Australian Government
Australian Law Reform Commission

Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

INTERIM REPORT

You are invited to provide a submission or comment on this Interim Report

ALRC Report 127 (Interim) July 2015

This Interim Report reflects the law as at 17 July 2015

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

The office of the ALRC is at Level 40 MLC Centre, 19 Martin Place, Sydney NSW 2000 Australia.

Postal Address:

GPO Box 3708

Sydney NSW 2001

Telephone: within Australia (02) 8238 6333

International:+61 2 8238 6333

Facsimile: within Australia (02) 8238 6363

International:+61 2 8238 6363

E-mail: info@alrc.gov.au

Website: www.alrc.gov.au

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

ISBN: 978-0-9943202-0-9

Commission Reference: ALRC Interim Report 127, 2015

Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Interim Report is **21 September 2015.**

Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to particular chapters of the report: https://www.alrc.gov.au/content/freedoms-IR127-online-submission Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few chapters as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: freedoms@alrc.gov.au
Facsimile: +61 2 8238 6363

Please send any pre-prepared submissions in Word or RTF format.

Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications.

Generally, submissions will be published on the ALRC website unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

The ALRC may redact certain information from submissions in order to protect the privacy of submitters or others mentioned in submissions. This may include withholding the name of the submitter. Publication or redaction of information in submissions is at the discretion of the ALRC.

See the ALRC policy on submissions and inquiry material for more information www.alrc.gov.au/about/policies.

Contents

Terms of Reference

Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to the rights, freedoms and privileges recognised by the common law,

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report pursuant to section 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
- a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

For the purpose of the inquiry 'laws that encroach upon traditional rights, freedoms and privileges' are to be understood as laws that:

- reverse or shift the burden of proof;
- deny procedural fairness to persons affected by the exercise of public power;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- interfere with freedom of speech;
- interfere with freedom of religion;
- interfere with vested property rights;
- interfere with freedom of association;
- interfere with freedom of movement;
- disregard common law protection of personal reputation;
- authorise the commission of a tort;
- inappropriately delegate legislative power to the Executive;
- give executive immunities a wide application;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- permit an appeal from an acquittal;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth laws in the areas of, but not limited to:

- commercial and corporate regulation;
- environmental regulation; and
- workplace relations.

In considering what, if any, changes to Commonwealth law should be made, the ALRC should consider:

- how laws are drafted, implemented and operate in practice; and
- any safeguards provided in the laws, such as rights of review or other accountability mechanisms.

In conducting this inquiry, the ALRC should also have regard to other inquiries and reviews that it considers relevant.

Consultation

In undertaking this reference, the ALRC should identify and consult relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders.

Timeframe

The Commission is to provide its interim report by December 2014 and its final report by December 2015.

Participants

Australian Law Reform Commission

President

Professor Rosalind Croucher AM

Part-time Commissioners

The Hon Justice John Middleton, Federal Court of Australia

Emeritus Professor Suri Ratnapala, TC Beirne School of Law, University of Queensland from July 2015

Executive Director

Sabina Wynn

Principal Legal Officers

Bruce Alston

Jared Boorer (A/g)

Senior Legal Officers

Justine Clarke, from May 2015

Legal Officers

Robyn Gilbert, from May 2015

Dr Julie Mackenzie, from May 2015

Brigit Morris

Shreeya Smith

Advisory Committee

Professor Margaret Allars SC, Sydney Law School, University of Sydney, and Wentworth Chambers, Sydney

The Hon Robert Austin, Barrister at Law, New/Chambers, Sydney

Professor Carolyn Evans, Dean, Melbourne Law School, University of Melbourne

Associate Professor Miriam Gani, ANU College of Law, Australian National University, Canberra

Professor the Hon William M Gummow AC, Sydney Law School, University of Sydney

Professor Barbara McDonald, Sydney Law School, University of Sydney

Professor Denise Meyerson, Macquarie Law School, Macquarie University

The Hon Justice John Middleton, Federal Court of Australia

Robert Orr PSM QC, Special Counsel, Australian Government Solicitor, Canberra

Emeritus Professor Suri Ratnapala, TC Beirne School of Law, University of Queensland

Professor Andrew Stewart, John Bray Professor of Law, Adelaide Law School, University of Adelaide

Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne

Bret Walker SC, St James' Hall Chambers, Sydney

Associate Professor Matthew Zagor, ANU College of Law, Australian National University, Canberra

Expert Readers

Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of NSW

Professor Jeremy Gans, Melbourne Law School, University of Melbourne

Professor Matthew Groves, Faculty of Law, Monash University, Clayton

Professor John McMillan AO, Australian Information Commissioner

Dr Sue McNicol QC, Barrister at Law, Owen Dixon Chambers West

Legal Interns

Claudia Crause

Sally Embelton

Annette Haddad

Neha Kasbekar

William Isdale

Rosetta Lee

Tristan Orgill

Sarah Sacher

Kali Schellenberg

Robert Size

Jordan Tutton

Jessica Uggucioni

1. The Inquiry in Context

Contents

The Inquiry

1.1 The Australian Law Reform Commission (ALRC) has been asked to identify and critically examine Commonwealth laws that encroach upon 'traditional' or common law rights, freedoms and privileges.[1] In this Interim Report, the ALRC analyses the source and rationale of many of these important common law rights and provides an extensive survey of current Commonwealth laws that limit these rights. The ALRC also discusses how laws that limit traditional rights might be justified and whether some of these laws merit further scrutiny.

1.2 This chapter considers these matters at a more general level, providing a conceptual foundation for the Inquiry: What are traditional rights, freedoms and privileges? What is their source and where may they be found? How do they relate to human rights in international treaties and bills of rights? To what extent, if any, may Parliament interfere with traditional rights and freedoms? Should laws that limit rights and freedoms require particular scrutiny and justification and, if so, how might this be done—by applying what standard and following what type of process?

---

1 The Terms of Reference were given to the ALRC by Senator the Hon George Brandis QC, Attorney-General of Australia. They are set out in full at the front of this paper. 'Traditional' and 'common law' are both used in the Terms of Reference.

Traditional rights, freedoms and privileges

1.3 The ALRC's Terms of Reference, which set out and limit the scope of this Inquiry, state that laws that encroach upon traditional rights, freedoms and privileges should be understood to refer to laws that:

- interfere with freedom of speech;
- interfere with freedom of religion;
- interfere with freedom of association;
- interfere with freedom of movement;
- interfere with vested property rights;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- reverse or shift the burden of proof;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- permit an appeal from an acquittal;
- deny procedural fairness to persons affected by the exercise of public power;
- inappropriately delegate legislative power to the executive;
- authorise the commission of a tort;
- disregard common law protection of personal reputation;
- give executive immunities a wide application;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

1.4 Following the list above, each chapter of this report considers a particular right, freedom or privilege.[2] Some chapters consider a few closely related rights together. In

2 A list of other similar legal rights and freedoms was included in the last chapter of the Issues Paper. Relatively few submissions included comments on these other rights, and given the extensive scope of this Inquiry, the ALRC has chosen to focus on the 19 rights listed in the Terms of Reference.

this report the ALRC uses the phrase 'rights and freedoms' and sometimes simply 'rights' as a general term to capture all of the rights listed above.[3]

Common law foundations

1.5 These rights, freedoms and privileges have a long and distinguished heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. They form part of the history of the common law, embodying key moments in constitutional history, such as the sealing of the Magna Carta in 1215, the settlement of parliamentary supremacy following the Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.[4] Many were found and developed by the courts; some were significantly developed by legislatures. The Hon Robert French AC, Chief Justice of the High Court, has said that

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[5]

1.6 In speaking to mark the 800th anniversary of the Magna Carta,[6] the Hon James Spigelman AC QC, former Chief Justice of the Supreme Court of New South Wales, said that we can 'trace the strength of our tradition of the rule of law to this document' and the support of liberties has developed in the wake of the demarcation between the great organs of state.[7]

> What we came to know as civil liberties or, in earlier centuries as the 'rights of Englishmen', were the practical manifestations of experience of the law over the centuries as manifest in judicial decisions and in legislation.[8]

1.7 Many traditional rights, freedoms and privileges are often called fundamental, and are recognised now as 'human rights'. Murphy J referred to 'the common law of

---

3 Nearly all are 'rights', broadly speaking. The American legal theorist Wesley Hohfeld distinguished between four basic 'incidents' of rights: privileges (or liberties), claims, powers, and immunities: see Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

4 *Bill of Rights 1688* 1 Will & Mar Sess 2 c 2 (Eng). The Bill of Rights remains an important element in the rule of law in Australia, as illustrated by *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; *Port of Portland v Victoria* (2010) 242 CLR 348.

5 Robert French, 'The Common Law and the Protection of Human Rights' (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

6 The various iterations of the document from 1215 are described in James Spigelman, 'Magna Carta in its Medieval Context' (Speech given at Banco Court, Supreme Court of New South Wales, 22 April 2015). See also Paul Brand, 'Magna Carta and the Development of the Common Law' (Patron's Address, Academy of Law, Sydney, 18 May 2015); Nicholas Cowdery, 'Magna Carta—800 Years Young' (Speech given at St James' Church, Sydney, 14 June 2015).

7 'The liberties often associated with the *Magna Carta* were the product of the institutions of Parliament and the Courts, over the course of centuries': James Spigelman, 'Magna Carta: The Rule of Law and Liberty', Centre for Independent Studies, 15 June 2015, 1.

8 Ibid 7.

human rights'[9] and Professors George Williams and David Hume have written that the common law is 'a vibrant and rich source of human rights.'[10]

1.8 Many are now found in international covenants and declarations and bills of rights in other jurisdictions—including, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the Bill of Rights in the US Constitution, and the human rights Acts in the United Kingdom, Canada and the two Australian jurisdictions with such Acts, the Australian Capital Territory and Victoria. In *Momcilovic v The Queen*, French CJ said that the human rights and freedoms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) 'in significant measure incorporate or enhance rights and freedoms at common law'.[11]

1.9 Before the wave of international conventions in the aftermath of the Second World War, legislation and the common law were the principal sources of protection of rights and freedoms. In his book, *Human Rights and the End of Empire*, English legal historian AW Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights were in the UK 'so well protected as to be an example to the world'. In normal times, Simpson writes, 'when there was neither war, nor insurrection, nor widespread problems of public order',

> few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom, and had done so earlier in the eighteenth and nineteenth centuries, though most of the population could only participate very indirectly, if at all, in government.[12]

1.10 These freedoms were also widely respected in the modern period:

> In the modern period, and subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.[13]

1.11 To the extent that Australian law has protected and fostered rights and freedoms,[14] it has long been statutes and judge-made law that have done so. In a 2013 speech, former Justice of the High Court of Australia, the Hon John Dyson Heydon AC QC, considered some of the benefits of protecting rights through statutes

---

9 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

10 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 33.

11 *Momcilovic v The Queen* (2011) 245 CLR 1, [51].

12 AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004).

13 Ibid.

14 Traditions, culture and politics also play a role. 'Legal rights do not necessarily offer better protection than societal rights. Public opinion, peer pressure and individual conscience may be more effective in seeing that rules are obeyed than expensive and elaborate bureaucratic and court procedures which may have very low compliance rates': Tom Campbell, *Rights: A Critical Introduction* (Taylor & Francis, 2011) 87.

and the common law. He said that statutes and the common law protect rights often by 'detailed and precise rules' and vindicate 'human rights directly and specifically':

> [C]ommon law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.[15]

1.12 Taking the right to a fair trial as an example, Heydon said that rules found in certain statutes and in the common law 'were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied'.[16]

1.13 Where Heydon was speaking of the strength of the common law in protecting rights, others have sought protection through human rights statutes.[17] Whether the introduction of a bill of rights in Australia is desirable is widely debated.[18] It draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights. However, these matters are not the subject of this Inquiry.

1.14 The focus of this Inquiry is on identifying Commonwealth laws that interfere with traditional rights, freedoms and privileges, and determining whether the laws are justified. To frame this discussion, however, it is useful to consider briefly how these rights, freedoms and privileges are currently protected in law from statutory encroachment. Broadly speaking, some protection is provided by the *Australian Constitution* and, less directly, by rules of statutory construction. It is also useful to consider the nature and function of common law rights.

Australian Constitution

1.15 The *Australian Constitution* expressly protects a handful of rights and has been found to imply certain other rights. The rights expressly protected by the *Constitution* are:

- the right to trial by jury on indictment for an offence against any law of the Commonwealth—s 80;
- freedom of trade, commerce and intercourse within the Commonwealth—s 92;

---

15 JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture delivered at Oxford Law School, 23 January 2013).

16 'Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights': JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture delivered at Oxford Law School, 23 January 2013).

17 Hiebert contrasts the two 'rival paths' in liberal constitutionalism to rights protection: one is the codification of rights, as in the US, the other emphasises parliamentary supremacy, as in Westminster-modelled parliamentary systems. Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 7–8.

18 See, eg, discussion in Attorney-General's Department, *National Human Rights Consultation Report* (2009).

- freedom of religion—s 116; and
- the right not to be subject to discrimination on the basis of the state in which one lives—s 117.

1.16 Section 51(xxxi) of the *Constitution* also provides that if the Commonwealth compulsorily acquires property, it must do so on 'just terms'—which may also be conceived of as a right.[19]

1.17 The High Court has also found certain rights or freedoms to be implied in the *Constitution*—notably, freedom of political communication.[20] This freedom is not absolute, but any law that interferes with political communication must be 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[21]

1.18 A right to vote has also been found to be implied in the *Constitution*—laws that limit adult suffrage can only be made when the law is proportionate, that is, 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[22]

1.19 The High Court may also have somewhat moved towards entrenching procedural fairness as a constitutional right.[23] If procedural fairness were considered an essential characteristic of a court, this might have the potential, among other things, to constitutionalise:

> the presumption of innocence, the 'beyond reasonable doubt' standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts' jurisdiction to make an adverse finding on law or fact that has not been put to the parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.[24]

1.20 It remains to be seen whether this will become settled doctrine of the court.

1.21 The *Constitution* does not, therefore, directly and entirely protect many of the rights, freedoms and privileges listed in the ALRC's Terms of Reference. One reason the *Constitution* does not expressly protect most civil rights, Professor Helen Irving

---

19 *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349 (Dixon J).

20 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

21 This is part of the second limb of the *Lange* test, as set out by French CJ in *Hogan v Hinch* (2011) 243 CLR 506.

22 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). See also, *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

23 Williams and Hume, above n 10, 375.

24 Ibid 376.

suggests, was the 'general reserve about directly including policy in the *Constitution*, instead of powers subsequently to enact policy'.

> Specifically, the British legal tradition (in which in fact the ideas of freedom and 'fair play', far from being overlooked, were thought central) largely relied on the common law, rather than statute or constitutional provision to define and protect individual rights and liberties. This approach was adopted for the most part by the Australians in constitution-making. It explains in large degree the shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and descriptions of essential human and national attributes.[25]

1.22 In *Australian Capital Television v Commonwealth*, Dawson J suggested that those who drafted the *Constitution* saw constitutional guarantees of freedoms as 'exhibiting a distrust of the democratic process':

> They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[26]

A common law constitution?

1.23 The term 'common law constitutionalism' is now 'widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law'.[27] Under this theory, many of the rights and freedoms listed in the ALRC's Terms of Reference would be considered constitutional.

1.24 Commonly associated with the writing of Professor TRS Allan[28] and Lord Justice John Laws,[29] common law constitutionalism has been called 'a potent phenomenon within contemporary public law discourse'.[30] Professor Allan has written

---

25 Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 162.

26 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

27 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17. Thomas Poole, a critic of the theory, has written that the main lines of the theory of common law constitutionalism are well defined: 'The common law is said to comprise a network of moral principles which reflect values considered to be fundamental. By virtue of this unique connection with basic moral principles, the common law is thought to constitute the political community by incorporating a set of higher-order values against which the legality of governmental decisions may be tested. Rights are the juridical residue of these higher-order principles and public law is reconceived as a vehicle for the protection of those rights against the state. The courts, on this account, assume a pivotal role in the polity: John Griffith's notion of the "political constitution" is turned on its head in favour of a system of constitutional politics whose central institution is the common law court?': Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463, 463.

28 See, eg, TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013).

29 See, eg, John Laws, *The Common Law Constitution* (Cambridge University Press, 2014).

30 Poole, above n 27.

that 'the common law is prior to legislative supremacy, which it defines and regulates'.[31] Elsewhere, Allan wrote:

> We should not underestimate the power of the common law constitution to protect fundamental rights, and the central role it ascribes to the individual conscience in testing the moral credentials of law, or rather of what purports to be law but may, on inspection, prove to be an infringement of the rule of law.[32]

1.25 Some even suggest that courts may invoke this common law constitution to invalidate Acts of Parliament.[33] The theory has therefore been said to invert the traditional relationship between statute law and the common law.[34] Professor Jeffrey Goldsworthy, a critic of common law constitutionalism, has written that the theory amounts to a 'takeover bid' which replaces legislative supremacy with judicial supremacy.[35]

1.26 The theory has its leading proponents in the United Kingdom, which lacks a written and rigid constitution. In Australia, it has had only limited application; it has not been applied to invalidate unambiguous statutes. In *South Australia v Totani*, French CJ said:

> [I]t is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.[36]

1.27 Common law constitutionalism does however find an application in an accepted principle of statutory construction known as the 'principle of legality'.

The principle of legality

1.28 The principle of legality is a principle of statutory interpretation that gives some protection to certain traditional rights and freedoms, including almost all of those listed in the ALRC's Terms of Reference.[37] In fact, as Spigelman has said, the 'protection

---

31 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003) 271.

32 TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' 190.

33 See also the comments of Sir Robin Cooke, former President of the New Zealand Court of Appeal, and discussed in Hon Justice Michael Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' (at the New Zealand Research Foundation Conference, Auckland, 4 April 1997).

