else"'.[47]

In the result, the *Benbrika [No 1]* plurality upheld the impugned law. They therefore did not apply as ratio, a principle that non-criminal punishment lies outside the scope of Commonwealth judicial power. Nonetheless, the Diceyan rejection of non-criminal punishment is given effect in the *Benbrika [No 1]* plurality's reasons at two key points. The first is in their Honours' rejection of a Commonwealth submission that the only concern of the *Lim* principle is to ensure that detention consequent on adjudication of criminal guilt is exclusively judicial.[48] The plurality warn that it would be a mistake to think that the only constitutional concern is to allocate criminal detention powers: this would imply that there are no constitutional constraints on state power to impose non-criminal detention. As the plurality state, that would be a 'radical reworking' of established principle.[49]

The *Benbrika [No 1]* plurality also emphasise the Diceyan rejection of non-criminal punishment in rejecting Gummow J's proposed reformulation of the *Lim* principle in *Fardon*. In *Fardon*, Gummow J (with whom Kirby J agreed) proposed a reformulation of the *Lim* principle in terms that 'the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts'.[50] This formulation 'eschews the phrase "is penal or punitive in character"' so as to emphasise that 'the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose'.[51] The *Benbrika [No 1]* plurality reject this reformulation, precisely because it shifts focus from punishment. On the plurality's approach, the *Lim* principle is centrally concerned with the specific inherited conception of punishment as an exclusive judicial function. To expunge reference to 'punitive' detention might be seen to unmoor analysis from its basis

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46 *Benbrika [No 1]* (n 3) 91 [19].
47 Ibid.
48 Ibid 90 [17], 94 [26].
49 Ibid 95 [27].
50 *Fardon* (n 2) 612 [80] (Gummow J).
51 Ibid 612–13 [81] (Gummow J). See also *Al-Kateb v Godwin* (2004) 219 CLR 562, 612–13 [136]–[137].

in anterior common law constitutionalism, which includes the Diceyan rejection of non-criminal punishment.[52]

### 3 *Gageler J*

Justice Gageler also recognises that the Diceyan rejection of non-criminal punishment referenced in the *Lim* principle describes an entrenched limit on Commonwealth judicial power. His Honour explains that the *Lim* principle is a reflection of 'traditional practices within historical institutional structures' that necessarily inform the contemporary nature of judicial power within Ch III.[53] Specifically, within 'our inherited conception of the rule of law' and 'at the heart of our system of government'[54] lies a relationship between the individual and the state,

> within which freedom of the individual from involuntary detention by the state, other than as a penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct, is the norm.[55]

It is clear that Gageler J's dissents in *Benbrika [No 1]* and *Garlett* rest most directly on the view he takes of the 'centrality of personal liberty to the functioning of government within our 800 year old inherited tradition',[56] and his insistence upon a high threshold for detention to escape its default characterisation as a punishment.[57] But what is relevant for present purposes is a distinct point, namely Gageler J's enunciation that penal measures are, in the common law system of government, prescribed by law 'for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct'.[58] Reflecting on what was said in the *Lim* joint judgment, Gageler J comments:

> The opening part of that observation, that detention in custody is to be characterised as 'penal or punitive' other than in 'exceptional cases' is inextricably linked to the concluding part of the observations concerning the limited means by which involuntary detention of that character is constitutionally permitted to occur.[59]

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52 It should be noted that despite Gummow J's reformulation, His Honour accepted that the purpose of detention provides the criterion upon which constitutional validity is assessed: compare *Benbrika [No 1]* (n 3) 115 [84] (Gageler J) and see McDonald (n 19) 35. Cf Foster (n 31) 243.

53 *Benbrika [No 1]* (n 3) 108 [67] (Gageler J).

54 *Garlett* (n 1) 917 [133] (Gageler J).

55 Ibid 917 [134] (Gageler J).

56 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610 [95] (Gageler J) ('*NAAJA*').

57 *Garlett* (n 1) 919 [150] (Gageler J). See generally Foster (n 31).

58 *Benbrika [No 1]* (n 3) 111 [73] (Gageler J).

59 Ibid 110 [71] (Gageler J).

Gageler J could not be clearer that the conception of punishment as an exclusive judicial function referenced in *Lim* incorporates the Diceyan rejection of non-criminal punishment:

> Limiting the permissible means of inflicting state sanctioned punishment underlies the traditional assignment of detention in custody to the exclusive exercise of judicial power involving adjudication and punishment of criminal guilt.[60]

### 4 *Gleeson J*

Gleeson J sat on *Garlett*, having joined the Court after *Benbrika [No 1]*. Her Honour articulates that the essential concern in testing a Commonwealth law for non-criminal detention against the *Lim* principle is whether the law imposes punishment on a basis other than breach of the law.[61] Her Honours approach is consistent with the plurality view in *Benbrika [No 1]*, that a law authorising non-criminal detention can only be consistent with separated judicial power if the detention is, in substance, non-punitive.[62]

## D *The Minority Judicial Perspectives on Non-Criminal Detention*

The above discussion shows that six of the eight judges who sat in *Benbrika [No 1]* and *Garlett* consider that Commonwealth judicial power cannot be applied to administer non-criminal punishment. Mention should be made of the alternate approaches taken by Edelman J and Gordon J.

### 1 *Edelman J*

Edelman J unequivocally affirms Commonwealth judicial power to impose non-criminal punishment, that is, punishment on a basis other than breach of the law by past acts.[63] His Honour considers that the only principle recognised in *Lim* with a firm foundation in Ch III is the principle that punishment is an exclusively judicial function.[64] Relevant to the present argument, Edelman J considers that the exclusive judicial function extends to 'protective or preventive punishment', that is, involuntary hardship imposed by the state as a sanction to enforce a norm of behaviour on a purely forward-looking basis.[65] Edelman J proposes that such

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60 Ibid 115 [84] (Gageler J).
61 *Garlett* (n 1) 950 [292] (Gleeson J).
62 Ibid. See also 954–5 [310]–[313] (Gleeson J).
63 *Benbrika [No 1]* (n 3) 164–6 [215]–[219]; Ibid 942–3 [251].
64 *Benbrika [No 1]* (n 3) 160 [208].
65 Ibid 148–9 [182], 149–50 [185] (Edelman J). See also *Garlett* (n 1) 942–3 [251] (Edelman J); *Alexander* (n 21) 498 [238] (Edelman J).

punishment, which does not treat the subject as a responsible moral agent,[66] is 'unjust', but may be administered by a Ch III court so long as it does not unjustifiably compromise the court's institutional integrity.[67]

Edelman J's conclusion in *Benbrika [No 1]* that the detention authorised by Div 105A is a 'punishment' has been welcomed by some commentators, for two reasons.[68] First, Edelman J's approach resonates with the view that safeguards on 'punishment' under criminal and human rights law should apply to at least some coercive measures that are imposed on a criterion of predictive risk. Second, it is considered that Edelman J's approach avoids an 'absurd' notion that detention which has a protective purpose is not punishment.[69] But neither of these outcomes provides a compelling reason for recognising Commonwealth judicial power to dispense non-criminal punishment.[70] As to the first, it is important to appreciate that a categorical constitutional rejection of non-criminal punishment by courts would not preclude applying protections in criminal and human rights law to measures which are permissible on a basis other than breach of the law by past acts. The conception of 'punishment' for the purpose of Ch III analysis does not preclude adopting a wider conception for the purpose of engaging incidents of criminal process or human rights law.[71] As to the second, Edelman J is not the only member of the Court who appreciates that detention which has a protective purpose can still be a punishment. The categorical prohibition on Commonwealth non-criminal punishment supported by majorities in *Lim*, *Benbrika [No 1]* and *Garlett* is engaged unless detention is, in substance, imposed for an independent protective purpose.[72] Those majorities are clearly cognisant that detention can be a 'punishment' in the constitutional sense, while pursuing a combination of protective and punitive objectives. The critical point made by these majorities is that detention can only be imposed on a basis other than criminal guilt if the protective purpose is independent, in a way that the protective purpose of a criminal sentence is not.[73]

For these reasons, it is not evident that any compelling advantage is secured by recognising Commonwealth judicial power to dispense non-criminal

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66 *Benbrika [No 1]* (n 3) 167–8 [222]; *Garlett* (n 1) 933 [203].

67 *Benbrika [No 1]* (n 3) 167–9 [222]–[227]; *Garlett* (n 1) 943–4 [256]–[259].

68 See generally Andrew Dyer and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights' (2022) 33(1) *Public Law Review* 61; Andrew Dyer, '*Minister for Home Affairs v Benbrika* and the Capacity of Chapter III of the *Commonwealth Constitution* to Protect Prisoners' Rights' (2022) 45(1) *UNSW Law Journal* 209.

69 Dyer (n 68) 212, 236. Cf *Benbrika [No 1]* (n 3) 149 [183], 155 [196] (Edelman J); *Garlett* (n 1) 942 [249] (Edelman J).

70 Cf Dyer (n 68) 248–9.

71 Cf ibid 248.

72 See *Benbrika [No 1]* (n 3) 97–104 [36]–[48] (Kiefel CJ, Bell, Keane and Steward JJ), 111–120 [73]–[100] (Gageler J); *Garlett* (n 1) 902 [40], 903–5 [49]–[56] (Kiefel CJ, Keane and Steward JJ), 918–21 [140]–[159] (Gageler J), 950 [292], 954 [310]–[313] (Gleeson J).

73 *Garlett* (n 1) 903–4 [52]–[55] (Kiefel CJ, Keane and Steward JJ).

punishment. It increases complexity.[74] It does not secure a stronger protection for individual liberty.[75] It is not the only route to a more robust method of evaluating Commonwealth non-criminal detention.[76] Nor is it apparent why the conception of Commonwealth judicial power should *not* embed traditional understandings of state power associated with the identification of punishment as an exclusively judicial function. It is unclear why in Edelman J's view those traditional understandings, expressed in *Lim*, lack sufficient foundation in Ch III to inform the conception of Commonwealth judicial power, but that an understanding of 'protective punishment' as an injustice can legitimately inform the conception of a court.

### 2 *Gordon J*

It is not entirely clear whether Gordon J considers that Commonwealth judicial power extends to non-criminal punishment. On the one hand, there is ample evidence that her Honour recognises that the *Lim* principle is grounded in a claim about state power to punish on a basis other than criminal guilt.[77] On the other hand, her Honour appears to contemplate that the relevant principle is that punishment can only be imposed without criminal guilt in exceptional cases.[78] This suggests that her Honour does, like Edelman J, recognise the possibility of non-criminal punishment by courts under Commonwealth laws, with sufficient justification. In any event, Gordon J's ultimate evaluation of the non-criminal detention regimes in *Benbrika [No 1]* and *Garlett* pivots away from a Diceyan rejection of non-criminal punishment. Her Honour's evaluation rests instead on a more general proposition that some special or compelling feature is required for judicial power to encompass a function that raises no question of antecedent right

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74 Instead of a one-step classification exercise that engages a categorical rule with a strong foundation in authority (is a measure 'punishment'?), Edelman J's approach requires a three-step classification exercise that engages an evaluative task unfamiliar in the Ch III context: (i) is a measure 'punishment' and so exclusively judicial (see, eg, *Benbrika [No 1]* (n 3) 157–9 [200]–[204]); (ii) is it 'preventive or protective punishment' and so 'unjust' (at 162–3 [214]); and if so, (iii) is the court's performance of this unjust function justified (at 169–72 [226]–[231])?

75 Indeed, Edelman J does not consider that there is sufficient foundation in Ch III for implications specifically concerned with involuntary detention in custody of the state: *Benbrika [No 1]* (n 3) 164–6 [215]–[219]. Edelman J's approach does preclude Commonwealth *executive* 'protective or preventive punishment', but that same result is achieved on the conventional understanding described above, that punishment is exclusively judicial and can only be dispensed on the basis of criminal guilt arising from past conduct.

76 See the fact that Gageler J dissented in *Benbrika [No 1]* and *Garlett*. While Edelman J's approach does incorporate a form of proportionality testing, that can also be accommodated on the conventional approach, at the stage of determining whether detention escapes its default punitive character: see, eg, McDonald (n 19) 39–52.

77 *Benbrika [No 1]* (n 3) 130–1 [134], 131–3 [137]–[140] (Gordon J); *Garlett* (n 1) 925–6 [175]–[178] (Gordon J). See also *Falzon* (n 27) 355–6 [82].