34 Goldsworthy, above n 27, 15.

35 Ibid.

36 *South Australia v Totani* (2010) 242 CLR 1, [31]. In a recent speech, French CJ said: 'The theoretical question whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia. ... The omens are not promising for the proponents of a free-standing common law limitation. However, the question has been left, at least theoretically, open': Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture given at Wellington, New Zealand, 27 November 2014).

37 The phrase 'principle of legality' is also used to refer to 'a wider set of constitutional precepts requiring any government action to be undertaken only under positive authorisation': Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 373. In this Interim Report, the phrase is used to refer to the narrower point of statutory interpretation. Recent papers on the principle also include Dan Meagher, 'The Common Law Principle of Legality in the Age of

which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[38]

1.29 The principle of legality perhaps goes back 'at least as far as Blackstone and Bentham'.[39] It may be a 'new label' for a traditional principle.[40] Early Australian authority may be found in the 1908 High Court case, *Potter v Minahan*.[41] A more recent statement of the principle appears in *Re Bolton; Ex parte Beane*:

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[42]

1.30 The rights or freedoms protected by the principle of legality 'often relate to human rights and are sometimes described as having a constitutional character'.[43] The principle 'extends to the protection of fundamental principles and systemic values'.[44] There is no settled list of rights protected by the principle, but in *Momcilovic* Heydon J set out the following examples:

> freedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests...; rights of access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; mens rea as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.[45]

Human Rights' (2011) 35 *Melbourne University Law Review* 449; James Spigelman, 'The Common Law Bill of Rights' (2008) 3 *Statutory Interpretation and Human Rights: Mcpherson Lecture Series*.

38 Spigelman, above n 37, 9.

39 James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775. It has 'many authorities, ancient and modern, Australian and non-Australian': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J). Although the continuity of the principle is questioned in Lim, above n 37, 380.

40 Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25 *Public Law Review* 265, 279.

41 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used': *Potter v Minahan* (1908) 7 CLR 277, 304.

42 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523. This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

43 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J).

44 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, (Gageler and Keane JJ).

45 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J) (citations omitted). Other lists appear in: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Spigelman, above n 37; Williams and Hume, above n 10. See also Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Ch 19.

1.31 Perhaps the primary rationale for this principle of statutory construction was provided by Lord Hoffmann:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[46]

1.32 The 'political cost' of the decision was also something alluded to by French CJ. The interpretation of legislation takes place 'against the backdrop of the supremacy of Parliament', which can qualify or extinguish rights and freedoms by 'clear words'—but words 'for which it can be held politically accountable'.[47] As suggested in *Coco v The Queen*, the principle may 'enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.[48]

1.33 The principle of legality may be applied not only to statutes, but also to regulations and other delegated legislation, where in fact it may assume greater importance, given such laws are not made directly by Parliament.[49]

1.34 Finally, it should be stressed that the principle 'does not constrain legislative power'.[50] Subject to the *Constitution*, Parliament has the power to modify or extinguish common law rights. Chief Justice Robert French has said the principle has a 'significant role to play in the protection of rights and freedoms', but it does not 'authorise the courts to rewrite statutes'.[51] The principle of legality will therefore be applied only where the parliamentary intention to encroach on a right is not clear. Moreover, it will have a very limited application where encroaching on the particular right is clearly the object of a statute.[52]

The nature of common law rights and principles

1.35 Some of the rights and freedoms listed in the Terms of Reference are justiciable legal rights—they give rise to legal obligations and may be enforced in courts of law.

---

46 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 131.

47 French, 'The Common Law and the Protection of Human Rights', above n 5.

48 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). This is a classic discussion of the principle of legality, although the phrase 'principle of legality' is not used.

49 See Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (forthcoming, to be published in the *University of New South Wales Law Journal*).

50 *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ). In a 2012 speech, Chief Justice Robert French said: 'The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms': Chief Justice Robert French, 'The Courts and Parliament' (Speech given at Queensland Supreme Court, Brisbane, 4 August 2012).

51 Robert French, *The Courts and the Parliament* (Brisbane, 4 August 2012).

52 'The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked': *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [314] (Gageler and Keane JJ).

In a 2010 speech, 'Protecting Human Rights Without a Bill of Rights', Chief Justice French said:

> It is also important to recognise... that common law 'rights' have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have 'a binding effect'. But 'rights', to movement, assembly or religion, for example, are more in the nature of 'freedoms'. They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.[53]

1.36 As suggested by French CJ, not all rights are protected by positive laws. Many are freedoms or liberties and are protected in Australia by virtue of the fact, and only to the extent, that laws do not encroach on the freedom. The High Court said in *Lange v Australian Broadcasting Corporation*:

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[54]

1.37 Many common law rights may therefore be largely residual,[55] and perhaps for this reason, more vulnerable to statutory encroachment.[56]

1.38 In *Dietrich v R*, Brennan J distinguished rights included in a constitutional Bill of Rights from individual legal rights recognised by the common law in Australia:

> In this country, a Court might declare an individual legal right bearing some resemblance to a right conferred by a constitutional Bill of Rights. But such an individual legal right is distinguishable from a right conferred by a constitutionally entrenched Bill of Rights, for it is either (i) an immunity resulting from a limitation on legislative power imposed otherwise than by reference to the scope of the right itself, or (ii) a right amenable to abrogation by competent legislative authority. The only legal sources from which such 'rights' may emerge are the text of the Constitution of the Commonwealth and other organic laws governing our legal system, statutes and the common law. Rights can be declared upon a construction of the Constitution or

---

53 Chief Justice Robert French, 'Protecting Human Rights Without a Bill of Rights' (at the John Marshall Law School, Chicago, 26 January 2010).

54 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, Mchugh, Gummow and Kirby JJ) quoting *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.

55 'The traditional doctrine in English law is that Parliament is sovereign. However, individuals may say or do whatever they please provided they do not transgress the substantive law or infringe the legal rights of others. Furthermore, public authorities including the Crown may do nothing but that which they are authorized to do by some rule of common law (including the royal prerogative) or statute and, in particular, may not interfere with the liberties of individuals without statutory authority. Where public authorities are not authorized to interfere with the individual, the individual has liberties. It is in this sense that such liberties are residual rather than fundamental and positive in their nature: they consist of what remains after taking account of all the legal restraints that impinge upon an individual': Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 28.

56 One consequence of the fact that many common law rights are residual is that Parliament can always 'legislate fundamental rights out of existence': Ibid 29.

> other organic laws, upon a construction of a statute, or by judicial development of the rules of the common law.[57]

1.39 In many countries, rights and freedoms are afforded some protection from statutory encroachment by bills of rights and human rights statutes. The degree of protection offered by these statutes varies. The protection offered by a constitutionally entrenched bill of rights, such as that found in the United States Constitution, is considerable, allowing the judiciary to declare laws invalid on the grounds that they are inconsistent with the bill of rights.

1.40 This may be contrasted with the *Human Rights Act 1998* (UK), which does not give courts the power to strike down legislation, but instead, provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.[58]

1.41 Similarly, s 32(1) of the Victorian Charter provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. French CJ has said that this is 'analogous to the common law principle of legality'.[59]

1.42 Common law rights overlap with the rights protected in these international instruments and bills of rights. In their history and development, each may be seen as an important influence on the other. A statute that encroaches on a traditional common law right will often, therefore, also encroach on its related human right. However, the two rights may not always have the same scope. As noted above, some common law rights are largely conceived of as residual; they exist to the extent that no law is made that interferes with them. Human rights are rarely thought of in this way, and moreover have been said to grow both in content and form—more rapidly, some suggest, than common law rights. Professor Tom Campbell has written:

> More and more interests are recognized as justifying the protection that flows from being adopted as a human right. This growth is a matter of the form of human rights as well as their content. Thus, even traditional core civil and political liberties are seen as involving positive correlative duties to secure the interest identified in the right, and not, as before, merely negative correlative duties to let people be and leave them alone to go their own way. Human rights are also being put to a wider variety of uses.[60]

---

57 *Dietrich v R* (1992) 177 CLR 292, [45] (citations omitted).

58 *Human Rights Act 1998* (UK) s 3(1). Section 4(2) also gives the courts a power to make a 'declaration of incompatibility'. In a speech about human rights, Lady Hale said that statements from Lord Nicholls, Lord Steyn and Lord Rodger in *Ghaidan v Godin Mendoza* gave 'a very broad meaning' to what was 'possible': 'as long as an interpretation was not contrary to the scheme or essential principles of the legislation, words could be read in or read out, or their meaning elaborated, so as both to be consistent with the convention rights and "go with the grain" of the legislation, even though it was not what was meant at the time': Lady Hale, 'What's the Point of Human Rights?' (Warwick Law Lecture, 28 November 2013). See also, *Ghaidan v Godin Mendoza* [2004] 2 AC 557.

59 Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture given at Wellington, New Zealand, 27 November 2014).

60 Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 17.

1.43 Many social and economic rights are also recognised as human rights in international law—for example, the right to work and the right to housing. As important as these rights may be, they are not the focus of this Inquiry.

1.44 In the absence of a specific legislative restriction which is consistent with the *Constitution*, the enjoyment of common law rights and freedoms is not confined to Australian citizens. For example, the guarantee of jury trial by s 80 of the *Constitution* in respect of indictable federal offences is conferred irrespective of the status of the accused. At common law, aliens who are not classified as enemy aliens are treated as being within 'the Queen's Peace', not as outlaws placed beyond the ordinary legal system. The High Court has noted on several occasions that an alien, other than an enemy alien, is, while resident in Australia, entitled to the same protection with respect to civil rights as the law affords to Australian citizens.[61]

International law and the common law

1.45 Each chapter of this Interim Report sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the *International Covenant on Civil and Political Rights* (ICCPR),[62] to which Australia is a party.[63] Such instruments provide some protection to rights and freedoms from statutory encroachment, but, like the principle of legality, generally only when a statute is unclear or ambiguous.[64]

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party.[65]

---

61 *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ); *Re Minister for Immigration and Multicultural Affairs v Te* (2002) 212 CLR 165, [125] (Gummow J); *Singh v Commonwealth* (2004) 222 CLR 322, [201] (Gummow, Hayne and Heydon JJ).

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

63 The other United Nations human rights treaties Australia has signed are: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

64 In *Coleman v Power*, Gleeson CJ distinguished between statutes enacted before Australia ratified a relevant international treaty and those statutes enacted since ratification, arguing that only the later statutes are capable of being interpreted, where possible, in line with Australia's obligations under the relevant international treaty: *Coleman v Power* (2004) 220 CLR 1, [19].

65 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). There is a 'common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party': *Momcilovic v The Queen* (2011) 245 CLR 1, [18] (French CJ). Every statute is 'to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with

1.46 In *Mabo*, Brennan J said that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[66]

1.47 However, even international instruments to which Australia is a party do not create binding domestic law in Australia. Nor do they abrogate the power of the Commonwealth Parliament to make laws that are inconsistent with the rights and freedoms set out in these instruments. In *Dietrich v The Queen*, Mason CJ and McHugh J said:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[67]

1.48 In *Minister for Immigration v B*, Kirby J said that the High Court 'cannot invoke international law to override clear and valid provisions of Australian national law'.[68] However, as Kiefel J said in *The Malaysian Declaration Case*:

> [A] statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law.... However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law.[69]

Identifying laws that limit rights and freedoms

1.49 The central tasks of this Inquiry are to identify Commonwealth laws—not state and territory laws—that encroach upon traditional rights, freedoms and privileges, and to determine whether these encroachments are properly justified.[70] There is no doubt that laws often encroach on traditional rights and freedoms. In *Malika Holdings v Stretton*, McHugh J said that 'nearly every session of Parliament produces laws which infringe the existing rights of individuals'.[71]

1.50 This report sets out many of the Commonwealth laws that may be said to interfere with the common law rights and freedoms listed in the Terms of Reference. It provides an extensive survey of such laws.[72]

---

established rules of international law': *Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353 (O'Connor J).

66 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42. Professor Ivan Shearer has said: 'This puts the matter in a nutshell: the Covenant is not as such part of the law of Australia, but is a powerful influence on the judges in developing the common law': Ivan Shearer, 'The Relationship between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 56.

67 *Dietrich v The Queen* (1992) 177 CLR 292, 305.

68 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

69 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [247].

70 See Terms of Reference for this Inquiry. This Inquiry is not primarily about the history and source of common law rights and freedoms, nor about how the rights and freedoms are legally protected from statutory encroachment, although these matters are discussed.

71 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J).Ibid [28].

72 A list of all the statutory provisions cited in this report is included at Appendix A. Lists of certain laws that limit rights are also set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*.

1.51 The Terms of Reference ask the ALRC to include consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation, and workplace relations. Such laws are highlighted throughout this report. However, the Terms of Reference are also clear that this Inquiry is not to be limited to these areas. This report is structured by the rights and freedoms in the Terms of Reference, but engages with commercial, environmental and workplace laws as they arise.

1.52 Having identified laws that affect traditional rights, it is vital to ask whether the laws are justified. The following section discusses justifications for limits on important rights and principles at a general level. More particular justifications are then discussed throughout this report.

Justifying limits on rights and freedoms

1.53 Laws that interfere with traditional rights and freedoms are sometimes considered necessary. The mere fact of interference will rarely be a sufficient ground of criticism.

1.54 For one thing, important rights often clash with each other, so that some must necessarily give way, at least partly, to others. Freedom of movement, for example, does not give a person unlimited access to another person's private property, and murderers must generally lose their liberty to protect the lives and liberties of others. Individual rights and freedoms will also sometimes clash with a broader public interest—such as public health or safety, or national security.

1.55 Accordingly, it is widely recognised that there are reasonable limits even to fundamental rights. Only a handful of rights—such as the right not be tortured—are considered to be absolute.[73] Limits on traditional rights are recognised by the common law. In fact, some laws that limit traditional rights may be as traditional as the rights themselves—although such 'limits' may rather define the scope of the rights.

1.56 This is also reflected in the limitations provisions in various bills of rights in other jurisdictions and in international human rights covenants and related guidelines, such as the 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights'.[74]

1.57 Nevertheless, much of the value of calling something a right will be lost if the right is too easily qualified or diluted. Many of the traditional common law principles were developed carefully over long periods of time and have been applied in many cases. In many jurisdictions, these rights and principles are considered so fundamentally important that they have constitutional status. There seems little doubt, therefore, that the common law rights in the Terms of Reference should be treated with considerable respect in law making and should not lightly be encroached upon. Where

---

73 See, eg, Williams and Hume, above n 10, [5.3].

74 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

a law does encroach on a traditional right or principle, the encroachments should be justified.

1.58 'Human rights enjoy a prima facie, presumptive inviolability, and will often 'trump' other public goods,' Louis Henkin wrote in *The Age of Rights*:

> Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.[75]

1.59 The ALRC has been asked to consider whether limits on traditional rights and freedoms are 'appropriately justified'.[76] This question might be considered on two broad levels. The first involves testing the law according to a particular measure or standard—such as proportionality. Laws that pass this standard might be said to have been *substantively* justified. This is the most commonly used meaning of the word justified, in this context, and it is the main focus of this Inquiry. The second level concerns the processes that lead to the making of the law—the *procedural* justification. Both of these types of justification are discussed below.

Proportionality

1.60 A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. Although it is commonly used by courts to test the validity of laws that limit constitutional rights,[77] proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit important (even if not constitutional) rights and principles.[78]

1.61 A 2012 book on the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:

> 1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
> 2. Are the means in service of the objective rationally connected (suitable) to the objective?
> 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?

---

75 Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

76 See Terms of Reference.

77 Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected': Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

78 In other words, proportionally tests need not only be used by *courts*, and need not only be used to test limits on *constitutional* rights.

> 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[79]

1.62 Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[80] and 'the orienting idea in contemporary human rights law and scholarship'.[81]

> Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication. Even in the United States, which is widely understood to have formally rejected proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality.[82]

1.63 Proportionality is also used by Australian parliamentary committees to scrutinise Bills. The Parliamentary Joint Committee on Human Rights, for example, applies a proportionality test. The Committee's Guide to Human Rights states:

> A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[83]

1.64 A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*.[84] This case concerned a statute, the *Narcotic Control Act*, which placed a legal burden of proof on the defendant, and so undermined the person's right, under the *Canadian Charter of Rights and Freedoms*, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter 'subject only to such reasonable limits

---

79 G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak: 'According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right': Barak, above n 77, 3.

80 Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

81 Huscroft, Miller and Webber, above n 79, 1.

82 Ibid. For recent discussions of proportionality in the UK High Court, see *R (Lord Carlile) v Home Secretary* [2014] 3 WLR 1404, [28]–[34] (Lord Sumption); *Bank Mellat v HM Treasury [No. 2]* [2014] AC 700, [68]–[76] (Lord Reed); and *R (Nicklinson) v Ministry of Justice* [2014] 3 All ER 843, [168] (Lord Mance).

83 Parliamentary Joint Committee on Human Rights, 'Guide to Human Rights' (March 2014) 8 <http://www.aph.gov.au/joint_humanrights/>.

84 *R v Oakes* [1986] 1 SCR 103 [69]–[70].

prescribed by law as can be demonstrably justified in a free and democratic society'.[85] Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

1.65 The first criterion concerned the importance of the objective of the law.

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[86]

1.66 Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[87]

1.67 In each case, Dickson CJ said, courts will be 'required to balance the interests of society with those of individuals and groups'.[88] There are variations, but the language in *Oakes* is reflected in most proportionality tests.

1.68 In Australia, a kind of proportionality test is applied when courts consider the validity of a law that limits the constitutional right to political communication. In considering such laws, courts look at whether the law is 'reasonably appropriate and adapted to serve a legitimate end'.[89] In this context, the phrase 'reasonably appropriate

---

85 The Victorian Charter similarly provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve': *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See also, *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

86 *R v Oakes* [1986] 1 SCR 103 [69]–[70].