78 *Garlett* (n 1) 925 [175]. See also *Benbrika [No 1]* (n 3) 321 [140]; and the endorsement of Gummow J's reformulation in *Fardon* (n 2) by Gordon J in *Benbrika [No 1]* (n 3) 131 [135].

or obligation.[79] Thus, her Honour's analysis does not critically rely on any principle regarding judicial power *to punish* as such.[80]

If Gordon J considers that Commonwealth judicial power extends to non-criminal punishment, this attracts the same comments made earlier on Edelman J's approach. If Gordon J considers that there *is* a Ch III prohibition on non-criminal punishment by courts, but that it is better viewed as a specific application of a more general rule that judicial power is exercised to determine existing rights or liabilities, this is contestable.[81] The general rule invoked by Gordon J has weakened over time, as the involvement of courts in imposing new liabilities has expanded.[82] And if the general rule admits exceptions, this requires some independent principled guidance for determining when exceptions are justifiable. As Gordon J has stated, this is not a matter of abstract reasoning but rather draws on 'deeply rooted notions of the relationship of the individual to the state going to the character of the national polity'.[83] One such notion is the Diceyan rejection of non-criminal punishment embedded in the conception of punishment as an exclusive judicial function referenced in *Lim*.[84]

## E *Summary*

The preceding discussion shows that the majority judges in *Lim*, *Benbrika [No 1]* and *Garlett* recognise that the Commonwealth cannot authorise non-criminal punishment by courts. Put another way, it is an essential characteristic of Commonwealth judicial power that it cannot be applied to dispense non-criminal punishment. This resolves one point of contention seen in *Garlett*, arising from the different approaches taken by Edelman J and Gordon J in *Benbrika [No 1]*.

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79 See *Benbrika [No 1]* (n 3) 137–9 [150]–[152], 141 [160]; *Garlett* (n 1) 926–7 [180], 932 [198], 932–3 [199]. To be clear, other judges also recognise the general proposition concerning judicial power, see especially *Garlett* (n 1) 918 [142] (Gageler J); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 287 [171] (Gageler J). But Gordon J is the only judge who centres this as the source of a requirement to justify non-criminal detention. A similar approach is proposed in McDonald (n 19) 65–74.

80 *Benbrika [No 1]* (n 3) 137–8 [150] (Gordon J) refers to *Lim* as a 'reflection' of the essential characteristic that judicial power is, as a general rule, concerned with existing rights.

81 One possibility is that Gordon J considers the more general lens emphasises a point of principle with respect to *all* coercive control measures and not just detention. But the Diceyan rejection of non-criminal punishment is flexible enough to address punishments beyond detention: see above n 39 for the caselaw developments concerning citizenship stripping.

82 The proposition that judicial power is generally exercised to determine existing rights or liabilities is supported by authority but there are multiple ways in which more recent case-law sidesteps or qualifies the 'rights determination' conception of judicial power: see generally James Stellios, 'The Masking of Judicial Power Values: Historical Analogies and Double Function Provisions' (2017) 28(2) *Public Law Review* 138; Stellios, *The Federal Judicature* (n 5) 131–52.

83 *Garlett* (n 1) 923–4 [171], 924 [173] (Gordon J).

84 Ibid 924 [173], 925 [175], 926 [178] (Gordon J).

## III Ch III and Commonwealth Incapacity to Legislate for Non-Criminal Punishment by Courts

Analysis can now turn to the second point of contention in *Garlett* that impedes recognition of a national prohibition on courts undertaking non-criminal punishment: whether the incapacity to authorise non-criminal punishment by courts, recognised for the Commonwealth in *Benbrika [No 1]*, extends to the states. This point of contention is seen in the position of four judges (Kiefel CJ, Keane and Steward JJ, and Gleeson J) who recognise that Commonwealth judicial power does not extend to non-criminal punishment, but do not consider that there is a corresponding limit on state laws authorising state courts to engage in non-criminal punishment.[85] As will be shown, the root of this contention is a lack of clarity about the precise basis in Ch III for the Commonwealth's incapacity to authorise non-criminal court-ordered punishment. Thus, to resolve this contention, it is necessary to first clarify the basis in Ch III for the Commonwealth's incapacity to legislate non-criminal court-ordered punishment (Part III), before considering the implications for the states (Part IV) and coherence with federal dimensions of Ch III doctrine (Part V).

This Part argues that Commonwealth incapacity to legislate court-ordered non-criminal punishment derives from the primary separation rule for Commonwealth judicial power. Put another way, this incapacity is not contingent on the *Boilermakers* restriction, which precludes courts exercising Commonwealth non-judicial powers (except for the performance of strictly incidental functions). Rather, the incapacity is necessary to safeguard the values that the Ch III scheme seeks to preserve by making judicial power exclusive to courts.

### A *The Primary Separation Rule and Permissible Court Functions*

The first step in the argument is to highlight that Ch III's primary separation rule — making Commonwealth judicial power exclusive to courts — is a potent source of limits on Commonwealth power to legislate court functions. Specifically, it precludes conferral of court functions that are incompatible with the essential characteristics of separated judicial power. Analysis of the Commonwealth functions permissible for courts often centres on the *Boilermakers* restriction, which prevents the Commonwealth conferring non-ancillary functions on federal courts that involve an exercise of Commonwealth non-judicial power. That approach can deflect attention from restrictions on Commonwealth court functions required by the distinct primary separation rule, identified well-before *Boilermakers*. By making Commonwealth judicial power exclusive to courts, Ch III

[85] See above nn 7–8.

requires a constitutional conception of courts as the repositories of Commonwealth judicial power. Understood purposively, this denies the Commonwealth power to confer any functions on courts that are incompatible with the essential characteristics of separated judicial power.

### 1 *The Primary Separation Rule and Limits on the Functions Permitted to Courts*

Section 71 of the *Constitution* states that the judicial power of Commonwealth is to be vested in courts — the High Court, other federal courts, and state courts.[86] By 1918, High Court authorities established that this was an exhaustive and exclusive provision for the conferral of Commonwealth judicial power, such that Commonwealth judicial power could only be exercised by the courts identified in Ch III.[87] In 1956, the Court spoke of this first separation rule as 'a proposition which has been repeatedly affirmed and acted upon by this Court'.[88] Recognition that Ch III makes exhaustive provision for the conferral and exercise of Commonwealth judicial power was the lynchpin for the Court's 1921 ruling that the Commonwealth cannot confer judicial power on a court other than in a 'matter'.[89]

From the early decades of the Australian federation, the Court recognised that the first separation principle for Commonwealth judicial power required a conception of the functions that are compatible with the essential nature of 'judicial power' and a conception of 'courts' as distinctive institutions of government entrusted to exercise separated judicial power. In a 1938 judgment, members of the Court held that Ch III denies Commonwealth legislative power to vest courts with functions 'inconsistent with the co-existence of judicial power';[90] 'inconsistent with the due exercise of its judicial power';[91] or '*at variance with* the conception of judicial power'.[92] Relatedly, the integrity of the primary rule requires purposive criteria for identifying whether an institution is a court *in substance* and not mere name.[93] Important for the present argument, it was also

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86 *Australian Constitution* ss 71, 76–7.

87 See above n 10. Cf *Burns* (n 13) 344 [63] (Kiefel CJ, Bell and Keane JJ) where their Honours incorrectly state that 'until this Court's decision in the *Boilermakers Case*, it was commonly, but erroneously, understood that an administrative body, such as the Inter-State Commission or the Commonwealth Court of Conciliation and Arbitration, was capable of exercising the judicial power of the Commonwealth.'

88 *Boilermakers* (n 11) 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

89 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Boilermakers* (n 11) 272–5.

90 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 567 (Latham CJ; Rich J agreeing) ('*Lowenstein*').

91 Ibid 591 (McTiernan J).

92 Ibid 588 (Dixon and Evatt JJ).

93 *JW Alexander* (n 10) 442 (Griffith CJ), 451 (Barton J).

recognised that this necessity operates at the institutional level — meaning that it must be observed in all functions performed by the court, and its judges.[94]

The insight that limits on Commonwealth capacity to legislate court functions are necessary to preserve the integrity of the primary separation rule has to some extent been downplayed in post-1956 caselaw, but it maintains a discernible presence.[95] Notably, Deane J applied this understanding to analysis of due process protections derived from Ch III:

> [I]n insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch. III, the *Constitution*'s intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires. Accordingly, the Parliament cannot, consistently with Ch. III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation. Nor can it infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power.[96]

The point of present significance is not Deane J's views on the content of a Ch III due process protection, but his Honour's clear articulation that such protection derives from the primary separation rule for Commonwealth judicial power. That is, 'the guarantee involved in vesting of judicial power exclusively in Ch III courts' is that an individual's guilt of a criminal offence or liability to another or the state under Commonwealth laws 'can be conclusively determined only by a Ch III court acting as such, that is to say, acting judicially'.[97] As Fiona Wheeler observed, Deane J's explanation

> goes to the heart of the matter by explicitly invoking the values served by vesting federal judicial power in Chapter III courts. It … is a modest and persuasive implication, insisting that the separation doctrine is concerned with 'who' is given judicial power because of an ultimate concern with 'how' that power is exercised[98]

Deane J's understanding was endorsed in *Lim*, where it was recognised that Commonwealth legislative power does not extend to making laws authorising courts to perform functions inconsistent with the essential character of a court or the nature of judicial power.[99] In *Lim*, this implication was applied to invalidate a

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94 *Lowenstein* (n 90) 566–7 (Latham CJ, Rich J agreeing).

95 For a teaching text that centres the primary separation rule see, eg, Nicholas Aroney, Sarah Murray, Peter Gerangelos, Patrick Emerton, Joel Harrison and Adrienne Stone, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Co, 5th ed, 2022) 1140–2, 1219–26.

96 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 606–7 (Deane J) ('*Polyukhovich*').

97 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580–1 (Deane J).

98 Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205, 210–11.

99 *Lim* (n 18) 27 (Brennan, Deane and Dawson JJ). See also *Lim* (n 18) 10 (Mason CJ), 50–1 (Toohey J), 53 (Gaudron J), 67–8 (McHugh J). I note Fiona Wheeler concludes it is 'unclear' whether Deane J's theory for deriving the due process principle had prevailed in authorities to 2004: ibid 210.

statutory provision that purported to prevent collateral challenge or review of an executive determination of liability to detention under Commonwealth law.[100] The provision 'purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction',[101] which was regarded as an impermissible 'intrusion on the judicial power which Ch III vests exclusively in the courts it designates'.[102] The understanding that such constraints are necessary for the integrity of the primary separation rule is not foreclosed by any more recent authority.[103]

### 2 *The* Boilermakers *Restriction as a Distinct Principle in Service of the Federal Compact*

Some mention should be made of the *Boilermakers* restriction, or the 'second limb' of the Commonwealth separation doctrine, which prevents federal courts exercising non-incidental functions that involve an exercise of Commonwealth non-judicial power.[104] Important to the present argument, this new and distinct restriction on Commonwealth power was not intended to disturb pre-1956 understandings of the primary separation rule, its basis in Ch III, or its necessary implication of Commonwealth incapacity to confer court functions incompatible with the nature of separated judicial power. Rather, the *Boilermakers* restriction supplemented the well-established doctrine, with a distinct limitation on Commonwealth power serving a distinct constitutional purpose. The *Boilermakers* restriction protects the federal compact, by assuring the states that the Commonwealth cannot, by exercising its legislative powers to control the venue for litigation of federal disputes, direct adjudication of federal disputes to a

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100 The section (*Migration Act 1958* (Cth) s 54R), which provided that a court was not to order the release of any person who had been administratively designated as a person whom the Commonwealth law required to be detained, was construed by the majority (Brennan, Deane and Dawson JJ, Gaudron J agreeing) as directing a court *not* to give effect to substantive rights to liberty while exercising federal judicial power. The minority (Mason CJ, Toohey and McHugh JJ) considered the section could be read down, being a direction not to release a person who is *lawfully* in custody.

101 *Lim* (n 18) 37 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).

102 Ibid.

103 This understanding is expressly endorsed and applied by Gordon J in *SDCV v Director of General of Security* (2022) 96 ALJR 1002, 1041–3 [171]–[175] ('*SDCV*'). Edelman J (at 1053 [225]) implicitly references the primary separation rule in reasoning that there is a requirement that all 'Australian courts, including federal and State courts recognised in Ch III of the *Constitution* and possessing, or capable of possessing, federal jurisdiction, remain institutions of justice'. The majority justices in that case refer more generally to 'Ch III' as the source of the requirement that all courts observe procedural fairness in all their functions (at 1019 [50]–[51], 1061 [269]). Gageler J states (at 1030–1 [106]) that observance of procedural fairness is *both* 'essential to the exercise of the judicial power of the Commonwealth' and 'an essential characteristic of any "court" capable of being invested by the Commonwealth Parliament with the judicial power of the Commonwealth'.

104 *Boilermakers* (n 11) 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

federal judiciary exposed to influence by the political branches of the Commonwealth government.[105]

As is well-known, *Boilermakers* held invalid a purported conferral of non-judicial arbitration powers on the 'Arbitration Court' — a body given the status of a superior court of record, appointments to which complied with s 72 of the *Constitution*. Despite these features, it was evident that the 'Court' was overwhelmingly engaged in non-judicial functions, settling inter-state industrial disputes through conciliation and arbitration. As such, the Privy Council noted that the arrangement was, in substance, contrary to Ch III's vesting of Commonwealth judicial power in 'courts'.[106] To allow the conferral of judicial power on what was in substance an executive tribunal would make a 'mockery' of the first separation principle.[107]

In the High Court judgment affirmed by the Privy Council, however, the fatal flaw in the legislation flowed from a different source. The 'basal reason' for invalidity was that Ch III is the sole and exclusive source of Commonwealth power to confer functions on courts.[108] The *Boilermakers* restriction by design went further than strictly necessary to safeguard the primary separation rule. So much was recognised by the *Boilermakers* High Court majority, who understood that the first separation rule — 'a proposition which has been repeatedly affirmed and acted upon by this Court'[109] — rested on a view that Ch III was exhaustive in relation to Commonwealth *judicial power*; while the new second restriction views Ch III as exhaustive in relation to Commonwealth *court functions*.[110]

In *Boilermakers*, the majority Justices considered this new and additional restriction on Commonwealth power was necessary to ensure the practical working of the federal compact. The majority were mindful that, under the terms of Ch III,[111] the Commonwealth holds paramount power over the venue for litigation of disputes in which the Commonwealth and states have different, and possibly contradictory, interests. This explains the emphasis that the majority placed on the position of the federal judicature in the resolution of matters about the federal division of powers between Commonwealth and states.[112] The *Boilermakers* implication can be understood as an insurance against the prospect of the Commonwealth legislating so that the only venues for resolution of federal disputes are federal courts, and then sapping the independence of those federal courts by requiring them to exercise Commonwealth non-judicial powers. That

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105 Cf *NAAJA* (n 56) 636 [177] (Keane J).

106 *Boilermakers PC* (n 11) 535 (Viscount Simonds for the Court).

107 Ibid 539 (Viscount Simonds for the Court).

108 *Boilermakers* (n 11) 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

109 Ibid 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

110 Ibid.

111 *Australian Constitution* s 77 gives the Commonwealth power to legislate to make jurisdiction in the subject-matters described in ss 75–6 exclusive to federal courts. And see the provision made in *Judiciary Act 1903* (Cth) s 38.

112 *Boilermakers* (n 11) 276; see also 267–8, 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

outcome would undermine the federal compact itself, which depends critically on the state governments' confidence that the terms of the federation can be enforced by a judicature that is independent and impartial as between the Commonwealth and states.[113]

Relevantly for present purposes, *Boilermakers* established a restriction on Commonwealth power to legislate court functions that was understood by its authors as an *addition* to the limitations that had already been recognised as necessary to safeguard the integrity of the primary separation rule. The intervention in 1956 was not intended to disturb the well-established understandings that: first, Ch III makes exhaustive provision for the conferral of Commonwealth judicial power (contrast, for the conferral of Commonwealth functions on federal courts); and, second, that this exhaustive scheme implies a constitutional understanding of the essential characteristics of separated judicial power that must be upheld at the institutional level, across all Commonwealth court functions.

### B *Ch III and Commonwealth Judicial Power to Punish*

The next point is that the Commonwealth incapacity to authorise courts to administer non-criminal punishment, recognised in *Benbrika [No 1]*, derives from the primary separation rule. The rationale, put simply, is this: it is a core purpose of that rule to ensure that Commonwealth-sanctioned punishment is administered consistently with the traditional understanding referred to in the *Lim* judgment. That purpose would be defeated if that separated judicial power could be used to administer non-criminal punishment.

To fully articulate this rationale, we should first notice a nuance in the doctrine concerning the scope of judicial power. Considered in the abstract, as one of the three powers of government, 'judicial power' is state power to render a conclusive determination of rights or liabilities which may be binding and enforceable (unless and until set aside) even if the determination is invalid.[114] Commonwealth judicial power can be applied to perform exclusively judicial functions and so-called innominate functions — functions that are neither exclusively judicial nor exclusively non-judicial — provided that the specific conferral of statutory jurisdiction to perform the innominate function is apt for the exercise of judicial power.[115] Because of this doctrinal nuance, defining the

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113 Cf *NAAJA* (n 56).

114 *New South Wales v Kable* (2013) 252 CLR 118, 133–4 [33]–[34], 135–6 [38]–[41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 141–2 [59]–[60] (Gageler J). The point is that this finality lies exclusively within judicial power. That point stands even if the finality is not conferred on the judicial orders of inferior courts, see 139–140 [53]–[56] (Gageler J). See also *Benbrika [No 1]* (n 3) 117 [89] (Gageler J).

115 An example being jurisdiction to make an adjudicative determination of new rights or liabilities: see generally Stellios, *The Federal Judicature* (n 5) 152–65, 198–222.

nature of an *exclusive* judicial function is analytically distinct from identifying the parameters of separated judicial power. So, for instance, consider the *Lim* observations on the traditional conception of punishment as an exclusive judicial function. As has been discussed, that conception embeds the anterior common law's default characterisation of detention as punitive and its rejection of non-criminal punishment. But to the present point, there is a gap between recognising that anterior common law conceptions are carried forward in the Ch III conception of punishment *as an exclusively judicial function* (on the one hand) and concluding that they inform the scope of judicial power to punish (on the other hand). In that gap is the logical possibility that there are innominate punitive functions which are not controlled by the same anterior British conceptions that operate on the exclusively judicial punitive functions.

In the predominant way of thinking about Commonwealth judicial power to punish, the logical possibility of an innominate function to punish on a non-criminal basis barely registers. It is, as it were, implicitly discounted.[116] This is telling. Why is this logical possibility so readily sidelined in the prevailing judicial account? The most plausible answer is the most obvious: it is considered axiomatic that preserving the anterior common law conception of punishment is a core value or purpose that is advanced by strictly allocating Commonwealth judicial power to courts.

### 1 *A Purposive Understanding of Separated Judicial Power Embeds the Diceyan Rejection of Non-Criminal Punishment*

Gageler J's reasons in *Garlett* explain why the essential characteristics of punishment *as an exclusively judicial function* translate into essential characteristics *of separated judicial power*. The reason, in essence, is that safeguarding the anterior common law's conception of state power to punish is a core purpose of entrusting Commonwealth judicial power exclusively to courts.

Gageler J outlines the rationale this way. The limits on state power embedded in the *Lim* conception of state power to punish speak to 'deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the *Constitution*'.[117] They go to 'the essence of the relationship between the individual and state under our system of government'.[118] Although 'rarely articulated, and all to readily overlooked', that conception of the relationship between the individual and state 'lies at the heart of our system of

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116 Cf James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "the Relationship of the Individual to the State"' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart Publishing, 2018) 177; *Garlett* (n 1) 916 [127] (Gageler J).

117 *Benbrika [No 1]* (n 3) 110 [70]; *Garlett* (n 1) 917 [127] quoting *Magaming v The Queen* (2013) 252 CLR 381, 400 [63].

118 *Garlett* (n 1) 916 [129].

government'.[119] Maintaining that 'relationship between the individual and the state within our inherited conception of the rule of law' supplies the 'substantive constitutional significance of consigning the function of adjudging and punishing criminal guilt exclusively to the judicial branch of government'.[120]

As such, it would undermine integrity of Ch III's primary separation rule if separated judicial power were exercised to impose punishment on a basis other than criminal guilt by past acts. The existence of an innominate power to dispense non-criminal punishment is logically possible, but normatively incoherent. It would undermine a core purpose of entrusting criminal punishment exclusively to courts. It would 'alter in a fundamental respect the nature of the relationship conventionally understood to exist between the individual and the state under our inherited conception of the rule of law'.[121]

The point of significance to the present argument is the link that Gageler J elucidates between: (i) the understanding of state power to punish expressed in *Lim*; and (ii) the constitutional conception of separated judicial power. That link is made on the basis that a purpose of vesting judicial power exclusively in courts is to preserve that anterior common law understanding of state power to punish which is hardwired into the conception of punishment as an exclusive judicial function. The link can be made, for the reasons Gageler J gives, irrespective of whether other members of the Court are in complete agreement with Gageler J on every aspect of the anterior conception of state power to punish. It may be correct to say that other members of the Court do not share Gageler J's view on the strength of the default characterisation of detention as a punishment and the importance of protecting the subject's liberty from detention, for example. But this does not negate a consensus that the Diceyan rejection of non-criminal punishment informs the conception of separated judicial power. As discussed earlier, six of the eight judges who sat on *Benbrika [No 1]* or *Garlett* recognised that Commonwealth judicial power does not extend to non-criminal punishment, invoking the Diceyan rejection of non-criminal punishment and its recognition in *Lim* as authority.[122] In taking that step, those judges implicitly recognised that a purposive conception of separated judicial power embeds those traditional understandings associated with the conception of punishment as an exclusively judicial function. This is hardly contentious. It is in keeping with many canonical judicial observations on the character of the powers allocated by the *Constitution*.[123]

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119 Ibid 917 [133] (Gageler J).
120 Ibid.
121 Ibid 919 [150] (Gageler J).
122 See Part III(C).
123 See, eg, n 29 above.

### 2 *Commonwealth Incapacity to Legislate Non-Criminal Punishment by Courts is Necessary for the Integrity of the Primary Separation Rule*

Gageler J's reasons in *Garlett* demonstrate why the traditional understandings expressed in *Lim* are considered essential characteristics of separated judicial power. But they also cast light on the Ch III foundation for Commonwealth incapacity to legislate for non-criminal punishment by courts. While Gageler J does not put it in precisely these terms,[124] his argument shows that Commonwealth incapacity to authorise non-criminal punishment by courts can be derived from the primary separation rule.

The derivation from the primary separation rule can be explained this way: the implied limit on Commonwealth power upholds the integrity of the primary rule by safeguarding the essential characteristics of separated judicial power from institutional impairment. Preserving the constitutional conception of state power to punish is a core purpose of the primary separation rule. Thus, a core purpose of making judicial power exclusive to courts would be undermined if that separated judicial power were able to be exercised on a basis that flouts fundamental values underlying the identification of punishment as an exclusive judicial function: 'Conferral of such a function is antithetical to the very conception of justice which it is the responsibility of courts to administer.'[125]

To this we can add a further point: Commonwealth incapacity to legislate court-ordered non-criminal punishment can be demonstrated without invoking the *Boilermakers* restriction on Commonwealth legislative power.[126] The incapacity is sufficiently explained on the view that non-criminal punishment requires a court to perform a function inconsistent with the nature of separated judicial power, thereby undermining the integrity of the primary separation rule.

Indeed, there would seem to be a particularly strong case that the Commonwealth incapacity identified in *Benbrika [No 1]* does not rest on the second separation rule. As has been discussed earlier, the prevailing judicial view is that the constitutional nature of separated Commonwealth judicial power incorporates the totality of the inherited conception of punishment as an exclusive judicial function referenced in *Lim*. Specifically, it incorporates the Diceyan rejection of state power to punish on a basis other than criminal guilt.[127] As such, the predominant understanding does not recognise non-criminal punishment *as a permitted non-judicial function*. This can be too readily overlooked if the issue is viewed through the lens of the *Boilermakers* restriction on Commonwealth power. Doing so confuses matters by suggesting that non-criminal punishment lies within Commonwealth non-judicial power.

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124 A point I return to later. See below n 153 and accompanying text.

125 *Garlett* (n 1) 917 [135] (Gageler J).