87 Ibid.

88 Ibid.

89 This is part of the second limb of the *Lange* test. 'The test adopted by this Court in *Lange v Australian Broadcasting Corporation*, as modified in *Coleman v Power*, to determine whether a law offends against the implied freedom of communication involves the application of two questions: 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect? 2. If the law effectively burdens that freedom, is the law *reasonably appropriate and adapted to serve a legitimate end* in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the

and adapted' does not mean 'essential' or 'unavoidable', but has been said to be closer to the notion of proportionality.[90] Professor Adrienne Stone has written that, in other circumstances, the 'reasonably appropriate and adapted to' formula has been used as 'a very minimal standard of review':

> By contrast, the proportionality formula, which has also been used to interpret grants of Commonwealth power, is a more rigorous tool of judicial review. In contrast to its previous deference, when employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights.... This kind of test resembles those employed in European Union law and in Canada.[91]

1.69 Despite the benefits of a structured proportionality analysis, some flexibility in approach may have benefits. Williams and Hume write that the Australian High Court's 'incompletely theorised agreement about the verbal formulation of the proportionality test has allowed the Court to forge majorities recognising rights rather than falling into disputes about the precise jurisprudential basis of how to balance those rights against other rights and the public interest'.[92]

1.70 Proportionality—'a single flexible standard'—has been contrasted with the law of the First Amendment to the US Constitution, which 'uses a multitude of less flexible, but more precise, rules designed to respond to particular kinds of cases'.[93]

1.71 In *Roach v Electoral Commissioner*, Gleeson CJ expressed reservations about an 'uncritical translation of the concept of proportionality' from jurisdictions with human rights instruments, into the Australian context.[94] In *Momcilovic*, Heydon J suggested that the proportionality test in the Victorian Charter created 'difficult tasks' that should be for legislatures, not judges.[95] However, these concerns may not arise if the

---

informed decision of the people?': *Hogan v Hinch* (2011) 243 CLR 506, [47] (French CJ) (emphasis added).

90 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ).

91 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 677.

92 Williams and Hume, above n 10, 136–7.

93 Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' 28(3) *UNSWLJ* 842, 844. 'The choice between the competing merits of these approaches depends on rather large questions of fact and value. Rules will appeal to those who value certainty in the application of judicial rules and who believe that rules created by one court are capable of constraining later and lower courts. Flexible standards will appeal to those who value flexibility and to those who are, in any event, sceptical about the capacity of legal doctrine to effectively constrain judges': Ibid.

94 'Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our Constitution. They create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [17] (Gleeson CJ).

95 'It will lead to debates in which many different positions could be taken up. They may be debates on points about which reasonable minds may differ. They may be debates in which very unreasonable minds may agree. They are debates that call for resolution by legislative decision': *Momcilovic v The Queen* (2011) 245 CLR 1, [431] (Heydon J). Heydon J said that s 7(2) 'creates a kind of "proportionality" regime without comprehensible criteria': Ibid [432].

proportionality analysis is being applied by law makers and others to test the merits of proposed laws, rather than by courts testing existing laws against constitutional rights.

1.72 Other criticisms of proportionality may apply not only to the use of the concept by courts, but also more broadly. The use of proportionality in the constitutional law of other countries has its critics.[96] Some have suggested that proportionality tests give insufficient weight to rights, or call for the comparison of incommensurable values. Proportionality has even been called an 'assault on human rights'.[97] To balance rights may be to 'miss the distinctive moral status that a rights claim presupposes and affirms'.[98] Far from rights being 'trumps',[99] a balancing approach might suggest that everything is 'up for grabs'.[100]

1.73 Nevertheless, in submissions to this Inquiry, a number of stakeholders said that proportionality was the appropriate concept to apply.[101] For example, the Law Council of Australia submitted that the proportionality test in *R v Oakes* 'has been applied in Australian domestic law and can produce logical and predictable outcomes when applied to legislation'.

> 'Proportionality' is... a fluid test which requires those analysing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.[102]

1.74 In its submission to this Inquiry, the Human Rights Law Centre stated:

> the test for determining whether a restriction is appropriate should be one of proportionality as used in international and comparative human rights jurisprudence and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). ... A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.[103]

1.75 In this Inquiry, the ALRC does not consider the question of whether testing the proportionality of laws that limit rights is better carried out by the judiciary or the legislature. Nor is it necessary, in this Inquiry, to find a perfect method—if such a

---

96 See, eg, Francisco J Urbina, 'Is It Really That Easy: A Critique of Proportionality and "Balancing as Reasoning"' (2014) 27 *Canadian Journal of Law and Jurisprudence* 167; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; Gregoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179. In defence, see, eg, Moller, above n 80.

97 Tsakyrakis, above n 96.

98 Ibid 489.

99 This is Ronald Dworkin's well-known metaphor: Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984).

100 Tsakyrakis, above n 96, 489. 'With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching': Ibid 487.

101 Although in most submissions, the justification for laws limiting rights was not discussed at this more general level.

102 Law Council of Australia, *Submission 75*.

103 Human Rights Law Centre, *Submission 39*. See also Centre for Comparative Constitutional Studies, *Submission 58*.

method exists—for testing the justification of laws that limit rights. Whether a particular law that limits a right is justified will of course sometimes be a question about which reasonable people acting in good faith disagree. A rigid insistence on a prescribed proportionality framework may also discourage more thorough and wide ranging analysis.

1.76 While the ALRC does not propose that one particular formulation must always be used to test the justification of laws that limit traditional rights and freedoms, proportionality tests offer a valuable way of structuring the critical analysis. It calls for a considerable degree of rigour, and is clearly more thorough than mere unsupported statements that a law is justified because it is in the public interest. Proportionality is also widely used in many other countries and jurisdictions. When considering similar laws in Australia, law makers will naturally find these other analyses instructive. Importantly, the use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary.

Scrutiny processes

1.77 A law that limits important rights may be said to be justified in another sense, namely, that it was made following open and robust scrutiny. A law that limits a right might therefore be said to be justified *procedurally*, if the law was made after a procedure that thoroughly tested whether the limit was *substantively* justified. A quite fundamental procedural justification for laws might be, for example, that the law was made by a democratically elected Parliament in a country with a free press. Another important process is scrutiny by parliamentary committees.

1.78 Rigorous processes for scrutinising laws for compatibility with traditional rights may be more important in jurisdictions without a constitutional bill of rights. So called 'political rights review' or 'legislative rights review', Professor Janet Hiebert has written,

> entails new responsibilities and new incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-inspired approach that relies almost exclusively on judicial review for judgments about rights.[104]

1.79 In Chapter 2, the ALRC discusses some procedural protections of traditional rights in more detail, with a particular focus on scrutiny by parliamentary committees—and the tests used in those scrutiny processes.

1.80 In Australia, proposed laws are checked for compatibility with traditional rights at a number of stages in the law making process. For example, when developing policy, government departments are encouraged to think about the effect a proposed law will have on fundamental rights. Bills and disallowable legislative instruments presented to Parliament must have a 'statement of compatibility' that assesses the legislation's

104 Hiebert, above n 17, 9. See also Janet L Hiebert and James B Kelly, *Parliamentary Bills of Rights* (Cambridge University Press, 2015) 4.

compatibility with the rights and freedoms in seven international human rights instruments (which include most of the traditional rights and freedoms in the ALRC's Terms of Reference). The Attorney-General's Department plays an important role in providing advice about human rights law and often assists agencies prepare statements of compatibility and explanatory memoranda.[105]

1.81 Law reform bodies such as the ALRC also routinely consider rights and freedoms in their work. Under the *Australian Law Reform Commission Act 1996* (Cth), the ALRC has a duty to ensure that the laws, proposals and recommendations it reviews, considers or makes:

> (a) do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
>
> (b) are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.[106]

1.82 The Office of Parliamentary Counsel will also consider common law rights and freedoms when drafting legislation, and may question departments about proposed laws that appear to unduly interfere with rights.

1.83 There are multiple parliamentary committees that review legislation, and three committees have a particular role in considering whether proposed laws are compatible with basic rights: the Senate Standing Committee for the Scrutiny of Bills, the Senate Standing Committee on Regulations and Ordinances, and the Parliamentary Joint Committee on Human Rights.

1.84 Because of the close relationship between many traditional common law rights and many human rights protected by international covenants and instruments, an important role is also played by the Australian Human Rights Commission. The Commission, established in 1986, and its predecessor, the Human Rights and Equal Opportunity Commission, established in 1981, have as their purpose, working

> for the progressive implementation of designated international conventions and declarations through representations to the Federal Parliament and the executive, through other public awareness activities, and where appropriate through intervention in judicial proceedings.[107]

1.85 No less importantly, laws are often scrutinised by the public and in the press.

1.86 Clearly, there are already many processes for testing the compatibility of proposed laws with important rights and freedoms. Some are relatively new, such as

---

105 Valuable resources about human rights may be found on the Attorney-General's Department website: <www.ag.gov.au>. See also, Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011); Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <www.ag.gov.au>. In addition to these guides, agencies are encouraged to consult early and often with relevant areas of the Attorney-General's Department where rights encroachment issues arise. See, eg, *Drafting Direction No. 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* [7], [54].

106 *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

107 Shearer, above n 66, 55.

the Parliamentary Joint Committee on Human Rights, established in 2011. Some are much older, like the Senate Standing Committee on Regulations and Ordinances, established in 1932. In Chapter 2, the ALRC considers whether some of these existing procedures might be improved. For example, the ALRC considers whether the justifications given to parliamentary committees and in compatibility statements are generally adequate, or could be made more thorough and the reasoning more explicit.

Laws that may merit further review

1.87 Throughout this paper, the ALRC highlights certain laws that may merit closer review. These are laws that have been criticised for unjustifiably limiting common law rights or principles. This report highlights some of these criticisms and some of the arguments that may be relevant to justification. However, for most of these laws, the ALRC would need more extensive consultation and evidence to justify making detailed recommendations for reform.[108]

1.88 Therefore, rather than make detailed recommendations for reform based on insufficient evidence, the ALRC has highlighted laws that seem to merit further review. These laws are identified in the conclusion to each chapter. The highlighted laws have been selected following consideration of a number of factors, including whether the law has been criticised in submissions or other literature for unjustifiably limiting one or more of the relevant rights and whether the law has recently been thoroughly reviewed. Laws that may be criticised for reasons other than interference with rights, for example because they do not achieve their objective, are not highlighted for that reason alone. The fact that a law limits multiple rights has also sometimes suggested the need for further review.[109]

1.89 The ALRC calls for submissions on which laws that limit traditional rights deserve further review.

The reform process

1.90 The release of this Interim Report is the second major step in this Inquiry. It builds upon the Issues Paper, which was released in December 2014. A Final Report will be presented to the Attorney-General in December 2015.

1.91 In the Issues Paper, two questions were asked about each right, freedom or principle listed in the Terms of Reference. The first was directed at general principles or criteria that might be applied to help determine whether a law that encroaches on the

---

108 Gathering this evidence is not possible, given the wide scope of the Inquiry. By way of illustration, 16 prior reports of the ALRC are referred to with respect to the consideration of particular aspects of rights, freedoms and privileges—sometimes only one small part of the broader chapter, as in the case of the work on secrecy provisions that is referred to in Ch 3: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). Each of these ALRC inquiries took some 12–15 months to undertake.

109 There may also be other laws that deserve further review, not highlighted in this report. Without testing the justification for all laws that limit rights, even in only a preliminary way, the ALRC cannot confidently say that they also do not need to be reviewed. The fact that a law is not highlighted should not be taken to imply that the ALRC considers that it does not need further review.

right is justified. The second question invited people to identify specific Commonwealth laws that unjustifiably encroached on the relevant right or freedom, and to explain why these laws are not justified. The ALRC received 76 public submissions. These are published on the ALRC website.

1.92 The ALRC has consulted with a broad range of people and organisations, and will meet with others after the release of this Interim Report. The names of the people and organisations the ALRC meets with will be published in the Final Report.

1.93 The ALRC also convened an Advisory Committee of experts, which has met once and will meet again later in the year. The committee has 13 members, and their names appear at the beginning of this report. Professor Barbara McDonald also provided crucial assistance, particularly in the preparation of the Issues Paper.

1.94 In this Inquiry the ALRC was also able to call upon the expertise and experience, as part-time Commissioners, of the Hon Justice John Middleton of the Federal Court of Australia and, from 9 July 2015, Emeritus Professor Suri Ratnapala. Invaluable input was also provided by five expert readers who commented on certain chapters of the report. Their names also appear at the beginning of this report.

1.95 Further information about the ALRC consultation and submission processes, including information about how the ALRC uses submissions in its work, is available on the ALRC website, along with how to subscribe to the Inquiry enews.

Call for further submissions

1.96 The ALRC invites submissions in response to this Interim Report. Although the paper does not contain proposals for specific changes to the law, it does highlight a number of laws that may unjustifiably interfere with traditional rights and therefore deserve further scrutiny. The ALRC invites submissions addressing whether these laws do indeed deserve further review, and submissions identifying any other Commonwealth laws that should be reviewed.

1.97 Generally, submissions will be published on the ALRC website, unless they are marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. However, the ALRC does not publish anonymous submissions.

To make a submission, please use the ALRC's online form, available at <https://www.alrc.gov.au/content/freedoms-IR127-online-submission>.
Otherwise, submissions may be sent to freedoms@alrc.gov.au or ALRC, GPO Box 3708, Sydney 2000. The deadline for submissions is **Monday 21 September 2015**. Submissions, other than those marked confidential, will be published on the ALRC website.

2. Scrutiny Mechanisms

Contents

A culture of justification

2.1 In Australia, existing and proposed laws are scrutinised for compatibility with fundamental rights and principles at a number of stages and by a number of different bodies and institutions. This chapter outlines some of these processes for testing compatibility, with a particular focus on scrutiny of draft legislation by parliamentary committees, and considers how the processes may be improved.

2.2 Scrutiny of laws for compatibility with fundamental rights may be seen as part of a 'democratic culture of justification'—that is, a culture in which 'every exercise of public power is expected to be justified by reference to reasons which are publicly

available to be independently scrutinised for compatibility with society's fundamental commitments'.[1]

2.3 Such scrutiny can provide a meaningful check on unjustified legislative intrusions on traditional rights and freedoms. There is also an important democratic rights value in good, transparent processes and debate about all laws, but particularly those laws that limit long-held and fundamental individual rights and freedoms.

2.4 Professor Janet Hiebert and others have written about processes of 'legislative rights review' and the 'importance of confronting whether and how proposed legislation implicates rights adversely and engaging in reasoned judgment about whether the initiative should be amended or is nevertheless justified'.[2] This can happen throughout the legislative process:

> From the early stages of bureaucratic policy development of identifying compatibility issues and advising on more compliant ways to achieve a legislative initiative, through to the Cabinet process of deciding whether to proceed with legislative bills, and ultimately in parliamentary deliberation about whether to approve legislation or put pressure on the government to make amendments.[3]

2.5 Scrutiny can also continue after a law is enacted. This chapter discusses the role and functions of some of the agencies and institutions that play a role in scrutinising existing laws for compatibility with fundamental rights.

Policy development and legislative drafting

2.6 Policy development and legislative drafting does not occur in a rights vacuum. Guidance on developing rights-compatible legislation is provided in the *Legislation Handbook*,[4] in drafting directions prepared by the Office of Parliamentary Counsel (OPC), and other guidance documents.[5]

Drafting guidance

2.7 The drafting directions specifically alert policy makers to the types of provisions which draw adverse comment from the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).[6] Policy makers are also encouraged to seek advice from the relevant sections of the Attorney-General's Department, and engage with drafters at OPC on these issues.

---

1 Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.

2 Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39, 40.

3 Ibid.

4 Department of Prime Minister and Cabinet, *Legislation Handbook* (1999), [8.19].

5 See, eg, Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011).

6 See, eg, *Drafting Direction No. 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* pt 7.

2.8 The *Legislation Handbook* provides that the Attorney-General's Department should be consulted on legislative proposals which may be 'inconsistent with or contrary to an international instrument relating to human rights, in particular [the *International Covenant on Civil and Political Rights*]'.[7]

2.9 While some rights-encroaching legislation includes a time limit or 'sunset clause',[8] or review or reporting mechanism,[9] there is no general guidance included in either the *Legislation Handbook* or OPC's *Drafting Directions* relating to the inclusion of sunset clauses or review mechanisms where legislation is likely to be inconsistent with fundamental rights, freedoms or privileges.

Explanatory material

2.10 Since 1983, it has been standard practice for government bills to be accompanied by an explanatory memorandum, and since 2003, all Commonwealth regulations must be accompanied by an explanatory statement. However, the history of explanatory statements and explanatory memoranda span back to 1932 and the 1950s respectively.[10]

2.11 These are prepared by the government department with policy responsibility for the bill or instrument, for approval by the relevant Minister. Explanatory memoranda ought, where possible, to address matters considered by the Scrutiny of Bills Committee or Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee). The Attorney-General's Department provides advice and guidance on the drafting of explanatory memoranda.

2.12 Since 2011, all legislation and disallowable instruments must also be accompanied by a 'statement of compatibility'. Statements of compatibility must include an assessment of whether a bill or disallowable instrument is compatible with human rights.[11] These are also prepared by the department developing a bill or disallowable instrument, for approval by the relevant Minister.

2.13 Following the introduction of this requirement, the Attorney-General's Department developed a tool for assessing human rights compatibility, and a number of guidance documents. A non-exhaustive list of policy triggers which may give rise to human rights concerns seeks to engage policy makers on human rights issues from the initial stages of policy development.[12] Templates and example statements of

---

7 Department of Prime Minister and Cabinet, above n 4, [6.34].

8 See, eg, *Criminal Code* (Cth) ss 119.2, 105.53.

9 See, eg, Ibid s 105.47; *Personal Property Securities Act 2009* (Cth) s 343.

10 Explanatory statements have accompanied Commonwealth regulations since the inception of the Regulations and Ordinances Committee in 1932. Explanatory memoranda in the modern sense have commonly accompanied government bills since the 1950s. In the first half of the 20th Century, they took the form of comparative memoranda, which inserted the proposed amendments into the parent Act, demarking the proposed additions and deletions: Patrick O'Neill, 'Was There an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament' (Parliamentary Library, Parliament of Australia, 2006).