126 Cf, on this point only, ibid 913–15 [111]–[123] (Gageler J).

127 Cf *Benbrika [No 1]* (n 3) 164 [215] (Edelman J).

### C *Summary*

This Part has addressed the Ch III foundation for the Commonwealth incapacity to legislate for non-criminal punishment by courts. It has argued that the Commonwealth incapacity is implied to uphold the purpose, or practical integrity, of the Ch III prescription that Commonwealth judicial power is exclusive to courts. The argument relies on Gageler J's explanation that non-criminal punishment is antithetical to the nature of separated judicial power. This conclusion rests on the understanding, outlined by His Honour, that a core purpose of Ch III's separation of judicial power is to ensure that the deeply rooted notions of state power embedded in the conception of punishment as an exclusive judicial function are upheld. The argument of this Part has diverged from Gageler J's account only in more insistently identifying that the Commonwealth's incapacity to legislate for non-criminal punishment derives from Ch III's primary separation rule.

## IV Ch III and State Incapacity to Legislate for Non-Criminal Punishment by Courts

This Part addresses the basis in Ch III for an entrenched categorical prohibition on non-criminal punishment by courts under state laws.[128] For the reasons given in Part III, a prohibition on non-criminal punishment by courts is necessary for the integrity of the primary separation rule. What remains to be demonstrated is that the necessity so identified engages the *Kable* restriction on state legislative power.

### A *The* Kable *Restriction on State Legislative Power*

In *Kable*, the Court first recognised that the integrity of the primary separation rule for Commonwealth judicial power required limits on the functions state courts could perform under state laws. The implication for state legislative power was drawn from the premise that state courts are 'neither less worthy recipients of federal jurisdiction than federal courts nor "substitute tribunals"' and 'there is nothing anywhere in the *Constitution* to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by state courts or federal courts'.[129] As such, states may not legislate court functions that 'are repugnant to or incompatible with' their exercise of separated Commonwealth judicial power.[130] The performance of any such function would

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128 As noted earlier at n 5, the argument in this Part would apply with equal force to territory authority to legislate court functions.

129 *Kable* (n 12) 103 (Gaudron J).

130 Ibid.

invalidly 'inflict an institutional impairment of the judicial power of the Commonwealth'.[131]

It is said that the *Kable* limit denies state legislative power to substantially impair the institutional integrity of a state court.[132] A state court is said to have institutional integrity if it maintains, throughout all its operations as a court, the essential or defining characteristics of a court as a repository for separated judicial power. These characteristics include institutional and decisional independence, the reality and appearance of impartiality, procedural fairness, transparency and reason-giving.[133] The relevant question is not whether a law affecting the functions of a court means that it, as an institution, desists from being a court.[134] In relation to institutional independence, the question might arguably be posed in this way.[135] But other essential characteristics (decisional independence, procedural fairness and reason-giving) must be complied with in all the courts' operations.[136] Derogation from those minimum standards in the exercise of any jurisdiction conferred on a state court is viewed as an institutional impairment on separated Commonwealth judicial power.

Importantly, 'institutional integrity' also refers to the integrity of courts *as repositories of separated judicial power*. The *Kable* restriction is a matter of practical necessity to safeguard the integrity of the primary separation rule by ensuring that the essential characteristics of separated judicial power are protected from institutional impairment. The *Kable* restriction is not concerned with courts in the abstract, or to demarcate court and non-court tribunals as a purely analytical exercise.[137] The *Kable* restriction cannot be severed from the allocative function of

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131 Ibid 143 (Gummow J). See also *South Australia v Totani* (2010) 242 CLR 1, 48 [70] (French CJ); *Kuczborski v Queensland* (2014) 254 CLR 1, 119 [228] (Crennan, Kiefel, Gageler and Keane JJ).

132 This language came to the fore in and following *Fardon* (n 2) and *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45: see William Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 411, 434–6; Lim (n 9) 44–6.

133 *NAAJA* (n 56) 594–5 [39]–[40] (French CJ, Kiefel and Bell JJ).

134 Cf *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153]–[154] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). This is not to ignore the complexity of interpreting 'court' as a constitutional expression, see generally Rebecca Ananian-Welsh, 'CATs, Courts and the *Constitution*: The Place of Super-Tribunals in the National Judicial System' (2020) 43(3) *Melbourne University Law Review* 852 ('CATs, Courts and the *Constitution*').

135 Cf the observation in *Forge* (n 132) 86 [93] (Gummow, Hayne and Crennan JJ) that the institutional integrity of State courts 'is not inevitably compromised by the appointment of an acting judge', but 'may be distorted' 'if a significant element of the court's membership stood to gain or lose from the way in which the duties of office were executed'.

136 This does not mean that the essential decisional and process characteristics prescribe an immutable minimum rule of court operation, but it does mean that each characteristic (evaluative and flexible as it may be) is required to be observed in the exercise of any jurisdiction conferred on the court: see, eg, *SDCV* (n 103) 1019–24 [50]–[68] (Kiefel CJ, Keane and Gleeson JJ), 1034 [129], 1035 [137] (Gageler J), 1048 [194] (Gordon J), 1069 [307] (Steward J). Cf 1052 [218], 1054–5 [231] (Edelman J).

137 Cf Graeme Hill, 'State Administrative Tribunals and the Constitutional Definition of "Court"' (2006) 13(2) *Australian Journal of Administrative Law* 103, 107–12; Ananian-Welsh, 'CATs, Courts and the *Constitution*' (n 134).

the primary separation rule.[138] Its application ensures that the values served by the primary separation rule are realised by ensuring that state courts maintain, at an institutional level, the qualities necessary to 'render [them] able to be vested with the separated judicial power of the Commonwealth'.[139]

## B *Separating* Lim *and* Kable *is Untenable*

Against this background of established principle, it is surprising to see judicial statements in *Garlett* that the *Lim* principle 'has no application to establish the invalidity'[140] of a state law; and that there is 'reason to doubt its significance for the principle stated in *Kable*, at least for the purpose of a conclusion that the *Lim* principle is germane to the institutional integrity of a State court'.[141] It is particularly surprising that these statements come from judges who recognise that the *Lim* principle describes an essential characteristic of Commonwealth judicial power. Kiefel CJ, Keane and Steward JJ appear to say that the *Lim* principle has no application at the state level precisely because it defines the scope of Commonwealth judicial power.[142] Gleeson J writes that a 'strict separation' is required between standards of institutional integrity and the *Lim* principle *because* that principle 'was articulated as a constitutive part of the doctrine of the separation of Commonwealth judicial power'.[143]

This aspect of *Garlett* highlights continuing ambivalence as to when, and why, Ch III implies the same limits on Commonwealth and state capacity to legislate court functions. It is well-understood that the *Kable* restriction on the states cannot *simply* reflect everything Ch III requires in relation to the exercise of Commonwealth judicial power. Ch III does not assimilate state courts with federal courts, and state courts can do things that federal courts cannot.[144] Nonetheless, in the light of *Benbrika [No 1]* it is impossible to 'strictly separate' *Lim* and *Kable*. If the argument in Part III is sound, then non-criminal punishment is antithetical

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138 I note Bateman's argument that due process principles are 'at best unstated assumptions' of the separation doctrine, and therefore find stronger support in an institutional character principle drawn from a constitutional definition of 'court' operating independently of the separation doctrine's allocation function: Bateman (n 132) 432, 441. To the extent that Bateman is here referring to the *second* limb of the *Boilermakers* doctrine, I agree. I do not, however, think that an institutional character principle should be separated from the primary separation rule. I note Bateman proposes a 'functional analysis' within which to identify the essential features of a court that allows regard to be had for the purposes served by separating judicial power (at 439) and concludes that 'attaching a due process principle to the institution of a 'court' suits the underlying goals of the separation doctrine' (at 442).

139 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 106 [183] (Gageler J).

140 *Garlett* (n 1) 902 [40] (Kiefel CJ, Keane and Steward JJ).

141 Ibid 953 [306] (Gleeson J).

142 Ibid 902 [39] (Kiefel CJ, Keane and Steward JJ).

143 Ibid 950–1 [293]–[296] (Gleeson J).

144 See generally Lim (n 9).

to the essential nature of separated Commonwealth judicial power. So understood, the *Lim* principle must inform the *Kable* restriction.

Two methods of justifying a separation between *Lim* and *Kable* can be ruled out. One method would be to posit that the *Kable* restriction does not protect *all* essential characteristics of Commonwealth judicial power. This is contrary to authority and the fundamental purpose of the *Kable* restriction. The *Kable* restriction operates to ensure against institutional impairment of *the judicial power of the Commonwealth*.[145] When it is said that the *Kable* restriction precludes states legislating court functions that are incompatible with 'the very nature of judicial power' or 'the essence of judicial power',[146] the reference is to the judicial power that Ch III makes exclusive to courts. It is not a reference to judicial power as exercised in the Australian states, nor to some 'lowest common denominator' conception that operates for the judicial power in every Australian polity. It is a reference to the essential characteristics of the separated judicial power entrusted to the courts referred to in s 71.

A second method of 'strictly separating' *Lim* and *Kable* would be to recognise that *Kable* protects all essential characteristics of separated judicial power, but to posit that the *Lim* principle does not describe any such characteristic. This reading must also be ruled out. It is contrary to the prevailing views in *Benbrika [No 1]* and other judicial statements of Kiefel CJ, Keane and Steward JJ, and Gleeson J.[147] There is no good reason to downgrade the characteristic of Commonwealth judicial power identified in *Benbrika [No 1]* to 'entrenched but not essential' — even supposing such a category of attributes of separated judicial power exists. On the contrary, there is a compelling case that protecting subjects from non-criminal punishment is a core purpose of vesting Commonwealth judicial power exclusively in Ch III courts.[148]

Thus, in the light of the earlier analysis in Part III, it is untenable to separate the *Lim* principle from the *Kable* restriction on the states. The *Kable* principle protects all essential characteristics of separated Commonwealth judicial power, and the *Lim* principle describes an essential characteristic of separated Commonwealth judicial power.

### C *Separating* Lim *from the* Boilermakers *Restriction is the Answer*

A simple step can be taken to clarify that the essential characteristic of separated judicial power identified in the *Lim* principle informs the *Kable* restriction. That step is to more clearly identify that the essential characteristic of Commonwealth judicial power recognised in *Lim*, *Benbrika [No 1]* and *Garlett* derives from the

145 See above n 131.
146 *Kable* (n 12) 96 (Toohey J).
147 See authorities cited in *Garlett* (n 1) 950 [292] (Gleeson J).
148 See Gageler J's account, discussed above in Part III(B)(1).

primary separation rule — vesting separated judicial power exclusively in courts — and is in no way contingent on the distinct secondary *Boilermakers* restriction on Commonwealth powers.

Taking this step would be justified for the reasons given in Part III. As has been argued, the Commonwealth incapacity recognised in *Benbrika [No 1]* (namely, to legislate for non-criminal punishment by courts) derives from that part of the Ch III scheme which makes Commonwealth judicial power exclusive to courts. Non-criminal punishment is antithetical to 'the very nature of' or 'the essence of' separated Commonwealth judicial power. Accordingly, any involvement of any Ch III court in non-criminal punishment amounts to an institutional impairment of an essential characteristic of separated Commonwealth judicial power.

### D *Summary*

Once the source of the Commonwealth incapacity recognised in *Benbrika [No 1]* is correctly identified, it is uncontroversial to recognise that it should also inform the *Kable* restriction on the states. The incapacity is necessary to safeguard something that is an essential characteristic of Commonwealth judicial power because it embodies a core value served by the exclusive vesting of Commonwealth judicial power in courts. It is precisely the purpose of the *Kable* principle to ensure that such characteristics are protected from institutional impairment in every Ch III court.

## V A More Integrated Way of Thinking About Permitted Court Functions?

Addressing the constitutionality of non-criminal punishment by state courts throws up difficult questions about the impact of federalism on Ch III doctrine. But as the arguments in Parts III and IV have shown, it also presents an opportunity to revisit certain ingrained habits of thinking about the implications of the Ch III scheme for the functions permitted to courts under Commonwealth and state laws. In particular, it may stimulate clearer recognition that the primary separation rule precludes courts exercising functions (whether under Commonwealth or state laws) that are incompatible with the essential characteristics of separated judicial power. This Part sketches out, in broad terms, what this recognition would entail, and its coherence with the Ch III scheme.