11 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8–9.

12 Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <www.ag.gov.au>.

compatibility[13] assist departments in the drafting of statements of compatibility. The Attorney-General's Department also provides specific assistance and advice to departments on statements of compatibility where requested.

2.14 Additionally, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) has published a guidance note on drafting statements of compatibility, setting out 'the committee's approach to human rights assessments and its requirements for statements of compatibility'.[14]

Consultation on draft bills

2.15 In addition to consultation with other government agencies, a draft version of a bill (an exposure draft) will sometimes be released to the public, particularly where 'the proposed measures will have a significant impact on groups in the community'.[15] Cabinet endorsement or Prime Ministerial approval (for bills that do not include measures endorsed by Cabinet) is required before an exposure draft is released.[16]

Parliamentary scrutiny processes

2.16 Parliamentary debate during the passage of legislation is the ultimate forum for the scrutiny of, and judgments about, encroachments on fundamental rights, freedoms and privileges. However, in order to ensure the Parliament is well-informed in conducting such debates, a number of scrutiny committees specifically consider whether Commonwealth laws encroach upon fundamental rights, freedoms and privileges. This began with the Regulations and Ordinances Committee, established in 1932 to review disallowable instruments. The scrutiny function was expanded to the Scrutiny of Bills Committee in 1981. Both committees have a long-standing history of conducting a technical scrutiny function, which does not delve into the policy merits of a particular provision.[17] In 2011, the Human Rights Committee was established to consider a wider range of human rights—specifically tied to Australia's international human rights obligations—in conducting its review. The Human Rights Committee specifically considers the policy merits of provisions as part of its scrutiny.[18]

2.17 Additionally, the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee), Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) and the Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) review legislation which impact on fundamental rights, freedoms and privileges, particularly in relation to migration, counter-terrorism and national security legislation.

---

13 Ibid.
14 Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014).
15 Department of Prime Minister and Cabinet, above n 4, [4.7(i)].
16 Ibid [7.9].
17 Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"' (2015) 26 *Public Law Review* 19, 22, 27.
18 Ibid 27.

Senate Standing Committee on Regulations and Ordinances

2.18 The Regulations and Ordinances Committee was established in 1932. It is required to review, and, if necessary, report on whether disallowable instruments:

- are in accordance with the statute;
- unduly trespass on personal rights and liberties;
- unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; or
- contain matter more appropriate for parliamentary enactment.[19]

2.19 The Regulations and Ordinances Committee is comprised of six members supported by a legal adviser who reviews all disallowable instruments against the principles above, and provides a report on compliance.[20]

2.20 Where an instrument raises a concern with respect to the matters being tested, the Regulations and Ordinances Committee usually writes to the responsible Minister for further explanation, or to seek an undertaking for specific action to resolve the concern.[21] This process is usually completed within 15 sitting days of the instrument being tabled, to allow the Committee to seek disallowance of an instrument if its concerns are not allayed. Where the scrutiny process is not completed, the Regulations and Ordinances Committee may move a notice of motion for disallowance in order to provide it with sufficient time to complete its review, and retain its power to seek disallowance if concerns about compliance with its scrutiny principles are not addressed.[22]

Senate Standing Committee for the Scrutiny of Bills

2.21 The Scrutiny of Bills Committee was established in 1981, on a six month probationary basis, with its functions carried out by the Constitutional and Legal Affairs Committee.[23] In May 1982, the Scrutiny of Bills Committee was constituted as a separate committee, but it was not until 1987 that it was made a standing committee of the Senate.[24] The scrutiny principles applied by the Committee are drawn from those applied by the Regulations and Ordinances Committee, and require it to consider whether bills or Acts:

- trespass unduly on personal rights and liberties;

---

19 Senate, Parliament of Australia, *Standing Order 23* (24 August 1994). The overlap between these scrutiny principles and the Terms of Reference for this ALRC Inquiry are discussed in text below.

20 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013), [1.12].

21 Ibid [1.13].

22 Ibid [1.14]–[1.15].

23 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny—A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills* (Senate, Parliament of Australia, 1991), 6.

24 Ibid 5–7.

- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.[25]

2.22 The Committee is comprised of six members, supported by a legal adviser who reviews all bills against the scrutiny principles, and provides a report on whether and how the principles are breached. Based on this advice, the Scrutiny of Bills Committee publishes, on each Wednesday of a sitting week, an *Alert Digest* containing an outline of each of the Bills introduced in the previous sitting week, along with any comments it wants to make in relation to a particular Bill.

2.23 If concerns are raised in the *Digest*, the Scrutiny of Bills Committee writes to the Minister responsible for the bill, inviting a response to its concerns, and sometimes suggests an amendment. The Minister's response may include a revised version of a section of legislation, a slight alteration to the legislation or explanatory memorandum, or the response may better explain why the bill has appeared in its current form. If these responses do not allay the Scrutiny of Bills Committee's concerns, it will draw the provisions in question to the Senate's attention through its Report, and leave it to the Senate to determine the appropriateness of the relevant encroachment.

2.24 The Scrutiny of Bills Committee's concerns, the Minister's responses and the Committee's conclusions are published in a Report. Since February 2015, the Scrutiny of Bills Committee also publishes a newsletter highlighting key scrutiny issues. It focuses on 'information that may be useful when bills are debated'.[26]

Parliamentary Joint Committee on Human Rights

2.25 The Human Rights Committee was established under section 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*Parliamentary Scrutiny Act*). The Human Rights Committee must examine all bills and legislative instruments that come before either House of Parliament for compatibility with human rights, and report to both Houses on that issue.[27] It is an extension of existing parliamentary rights review

---

25 Senate, Parliament of Australia, *Standing Order 24* (15 July 2014). The overlap between these scrutiny principles and the Terms of Reference for this ALRC Inquiry are discussed in text below.

26 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Senate Scrutiny of Bills Committee News* (2015), 1.

27 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a). The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) formed part of the government response to the National Human Rights Consultation. The National Human Rights Consultation Committee recommended the adoption of federal human rights legislation modelled on the Victorian and ACT charters. It extends the existing parliamentary rights review model, rather than adopting a judicial review model of rights protection. The overlap between the human rights considered by the Human Rights Committee and the Terms of Reference for this ALRC Inquiry are discussed in text below.

mechanisms, and draws an explicit connection with international human rights instruments.

2.26 Unlike the Regulations and Ordinances Committee and the Scrutiny of Bills Committee, which draw their scrutiny principles broadly from the *International Covenant on Civil and Political Rights* (ICCPR),[28] the Human Rights Committee's scrutiny is tied directly to international human rights instruments. The *Parliamentary Scrutiny Act* defines human rights as those rights and freedoms declared in the ICCPR and *International Covenant on Economic, Social and Cultural Rights* (ICESR),[29] as well as a number of other international instruments which relate to the rights in the ICCPR and ICESR.[30]

2.27 The Committee is comprised of 10 members,[31] and is supported by a legal adviser and secretariat. If the Human Rights Committee is not initially satisfied with the human rights compatibility of a bill, it will write to the relevant Minister seeking further detail about the bill. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and/or call for witnesses.[32]

2.28 On each Tuesday of a sitting week, the Human Rights Committee publishes a report commenting on provisions raising human rights concerns, or where insufficient information has been provided to allow it to undertake an analysis. It also comments on responses received in response to comments in earlier reports.

2.29 In conducting its examination, the Human Rights Committee categorises bills and instruments into three groups: legislation which does not give rise to human rights concerns; legislation which potentially raises human rights concerns; and legislation that raises human rights concerns the Committee considers require closer examination.[33] The third category refers to those pieces of legislation that raise human rights concerns of such significance or complexity that the Committee may examine it more closely, and use its powers to hold hearings or request a briefing.[34]

---

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

29 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

30 Namely, the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for Signature 10 December 1984, 1465 UNTS 85 (entered into Force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

31 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 5(1).

32 Commonwealth, *Hansard*, House of Representatives, 20 June 2012, 7177 (Mr Harry Jenkins).

33 Parliamentary Joint Committee on Human Rights, *Annual Report 2012–13* (2013), [1.19].

34 Ibid [1.27].

2.30 The primary focus of the Committee is 'determining whether any identified limitation of a human right is justifiable'.[35] It does so by reference to what are known as the Siracusa Principles,[36] which broadly invite an analysis of whether the limitation is prescribed by law, in pursuit of a legitimate objective, rationally connected to its stated objective, and proportionate to the achievement of the objective.[37]

Senate Standing Committee on Legal and Constitutional Affairs

2.31 First established in 1970, eight legislative and general purpose standing committees, including the Legal and Constitutional Affairs Committee, are appointed under Senate Standing Order 25.[38] It is comprised of a pair of committees, the Legislation Committee, which deals with bills, estimates processes and oversees departmental performance, and the References Committee, which deals with references from the Senate.[39] The Legislation Committee is required to take into account, in its review of bills, comments made by the Scrutiny of Bills Committee.[40] As a result, the Constitutional and Legal Affairs Committee considers encroachments on fundamental rights, freedoms and privileges to the extent that the Scrutiny of Bills Committee raises these issues in its reports. As discussed above, the Scrutiny of Bills Committee is specifically required to review bills to determine whether they trespass on personal rights and liberties.

2.32 Each committee is allocated a group of departments and agencies to oversee.[41] The Legal and Constitutional Affairs Committee has coverage of the Attorney-General's Department and Department of Immigration and Border Protection.[42] As part of its oversight, it scrutinises a number of legislative frameworks which may have an impact upon fundamental rights, freedoms and privileges, such as migration law, and counter-terrorism and national security legislation.

2.33 The Legislation and References Committees of the Legal and Constitutional Affairs committee are comprised of six members each, with a Government majority in the Legislation Committee and an Opposition majority in the References Committee.[43] In the Legislation Committee, three of the members are nominated by the Leader of the Government in the Senate, two are nominated by the Leader of the Opposition in the Senate and one by minority groups and independent senators.[44] In the References Committee, three members are nominated by the Leader of the Opposition in the Senate, two by the Leader of the Government and one by minority groups and

35 See, eg, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—Nineteenth Report of the 44th Parliament* (2015), v.
36 See Ch 1.
37 See, eg, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—Nineteenth Report of the 44th Parliament* (2015), v.
38 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), ch 16.
39 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 2.
40 Ibid cl 2B.
41 Harry Evans and Rosemary Laing, above n 38, ch 16.
42 Ibid.
43 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 5.
44 Ibid cl 5(a).

independent senators.[45] The Committees have the power to appoint persons with specialist knowledge.[46]

Parliamentary Joint Committee on Intelligence and Security

2.34 The Intelligence Committee was established in 2001, under s 28 of the *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*). It is comprised of eleven members, the majority of whom must be Government members.[47] Five members are drawn from the Senate and six from the House of Representatives.[48]

2.35 The Intelligence Committee is required to review any matter, including bills before the Parliament, relating to Australia's intelligence and security agencies referred to it by the Attorney-General or a resolution of either House of Parliament.[49] It may also request the Attorney-General to refer a matter to it.[50] Some examples of bills the Intelligence Committee has reviewed since January 2014 include the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), and the National Security Legislation Amendment Bill (No. 1) 2014 (Cth).

2.36 The Intelligence Committee also has a role in post-implementation review. It is required, under s 29 of the *Intelligence Services Act*, to review the operation, effectiveness and implications of the following provisions by 7 May 2018:

- pt III div 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth);
- pt 1AA div 3A of the *Crimes Act 1914* (Cth);
- divs 104 and 105 of the *Criminal Code 1995*;[51] and
- ss 119.2 and 119.3 of the *Criminal Code 1995*.[52]

2.37 While the *Intelligence Services Act* does not expressly require that the Intelligence Committee consider fundamental rights, freedoms and privileges as part of its review of bills, in practice, the Committee considers whether the bill provides adequate safeguards and accountability mechanisms.[53] These are matters that are relevant to whether encroachments on fundamental rights, freedoms and privileges are

45 Ibid cl 5(b).
46 Ibid cl 17.
47 *Intelligence Services Act 2001* (Cth) s 28(3).
48 Ibid s 28(2).
49 Ibid s 28(1)(b).
50 Ibid s 28(2).
51 *Criminal Code Act 1995* (Cth) sch 1 *(Criminal Code*).
52 *Intelligence Services Act 2001* s 29(1)(bb).
53 See, eg, Parliamentary Joint Committee on Intelligence and Security, 'Advisory Report on the National Security Legislation Amendment Bill (No. 1) 2014' (Parliamentary Paper 199/2014, 17 September 2014), 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter–Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014), 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015), 2.

justified.[54] The Intelligence Committee has the power to conduct private hearings,[55] which may allow it to conduct a more thorough evidence-based review of justifications for encroachments on fundamental rights, freedoms and privileges based on national security concerns.

Parliamentary Joint Committee on Law Enforcement

2.38 The Law Enforcement Committee was established in December 2013, and is comprised of ten members,[56] with a Government majority. Five members are drawn from the House of Representatives and five from the Senate.[57] The five members of the House of Representatives are comprised of three members nominated by the Government Whip and two by the Opposition Whip. The five members of the Senate are comprised of two members nominated by the Leader of the Government in the Senate, two members by the Leader of the Opposition in the Senate and one by any minority group or independent senator. [58] The Committee is chaired by a Government member,[59] and a non-Government member is the deputy chair.[60]

2.39 The Law Enforcement Committee is concerned mostly with the activities of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). It reviews annual reports of the ACC and the AFP, providing additional oversight of agencies with 'strong, coercive powers'.[61] It is required, among other things, to examine trends and changes in criminal activities, practices and methods and report on changes it thinks desirable to the structure, functions, powers and procedures of the ACC and AFP.[62] It is also required to oversee the operation of pt 2–6 and s 20A of the *Proceeds of Crime Act 2002* (Cth).[63]

2.40 The Law Enforcement Committee is not expressly required, under the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth), to consider fundamental rights, freedoms and privileges as part of its review. However, its oversight functions are designed to monitor the implementation and operation of legislative frameworks which may encroach upon fundamental rights, freedoms and privileges.[64]

---

54 This is reflected in the Terms of Reference to this ALRC Inquiry, which requires the ALRC to consider 'any safeguards provided in the laws, such as rights of review or other accountability mechanisms'.

55 *Intelligence Services Act 2001* (Cth) sch 1, cl 6–7.

56 *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) s 5.

57 Ibid s 5(2).

58 Commonwealth *Hansard*, House of Representatives, 21 November 2013, 968-9 (The Hon. Chris Pyne MP) cl 1(a).

59 Ibid cl 1(c)(i).

60 Ibid.

61 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Examination of the Australian Crime Commission Annual Report of the 2014*, June 2015, [1.3].

62 *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) s 7(1)(g).

63 *Proceeds of Crime Act 2002* (Cth) s 179U.

64 The Attorney-General, in discussing the Law Enforcement committee's role, stated that it exemplifies the 'commitment to improving oversight and accountability in relation to the exercise of the functions of Commonwealth agencies': Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Examination of the Australian Crime Commission Annual Report of the 2014*, June 2015, [1.3].

Other review mechanisms

Australian Human Rights Commission

2.41 The Australian Human Rights Commission (AHRC), as part of its role under the *Australian Human Rights Commission Act 1986* (Cth), has the power to review laws. This may be conducted under a reference from the Attorney-General, or because it appears to the AHRC desirable to do so, to determine whether it is compatible with Australia's international human rights obligations.[65] It is required to report to the Attorney-General on its review,[66] and shall include any recommendations for amendments of an enactment to ensure it is not inconsistent with or contrary to any human right.[67] The Minister is required to table a copy of any such report within 15 sitting days of receipt of the report.[68]

Independent National Security Legislation Monitor

2.42 The Independent National Security Legislation Monitor (INSLM) must review, on his or her own initiative, or arising from a reference from the Prime Minister or the Committee on Intelligence and Security, the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation, and any other laws which relate to counter-terrorism or national security.[69] As part of its review, the INSLM must consider whether these provisions contain appropriate safeguards to protect the rights of the individual, and are proportionate and necessary.[70] The INSLM is required to give the Prime Minister an annual report relating to the above functions.[71] The Prime Minister must table the annual report before Parliament within 15 sitting days of receipt.[72]

2.43 As discussed above, the Intelligence Committee is also specifically tasked with a post-implementation review of a number of provisions relating to counter-terrorism and national security.

Australian Law Reform Commission

2.44 The ALRC conducts reviews into matters referred to it by the Attorney-General.[73] In conducting a review, the ALRC must aim to ensure that the laws, proposals and recommendations it reviews 'do not trespass unduly on personal rights and liberties'.[74] It is required to report on its review to the Attorney-General,[75] who must table the report within 15 sitting days of receipt of the report.[76]

---

65 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(e).
66 Ibid.
67 Ibid s 29(1).
68 Ibid s 46.
69 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1).
70 Ibid s 6(1)(b).
71 Ibid s 29(1).
72 Ibid s 29(5).
73 *Australian Law Reform Commission Act 1996* (Cth) s 21.
74 Ibid s 24.
75 Ibid s 21(2).
76 Ibid s 23.

Efficacy of scrutiny and review mechanisms

Overlapping parliamentary scrutiny

2.45 Since the establishment of the Human Rights Committee, the overwhelming majority of bills which have an impact on the rights, freedoms and privileges listed in the Terms of Reference have been subject to at least two separate streams of parliamentary committee review. Table 1 sets out the extent of overlap in the consideration of these rights by the three parliamentary rights scrutiny committees.

Table 1 Parliamentary scrutiny of fundamental rights, freedoms and privileges[77]

ALRC Terms of Reference	Human Rights Committee	Scrutiny of Bills Committee	Regulations and Ordinances Committee
Freedom of speech	✓	✓	✓
Freedom of religion	✓	✓	✓
Freedom of association	✓	✓	✓
Freedom of movement	✓	✓	✓
Vested property rights	×	✓	✓
Retrospective offences	✓	✓	✓
Retrospective application of obligations (civil)	×	✓	✓
Fair trial	✓	✓	✓
Burden of proof	✓	✓	✓
Privilege against self-incrimination	✓	✓	✓
Client legal privilege	✓[78]	✓	✓
Strict and absolute liability	✓	✓	✓
Appeal from acquittal	✓	✓	✓
Procedural fairness	✓	✓	✓
Judicial review	✓[79]	✓	✓
Delegating legislative power	×	✓	✓
Authorising what would otherwise be a tort	Limited[80]	✓	✓
Executive immunities	Limited[81]	✓	✓

77 This table is derived from: the definition of human rights in *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3; the scrutiny principles listed in Senate, Parliament of Australia, *Standing Order 23* (24 August 1994); Senate, Parliament of Australia, *Standing Order 24* (15 July 2014); and the reports of the relevant committees.

78 Respect for professional duties of confidentiality (such as the confidentiality of legal communications) is considered to fall under the category of a 'right to privacy': See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifteenth Report of the 44th Parliament* (November 2014), [1.52].

79 Parliamentary Joint Committee on Human Rights, above n 33, 18.

80 Where a contravention of the ICCPR would constitute a tort, authorisation of such conduct falls within the purview of art 2(3)(a) of the ICCPR, which requires that an effective remedy be available.

81 Executive immunities for actions which contravene the ICCPR fall within the purview of art 2(3)(a) of the ICCPR, which requires that an effective remedy be available.

2.46 Where no concerns arise about human rights compatibility, or where further information is required before a determination on compatibility can be made, the work of the Human Rights Committee, in practice, appears quite similar to the work of the Scrutiny of Bills Committee. In particular, the reports of each committee reflect that both committees commonly write to the Minister seeking additional information or explanation for why a law that limits fundamental rights, freedoms or privileges is justified.[82]

2.47 However, where stronger concerns about human rights impacts arise, it seems that only the Human Rights Committee seeks empirical evidence to justify an encroachment, and focuses on the measure as a whole, while the Scrutiny of Bills Committee conducts a more technical analysis.[83]

2.48 A similar approach appears to be reflected in considering disallowable instruments, with the Regulations and Ordinances Committee focused on technical scrutiny.[84] Of the 283 instruments the Regulations and Ordinances Committee commented on in 2012–13, 70 related to a failure to provide sufficient information on consultation.[85]

2.49 The Scrutiny of Bills Committee, in its own inquiry into the future role and direction of the Committee, recognised the potential for significant overlap in the work of the committees.[86] In light of this, it may be useful to consider reviewing the scope of the committees, and the relationship between them. For instance, the Human Rights Committee mght focus its attention only on the most significant limitations on human rights, while the Scrutiny of Bills Committee and Regulations and Ordinances Committees might continue to undertake a technical review of all bills and disallowable instruments. Another possible approach could see the requirement to conduct a human rights compatibility analysis added to the scope of the Scrutiny of Bills Committee's work.

2.50 The United Kingdom's experience provides an instructive precedent. The Joint Committee on Human Rights (UK Human Rights Committee) was established in

---

82 Cf Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014), [1.317]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2014* (June 2014), 238–9.

83 Cf Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014), [1.37]–[1.42]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (March 2014), 94–126.

84 Cf Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013), [3.11], [3.19]; Senate Standing Committee on Regulations and Ordinances, 'Delegated Legislation Monitor No. 6 of 2013' (Parliament of Australia, 20 June 2013), 403–4.

85 Senate Standing Committee on Regulations and Ordinances—Report on the Work of the Committee in 2012–13. Report No. 118, [3.7].

86 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012), [3.12].

2001.[87] The UK Human Rights Committee has, since its inception, focused only on bills which appear to raise 'significant questions of human rights'.[88] The legal adviser to the UK Human Rights Committee reviews all bills at an early stage, and brings those bills which raise significant concerns to the Committee's attention.[89] Significance is determined by reference to various criteria, including:

> how important is the right affected, how serious is the interference with it, and in the case of qualified rights, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.[90]

2.51 Since 2006, the UK Human Rights Committee has begun an additional sifting process, to further target those bills to concentrate upon. The additional criteria used to determine its work program include whether:

- the European Court of Human Rights or United Kingdom higher courts have recently given a judgment on the issue raised;
- the Bill has attracted broader public or media attention;
- 'reputable' stakeholders such as non-governmental organisations have commented on the Bill;
- the Explanatory Notes are incomplete so as to necessitate an inquiry into the relevant human rights issues; and
- the Bill raises an issue that has consistently been a concern for the UK Human Rights Committee in the past, but which the Government does not appear to have addressed.[91]

2.52 Similar criteria adapted for Australia could, for example, be used by the Human Rights Committee.

Statements of compatibility and explanatory memoranda

2.53 Since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.[92] The Scrutiny of Bills Committee, in the same period, asked the relevant Minister to include further information and justification in explanatory memoranda for 78 bills.[93]

---

87 Joint Committee on Human Rights, 'The Work of the Committee in the 2001–2005 Parliament—19th Report of the 2004–05 Session', [1].

88 Ibid [46].

89 Joint Committee on Human Rights, above n 87, [47].

90 Ibid.

91 House of Lords House of Commons Joint Committee on Human Rights, 'The Committee's Future Working Practices—Twenty Third Report of Session 2005–06' (Report No 239, 24 July 2006), [29].

92 This figure is derived from a review of reports of the Human Rights Committee. Where a number of bills are introduced as part of a package, it has been counted as a single bill. Data has been collected from January 2013 because the Human Rights Committee began regularly drawing attention to statements of compatibility it judged inadequate from its first report of 2013 onwards.

93 This figure is derived from a review of reports of the Scrutiny of Bills Committee from January 2013 onwards.

2.54 The need for explanatory material that sets out adequate justification for encroachments on fundamental rights, freedoms and privileges is well documented. In its 2006 report on future approaches to scrutiny, the UK Human Rights Committee noted:

> the provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the [scrutiny process].[94]

2.55 Such concerns have been echoed in the Australian context:

> Deficient [explanatory memoranda] means that committees are required to seek additional information from agencies about the proposed legislation. This delays the scrutiny process and could have been avoided had a sufficient EM been provided. This is not an ideal outcome given the tight timeframes under which committees often operate when reporting to Parliament.[95]

2.56 In 2004, the Scrutiny of Bills Committee specifically considered the quality of explanatory memoranda. It recommended:

> Before a Bill is introduced into the Parliament, an appropriately qualified person should check the explanatory memorandum accompanying the Bill to ensure it explains fully the effect and operation of the proposed legislation and complies with the requirements contained in [a new *Legislation Handbook* which consolidates the information contained in the *Legislation Handbook*, Legislation Circulars and Office of Parliamentary Counsel *Drafting Directions*].[96]

2.57 The Human Rights Committee has also emphasised the need for detailed and evidence-based assessments in statements of compatibility.[97]

2.58 Additional procedures could be put in place to improve the rigour of statements of compatibility and explanatory memoranda to assist Parliament in understanding the impact of proposed legislation on fundamental rights, freedoms and privileges. The object of such procedures would be to ensure that statements of compatibility and explanatory memoranda provide sufficiently detailed and evidence-based rationales for encroachments on fundamental rights, freedoms and privileges to allow the parliamentary scrutiny committees to complete their review.

Time constraints and parliamentary consideration of committee reports

2.59 Parliamentary committees tasked with legislative scrutiny are subject to significant time constraints. Parliamentarians have identified that 'the main thing that would make parliamentary scrutiny more effective is more time'.[98] Bills may pass into

---

94 House of Lords House of Commons Joint Committee on Human Rights, above n 91, [41].

95 Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29 *Australasian Parliamentary Review* 116, 120.

96 Senate Standing Committee for the Scrutiny of Bills, 'The Quality of Explanatory Memoranda Accompanying Bills—Third Report of 2004' (Parliament of Australia), 31.

97 Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014), 1.

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

legislation with little or no consideration of the committees' reports.[99] An extreme example of this arises where bills are passed into legislation before the Scrutiny of Bills Committee has published its reports. Since 2000, this has occurred in relation to 109 of the bills considered in the Scrutiny of Bills Committee's reports. Since its inception, over 50 bills have been passed before the Human Rights Committee completed its review.

2.60 The Scrutiny of Bills Committee, in its own inquiry into its future role and direction, concluded that minimum timeframes for committee consideration of legislation were not appropriate, on the basis that its role is not to delay the passage of legislation, but to provide timely reports which alert the Senate of the need for possible further examination of provisions of concern. It also noted that the Scrutiny of Bills Committee retains the discretion to set its own timeframe for considering and reporting on a bill, while acknowledging that the passage of legislation is not deferred pending the Committee's views.

2.61 However, a number of parliamentarians[100] and commentators[101] support the imposition of minimum timeframes for scrutiny committees to consider bills.

2.62 A separate concern is the extent to which Parliament takes into account reports of the Scrutiny of Bills Committee and Human Rights Committee in passing legislation. Speaking about the Human Rights Committee, Professor George Williams noted that 'there is little or no evidence that [the reports of the Committee] have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights'.[102] A review of bills before the Commonwealth Parliament in the three year period from 2001 to 2003 found that, of the 63 bills considered to burden human rights, 43 (or approximately 68%) were enacted.[103]

---

99 See, eg, 'Ten Years of Scrutiny—a Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills', above n 23, 33, 96–7; Carolyn Evans & Simon Evans, Messages from the Front Line: Parliamentarians'Perspectives of Rights Protection in Tom Campbell, KD Ewing and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

100 A number of parliamentarians interviewed by Professors Carolyn and Simon Evans indicated that 'there was a need for parliamentarians, and parliamentary committees, to be given sufficient time to carry out their role seriously and responsibly': Carolyn Evans & Simon Evans, Messages from the Front Line: Parliamentarians'Perspectives of Rights Protection in Tom Campbell, KD Ewing and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 343.

101 See, eg, Law Council of Australia, Submission 19 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Amnesty International, Submission 18 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee,*, 6 April 2010; Combined Community Legal Centres NSW, Submission 16 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 1 April 2010; Australian Human Rights Commission, Submission 11 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Civil Liberties Australia, Submission 7 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010.

102 Professor George Williams, *Submission 76*.

103 Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' *Papers on Parliament No 47*, figure 1.

2.63 In the United Kingdom, of 1,006 substantive references to the UK Human Rights Committee's reports during debate in Parliament, only 16 resulted in the Government offering amendments.[104] In a further seven instances, the Government issued guidance based on the UK Human Rights Committee's reports.[105]

2.64 The effectiveness of the scrutiny process was also queried in the context of the *Anti-Terrorist, Crime and Security Act 2001* (UK):

> [A]ll 124 clauses of the ATCSA 2001 were discussed in sixteen hours, which resulted in no amendments to the Government's proposal. If parliamentary debate is unable to effect changes to potential legislation that breaches human rights standards, its effectiveness must be questioned. One possibility for the complacency of the Commons might be that the s 19 Declaration of Compatibility gives the impression that the Act has already been 'proofed' for human rights compliance. Thus it may serve as a 'legitimizing cloak' which detracts from the quality of debate.[106]

2.65 Determining the efficacy of scrutiny committees solely, or even primarily, by reference to the number of amendments resulting from consideration of committee reports is not necessarily appropriate. As noted by political scientists Meghan Benton and Meg Russell, 'take-up by government of recommendations is only one form of committee influence and arguably not even the most important'.[107] Influencing policy debate, improving transparency within the bureaucracy, holding the government to account by scrutiny and questioning, and creating incentives to draft or amend legislation to avoid negative comments from the committee are all examples of other important functions of scrutiny committees.

2.66 However, Michael Tolley, in his consideration of the effectiveness of the UK Human Rights Committee concluded that 'the jury is still out on the JCHR's effectiveness',[108] suggesting:

> in most instances … the JCHR is unable to get the government to consider its views during the drafting stage ... [and] is unable to prevent the Government from passing the bills it wants.[109]

2.67 The UK Human Rights Committee has, since 2005, adopted the practice of recommending amendments to bills in its reports to give effect to its recommendations, and encourages its members to table these amendments before both Houses of Parliament.[110] This has contributed to a dramatic increase in parliamentary

---

104 Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit' (Arts & Humanities Research Council, 18 April 2012) 43–4.

105 Ibid 44.

106 Rhonda Powell, 'Human Rights, Derogations and Anti-Terrorist Detention' 69 *Saskatchewan Law Review* 79, 98.

107 Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary OVersight Committees: The Select Committees in the British House of Commons' [2012] *Parliamentary Affairs* 1, 26.

108 Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' 44 *Australian Journal of Political Science* 41, 53.

109 Ibid 54.

110 Murray Hunt, Hayley Hooper and Paul Yowell, above n 104, 22.

consideration of its reports, increasing from 23 substantive references in the 2001–2005 Parliament to 1,006 substantive references in the 2005–2010 Parliament.[111]

2.68 A more radical suggestion to facilitate greater parliamentary consideration of committee reports is to, in effect, incorporate the scrutiny process into a bill's passage through Parliament, with scrutiny committees empowered to amend the text of the Bill. These amendments would be subject to rejection in a vote before the Parliament.[112] However, this has the potential to result in more politically partisan scrutiny committees, subject to greater executive control.[113] Alternatively, it may also be useful to provide that the Senate 'cannot deal with a Bill until the Committee has presented a report which in itself has been dealt with by the parliament'.[114]

2.69 The ALRC considers that it may be constructive to consider reviewing the operations of the committees and Senate procedure to ensure that the relevant parliamentary scrutiny bodies have sufficient time to conduct their reviews, and to facilitate adequate consideration of scrutiny reports during parliamentary debates.

2.70 A number of submissions to the Scrutiny of Bills Committee's inquiry into its future role and direction, including that of the ALRC, also noted that the Scrutiny of Bills Committee should have access to adequate resources to complete its scrutiny task.[115]

Conclusions

2.71 The processes and mechanisms for developing and scrutinising Commonwealth laws aim to encourage public and political officials to assess policies and laws to determine whether an encroachment on a fundamental right, freedom or privilege is justified. The following areas may be reviewed to enhance the ability of committees to perform a constructive role in the scrutiny of legislation:

---

111 Ibid 41.

112 Jonathan Morgan, Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties in Tom Campbell, KD Ewing and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 428, 444.

113 Ibid.

114 'Ten Years of Scrutiny—a Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills', above n 23, 97.

115 Australian Law Reform Commission, Submission 32 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 9 April 2010; Rule of Law Institute of Australia, Submission 28a to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*,24 June 2010; Australian Lawyers for Human Rights, Submission 24a to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 9 July 2010; Law Council of Australia, Submission 19 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Australian Human Rights Commission, Submission 11 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Civil Liberties Australia, Submission 7 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Rev Prof the Honourable Michael Tate AO, Submission 2 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 2 March 2010.

- guidance materials and assistance at the legislative drafting and policy development stages, particularly in relation to the application of post-implementation review mechanisms or sunset clauses for legislation which intrudes on fundamental, rights freedoms and privileges;
- oversight of explanatory material and statements of compatibility prior to parliamentary committee scrutiny;
- the scope of and relationship between the committees, with particular attention on what each of the scrutiny committees focuses upon;
- the procedures of scrutiny committees, particularly in relation to minimum timeframes for committee scrutiny, and the role of committee members in bringing the committee's concerns to the Parliament's attention.

3. Freedom of Speech

Contents

The common law

3.1 Freedom of speech has been characterised as one of the 'fundamental values protected by the common law'[1] and as 'the freedom *par excellence*; for without it, no other freedom could survive'.[2]

3.2 This chapter discusses the source and rationale of the common law right of freedom of speech; [3] how this right is protected from statutory encroachment; and when laws that interfere with freedom of speech may be considered justified, including by reference to the concept of proportionality.[4]

---

1 *Nationwide News v Wills* (1992) 177 CLR 1, 31.
2 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.
3 Heydon J has observed that 'there are many common law rights of free speech' in the sense that the common law recognises a 'negative theory of rights' under which rights are marked out by 'gaps in the criminal law': *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [145].
4 See Ch 1.

3.3 The High Court of Australia has stated that freedom of speech 'is a common law freedom' and that it 'embraces freedom of communication concerning government and political matters':

> The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters … The common law and the freedoms it encompasses have a constitutional dimension. It has been referred to in this Court as 'the ultimate constitutional foundation in Australia'.[5]

3.4 In Australian law, particular protection is given to political speech. Australian law recognises that free speech on political matters is necessary for our system of representative government:

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.[6]

3.5 Free speech or free expression is also understood to be an integral aspect of a person's right of self-development and fulfilment.[7] Professor Eric Barendt writes that freedom of speech is 'closely linked to other fundamental freedoms which reflect ... what it is to be human: freedoms of religion, thought, and conscience'.[8]

3.6 This freedom is intrinsically important, and also serves a number of broad objectives:

> First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[9]

3.7 Freedom of speech has, of course, been defended and advocated in the works of leading philosophers and jurists from Aristotle in the 4th century BCE,[10] John Milton

---

5 *Monis v The Queen* (2013) 249 CLR 92, [60] (French CJ).

6 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 108 (Mason CJ). See also, *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).

7 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

8 Ibid. See also United Nations Parliamentary Joint Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [1].

9 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

10 Aristotle, *Politics* (Hackett Publishing Company, 1998) Book 6.

in the 17th century,[11] J S Mill in the 18th century,[12] through to John Rawls, Ronald Dworkin and Eric Barendt in the 20th century.[13]

Protections from statutory encroachment

Australian Constitution

3.8 Beginning with a series of cases in 1992,[14] the High Court has recognised that freedom of political communication is implied in the *Australian Constitution.* This freedom 'enables the people to exercise a free and informed choice as electors'.[15] The *Constitution* has not been found to protect free speech more broadly.