### A *What it Means to Recognise a National Restriction on Court Functions Derived from the Primary Separation Rule*

To repeat a point made earlier, it is quite clear that Ch III imposes restrictions on Commonwealth-legislated court functions that do not apply to the states. For example, Ch III denies the Commonwealth *any* latitude to confer non-incidental functions on courts that involve Commonwealth non-judicial power but imposes no equivalent limit on the states. Nothing said in this Part should be taken to imply that Ch III imposes the exact same limits on Commonwealth and state-legislated functions in all respects. Additionally, this proposal concerns court functions, not matters bearing on institutional independence (judicial appointments, tenure and remuneration).

What is being suggested is simply this: Ch III's vesting of judicial power exclusively in courts denies all polities, the Commonwealth and states alike, capacity to legislate court functions that are incompatible with the essential characteristics of separated judicial power. The integrity of the Ch III scheme requires that those essential characteristics of separated judicial power be protected from any institutional impairment, whether by Commonwealth or state laws.

As such, two categories of Ch III restrictions on Commonwealth and state capacity to legislate functions for courts can be identified:

(i) Restrictions that derive from the primary separation rule, in the sense that they are necessary to prevent institutional impairment of those core features of judicial power that the exclusive vesting in courts seeks to protect. These restrictions apply to Commonwealth and state-legislated court functions alike.

(ii) Restrictions attributable solely to the *second* separation rule first recognised in *Boilermakers*. These restrictions apply only to Commonwealth capacity to legislate court functions.

It is beyond the scope of this article to work through a detailed implementation of the boundary between these two categories of restriction.[149] However, some brief observations can be made. First, making this distinction would not disrupt established doctrine regarding *state* power to confer functions on state courts. The only restrictions applicable to the states on this approach would be those that find support in the rationale for the *Kable* restriction on state laws. Second, adopting this approach would require a small adjustment in thinking about restrictions on *Commonwealth* powers. Specifically, it would require a more precise articulation

[149] Cf more developed proposals made in, eg, Sarah Murray, 'Giving Chapter III Back Its Constitutional Mojo? — Lessons from State Courts and Beyond' (2014) 40(1) *Monash University Law Review* 18; Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66 ('Purposive Formalism').

of restrictions that operate on Commonwealth-legislated court functions by reason of the primary separation rule. This would draw on the foundation provided in authority and scholarship discussed earlier (Part III). Third, the second category of restriction is important. It recognises the existence of separate and distinct restrictions at the Commonwealth level,[150] namely those that rest *entirely* on the Commonwealth's inability to confer non-judicial power on courts (outside the performance of strictly incidental functions). As such, the proposed approach contemplates that the *Boilermakers* restriction may impose limits on Commonwealth capacity to legislate court functions that do not apply to the states. For instance, the *Boilermakers* restriction would invalidate any Commonwealth law purporting to authorise federal courts to make orders that lack the dispositive effect on rights, or the intrinsic legal efficacy, that is present in an exercise of judicial power.[151]

This way of thinking would not produce a uniform institutional integrity jurisprudence (because it applies to the evaluation of *functions* and does not consider institutional independence), and nor would it produce a single test for permissible court functions (because the separate and additional role of the *Boilermakers* restriction is maintained for Commonwealth functions). But it would support a unified jurisprudence in relation to those restrictions on court functions that are drawn to prevent institutional impairment of those core features of separated judicial power that the exclusive vesting in courts seeks to protect. Within this unified jurisprudence on court functions, attention can better focus on the important work of articulating and protecting the values served by vesting judicial power exclusively in courts.[152]

### B *Clarifying the Separate and Distinct Purpose of the* Boilermakers *Restriction*

Recognising that a uniform national restriction on court functions flows from the primary separation rule is not an attack on the *Boilermakers* restriction. Rather, it requires a small adjustment in thinking about Ch III restrictions on the Commonwealth, which creates space to register the distinct purpose and effect of the *Boilermakers* restriction.

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150 Cf the two-tiered approach for Commonwealth functions proposed in Welsh, 'Purposive Formalism' (n 149), in which a compatibility criterion is applied only if the nature of a function is unclear. That approach situates compatibility as one factor assisting in defining judicial power. See also Rebecca Welsh, 'Incompatibility Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22(4) *Public Law Review* 251, 263.

151 See, eg, the function of making a 'declaration of incompatibility' with a statutory bill of rights considered in *Momcilovic v The Queen* (2011) 245 CLR 1.

152 An outcome with broad support in the scholarship, see especially Wheeler (n 98) above. See also Zines (n 24) 298–9; Welsh, 'Purposive Formalism' (n 149) 5–105.

As evidence that the change is minimal, consider that Gageler J has in substance recognised that it is the primary separation rule which prohibits Ch III courts dispensing non-criminal punishment. In *Garlett*, his Honour presented the *Boilermakers* and *Kable* restrictions as 'complementary' secondary implications necessary to preserve Ch III's primary separation rule:

> The restriction on Commonwealth legislative power associated with *Boilermakers* and the restriction on State and Territory legislative powers associated with *Kable* are … complementary implications from Ch III's separation of the judicial power of the Commonwealth. Each is a structural implication implicit in, and directed to the preservation of, the distinctive nature of the separated judicial power of the Commonwealth. Each serves ultimately to maintain the integrity of the exercise of that judicial power …
>
> The *Kable* restriction on State and Territory legislative power and the *Boilermakers* restriction on Commonwealth legislative power have a common purpose and complementary operation.[153]

This leads Gageler J to observe that there is an overlap between *Kable* and *Boilermakers* restrictions on legislative power:

> [I]f a function is non-judicial for the reason that having that function would impair the institutional integrity of a court, legislative conferral of that function must be offensive to the *Kable* restriction on State and Territory legislative power in the same way as it is offensive to the *Boilermakers* restriction on Commonwealth legislative power. In respect of a non-judicial function of that nature, the *Boilermakers* restriction and the *Kable* restriction are indistinguishable.[154]

This helpfully identifies that convergent restrictions on Commonwealth and state court functions derive from the primary separation rule. It would be a very small, incremental adjustment to give more overt recognition that what is being described here is a singular implication from the primary separation rule, precluding any court functions that are incompatible with the nature of separated judicial power.

Taking this step can avoid unnecessary debate regarding Gageler J's portrayal of the *Boilermakers* restriction as one that has a 'common purpose' with the *Kable* restriction. This is not a widely shared view of the *Boilermakers* restriction.[155] Some might ask why, if the *Boilermakers* and *Kable* restrictions do

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153 *Garlett* (n 1) 914–15 [119]–[122] (Gageler J).

154 Ibid 915 [123] (Gageler J). Cf *SDCV* (n 103) 1030–1 [106] (Gageler J).

155 Criticisms of the second limb of *Boilermakers* are widespread. See generally Murray (n 149) 200–5. A more radical critique, encompassing both limbs of the *Boilermakers* doctrine, is made in Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers* and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265.

have the same rationale, should the additional strictures of the *Boilermakers* restriction on Commonwealth court functions be maintained?[156]

The approach proposed in this article allows for the distinct purpose and effect of the *Boilermakers* restriction, operating independently of a national restriction on court functions drawn directly from the primary separation rule.[157] Recognising that the primary separation rule generates important restrictions on Commonwealth court functions (as this article proposes) clarifies the conceptual underpinning of a values-driven approach that is, in substance, implied by judicial accounts such as Gageler J's in *Garlett*.[158] And in doing so, it creates space for Ch III doctrine to better register the distinct rationale and effect of the *Boilermakers* restriction, which can be seen to supplement (but not sustain) the core constraints that the primary separation rule imposes on Commonwealth and state-legislated court functions alike.

### C *Coherence with Ch III's Primary Separation Rule for State Judicial Power*

There is another aspect of recent Ch III doctrine that supports the emergence of a more integrated way of thinking about the courts as repositories of separated judicial power. This arises from the ruling in *Burns*[159] that Ch III makes *state* judicial power in federal subject-matters exclusive to state courts.[160] It is not suggested that *Burns* establishes an integrated institutional integrity jurisprudence. Rather, it is conducive to a more 'joined up' way of thinking about permissible court functions.

The *Burns* majority (Kiefel CJ, Bell and Keane JJ in joint reasons; Gageler J writing separately) drew on the premise for the primary separation rule for *Commonwealth* judicial power, that Ch III is the only source of Commonwealth power to confer or invest judicial power in the subject-matters identified in ss 75 and 76.[161] On the assumption that Commonwealth legislative power in relation to adjudication of these matters is both paramount and limited, their Honours concluded that Ch III impliedly denies *state* legislative power to outflank the choices given to Commonwealth parliament in relation to adjudication of those

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156 See arguments favouring the replacement of *Boilermakers*' second limb with a general or structured incompatibility criterion that operates on all Ch III courts, eg, Murray (n 149) 211–27; Appleby (n 155) 280–6; James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22(2) *Public Law Review* 113, 135–6; McLeish (n 9) 265.

157 As discussed in Part III(A)(2) above.

158 Cf Wheeler (n 98) explaining her preference for the approach of Deane J over Gaudron J in relation to the derivation of 'due process' protections from the *first* rather than *second* limb of the *Boilermakers* doctrine.

159 *Burns* (n 13).

160 For an argument that the *Burns* restriction would apply to the territories, see Stellios, *The Federal Judicature* (n 5) 606–8.

161 *Burns* (n 13) 335 [43], 341 [55], 345 [64] (Kiefel CJ, Keane and Bell JJ), 346 [68], 364 [119] (Gageler J).

subject-matters.[162] Specifically, Ch III necessarily denies Australian states the constitutional option of vesting judicial power in federal subject-matters in non-courts.

Relevantly to the present discussion, the ruling in *Burns* implicitly advances a new insight into the constitutional conception of those state institutions that are 'courts' for the purpose of Ch III. Specifically, *Burns* makes clear that Ch III requires a conception of state courts as repositories of separated state judicial power. Even though Ch III does not make *all* state judicial power exclusive to courts, it does, nonetheless, require a conception of state courts as the only state institutions competent to exercise state judicial power in relation to federal subject-matters.[163] In the light of *Burns*, the 'attribution' of courts as state courts is not antithetical to a conception of them as repositories of separated judicial power.[164]

More than this, the rationale for the *Burns* restriction on state legislative power lends conceptual support to a more integrated way of thinking about the functions permitted to courts as repositories of separated judicial power. *Burns* recognised that the states cannot have any wider legislative power in relation to the adjudication of federal subject-matters than the Commonwealth.[165] This means, for instance, that the states cannot confer judicial power on courts in federal subject-matters other than in 'matters'.[166] One way of expressing this is that Ch III contains an exhaustive statement of the kind of judicial power which may be conferred or exercised in respect of the subject-matters set out in ss 75 and 76.[167] *Burns* recognises that there is a uniformity to the nature of separated judicial power throughout the Australian federation. All of the judicial power that Ch III vests exclusively in courts is of like nature, whether it be Commonwealth judicial power or state judicial power in federal subject-matters.

Viewing state courts as repositories of separated state judicial power will not have any practical effect on state *court* operations. This is because longstanding Commonwealth legislation ensures that all jurisdiction exercised by state courts on federal subject-matters is federal jurisdiction.[168] But the point of present relevance concerns the Ch III scheme underlying that Commonwealth legislation.

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162 Ch III empowers the Commonwealth parliament to replace a state court's *state* jurisdiction with *federal* jurisdiction, so that appeals lie directly to the High Court; or to make a federal court's jurisdiction exclusive of that which belongs to or is invested in state courts: see ibid 356–7 [96]–[99] (Gageler J) and, to similar effect, 335–7 [43]–[45] (Kiefel CJ, Keane and Bell JJ).

163 For a contrary view, see Foster (n 31) 240.

164 On the attribution of State courts, compare Lim (n 9) writing before *Burns* (n 13) was handed down.

165 See especially *Burns* (n 13), 358–60 [101]–[106] (Gageler J).

166 *Commonwealth v Queensland (Queen of Queensland Case)* (1975) 134 CLR 298. See ibid, 358–60 [101]–[106] (Gageler J).

167 Ibid 328 (Jacobs J, McTiernan J agreeing); *Burns* (n 13) 360 [106] (Gageler J). See to similar effect 338–9 [49] (Kiefel CJ, Keane and Bell JJ), 'the exercise of adjudicative authority in respect of the matters listed in ss 75 and 76 in accordance with Ch III, and not otherwise, ensures that adjudication of all such matters occurs consistently and coherently throughout the federation.'