3.9 The *Constitution* does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.[16]

> The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?[17]

3.10 The freedom is not absolute. For one thing, it only protects some types of speech—political communication.[18] In *Lange v Australian Broadcasting Corporation* it was held that the freedom is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'.[19]

---

11 John Milton, 'Areopagitica', *Areopagitica, and Other Political Writings of John Milton* (Liberty Fund, 1644).

12 John Stuart Mill, *On Liberty* (London, 1859) in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991).

13 John Rawls, *Political Liberalism* (Colombia University Press, 1993); Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing, 1978); Barendt, above n 7.

14 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570.

16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506. This 'negative' form of the right to freedom of speech is shared by the United States and other common law countries, where 'constitutional rights are thought to have an exclusively negative cast': Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010), *University of Melbourne Legal Studies Research Paper*, No 476, 12.

17 *Unions NSW v New South Wales* (2013) 304 ALR 266, [36]. Also, the High Court said in *Lange*: 'Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government': *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557. Sections 7 and 24 do not 'confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power': Ibid 560.

18 Political communication includes 'expressive conduct' capable of communicating a political or government message to those who witness it: *Levy v Victoria* (1997) 189 CLR 579.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

3.11 While the scope of the implied freedom is open to some interpretation, it does not appear to extend to non-political communication and non-federal communications concerning discrete state issues.[20]

3.12 Chief Justice French has advocated a broader understanding of the meaning of 'political communications' to include 'matters potentially within the purview of government',[21] but this interpretation has not commanded support of a majority of the High Court.[22]

3.13 In *Lange*, the High Court formulated a two-step test to determine whether a law burdens the implied freedom. As modified in *Coleman v Power*,[23] the test involves asking two questions:

> 1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
>
> 2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by s 128 of the *Constitution* for submitting a proposed amendment of the *Constitution* to the informed decision of the people?[24]

3.14 The limited scope of the communications covered by the implied freedom are illustrated by the decision of the High Court in *APLA Ltd v Legal Services Commissioner (NSW)*.[25] This concerned whether prohibitions, in NSW legislation, on advertising by barristers and solicitors offended the *Constitution*. The High Court held that the prohibitions were not constitutionally invalid.

3.15 Kirby J, in dissent, held that as a matter of basic legal principle, a protected freedom of communication arises to protect the integrity and operation of the judicial branch of government, just as it does with regard to the legislature and executive branch.[26] The laws in question, he said, amounted to 'an impermissible attempt of State law to impede effective access to Ch III courts and to State courts exercising federal

---

20 See George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 184. However, the High Court has stated that the 'complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication': *Unions NSW v New South Wales* (2013) 304 ALR 266, [25].

21 *Hogan v Hinch* (2011) 243 CLR 506, [49]. French CJ has said that the 'class of communication protected by the implied freedom in practical terms is wide': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [67] (French CJ). The case left open the possibility that religious preaching may constitute 'political communication'.

22 See Williams and Hume, above n 20, 185. *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [67] (French CJ).

23 *Coleman v Power* (2004) 220 CLR 1.

24 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67] (French CJ).

25 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

26 Ibid [343].

jurisdiction', which 'cannot stand with the text, structure and implications of the Constitution'.[27]

3.16 The constitutionality of provisions of the *Criminal Code* (Cth), concerning using a postal or similar service to menace, harass or cause offence,[28] was considered by the High Court in *Monis v The Queen*.[29]

3.17 The High Court divided equally on whether s 471.12 of the *Criminal Code* exceeded the limits of the legislative power of the Commonwealth Parliament because it impermissibly burdens freedom of communication about government or political matters.[30]

3.18 Three judges held that the provision was invalid on the basis that preventing offence through a postal or similar service was not a 'legitimate end', as referred to in the *Lange* test.[31] The other judges read down s 471.12 as being 'confined to more seriously offensive communications' and aimed at the legitimate end of preventing a degree of offensiveness that would provoke a more heightened emotional or psychological response by a victim.[32] Read this way, the law went no further than was reasonably necessary to achieve its protective purpose.[33]

3.19 The freedom of political communication doctrine in Australia applies to a narrower range of speech, as compared to protections in other countries (including the United States, Canada, the UK and New Zealand). Australia is the only democratic country that does not expressly protect freedom of speech in its 'national Constitution or an enforceable national human rights instrument'.[34]

Principle of legality

3.20 The principle of legality provides some further protection to freedom of speech.[35] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of speech, unless this intention was made unambiguously clear.[36]

---

27 Ibid [272].
28 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 471.12.
29 *Monis v The Queen* (2013) 249 CLR 92.
30 As a result, the decision of the Supreme Court of New South Wales (Court of Criminal Appeal)—that the provision was valid—was affirmed.
31 *Monis v The Queen* (2013) 249 CLR 92, French CJ [73]–[74], Hayne J [97], Heydon [236].
32 Ibid Crennan, Kiefel, Bell JJ [327]–[339].
33 Ibid [348].
34 George Williams, 'Protecting Freedom of Speech in Australia' (2014) 39 *Alternative Law Journal* 217, 218. Israel has an implied right: Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010), *University of Melbourne Legal Studies Research Paper*, No 476 1.
35 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.
36 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30–33 [42]–[46]; *Evans v State of New South Wales* (2008) 168 FCR 576, [72]; *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 130.

3.21 For example, in *Attorney-General (South Australia) v Corporation of the City of Adelaide*, French CJ said:

> The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories. However, through the principle of legality, and criteria of reasonable proportionality, applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.[37]

3.22 In *Monis*, Crennan, Kiefel and Bell JJ held:

> The principle of legality is known to both the Parliament and the courts as a basis for the interpretation of statutory language. It presumes that the legislature would not infringe rights without expressing such an intention with 'irresistible clearness'. The same approach may be applied to constitutionally protected freedoms. In such a circumstance it may not be necessary to find a positive warrant for preferring a restricted meaning, save where an intention to restrict political communication is plain (which may result in invalidity). A meaning which will limit the effect of the statute on those communications is to be preferred.[38]

International law

3.23 International instruments provide for freedom of expression including the right, under art 19 of the *International Covenant on Civil and Political Rights* (ICCPR), to 'seek, receive and impart information and ideas of all kinds regardless of frontiers'.[39] The UN Human Rights Committee provides a detailed list of forms of communication that should be free from interference:

> Political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse.[40]

3.24 The Castan Centre for Human Rights Law stated that common law 'protection of free speech at the Commonwealth level essentially dates back to 1992, and is very limited compared with the equivalent protection under international law'.[41]

---

37 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 32 [44] (French CJ).

38 *Monis v The Queen* (2013) 249 CLR 92, [331] (Crennan, Kiefel and Bell JJ).

39 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2). The Universal Declaration of Human Rights also enshrines freedom of speech in its preamble: *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

40 United Nations Parliamentary Joint Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [11].

41 Monash University Castan Centre for Human Rights, *Submission 18*. Referring to the decisions in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

3.25 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[42] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[43]

Bills of rights

3.26 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes protect free speech in the United States,[44] United Kingdom,[45] Canada[46] and New Zealand.[47] For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention on Human Rights, art 10 of which provides:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[48]

3.27 This legislative right may not necessarily be different from the freedom recognised at common law: several members of the House of Lords expressed the opinion 'that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention'.[49]

3.28 The First Amendment to the *United States Constitution* provides significant protection to free speech. In *New York Times v Sullivan*, Brennan J spoke of a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.[50]

3.29 There are also protections for free speech in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).[51]

Laws that interfere with freedom of speech

3.30 A wide range of Commonwealth laws may be seen as interfering with freedom of speech and expression, broadly conceived. Some of these laws impose limits on freedom of speech that have long been recognised by the common law, for example, in relation to obscenity and sedition. Arguably, such laws do not encroach on the

---

42 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

43 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

44 *United States Constitution* amend I.

45 *Human Rights Act 1998* (UK) c 42, s 12 and sch 1 pt I, art 10(1).

46 *Canada Act 1982 c 11* s 2(b).

47 *New Zealand Bill of Rights Act 1990* (NZ) s 14.

48 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 10(1).

49 *Attorney General v Guardian Newspapers Ltd (No 2) (Spycatcher)* [1988] 1988 UKHL 6 283–4 (Lord Goff). This was approved in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 550–1 (Lord Keith); *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115.

50 *New York Times v Sullivan* 376 US 254 (1964) 270 (Brennan J, giving the opinion of the Court).

51 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15; *Human Rights Act 2004* (ACT) s 16.

traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.[52]

3.31 Commonwealth laws prohibit, or render unlawful, speech or expression in many different contexts, and include:

- criminal laws;
- secrecy laws;
- contempt laws;
- anti-discrimination laws;
- media, broadcasting and telecommunications laws;
- information laws; and
- intellectual property laws.[53]

3.32 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of speech, and public criticisms of laws on that basis, are also discussed.

Criminal laws

3.33 A number of offences directly criminalise certain forms of speech or expression. Some of these have ancient roots in treason and sedition, which since feudal times punished acts deemed to constitute a violation of a subject's allegiance to his or her lord or monarch.

3.34 Following the demise of the absolute monarchy and the abolition of the Star Chamber by the Long Parliament in 1641, the law of sedition was developed in the common law courts. Seditious speech may, therefore, be seen as falling outside the scope of traditional freedom of speech. However, the historical offence of sedition would now be seen as a 'political' crime, punishing speech that is critical of the established order. Prohibiting mere criticism of government that does not incite violence reflects an antiquated view of the relationship between the state and society, which would no longer be considered justified.[54]

---

52 In fact, freedom of speech has been said to represent the 'limits of the duty not to utter defamation, blasphemy, obscenity, and sedition': Glanville Williams, 'The Concept of Legal Liberty' [1956] *Columbia Law Review* 1129, 1130. See also Ch 1.

53 Other laws that interfere with freedom of speech include the uniform defamation laws: *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA)*; Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Act 2002* (ACT) ch 9; *Defamation Act 2006* (NT). As this Inquiry is concerned with Commonwealth laws, it will not be considering the operation of these state and territory laws.

54 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006) rec 3–1. This followed an earlier recommendation of the Gibbs Committee that, given its similarity to the then existing treason offence, the offence of treachery should be repealed and a new provision created, making it an offence for an Australian citizen or resident to help a state or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities: See

3.35 Offences that may restrict speech or expression include the modern offences of treason, urging violence, and advocating terrorism contained in the following provisions of the *Criminal Code* (Cth):

- s 80.1AA (Treason—materially assisting enemies);
- s 80.2 (Urging violence against the Constitution);
- s 80.2A (Urging violence against groups);
- s 80.2B (Urging violence against members of groups); and
- s 80.2C (Advocating terrorism).

3.36 In addition, the offence of treachery contained in s 24AA of the *Crimes Act 1914* (Cth) covers the doing of any act or thing with intent: to overthrow the *Constitution* of the Commonwealth by revolution or sabotage; or to overthrow by force or violence the established government of the Commonwealth, of a state or of a proclaimed country. In 2006, in the context of its review of sedition laws, the ALRC recommended that the treachery offence be reviewed to consider whether it merited retention, modernisation and relocation to the *Criminal Code*.

3.37 There are other terrorism-related offences that may involve speech or expression, such as providing training connected with terrorism, making documents likely to facilitate terrorism, and directing the activities of, recruiting for, or providing support to a terrorist organisation.[55] The power to prescribe an organisation as a 'terrorist organisation' under div 102 of the *Criminal Code*—which triggers a range of these offences—may also be seen as infringing rights to freedom of speech.[56]

3.38 Counter-terrorism offences were criticised in some submissions on the grounds that their potential interference with freedom of speech is not justified.[57]

> In the context of counter terrorism, the pursuit of national security is quintessentially a legitimate aim. However, a number of provisions risk burdening free speech in a disproportionate way. The chilling effect of disproportionate free speech offences should not be underestimated, nor should the normalising effect of gradually limiting free speech over successive pieces of legislation.[58]

Advocating terrorism

3.39 A number of stakeholders submitted, for example, that the scope of the 'advocating terrorism' offences in s 80.2C of the *Criminal Code* is an unjustified encroachment on freedom of speech.[59]

H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991). This wording became part of the treason and sedition offences in the *Criminal Code*, as enacted in 2005.

55 *Criminal Code* (Cth) ss 101.2, 101.5, 102.2, 102.4, 102.5, 102.7.

56 Gilbert and Tobin Centre of Public Law, *Submission 22*.

57 See eg, Public Interest Advocacy Centre, *Submission 55*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

58 Public Interest Advocacy Centre, *Submission 55*.

59 National Association of Community Legal Centres, *Submission 66*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

3.40 Section 80.2C makes it an offence if a person advocates the doing of a terrorist act, or the commission of a terrorism offence, and is reckless as to whether another person will engage in that conduct as a consequence. A person 'advocates' the doing of a terrorist act or the commission of a terrorism offence if the person 'counsels, promotes, encourages or urges' the doing of it. A defence is provided covering, for example, pointing out 'in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters'.[60]

3.41 In relation to proportionality in restricting freedom of expression, the statement of compatibility with human rights stated:

> The criminalisation of behaviour which encourages terrorist acts or the commission of terrorism offences is a necessary preventative mechanism to limit the influence of those advocating violent extremism and radical ideologies.[61]

3.42 The parameters of the offence were considered by the Parliamentary Joint Committee on Human Rights (the Human Rights Committee) and the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) in their deliberations on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[62]

3.43 The Human Rights Committee concluded that the provision was 'likely to be incompatible with the right to freedom of opinion and expression'.[63] In reaching this conclusion the Human Rights Committee noted that a number of existing provisions in the *Criminal Code* contain offences that may apply to speech that incites violence and expressed concern that, despite the good faith defences, this offence was 'overly broad' in its application:

> This is because the proposed offence would require only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). The committee is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind. For example, there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes; the committee is concerned that in such cases the proposed offence could criminalise legitimate (though possibly contentious or intemperate) advocacy of regime change, and thus impermissibly limit free speech.[64]

---

60 *Criminal Code* (Cth) s 80.3(1)(d).

61 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [138].

62 The Bill also received scrutiny from the Parliamentary Joint Committee on Intelligence and Security: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter–Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014).

63 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.259].

64 Ibid [1.258].

3.44 The Scrutiny of Bills Committee highlighted the definition of 'advocates' and stated that this is a broad definition that 'may therefore amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits, and have a 'chilling effect on the exercise of the right of free expression'.[65] It also noted existing offences in the *Criminal Code* which may already cover conduct intended to be captured by the proposed offence.[66]

3.45 The Attorney-General responded to these concerns by emphasising that terrorist offences generally require a person to have three things: the capability to act, the motivation to act, and the imprimatur to act (for example, endorsement from a person with authority).

> The new advocating terrorism offence is directed at those who supply the motivation and imprimatur. This is particularly the case where the person advocating terrorism holds significant influence over other people who sympathise with, and are prepared to fight for, the terrorist cause.[67]

3.46 In relation to the availability of other offences, the Attorney-General advised that where the Australian Federal Police (AFP) has sufficient evidence, the existing offences of incitement or the urging violence offences would be pursued. However, these offences require the AFP to prove that the person intended the crime or violence to be committed. There will not always be sufficient evidence to meet this threshold because 'persons advocating terrorism can be very sophisticated about the precise language they use, even though their overall message still has the impact of encouraging others to engage in terrorist acts'. [68]

> It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention) are required to inspire others to take potentially devastating action in Australia or overseas. The cumulative effect of more generalised statements when made by a person in a position of influence and authority can still have the impact of directly encouraging others to go overseas and fight or commit terrorist acts domestically. This effect is compounded with the circulation of graphic violent imagery (such as beheading videos) in the same online forums as the statements are being made. The AFP therefore require tools (such as the new advocating terrorism offence) to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity. [69]

3.47 The Scrutiny of Bills Committee acknowledged these points but concluded that, on balance, it would be appropriate to further clarify the meaning of 'advocate' to

---

65 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 795.
66 Ibid. Citing *Criminal Code* (Cth) ss 80.2, 80.2A, 80.2B, 101.5, 102.4.
67 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014*, (October 2014) 796.
68 Ibid.
69 Ibid.

assist people in 'prospectively knowing the scope of their potential criminal liability'.[70] The Bill was not amended in this respect.

3.48 A number of stakeholders to this Inquiry raised concerns about the advocating terrorism offences. The Gilbert and Tobin Centre of Public Law submitted that s 80.2C directly infringes the right to freedom of speech as it 'limits the capacity for individuals to voice their views and opinions on terrorism and overseas conflicts'. It observed that the offence goes beyond the concept of incitement by criminalising the 'promotion' of terrorism and by requiring only that the person is 'reckless' as to whether their words may result in terrorism (as opposed to intending that result).

> The offence could apply, for example, to a person who posts online that they support the beheadings of hostages by Islamic State. Such a comment would be highly disagreeable, and it could legitimately attract the attention of the security services and law enforcement to ensure that the person does not become involved in terrorism. However, the law has not traditionally treated such actions as criminal acts unless the person encourages another person to commit an unlawful act, and intends that the unlawful act should be committed.[71]

3.49 The Gilbert and Tobin Centre stated that the broader approach adopted in the offence of advocating terrorism is unjustified because of its significant impact on free speech, and because it 'may contribute to a sense of alienation and discrimination in Australia's Muslim communities if they feel like the government is not willing to have an open discussion about issues surrounding terrorism and Islam'.[72]

3.50 The Public Interest Advocacy Centre (PIAC) questioned the need for the new offence, in view of the offence in s 80.2 of the *Criminal Code* (criminalising 'urging violence' against the *Constitution* or a Commonwealth, state or territory government) and the offence of incitement, which covers urging another person to commit a terrorist act.[73] They also questioned the assertion that the provision is proportionate.