168 *Judiciary Act 1903* (Cth) ss 39, 39A. See *Burns* (n 13) 331 [26] (Kiefel CJ, Keane and Bell JJ).

The *Burns* perspective on Ch III offers conceptual support for a more integrated way of thinking about the nature of courts as repositories for separated judicial power. At the very least, *Burns* clarifies that *some* state judicial power is exclusive to courts.[169] In a more general sense, *Burns* offers a rejoinder to rhetoric portraying the *Kable* restriction as something imposed on states from 'outside' their own constitutional arrangements, serving the Commonwealth's interests. Because Ch III makes some state judicial power exclusive to courts, and so requires a conception of state courts as repositories for separated state judicial power, each autonomous state political community has an interest in courts maintaining the standards of institutional integrity required by Ch III's vesting of judicial power exclusively in courts. Developing a strand of institutional integrity jurisprudence grounded in Ch III's primary separation of judicial power is, therefore, significant to the constitutional structure of every polity in the Australian federation.

## VI Conclusion

This article has argued that Ch III supports a national prohibition on non-criminal punishment by courts. It has addressed two points of contention in *Garlett* that are impeding recognition that Ch III has this effect, and offered two corresponding solutions: first, recognising as settled that separated judicial power cannot be exercised to dispense non-criminal punishment and, second, recognising that this prohibition is implied to uphold the integrity of the primary separation rule at the centre of the Ch III scheme. The integrity of the primary separation rule requires that courts do not exercise any functions (whether under Commonwealth or state laws) antithetical to the nature of separated judicial power, such as non-criminal punishment. In making this argument, the article has proposed a more integrated way of thinking about permissible court functions throughout the Australian federation. This involves more clearly recognising that Ch III's primary separation rule implies a national prohibition on court functions that are incompatible with the essential nature of separated judicial power. As the article has argued, this is a viable step, consistent with authority. Taking this step will significantly clarify a difficult area of Ch III doctrine by pinpointing where, and why, Ch III generates identical limits on Commonwealth and state power to legislate court functions.

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169 For example, following *Burns* (n 13), it can no longer be said that State legislative power to entrust adjudication and punishment of criminal guilt to non-courts is 'as plenary as that of the Imperial Parliament': cf *Garlett* (n 1) 952 [301] (Gleeson J), quoting *Fardon* (n 2) 600 [40] (McHugh J).

# THE 23RD WA LEE EQUITY LECTURE

# SNARK HUNTING: A SEARCH FOR TRACING'S UNDERLYING RATIONALE

## 17 NOVEMBER 2022, BANCO COURT, SUPREME COURT OF QUEENSLAND

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## I THE DEBATE

The underlying rationale for tracing in equity is a much-debated topic and has seemingly resulted in more theories than there are commentators. For a relatively minor area of the law, it has attracted substantially more than its fair share of attention from academic theorists, each of whom vie to include it as part of their particular speciality. They include the restitutionalists; those who regard tracing as an inherent right of property; those who regard it as underpinned by the Roman Law notion of *obligatio*;[1] and those who regard it as the enforcement of fiduciary duties.

The intense debate necessarily reflects a lack of jurisprudential consistency in the authorities and there are myriad doctrinally diverse cases from which academics can choose to support their respective theories.

## II WHY SEARCH FOR AN UNDERLYING RATIONALE?

It is not irrational to ask, why does it matter that there be an identifiable basis for equitable tracing? It is well understood as a process by which a person, whose right, interest or claim in respect of property has been misapplied, seeks to advance a proprietary claim against different property which can be regarded as a substitute for the original property.[2] Hence, it may be regarded as no more than a useful tool which applies in a variety of circumstances, such that there is no need

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1 See Rachael Short, 'A Common Law *Vindicatio*? Property Rights as an Independent Basis for Restitution' (2022) 51(2) *Australian Bar Review* 264.

2 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 252 [89] (Allsop P), 269–70 [179]–[180] (Campbell JA and Handley AJA agreeing).

DOI: 10.38127/uqlj.v43i1.9341

to identify one 'Very Big Idea', as Gageler J termed it, which might provide coherence to it.[3]

However, the identification of a consistent doctrinal basis is essential for transparency and certainty in the application of legal principle. Permitting a claimant to utilise the tracing process in whimsical ways, as has occurred with the concept of 'backward tracing', leaves a stain on the administration of justice.

Nevertheless, as we shall see, the search for an underlying rationale for tracing faces impediments similar to those adverted to by Lewis Carroll in his nonsense poem, 'The Hunting of the Snark'. It may be that no one person is suitably equipped for the task; the object of the inquiry may well be completely ethereal — and the paths to the anticipated conclusion point in many different directions. Worse still, the moment that that which has been searched for is located, it vanishes.

## III What is Tracing?

If one starts by asking, 'what is tracing?', the confusion immediately commences. As the former Court of Appeal judge, the Hon J Campbell KC, has observed,[4] the word 'tracing' is an imprecise term incapable of exact legal definition, and its generally accepted meaning has altered over time. He correctly noted that lawyers use the expression with different meanings or conceptions, and there is sometimes debate as to whether the awarding of a proprietary remedy in some of the authorities occurred by reliance on tracing or not.

The present discussion is concerned with that form of tracing where the owner of misapplied property seeks to assert a proprietary remedy over different property, which is said to be a substitute for the original. This is referred to by Campbell KC as 'archetypal tracing', which is a useful nomenclature.

Even when one settles on what is the nature of tracing, a further dispute arises as to what it is that is traced. As will be discussed, some perceive that the tracing is of a right in respect of property or a proprietary right, others that it is of 'value', while still others eschew a metaphorical analysis and assert that the end result of the tracing process is the creation of a new right or, in other words, that tracing does not really exist at all.

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3 See the salutary observations of Gageler J in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 598 [80].

4 J C Campbell, '*Republic of Brazil v Durant* and the Equities Justifying Tracing' (2016) 42(1) *Australian Bar Review* 32, 40, 50.

## IV Tracing and Insolvency

In the search for legal principle, consideration should be given to outcomes. For tracing, which is particularly important in the insolvency context, one outcome can be that a successful claimant will enforce a proprietary claim against a person which takes precedence over the claims of that person's other creditors. So, if it is underpinned by no more than unperformed fiduciary obligations, why should it confer an advantage over creditors to whom obligations have also been breached?

## V What Generates the Right to Trace?

That which divides some commentators concerns the identity of tracing's essence, or that which justifies a party's invocation of the tracing process. It may well be that a satisfactory answer will provide some identification of a coherent exegetical principle for tracing more generally.

The issue can be contextualised by the following example.

T is the trustee of a trust of which B is the beneficiary. A painting worth $10,000 is part of the trust assets, but T takes it from the trust and keeps it at his house. T then sells it and, after mixing the proceeds in a bank account, buys another painting, paying $10,000 from the account. Subsequently, T gives the second painting to his friend, V, who keeps it. The artist who painted the second painting dies and the value of his works increases tenfold so that the substitute painting is now worth $100,000. B seeks to recover the substitute painting from V's insolvent estate.

In equity, B is entitled to trace their interest through the transactions, including through the mixed funds, and make good a claim to the beneficial interest in the $100,000 painting.

But what was it in the nature of B's right, claim or interest in relation to the original painting or in the relationship with the trustee that enabled the invocation of such a process, which resulted in such a windfall?

As mentioned above, the theories are abundant and diverse:

(a) One view, which has growing support in Australia, is that the right to invoke tracing in equity stems from the presumptive paramountcy which our society affords to individual property ownership. In general terms, the bundle of rights which constitute ownership of property includes a right over or with respect to anything for which the original property is substituted. This is the approach which Lord Millett strongly favoured in obiter in *Foskett v McKeown*.[5]

[5] [2001] 1 AC 102, 127–9. See also 108 (Lord Browne-Wilkinson), 115 (Lord Hoffman).

(b) A view which, despite much debate,[6] persists in the United Kingdom and also in Australia to some extent, is that the right to invoke tracing in equity is a consequence of the trust or fiduciary obligations which a person in control of property of another, owes to that other.[7] So where T has sold the painting and cannot anymore hold it on trust for B, he is required to do the 'next best thing' and hold the proceeds or substitute painting on trust.[8] The theory runs into difficulties when the property finds its way into the hands of a third-party volunteer, although there it is argued that such a person has no greater interest than the original errant trustee.[9]

(c) A different approach appears from the rather excellent analysis of Dr Aruna Nair in her work *Claims to Traceable Proceeds: Law, Equity and the Control of Assets*.[10] Her theory is that the right to trace is derived from the inherent power of one person to deal with assets in which another person has an interest in such a way to defeat that interest, and the obligations which are attached to that power. Her analysis provides a solid taxonomy for the wide variety of cases where tracing has been allowed, including those in which the equitable powers are non-existent or irrelevant. It also explains why some equitable rights do not generate a right to trace.

(d) A somewhat related view is expressed by Mohammud Jaamae Hafeez-Baig and Jordan English in *The Law of Tracing*.[11] They also present a compelling analysis of the authorities and suggest that the right to invoke tracing arises from the unauthorised use of rights to acquire substituted rights and that the party seeking to trace in equity becomes entitled to newly created equitable proprietary rights against those rights which were acquired.

(e) The view advanced in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*[12] is that the right to trace is not dependent upon any antecedent proprietary interest, but on the person seeking to trace having a sufficient right in relation to property which arises from a trust

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6 See the discussion in Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press, 2021) 153 [5.106].

7 See, eg, *Boscawen v Bajwa* [1996] 1 WLR 328, 335 (Lord Millett); *CFHW Pty Ltd v Burness* [2014] VSC 451 [35] (Warren CJ).

8 See the observations of Campbell (n 4) 58–9. See also *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 106–7 [159]–[166] (Spiegelman CJ).

9 *Foskett v McKeown* (n 5) 132 (Lord Millett).

10 Aruna Nair, *Claims to Traceable Proceeds: Law, Equity and the Control of Assets* (Oxford University Press, 2018).

11 Hafeez-Baig and English (n 6).

12 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2014) [4-110].

or other fiduciary duty. That right does not need to exist prior to any wrongful dealing with the property in question; rather, it may arise subsequently.

(f) Not unexpectedly, the restitutionalists argue that the right to trace is justified by the principle of 'unjust enrichment'.[13] Although an initial reaction might be to say, 'they would say that, wouldn't they',[14] the strength of that analysis is enhanced by the growing support for the proprietary interest rationale for tracing.

These theories are not entirely disparate and they tend to overlap, have similar components, or emphasise different aspects of shared principles. In general, but not exclusively, most accept that the party seeking to trace held, at least at one stage, a right, claim or interest in relation to property which has been adversely affected by the actions of another and has been the subject of some form of substitution.[15]

### A *An Equitable Proprietary Interest in Property or a Proprietary Right*

Though each of these theories could be discussed at length, this paper is focussed on that issue which arises regularly across these theories, being whether the right to trace is based in the obligation of a fiduciary or in the claimant's interest with respect to the misappropriated property.

There is insufficient opportunity on this occasion to evaluate the debate as to the nature of proprietary rights as opposed to rights with respect to property, despite its essentiality to the coherence of some theories. In summary, those who assert that the right to trace stems from a fiduciary's equitable obligation commence with the proposition that, save in the case of a beneficiary of a vested fixed trust, beneficiaries do not have any proprietary interest at all in the subject matter of the trust. Rather, they have equitable rights which are engrafted onto the trustee's rights over the trust property,[16] and it is that which enables them to compel the trustee to exercise their rights in a particular way.[17] While that analysis of beneficial rights can be accepted, it must be acknowledged that, historically, the authorities have regarded a beneficiary's beneficial interest in a trust as a proprietary interest of sorts, regardless of whether it was vested.[18]

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13 James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 100–13.

14 To paraphrase Mandy Rice Davies.

15 Hafeez-Baig and English (n 6) 115–116 [5.2].

16 Heydon, Leeming and Turner (n 12) [4]–[110].

17 *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524, 560–1 [82] (Bell, Gageler and Nettle JJ).

18 *Foskett v McKeown* (n 5) 108, 127 (Lord Millett).

In any event, so the theory goes,[19] as beneficiaries of all trusts are entitled to rely upon equitable tracing, it follows that the underlying rationale for it is not the existence of any proprietary interest, but a consequence of the fiduciary's continuing obligations.