> The new advocacy offence is far wider in scope than the targeted offence of incitement, requiring a person only to be reckless as to whether their expression of a view 'counsels, promotes, encourages or urges' another to commit a terrorist act, rather than intending them to do so.[74]

3.51 The Law Council of Australia (Law Council) observed that div 80 and s 80.2C are framed broadly, and may have the 'potential to unduly burden freedom of expression'. The good faith defence 'may not address concern of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the offences'.[75]

---

70 Ibid 797. Consistently with Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter–Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014) rec 5.

71 Gilbert and Tobin Centre of Public Law, *Submission 22*.

72 Ibid.

73 *Criminal Code* (Cth) s 11.4.

74 Public Interest Advocacy Centre, *Submission 55*.

75 Law Council of Australia, *Submission 75*.

Prescribed terrorist organisations

3.52 Similar concerns about overreach have been identified in relation to prescribed terrorist organisations under div 102 of the *Criminal Code*. These provisions allow an organisation to be prescribed by regulations as a terrorist organisation where it is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act.[76] Professor George Williams has commented that, while it is understandable that the law would permit groups to be banned that engage in or prepare for terrorism, 'it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism'.[77]

3.53 The Gilbert and Tobin Centre stated that, as a result, members of an organisation may be exposed to serious criminal offences for expressing radical and controversial (but not necessarily harmful) views about terrorism and religion.

> An organisation may be proscribed on the basis of views expressed by some of its members, which means that other individuals may be exposed to liability when they do not even agree with those views. Indeed, an organisation may even be proscribed on the basis that the views it expresses might encourage a person with a severe mental illness to engage in terrorism.[78]

Using a postal service to menace, harass or cause offence

3.54 Another provision of the *Criminal Code* that received comment in submissions was s 471.12, which provides that a person is guilty of an offence if the person uses a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. This provision was the subject of the High Court's deliberations in *Monis v The Queen*.[79]

3.55 The University of Melbourne Centre for Comparative Constitutional Studies submitted that s 471.12 unjustifiably interferes with freedom of speech, and political communication in particular for the following reasons:

- application to core political speech—the broad scope of the provision means that it can operate to suppress core political speech; and

---

76 *Criminal Code* (Cth) s 102.1. Related criminal offences include those in relation to being a member of, training with, or providing support or resources to a terrorist organisation: Ibid ss 102.3, 102.5, 102.7.

77 Williams, above n 34, 220.

78 Gilbert and Tobin Centre of Public Law, *Submission 22*. Section 102.1(1A)(c) of the *Criminal Code* provides that an organisation advocates the doing of a terrorist act if it 'directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act'. The notion of proscribing speech based upon a reaction of someone who suffers from a mental impairment is 'extraordinary' and a 'radical departure from the normal, accepted legal standard of a "reasonable person"': Williams, above n 34, 220.

79 *Monis v The Queen* (2013) 249 CLR 92.

- the 'offensiveness' standard is not sufficient to justify a law that criminalises political speech.[80]

3.56 The Centre for Comparative Constitutional Studies suggested that s 471.12 should include 'clear exceptions for communication pertaining to matters that are in the public interest in order to protect core political speech' and that offensiveness should not be used as a criterion of the offence, leaving only 'menacing' and 'harassing'.[81] Alternatively, the provision could specify matters that the court must consider when determining whether the communication was offensive.[82]

Other criminal laws

3.57 Many other *Criminal Code* provisions potentially engage with freedom of speech, including those creating offences in relation to providing false or misleading information or documents;[83] distributing child pornography material; and counselling the committing of suicide.[84]

Incitement and conspiracy laws

3.58 The concepts of incitement and conspiracy have a long history in the common law. Traditional freedom of speech has never protected speech inciting the commission of a crime.

3.59 Under s 11.4 of the *Criminal Code* (Cth) a person who urges the commission of an offence is guilty of the offence of incitement. Incitement may relate to any offence against a law of the Commonwealth and is not limited to serious offences, such as those involving violence. Therefore, a person may commit the offence of incitement by urging others to engage in peaceful protest by trespassing on prohibited Commonwealth land.[85]

3.60 Similarly, a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence.[86]

3.61 The Law Council observed that various features of the terrorism offences in div 101 of the *Criminal Code*—including the preparatory nature of some offences, and the broad and ambiguously defined terms on which the offences are based, when combined with the offence of incitement may 'impact on freedom of speech more than

---

80 Cf *Racial Discrimination Act 1975* (Cth) s 18C. Unlike s 471.12, s 18C does not create a criminal offence and is subject to a number of broadly defined defences: Centre for Comparative Constitutional Studies, *Submission 58*.

81 Centre for Comparative Constitutional Studies, *Submission 58*.

82 Ibid. Cf *Criminal Code* (Cth) s 473.4.

83 *Criminal Code* (Cth) ss 136, 137.1, 137.2.

84 Ibid ss 471.12, 474.15, 474.17, 474.19, 474.22, 474.29A.

85 An offence under *Crimes Act 1914* (Cth) s 89. For the person to be guilty, the person must intend that the offence incited be committed: *Criminal Code* (Cth) s 11.4(2).

86 *Criminal Code* (Cth) s 11.5.

is necessary to achieve the putative objective and is not specific enough to avoid capturing less serious conduct'.[87]

Secrecy laws

3.62 The secrecy of government information has a long history.[88] The notion that the activities of government should be secret goes back to a period when monarchs were motivated by a desire to protect themselves against their rivals and official information was considered the property of the Crown, to be disclosed or withheld at will. Two principal rationales for secrecy in the modern context are the Westminster system of government and the need to protect national security.[89]

3.63 The exposure of state secrets may be seen as falling outside the scope of traditional freedom of speech. However, while the conventions of the Westminster system were once seen to demand official secrecy, secrecy laws may need to be reconsidered in light of principles of open government and accountability—and modern conceptions of the right to freedom of speech.

3.64 Many Commonwealth laws contain provisions that impose secrecy or confidentiality obligations on individuals or bodies in respect of Commonwealth information. Statutory secrecy provisions typically exhibit four common elements:

- protection of particular kinds of information;
- regulation of particular persons;
- prohibition of certain kinds of activities in relation to the information; and
- exceptions and defences which set out the circumstances in which a person does not infringe a secrecy provision.

3.65 In its 2009 report *Secrecy Laws and Open Government in Australia* (ALRC Report 112), the ALRC identified 506 secrecy provisions in 176 pieces of primary and subordinate legislation.[90]

3.66 Provisions in Commonwealth legislation that expressly impose criminal sanctions for breach of secrecy or confidentiality obligations include, for example:

- *Crimes Act 1914* (Cth) s 70, 79;
- *Aboriginal and Torres Strait Islander Act* 2005 (Cth) ss 191, 193S, 200A;
- *Aged Care Act* 1997 (Cth) ss 86-2, 86-5, 86-6, 86-7;
- *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) ss 121, 122, 123, 127, 128(5) and (10), 130, 131(4);

87 Law Council of Australia, *Submission 75*.
88 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) ch 2.
89 See Ibid [2.4].
90 Ibid Appendix 4.

- *Australian Border Force Act 2015* (Cth) s 24, pt 6;
- *Australian Prudential Regulation Authority Act 1998* (Cth) s 56;
- *Australian Securities and Investments Commission Act 2001* (Cth) s 127(4EA), (4F); and
- *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18, 34ZS(1) and (2), 35P(1) and (2), 81, 92(1) and (1A).

3.67 Other provisions impose secrecy or confidentiality obligations but do not expressly impose criminal sanctions. Such provisions create a 'duty not to disclose', which may attract criminal sanctions under s 70 of the *Crimes Act 1914* (Cth). These include, for example:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 189B, 251(3), 324R, 341R, 390R;
- *Export Finance and Insurance Corporation Act 1991* (Cth) s 87(4); and
- *Food Standards Australia New Zealand Act 1991* (Cth) s 114.

3.68 The ALRC recommended, among other things, that the general secrecy offences in ss 70 and 79 of the *Crimes Act* should be repealed and replaced by new offences that require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to cause harm.[91]

3.69 The ALRC concluded that specific secrecy offences are only warranted where they are 'necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions' and should include an express requirement that the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.[92] These recommendations have not been implemented.

3.70 PIAC endorsed, in the context of freedom of speech, the ALRC's earlier recommendations with regard to reform of secrecy offences and observed:

> Blanket restrictions on the dissemination of information regarding government activity should generally be viewed with a critical eye. Australia's constitutionally-mandated system of democratic, responsible government requires transparency and openness and, as such, any such restrictions are only justifiable if they are tightly defined and closely tied to a legitimate purpose.[93]

91 Ibid recs 4–1, 5–1.
92 Ibid recs 8–1, 8–2.
93 Public Interest Advocacy Centre, *Submission 55*.

Australian Border Force Act

3.71 The scope of secrecy and disclosure provisions enacted in the *Australian Border Force Act 2015* (Cth) have been criticised by the Law Council because the provisions 'may discourage legitimate whistle-blowers from speaking out publicly'.[94]

3.72 Part 6 of the *Australian Border Force Act* makes it an offence to record or disclose any information obtained by a person in their capacity as an entrusted person, punishable by imprisonment for 2 years.[95] An 'entrusted person' is defined to include the secretary, the Australian Border Force Commissioner and any Immigration and Border Protection Department worker.[96] The latter category of person may, by written determination of the secretary or Commission, include any consultant, contractor or service provider—such as a doctor or welfare worker in an offshore immigration detention centre.[97]

3.73 Sections 42–49 of the Act provide an extensive range of exceptions. In summary, however, unauthorised disclosure is only permissible if it is 'necessary to prevent or lessen a serious threat to the life or health of an individual' and the disclosure is 'for the purposes of preventing or lessening that threat'.[98]

3.74 The Law Council submitted that the relevant provisions of the Bill should be amended to include a public interest disclosure exception; and that the secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.[99]

ASIO Act secrecy provisions

3.75 Particular secrecy provisions have been subject to criticism for interfering with freedom of speech or expression including, for example, in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), where secrecy offences have been extended to apply to the unauthorised disclosure of information relating to a 'special intelligence operation'.[100]

3.76 Section 35P(1) of the ASIO Act provides that a person commits an offence if the person discloses information; and the information relates to a 'special intelligence

---

94 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 and the Australian Border Force Bill 2015*, 2015.

95 *Australian Border Force Act 2015* (Cth) s 24.

96 Ibid s 5.

97 Ibid ss 4, 5.

98 Ibid s 48.

99 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 and the Australian Border Force Bill 2015*, 2015. This was said to be consistent with the ALRC's conclusion that, where no harm is likely, other responses to the unauthorised disclosure of Commonwealth information are appropriate—including the imposition of administrative sanctions or the pursuit of contractual or general law remedies: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [8.6].

100 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P.

operation'.[101] Recklessness is the fault element in relation to whether the information relates to a special intelligence operation.

3.77 Section 35P(2) provides an aggravated offence where the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; or the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

3.78 The Explanatory Memorandum stated that these offences are 'necessary to protect persons participating in a [special intelligence operation] and to ensure the integrity of operations, by creating a deterrent to unauthorised disclosures, which may place at risk the safety of participants or the effective conduct of the operation'.[102]

3.79 The Human Rights Committee examined provisions of the ASIO Act in its consideration of the National Security Legislation Amendment Bill (No. 1) 2014, and concluded that these offence provisions had not been shown to be a reasonable, necessary and proportionate limitation on the right to freedom of expression.[103] The provisions were incompatible with the right to freedom of expression because they appeared to impose disproportionate limits on that right.[104]

3.80 While the statement of compatibility highlighted the existence of defences and safeguards, the Human Rights Committee observed that because s 35P(1) 'applies to conduct which is done recklessly rather than intentionally, a journalist could be found guilty of an offence even though they did not intentionally disclose information about a [special intelligence operation]'.[105]

> As [special intelligence operations] can cover virtually all of ASIO's activities, the committee considers that these offences could discourage journalists from legitimate reporting of ASIO's activities for fear of falling foul of this offence provision. This concern is compounded by the fact that, without a direct confirmation from ASIO, it would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a [special intelligence operation] or other intelligence gathering power.[106]

3.81 The Scrutiny of Bills Committee also considered these provisions and criticised the broad drafting:

> First, they are not limited to initial disclosures of information relating to a [special intelligence operation] but cover all subsequent disclosures (even, it would seem, if the information is in the public domain). In addition, these new offences as currently drafted may apply to a wide range of people including whistleblowers and journalists.

---

101 'Special intelligence operation' is defined in Ibid s 4.
102 Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014 (Cth) [553].
103 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixteenth Report of the 44th Parliament* (November 2014) [2.107].
104 Ibid [2.112].
105 Ibid [2.107].
106 Ibid.

> Second, the primary offence (unlike the aggravated version) is not tied to the underlying purposes of the criminalisation of disclosure. This means that the offence (under subsection 35P(1)) could be committed even if unlawful conduct in no way jeopardises the integrity of operations or operatives.[107]

3.82 The Scrutiny of Bills Committee added that its concerns were heightened by the fact that the application of the offences depends on whether or not the information relates to a special intelligence operation, which in turn depends on an authorisation process which is internal to ASIO.[108]

3.83 The Attorney-General provided a detailed response to these concerns, restating that the wrongdoing to which the offences are directed is the harm inherent in the disclosure of highly sensitive intelligence-related information; and that the provisions were 'necessary and proportionate to the legitimate objective to which they are directed'. For example:

- the offences need to be capable of covering information already in the public domain because risks associated with disclosure of information about a special intelligence operation (including its existence, methodology or participants) are just as significant in relation to a subsequent disclosure as they are in relation to an initial disclosure;
- the offences need to be capable of applying to all persons, consistent with avoiding the significant risks arising from disclosure, and it would be contrary to the criminal law policy of the Commonwealth to create specific exceptions for journalists from legal obligations to which all other Australian persons and bodies are subject; and
- the policy justification for adopting recklessness as the applicable fault element is to place an onus on persons contemplating making a public disclosure to consider whether or not their actions would be capable of justification to this standard.[109]

3.84 Section 35P of the ASIO Act was enacted unchanged.[110] In December 2014, the Prime Minister announced that the newly appointed Independent National Security Legislation Monitor would review any impact on journalists of the provisions.[111]

---

107 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2014* (September 2014) 627–8.

108 Ibid 628.

109 See Ibid 628–34.

110 In response to recommendations made by the Parliamentary Joint Committee on Intelligence and Security, the Government amended the Explanatory Memorandum to the Bill to refer to the need for the Commonwealth Director of Public Prosecutions to consider the public interest in the commencement or continuation of a prosecution: Revised Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014 (Cth) [582].

111 Prime Minister of Australia, the Hon Tony Abbott MP, 'Appointment of Independent National Security Legislation Monitor' (Press Release, 7 December 2014).

3.85 Stakeholders in this ALRC Inquiry expressed concerns about the secrecy provisions of the ASIO Act.[112] The Joint Media Organisations expressed a range of concerns about s 35P, including that it

- criminalises journalists for undertaking and discharging their role in a modern democratic society;
- does not include an exception for journalists and the media for public interest reporting; and
- further erodes the already inadequate protections for whistle-blowing and has a chilling effect on sources.[113]

3.86 Free TV Australia expressed concern that the offences remain capable of capturing 'the activities of journalists reporting in the public interest'. Section 35P, it said, appears to capture circumstances where a person does not know whether the relevant information relates to an intelligence operation; or knows that the information relates to an intelligence operation but does not know it is a special intelligence operation.[114] Free TV Australia wrote that problems with the provisions include that:

> - It is unclear whether [special intelligence operation] status can be conferred retrospectively;
> - It appears to apply regardless of who the disclosure is made to, for example, if a journalist discloses the material to his/her editor and the story is subsequently not published, the offence provision may still apply;
> - If a number of disclosures are made in the course of preparing a story, it appears to apply to all disclosures (for example, it could apply to the source, the journalist and the editor, even if the story is not ultimately published);
> - It applies to whistle-blowers, further discouraging whistleblowing.[115]

3.87 The Law Council stated that s 35P may not include sufficient safeguards for public interest disclosures, 'suggesting a disproportionate infringement on freedom of speech'.[116] The Human Rights Law Centre submitted that the offences in s 35P 'disproportionately and unjustifiably limit freedom of speech and expression and should be repealed'.[117]

---

112 Law Council of Australia, *Submission 75*; Joint Media Organisations, *Submission 70*; Public Interest Advocacy Centre, *Submission 55*; Free TV Australia, *Submission 48*; Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*. See also submissions to the Independent National Security Legislation Monitor's current review of s 35P of the ASIO Act: Australian Government Department of the Prime Minister and Cabinet, *Independent National Security Legislation Monitor* <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>.

113 Joint Media Organisations, *Submission 70*.

114 Free TV Australia observed that the impact of s 35P may be 'amplified in the context that information relating to SIOs is unlikely to be readily identifiable as such', so that journalists reporting on intelligence and national security matters will not necessarily know whether or not information 'relates to' a special intelligence operation or not: Free TV Australia, *Submission 48*.

115 Ibid.

116 Law Council of Australia, *Submission 75*.

117 Human Rights Law Centre, *Submission 39*.

3.88 PIAC observed that the 'natural and ordinary meaning of the provision suggests a broad scope: it could apply, for example, to a journalist publishing information in circumstances where there may well be an overriding public interest to do so'. PIAC recommended that s 35P be repealed.[118]

3.89 The UNSW Law Society stated that the lesser offence under s 35P(1) 'unnecessarily restricts the freedom of communication' because there is 'no public interest defence for unauthorised disclosure, which is likely to restrict legitimate scrutiny of security agencies',[119] and because there is no harm element.