But there is a danger in seeking to cleave the concepts of property rights and proprietary interests. After all, 'ownership' is merely a bundle of rights with respect to an asset or thing in connection with which, in a Hohfeldian sense, others have obligations. Those ownership rights, which are separate from the physical asset itself, include the right or, perhaps, the power to alienate, destroy, sell, charge as security and lease amongst other rights.[20] They also include concomitant rights against other persons who interfere with those rights. So, as proprietary interests may be merely an aggregation of various rights with respect to property, the distinction between a proprietary interest and a beneficiary's rights with regard to trust property may well be more chimerical than real.

For present purposes, it suffices to generalise somewhat and proceed upon the presumption that a person has a proprietary interest in an asset if they hold certain specific rights in relation to it. In order to avoid the ire of some theorists, it might be best to describe these rights or interests as 'property rights' rather than 'proprietary interests'.

## VI What is Traced?

A debate also rages between the theorists about precisely what it is that is 'traced', though, here too, the discussion is fuelled by inconsistency in the nomenclatures used. Nevertheless, its discussion has the potential to illuminate tracing's underlying rationale.

It is commonly accepted that in the tracing process the property right neither enlarges nor diminishes and nor does it change its character as it is 'transferred' from property to property.[21] That is so regardless of whether the property to which the right attaches is sufficient to satisfy the value of the original owner's interest or has increased in value. In *Foskett v McKeown*, Lord Millett held in relation to the nature of the right which is traced:

> That [the nature] will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset. If he held only

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19 Heydon, Leeming and Turner (n 12) [4]–[110].

20 The strength of that interest will depend upon the admixture of the rights which the person has, including whether there is a right to possession: see the discussion in *Yanner v Eaton* (1999) 201 CLR 351, 365–8 [17]–[25] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

21 Lionel Smith, *The Law of Tracing* (Oxford University Press, 1997) 348.

> a security interest in the original asset, he cannot claim more than a security interest in its proceeds.[22]

Returning to the example previously postulated, by the tracing process B is entitled to assert a beneficial interest in the substitute painting even though its value has increased tenfold. But what is it that is traced through the transactions and why is B now entitled to the painting worth $100,000?

In *Foskett v McKeown*,[23] Lord Millett identified 'value' as the subject matter of the tracing process and that which can be asserted in any substitute property. But it was not monetary value to which his Lordship was referring. In his reasons, he was concerned with the application of the tracing links which operate to identify whether the original asset is represented by a substitute asset or part of it and in the course of that consideration he identified that '[t]he transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment'.[24] By this he clarified that it is the right of property which is the 'value' inherent in an asset.[25]

In that way, 'value' 'reifies that which inheres in an asset and which can be seen as passing into another form when that asset is exchanged for another asset'.[26] It is difficult to conceive of this 'value' as being other than the original owner's property or proprietary right.

Some of the theories tend to converge around this issue. At the least, it is recognised that a property right which existed in relation to the original misappropriated property can be traced through the transactions and be applied as against the substitute asset. The legal nature of that right does not alter, even if the monetary value of the proceeds or substitute asset fluctuates.[27]

Given the nature of this area of discourse, it goes without saying that this is not a universally accepted concept. Hafeez-Baig and English postulate that nothing is traced; rather, the original right in respect of property disappears and is replaced by a new right.[28] They surmise that the confusion arises consequent upon the adoption of metaphorical explanations for aspects of tracing, such as 'value' and 'property', which presuppose there exists something to trace.[29] While that might be fair comment, there is also some irony in it, given that the use of the word 'tracing' is, itself, entirely metaphorical.

Nevertheless, there is a degree of acceptance, at least in the authorities, that tracing is concerned with ascertaining property which has been substituted for the original property in respect of which a claimant's property right existed and

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22 *Foskett v McKeown* (n 5) 128.
23 Ibid.
24 Ibid 127.
25 Ibid 130.
26 Smith (n 21) 16. See also the discussion of the nature of value in Nair (n 10) 57–82.
27 See *Foskett v McKeown* (n 5) 128 (Lord Millett).
28 Hafeez-Baig and English (n 6) 6 [1.20].
29 Ibid 11–12 [1.34].

in which that right now inheres. In other words, that which is traced is a right of property.[30] That is consistent with the paramountcy which the common law, and Western jurisprudence in general, has historically attached to property rights. Such rights are not easily defeated by unauthorised transactions. They will survive the wrongful misappropriation of the subject matter to which they attach and can annex themselves, in the sense of being exigible against third parties, to substitute property.[31]

Such a conclusion supports the view that it is the existence of the right, as opposed to any concomitant duties attached to it, which underpins the right to trace. However, the nature of that right remains elusive and, particularly so, in the light of the considerable focus in the authorities on the requirement that the right be derivative of a fiduciary duty. Many theorists rely on that requirement to support the argument that the right to trace is derivative of the obligations imposed by the duty rather than any specific right in relation to property.

## VII Is a Pre-Existing Fiduciary Relationship a Requirement?

A brief perusal of the salient English authorities reveals the evolution of the precondition for tracing of the presence of an initial fiduciary relationship.

In *Re Hallett's Estate*,[32] the point made by Sir George Jessel MR was that, where the property dealings in question involved a fiduciary, the party whose interest had been misapplied might utilise the processes of tracing provided in the Courts of Equity. He contrasted that with the position where the loss of the interest in property had occurred in the course of a common law relationship, the same relief there being unavailable. There is nothing in his reasons which suggests that the existence of a fiduciary duty did other than provide a method by which access to the Courts of Equity arose. Nevertheless, the case has long been seen as the epicentre of the fiduciary duty requirement.

The case was, for a while, also taken as standing for the proposition that the right to trace could only be applied against the fiduciary themselves. That was rejected in *Re Diplock*,[33] where it was held that the right could be used to identify a claimant's property in the hands of a third party. There, the Court of Appeal recognised that a beneficiary of a wrongfully distributed estate could trace into the bank accounts of volunteers who had received part of the estate, even where the funds received were mixed with their own. The Court said that, so long as 'there was originally such a fiduciary or quasi-fiduciary relationship between the

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30 See *Foskett v McKeown* (n 5) 127 (Lord Millett).

31 Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63(6) *Modern Law Review* 905, 910–911.

32 (1879) 13 Ch D 696, 710.

33 *Re Diplock*; *Diplock v Wintle* [1948] Ch 465, 540 (CA), affd sub nom *Ministry of Health v Simpson* [1951] AC 251 (HL) ('*Re Diplock*').

claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant',[34] the right to trace existed. In this way, equity could 'protect and enforce what it recognises as equitable rights of property which subsist until they are destroyed by the operation of a purchase for value without notice'.[35] The Court said:

> [E]quity may operate on the conscience not merely of those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers *provided that as a result of what has gone before* some equitable proprietary interest has been created and attaches to the property in the hands of the volunteer. [36]

The reference to 'what has gone before' would encompass the creation of an equitable interest in property consequent upon the presence of an anterior fiduciary duty with respect to it.[37] But that is not necessarily the only way in which such an interest might arise. This appears to have been accepted earlier in the Court's reasons, where it held that the tracing process was available where the claimant had established as the starting point 'the existence of a fiduciary or quasi-fiduciary relationship *or* of a continuing right of property recognised by equity'.[38]

The reference to '*or* of a continuing right of property recognised by equity'[39] has been latched onto by commentators as eschewing any singularity in the nature of the interests which attract the right to trace. To a similar effect were the Court's subsequent observations, where it referred to the powers of equity to 'protect and enforce what it recognises as equitable rights of property which subsist until they are destroyed by the operation of a purchase for value without notice'.[40] If, therefore, the right to trace arose from the existence of the proprietary interest rather than the fiduciary duty, there was no reason why third party recipients of property, who were not bona fide purchasers for value without notice, would not be subject to the tracing rules.[41]

On this issue, the decision of the House of Lords in *Foskett v McKeown* is pivotal. Although the Court confirmed the requirement of a relevant fiduciary relationship, numerous observations in the leading speech of Lord Millett indicated a clear preference for the view that tracing's foundation was the existence of a proprietary interest. In his Lordship's analysis he recognised that, by the tracing process, a claimant asserts a 'continuing beneficial interest' in the

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34 Ibid 467.

35 Ibid 525.

36 Ibid 530 (emphasis added).

37 This being the proposition for which *Re Diplock* (n 33) was said to stand for by Goulding J in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, 113, 118–20 ('*Chase Manhattan Bank*').

38 *Re Diplock* (n 33) 520 (emphasis added).

39 Ibid (emphasis added).

40 Ibid 525.

41 The conclusion reached by the Court of Appeal in *Re Diplock* (n 33) had been presaged by the High Court of Australia some 38 years before in *Black v S Freedman & Co* (1910) 12 CLR 105 ('*Black*').

substituted asset as the result of a transmission of their property rights from one asset to its traceable proceeds such that tracing is an incident of property rights. He held:

> A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice.[42]

So adamant was his Lordship that the underlying justification for tracing was the property interest that, in obiter, he moved to denounce the existence of an initial fiduciary interest as a precondition. He said:

> Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough. The existence of two has never formed part of the law in the United States … There is certainly no logical justification for allowing any distinction between them to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition for applying equity's tracing rules. The existence of such a relationship may be relevant to the nature of the claim which the plaintiff can maintain, whether personal or proprietary, but that is a different matter. I agree with the passages which my noble and learned friend, Lord Steyn, has cited from Professor Birks's essay 'The Necessity of a Unitary Law of Tracing', and with Dr Lionel Smith's exposition in his comprehensive monograph …[43]

His Lordship, however, considered that the case before him was not the occasion to explore those matters further, given that it was clear that the proprietary interest in question was the subject of a fiduciary relationship. Similar views were expressed by Lords Browne-Wilkinson[44] and Hoffman.[45]

Despite Lord Millett's obvious reservations, *Foskett v McKeown* recognised that the established position in England was that the existence of a fiduciary duty, and possibly a pre-existing one, was essential to the invocation of tracing in Equity.

It might be that the perceived requirement of a fiduciary duty with respect to misappropriated property is merely a function of its almost ubiquitous presence in cases where tracing in equity is relied upon. Where a fiduciary duty exists with respect to property, there is often a bifurcation of interests in, or rights with respect to, that property which provides the opportunity and ability for the fiduciary effectively to dispose of the property to a third party. A trustee, executor or agent has both the power and capacity to dispose of title to property in respect

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42 *Foskett v McKeown* (n 5) 127.

43 Ibid 128–9 (emphasis added), citing Austin Wakeman and William Franklin Fratcher, *Scott on Trusts* (Little, Brown, 4th ed, 1989), 605–9; P Birks, 'The Necessity of a Unitary Law of Tracing' in R Cranston (ed), *Commercial Law: Essays in Honour of Roy Goode* (Clarendon, 1997), ch 9; Smith (n 21) 120–30, 277–9, 342–7.

44 *Foskett v McKeown* (n 5) 108.

45 Ibid 105.

of which the beneficiary has rights, so the occasions on which a party will need to rely upon tracing in Equity will most frequently arise from those circumstances. Thus, it may simply be that the presence of an anterior fiduciary relationship is the cause of the need to invoke tracing in equity, rather than a precondition for it.

### A *The Position in Australia*

It will come as no surprise that there is a lack of uniformity in Australia as to whether the existence of a fiduciary relationship is a precondition to a right to trace.

In 2014, in *CFHW Pty Ltd v Burness*, Warren CJ observed that 'the authorities make it clear that in order to rely on equitable tracing and the subsequent constructive trust, the party seeking that remedy must show a breach of fiduciary duty'.[46] That emphatic statement was apparently a reflection of the force of *Re Diplock*,[47] on which the Chief Justice relied.

A perhaps similar view was adopted by Colvin J in *Goldus Pty Ltd v Cummins (No 4)*, where his Honour said:

> What the above analysis [in *Grimaldi v Chameleon Mining (No 2)* ('*Grimaldi*')] indicates is that in the absence of a 'proprietary base' (that is, a foundational property claim) on the part of the claimant which takes the form of a vested beneficial interest in trust property, including such an interest that arises by reason of the recognition of a remedial constructive trust, there is an insufficient foundation for the tracing process. Equity only affords the characteristic of property that allows for tracing into the hands of third parties where the interest takes the form of a vested beneficial interest in trust property.[48]

Although his Honour referred to a proprietary base, he identified its necessary attachment to the duties arising from either a fixed trust or a constructive trust, which, in context, effectively means a breach of fiduciary duty. His Honour then said:

> Putting to one side the effect of the Australian possibilities of a remedial constructive trust and the application of the reasoning in *Black v S Freedman & Co* there appears to be no Australian decision that has embraced a complete departure from the requirement that there must be a fiduciary relationship before tracing can apply on the basis of an equitable foundation.[49]

The decision in *Grimaldi* is important.[50] Part of that extremely complex and, at times Byzantine, decision concerned whether company property which had been misapplied by directors could be traced. In the context of the authorities, the difficulty was that there was no antecedent fiduciary duty owed to the company

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46 [2014] VSC 451 [35].
47 *Re Diplock* (n 33).
48 [2021] FCA 1095, 73 [288], citing *Grimaldi v Chameleon Mining (No 2)* (2012) 200 FCR 296 ('*Grimaldi*').
49 Ibid 73–4 [290], citing *Black* (n 41).
50 *Grimaldi* (n 48).

from which any equitable proprietary interest arose. The company, itself, owned the property which had been misapplied and transferred through the directors' exercise of their powers. This absence of an initial fiduciary duty was overcome by the application of the principle in *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*,[51] that a misapplication of company property by directors involves a breach of their fiduciary duties even though they do not hold any title in it, and a third party recipient with knowledge of the breach of duty becomes a constructive trustee of it for the company. In that case, Buckley LJ said:

> A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co* …). So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.[52]

So, in *Grimaldi*, the difficulty was that the improper transfer of property occurred prior to the company holding any equitable interest in it that was derivative upon a breach of fiduciary duty, and there was no pre-existing beneficial interest which the authorities seemed to require. Nevertheless, the Full Court appeared to hold that it was sufficient if the property in respect of which the right was held passed through the hands of a party who owed the owner a fiduciary duty. Certainly, there was express authority for that proposition. In *Re Global Finance Group Pty Ltd*, McLure J had held: 'Further, it is probably still the case that the right to trace in equity (but not of course at law) requires that the property being traced *has passed into or through* the hands of a fiduciary'.[53]

Such an analysis might be said to be supported by those cases where the right to trace has been recognised in relation to the equitable interest in property which arises in consequence of a fiduciary's wrongful conduct, such as where an agent receives a bribe.[54] The same point arises where tracing is permitted in relation to the proceeds of a payment made by mistake.[55] In such cases there is no antecedent fiduciary relationship which is productive of any equitable interest in property. It arises subsequently and from the conduct of the fiduciary.[56]

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51 [1980] 1 All ER 393, 405.

52 Ibid, citing *Re Lands Allotment Co* [1894] 1 Ch 616, 631, 638 (Lindley and Kay LJJ).

53 (2002) 26 WAR 385, 407 (emphasis added), citing see *Re Diplock* (n 33); cf *Foskett v McKeown* (n 5) 1324; 121 (Lord Millett).

54 *Attorney-General of Hong Kong v Reid* [1994] 1 AC 324.

55 *Chase Manhattan Bank* (n 37).

56 See generally the discussion of proprietary claims which arise consequent upon a breach of fiduciary duty in *Twigg v Twigg* [2022] NSWCA 68 [203]–[244] (Brereton JA).

Other cases have held that either the existence of a proprietary right derivative upon a fiduciary duty *or* other form of equitable duty is sufficient. In *Robb Evans of Robb Evans & Associates v European Bank Ltd*,[57] Spigelman CJ (with whom Handley and Santow JJA agreed) held that, in order for a party to invoke the tracing process in equity, they required 'a duty *or* interest arising pursuant to the doctrines of equity'.[58] This echoes the Court of Appeal in *Re Diplock*, where the Court recognised the relevant precondition as being either a fiduciary relationship or a continuing right of property recognised in Equity.

There is a growing number of cases which reject the precondition of a pre-existing fiduciary relationship. Justice Einstein was particularly enthusiastic on this in *Commonwealth Bank of Australia v Saleh*, where he observed:

> There is a view that, in equity, tracing can only be obtained where some pre-existing fiduciary relationship can be shown. But the better view must now be that tracing protects rights of property, rather than enforcing fiduciary obligations. That view is supported by the House of Lords decision in *Foskett v McKeown* ... in which Lord Millet at 124, in particular, stressed that tracing was a process intended to vindicate rights or property rather than to prevent unjust enrichment, even though it may result in that effect.[59]

That is one reading of *Foskett v McKeown*, though it tends to elevate his Lordship's obiter above that which he actually held.

Justice Santow has also advanced the view that the right to trace is not dependent upon any pre-existing fiduciary duty in a trilogy of cases: *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd*;[60] *Opus Productions Pty Ltd v Popwing Pty Ltd*;[61] and *Hurt v Freeman*.[62] However, those cases were concerned with the imposition of a constructive trust consequent upon unconscionable conduct and the entitlement of the wronged party to enforce a proprietary claim with respect to the subject of that trust. They were not cases of 'archetypal tracing' and his Honour's comments must be treated with some caution.

Nevertheless, there are many commentators who reject altogether, as a precondition to tracing, the existence of a fiduciary duty from which the relevant right arises.

The learned authors of the current edition of *Ford and Lee: The Law of Trusts* make it clear where they stand when they observe: 'In equity theory a plaintiff's proprietary claim to a traceable asset is seen as a response to, and a vindication of, the plaintiff's proprietary right in the original asset'.[63]

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57 (2004) 61 NSWLR 75.

58 Ibid 104 [141] (emphasis added).

59 [2007] NSWSC 903, [29], citing *Foskett v McKeown* (n 5).

60 (1996) 7 BPR 14,685, 14,706–7 (Santow J).

61 (Supreme Court of New South Wales, Santow J, 28 February 1995).

62 [2002] NSWSC 264 [223].

63 Thomson Reuters, HAJ Ford and WA Lee, *Ford and Lee: The Law of Trusts* (online at 22 March 2024) [17.4010], citing *Foskett v McKeown* (n 5); *Conlan v Registrar of Titles* (2001) 24 WAR 299, 338 (Owen J).

Similarly, Professor Denis Ong, in *Ong on Tracing*, after discussing *Re Diplock*, observed that it was the continuing right of property recognised by Equity which was the essential foundation of tracing and that there was no requirement for any pre-existing fiduciary relationship:

> This pronouncement of the English Court of Appeal in *Diplock* makes it pellucidly clear that 'a continuing right of property recognised in equity' forms the essential foundation of equitable tracing, and that the apparent insistence that the tracing claimant is, additionally, required to demonstrate that the property sought to be traced was originally held by a fiduciary to the tracing claimant, is an inept attempt to describe what is, in essence, the tracing claimant's continuing equitable right in property.[64]

To the same effect are the comments of Professor Lionel Smith in *The Law of Tracing*,[65] where the learned author also identified that the more accurate analysis of *Re Diplock* is that the existence of an equitable proprietary interest in the original asset in respect of which a wrongful disposition occurred generates the right to trace. He observed that the precondition of a fiduciary relationship was artificial and resulted in courts engaging in increasingly fictitious attempts to identify a relevant relationship in order to advance the interests of a wronged individual:

> So long as it is thought that a fiduciary relationship must be established to permit a plaintiff to commence the exercise of tracing in a court of equity, the inevitable result will be increasingly fictitious attempts to locate fiduciary relationships in facts which do not support them.[66]

Certainly, there are examples of scenarios in which tracing in equity has permitted the recovery of proprietary rights despite the absence of an initial fiduciary:

(a) As Professor Smith observes, 'purchase money resulting trusts' are examples of tracing despite the absence of any pre-existing fiduciary duty;[67]

(b) Similarly, a trustee-in-bankruptcy can trace the proceeds of a disposition of property which has been rescinded for fraud: *Official Trustee in Bankruptcy v Alvaro*;[68]

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64 Denis S K Ong, *Ong on Tracing* (Federation Press, 2019) 106, citing Re Diplock
65 Smith (n 21) 121–30.
66 Ibid 128.
67 Smith (n 21) 129.
68 (1996) 66 FCR 372, 426–7 (Wilcox and Cooper JJ).

(c) The same applies to stolen money: *Black v S Freedman and Co* (although there the thief did, in fact, owe fiduciary duties);[69] and the proceeds of stolen property: *Creak v James Moore & Sons Pty Ltd*;[70]

(d) There is an acknowledged right for equitable mortgagees or chargees to trace the proceeds of misapplied property which was subject to the security: *Buhr v Barclays Bank plc*;[71] *ASIC v GDK Financial Solutions Pty Ltd (in liq) (No 5)*.[72]

This list is not exhaustive, but the cases in these categories defy a taxonomic characterisation by reference to the existence of an anterior or intermediately occurring fiduciary duty from which a relevant property interest arises.

Further, there is a solid doctrinal basis for the proposition that the right to trace in equity is grounded in proprietary rights. It is extremely well encapsulated in the article by Professors Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth',[73] where the learned authors argue that tracing is a process by which a person's continuing right of property inheres in any property which, through an unauthorised transaction, has been substituted for the property in respect of which the right originally existed. The authors observe:

> Once it is recognised that, in cases where the plaintiff retains legal or equitable property rights in the original asset even after the transfer of possession to the defendant, those persisting property rights are alone the (and, indeed, are the only) basis for recovery, then it follows that the most likely event to which the creation of rights in the traceable product are a response is also the property rights held in the original asset. This is most obviously so where the claim is in respect of equitable property rights. As *Foskett v McKeown* illustrates, where the plaintiff's claim is one to vindicate his property rights in the asset, the law's response is simply to declare that the plaintiff's rights in the original asset are now exigible against the traceable product.[74]

They also identified this as a natural consequence of the importance placed on property rights by the Anglo-American legal system:

> It should not be surprising that the property rights in the traceable product arise as a response to the plaintiff's rights in the original asset. Indeed, it would be more surprising if they did not. Property rights are a significant matter in the common law and represent one of the fundamental building blocks of the Anglo-American legal tradition.[75]

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69 *Black* (n 41).
70 (1912) 15 CLR 426. See also *Re Brumm* [1942] St R Qd 52.
71 [2001] EWCA Civ 1223.
72 [2008] FCA 1700.
73 Grantham and Rickett (n 31).
74 Ibid 910.
75 Ibid 911.

There is support for that conclusion given that civil law jurisdictions do not provide for such a result.[76]

Despite that, the existing authorities do not bespeak of any doctrinal purity. As opponents of the property interest approach identify, there are cases where the right to trace has been recognised despite the claimant not holding any relevant initial interest in property. For instance, tracing has been permitted where a party rescinds a contract in equity for fraud. The innocent party may trace the pre-contractual beneficial title in any property transferred under the contract, including into any proceeds of that property.[77] In such a case, the claimant has not had any relevant initial beneficial interest in the property in question and, indeed, had intended to transfer all title to the other contracting party.

Similarly, beneficiaries of discretionary trusts who hold no beneficial interest in the trust property have been held entitled to invoke tracing in order to recover any misappropriated trust property or its proceeds,[78] as have legatees of an un-administered estate.[79] Neither have any initial proprietary interest in property, but merely a transmissible right to the proper administration of the trust or estate.

Now, there exists a further unsurprising debate about these cases and, though they may be explained as being the result of the fluidity of equitable procedure,[80] they demonstrate the generally unsatisfactory nature of the jurisprudence in this area.

## VIII Conclusion

This paper has not discussed 'backward tracing', which is quite possibly a doctrinally bankrupt concept, but its emergence will not advance the clarification of any underlying rationale for tracing.

The small part of tracing discussed in this paper reveals the existence of great uncertainty. Moreover, even if some consensus was reached as to whether property rights or fiduciary duties underpinned the right to trace, that would not resolve many secondary issues on which the commentators disagree.

It remains to be seen whether any court can identify any coherency in this area or whether it will remain as elusive as the Snark.

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76 Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights (Hart Publishing, 2002) 89.

77 See, eg, *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372, 426–7; *Shalson v Russo* [2005] Ch 281, 321 [122].

78 *Elliot v Secretary, Department of Education, Employment & Workplace Relations* (2008) 249 ALR 182, 193 [39]; *Orb ARL v Ruhan* [2015] EWHC 262 (Comm) [110].

79 *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 (Privy Council).

80 Hafeez-Baig and English (n 6) 122 [5.18].

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