> The prosecution has to prove that the accused was reckless as to whether the information related to a [special intelligence operation], and consequently a person can face up to 5 years imprisonment for disclosure that does not endanger lives or prejudice the [special intelligence operation].[120]

Other secrecy provisions

3.90 Other provisions identified as raising freedom of speech concerns included:

- *Criminal Code* s 105.41, which provides for a range of offences in relation to disclosing that a person is in preventative detention;[121]
- *Criminal Code* s 119.7, which prohibits the advertising or publishing of material which discloses the manner in which someone might be recruited to become a foreign fighter;[122]
- *Crimes Act* s 3ZZHA, which prohibits the unauthorised disclosure of information in relation to the application for or execution of a delayed notification search warrant;[123] and
- *Crimes Act* ss 15HK, 15HL, which prohibit the disclosure of information relating to a 'controlled operation'.[124]

Public interest disclosure

3.91 The *Public Interest Disclosure Act 2013* (Cth) is intended to encourage and facilitate the making of public interest disclosures by public officials and, in some circumstances, provides public officials with protection from liability under secrecy laws.

3.92 The Joint Media Organisations criticised this protection as inadequate, a problem that is 'further exacerbated when laws, such as the three tranches of 2014–2015 national security laws, not only provide no protection but criminalise information

---

118 Public Interest Advocacy Centre, *Submission 55*.
119 However, s 35P(3) does provide for disclosure to the Inspector-General of Intelligence and Security in certain circumstances.
120 UNSW Law Society, *Submission 19*.
121 Australian Lawyers for Human Rights, *Submission 43*.
122 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.
123 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.
124 Joint Media Organisations, *Submission 70*.

disclosure (external or otherwise)—and therefore unjustifiably interfere with freedom of speech'.[125]

Contempt laws

3.93 The law of contempt of court is a regime of substantive and procedural rules, developed primarily within the common law, whereby persons who engage in conduct tending to interfere with the administration of justice may be subjected to legal sanctions.[126] These rules may be seen as interfering with freedom of speech.

3.94 In addition, s 195 of the *Evidence Act 1995* (Cth) provides that a person must not, without the express permission of a court, print or publish any question that the court has disallowed nor any question in respect of which the court has refused to give leave under pt 3.7 (in relation to credibility). This is a strict liability offence.

3.95 A range of other legislative provisions protect the processes of tribunals, commissions of inquiry and regulators. These laws interfere with freedom of speech by, for example, making it an offence to use insulting language towards public officials or to interrupt proceedings, and include:

- *Administrative Appeals Tribunal Act 1975* (Cth) s 63;
- *Bankruptcy Act 1966* (Cth) s 264E;
- *Copyright Act 1968* (Cth) s 173;
- *Defence Act 1903* (Cth) s 89;
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 119;
- *Fair Work Act 2009* (Cth) s 674;
- *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61;
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 94;
- *Royal Commissions Act 1902* (Cth) s 6O; and
- *Veterans' Entitlements Act 1986* (Cth) s 170.

3.96 Some of these same laws also make it an offence to use words that are false and defamatory of a body or its members; or words calculated to bring a member into disrepute.[127]

---

125 Ibid.

126 Thomson Reuters, *The Laws of Australia* [10.11.140].

127 *Bankruptcy Act 1966* (Cth) s 264E; *Fair Work Act 2009* (Cth) s 674; *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61; *Royal Commissions Act 1902* (Cth) s 6O; *Veterans' Entitlements Act 1986* (Cth) s 170.

3.97 The Centre for Comparative Constitutional Studies submitted that such laws unjustifiably interfere with freedom of speech—and may in some cases be unconstitutional—having regard to

- the content-based nature of the laws—that is, the laws regulate speech because of the harm caused by the communication of a message rather than being directed to the 'time, place and manner' in which speech occurs;
- the provisions directly target criticism of public officers engaged in performing public functions, affecting 'core political speech'; and where
- less restrictive means are available to achieve the ends pursued by these laws, such as existing defamation law and powers to exclude individuals from proceedings.[128]

3.98 The Human Rights Committee in its consideration of the Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014 requested further advice from the Minister for Veterans' Affairs as to the compatibility of s 170 with the right to freedom of opinion and expression. In particular, the Committee asked whether the measure was rationally connected to its stated objective; and proportionate to achieving that objective.[129]

3.99 The Minister responded that the provision was likely to be effective in achieving the objective of protecting the Board and its hearings because it would act as a deterrent to inappropriate and disruptive behaviour. As to the question of proportionality, it was noted that, on occasion, the Board operates from non-secure, non-government premises, and protections are required to ensure the safety and proper function of the Board and its members.[130]

Anti-discrimination laws

3.100 Commonwealth anti-discrimination laws may interfere with freedom of speech by making unlawful certain forms of discrimination, intimidation and harassment that can be manifested in speech or other forms of expression. At the same time, such laws may protect freedom of speech, by preventing a person from being victimised or discriminated against by reason of expressing, for example, certain political or religious views.

3.101 The *Racial Discrimination Act 1975* (Cth) (RDA) makes unlawful offensive behaviour because of race, colour or national or ethnic origin.[131] The *Sex*

128 Centre for Comparative Constitutional Studies, *Submission 58*.

129 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Ninth Report of the 44th Parliament* (July 2014) 111.

130 Ibid 111–112. However, the Board 'would not use these provisions lightly' as it would require an extreme event to warrant consideration of applying the contempt provisions and the decision to prosecute would be undertaken by the Commonwealth Director of Public Prosecutions on referral from the police.

131 *Racial Discrimination Act 1975* (Cth) s 18C. See also, exemptions in s 18D.

Discrimination Act 1984 (Cth) makes sexual harassment unlawful in a range of employment and other contexts.[132]

3.102 The *Age Discrimination Act 2004* (Cth) and *Disability Discrimination Act 1992* (Cth) make it an offence to advertise an intention to engage in unlawful age and disability discrimination.[133] Each of these Acts also makes it an offence to victimise a person because the person takes anti-discrimination action.[134]

3.103 More generally, these Acts, together with the *Australian Human Rights Commission Act 1986* (Cth), prohibit breaches of human rights and discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, sexual preference and trade union activity. The conduct prohibited may include speech or other forms of expression.

3.104 Similarly, the general protections provisions of the *Fair Work Act 2009* (Cth) provide protection from workplace discrimination because of a person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[135]

Racial Discrimination Act

3.105 There has been much debate over the scope of s 18C of the RDA. Section 18C provides that it is unlawful to 'do an act', otherwise than in private, if:

> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

3.106 Importantly, s 18C does not create a criminal offence. Under s 46P of the *Australian Human Rights Commission Act 1986* (Cth), a person may make a complaint about an unlawful act to the Australian Human Rights Commission. Where the complaint is not resolved, an application may be made to the Federal Court or the Federal Circuit Court. If the court is satisfied that there has been unlawful discrimination, the court may make orders, including for compensation.[136]

3.107 Section 18D provides exemptions. It states that s 18C does not render unlawful anything said or done reasonably and in good faith for various purposes, including artistic work and reporting on events or matters of public interest.[137]

---

132 *Sex Discrimination Act 1984* (Cth) pt II, div 3.

133 *Age Discrimination Act 2004* (Cth) s 50; *Disability Discrimination Act 1992* (Cth) s 44.

134 *Racial Discrimination Act 1975* (Cth) s 27(2); *Sex Discrimination Act 1984* (Cth) s 94; *Age Discrimination Act 2004* (Cth) s 51; *Disability Discrimination Act 1992* (Cth) s 42.

135 *Fair Work Act 2009* (Cth) s 351. See also civil remedy provisions concerning coercion, misrepresentations and inducements in relation to industrial activity, and the offence of intimidation: Ibid ss 348–350, 676.

136 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

137 These sections were inserted into the RDA in 1995 by the *Racial Hatred Act 1995* (Cth).

3.108 On 25 March 2014, the Attorney-General, Senator the Hon George Brandis QC, announced that the Government proposed amending the RDA to repeal s 18C and insert a new section prohibiting vilification and intimidation on the basis of race, colour or national or ethnic origin.[138] This announcement followed controversy about s 18C occasioned by the decision of *Eatock v Bolt*.[139] On 6 August 2014, after consultation on an exposure draft Freedom of Speech (Repeal of s 18C) Bill, the Prime Minister, the Hon Tony Abbott MP, announced that the proposed changes to s 18C had been taken 'off the table'.[140]

3.109 A number of submissions to this ALRC Inquiry presented views on whether s 18C unjustifiably interferes with freedom of speech. Some stakeholders raised concerns about the breadth of s 18C.[141]

3.110 Professor Patrick Parkinson AM observed that s 18C is broader in its terms than art 20 of the ICCPR, which provides that any 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[142] In his view, s 18C should be similarly confined and not extend to matters likely only to offend.[143]

3.111 FamilyVoice Australia submitted that s 18C does not fall within the 'justifiable limitations of protecting personal reputation, national security, public order, public health or public morals' set out in the ICCPR and, therefore, constitutes an unjustifiable limitation on freedom of speech.[144]

3.112 The Church and Nation Committee submitted that the state 'cannot legislate against offence and insult without doing serious damage to wide-ranging freedom of speech'.[145] The Wilberforce Foundation stated that s 18C is flawed because it 'essentially makes speech and acts unlawful as a result of a subjective response of another or a group or others'. The flaw, it said, is compounded by s 18D, which does not make truth a defence.[146]

3.113 Others submitted that the scope of the provision does strike an appropriate balance between freedom of speech and other interests, including the right to be free

---

138 See Australian Government, Attorney-General's Department, *Amendments to the Racial Discrimination Act 1975* <www.ag.gov.au/consultations>; Exposure Draft, Freedom of Speech (Repeal of S 18C) Bill 2014.

139 *Eatock v Bolt* [2011] 197 FCR 261.

140 Emma Griffiths, *Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws* Australian Broadcasting Corporation <www.abc.net.au>. Submissions on the exposure draft Freedom of Speech (Repeal of s 18C) Bill are not made available on the Attorney-General's Department's website.

141 FamilyVoice Australia, *Submission 73*; Wilberforce Foundation, *Submission 29*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*; P Parkinson, *Submission 9*.

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

143 P Parkinson, *Submission 9*.

144 FamilyVoice Australia, *Submission 73*.

145 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

146 Wilberforce Foundation, *Submission 29*.

from racial discrimination,[147] or should be extended to other forms of speech.[148] For example, the Law Society of NSW Young Lawyers (NSW Young Lawyers) submitted that s 18C of the RDA, as it currently stands, 'finely balances fair and accurate reporting and fair comment with discrimination protections'.

> The 'reasonably likely' test provided for in section 18C allows for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate. Section 18D of the RDA provides adequate safeguards to protect freedom of speech by imposing a list of exemptions for 'anything said or done reasonably and in good faith'. The Australian Courts have historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind.[149]

3.114 NSW Young Lawyers considered that, rather than going too far, s 18C only limits freedom of speech to the extent required to ensure that communities are protected from racial vilification:

> Racial vilification can have a silencing effect on those who are vilified. In the absence of a federal bill of rights and constitutional guarantees of human rights, the need to strike a clear and equitable balance between the right to free speech and the right to be free from vilification is obviously all the more pressing. Protection from racial vilification is key to the protection that underpins our vibrant and free democracy, and therefore its abolition cannot be seen as a reasonable or proportionate response to 'restrictions' on freedom of speech.[150]

3.115 PIAC stated that s 18C is an example of a justifiable limitation of free speech, because the need to protect against harmful speech is clearly contemplated in international law.[151] It observed that, in relation to racial vilification, 'the law must strike a balance between permitting the expression of views that might be disagreeable or worse, but draw a line to prohibit speech that causes unreasonable harm to others'. One of the key motivations for PIAC's opposition to the proposed rollback of restrictions on racist speech, in 2014, was said to be evidence of the wide-ranging impact of racially motivated hate speech on PIAC's clients.[152]

3.116 Jobwatch stated that s 18C should remain unchanged as it does not 'unnecessarily restrict free speech, restrict fair comment or reporting of matters that are

---

147 Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; Arts Law Centre of Australia, *Submission 50*; Jobwatch, *Submission 46*; Kingsford Legal Centre, *Submission 21*; UNSW Law Society, *Submission 19*.

148 The NSW Gay and Lesbian Rights Lobby submitted that protection similar to that under the RDA should be available to LGBTI people under the *Sex Discrimination Act 1984* (Cth): NSW Gay and Lesbian Rights Lobby, *Submission 47*.

149 Law Society of NSW Young Lawyers, *Submission 69*.

150 Ibid.

151 Public Interest Advocacy Centre, *Submission 55*. In addition to art 20 of the ICCPR, art 4(a) of the *Convention on the Elimination of Racial Discrimination* states that signatory states should declare an offence 'the dissemination of ideas based on racial superiority or hatred and declare an offence all other propaganda activities promoting and inciting racial discrimination': *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). In this regard, art 4 is not fully implemented because it does not create a criminal offence of racial incitement: Public Interest Advocacy Centre, *Submission 55*.

152 Public Interest Advocacy Centre, *Submission 55*.

in the public interest'.[153] The Law Council observed that, while there is a case for amendment of the current provisions of the RDA 'from a civil and political rights perspective', there is also 'a strong view among a number of constituent bodies of the Law Council that the balance was correctly struck in the existing legislation'.[154]

3.117 Australian racial vilification laws have long been the subject of academic and other criticism. For example, in 2004, Dan Meagher found Commonwealth, state and territory laws, including s 18C of the RDA, lacked 'sufficient precision and clarity in key respects'. He stated that, as a consequence, an incoherent body of case law has developed, where too much is left open to the decision maker in each individual case.[155]

3.118 Meagher concluded that the primary goal of racial vilification laws in Australia—to regulate racial vilification without curbing legitimate public communication—is compromised by this lack of precision and clarity.[156] In relation to s 18C specifically, he wrote that the critical problem is that its key words and phrases are 'sufficiently imprecise in both their definition and application as to make the putative legal standards they embody largely devoid of any core and ascertainable content'.[157]

3.119 Meagher highlighted, in particular, that the meaning of the words 'offend' and 'insult' in s 18C of the RDA

> is so open-ended as to make any practical assessment by judges and administrators as to when conduct crosses this harm threshold little more than an intuitive and necessarily subjective value judgement. The fact that an act must be 'reasonably likely' to cross this harm threshold, though importing an objective test of liability, does not cure the definitional indeterminacy of these words that a decision-maker must objectively apply.[158]

3.120 More recently, Darryn Jensen has written that, under s18C, the reasonableness requirement works to demand that the court make what is essentially a 'political decision' about the boundaries of permissible speech. He highlights that, in contrast, Tasmanian anti-vilification legislation avoids this particular problem by confining the question to whether the speaker acted honestly in the pursuit of a permissible purpose.[159]

3.121 Other common law countries have anti-vilification legislation. In New Zealand, the *Human Rights Act 1993* (NZ) makes it unlawful to use words in a public place which are 'threatening, abusive, or insulting' and 'likely to excite hostility against or

---

153 Jobwatch, *Submission 46*.
154 Law Council of Australia, *Submission 75*.
155 Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' [2004] *Federal Law Review* 225, 227.
156 Ibid 228.
157 See, eg, Meagher, above n 155.
158 Ibid 231.
159 Darryn Jensen, 'The Battlelines of Interpretation in Racial Vilification' (2011) 27 *Policy* 14, 19; *Anti-Discrimination Act 1998* (Tas) ss 19, 55.

bring in contempt any group of persons … on the ground of the colour, race, or ethnic or national origins of that group of persons'.[160]

3.122 In the United Kingdom, it is an offence for a person to 'use threatening, abusive or insulting words or behaviour' if the person 'intends thereby to stir up racial hatred' or, having regard to all the circumstances, 'racial hatred is likely to be stirred up thereby'.[161]

3.123 The New Zealand and UK provisions seem narrower than the Australian provision—leaving aside the operation of the exemptions in s 18D. For example, the provisions do not cover offensiveness, and require that the person provoke hostility or hatred against a group of persons defined by race or ethnicity.

3.124 Before 2013, the *Canadian Human Rights Act 1985* (Can) prohibited the sending of messages 'likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination'.[162]

3.125 The repeal of this provision, introduced by a private members' bill and subjected to a conscience vote,[163] was controversial.[164] Repeal was justified on a number of grounds, including that the provision conflicted with the 'freedom of thought, belief, opinion and expression' protected by s 2(b) of the *Canadian Charter of Human Rights and Freedom*;[165] and because provisions of criminal law were considered to be the 'best vehicle to prosecute these crimes'.[166]

Media, broadcasting and communications laws

3.126 Obscenity laws have a long history in the common law,[167] and censorship of publications dates back to the invention of the printing press.[168]

3.127 In Australia, freedom of expression is subject to the restrictions of the classification cooperative scheme for publications, films and computer games implemented through the *Classification (Publications, Films and Computer Games)*

---

160 *Human Rights Act 1993* (NZ) s 61.

161 *Public Order Act 1986* (UK) s 18(1). While this provision is framed as a criminal offence, proceedings can only occur with the prior consent of the Attorney General: Ibid s 27(1).

162 *Canadian Human Rights Act 1985* (Can) s 13 (repealed).

163 Jason Fekete, 'Tories Repeal Sections of the Human Rights Act Banning Hate Speech over Telephone or Internet' *National Post* (Canada), 7 June 2012.

164 Jennifer Lynch, 'Hate Speech: This Debate Is Out of Balance' *Globe and Mail* (Canada), 11 June 2009.

165 Brian Storseth, MP 'Bill C-304 Background' (17 October 2011).

166 Joseph Brean, 'Repeal Controversial Hate Speech Law, Minister Urges' *National Post (Canada)* 18 June 2011. *Criminal Code 1985* (Can) s 319 provides for an indictable offence applying to anyone who 'by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace'.

167 See *Crowe v Graham* (1968) 121 CLR 375, 391; *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 471. Since 1727, it was an offence under the common law of England and Wales to publish an obscene libel: *R v Curl* (1727) 2 Str 788 (93 ER 849).

168 For example, by Star Chamber ordinances of 1586 and 1637, there were to be no presses in England, save those that were licensed by the Crown, and registered with the Stationers' Company: Garrard Glenn, 'Censorship at Common Law and Under Modern Dispensation' (1933) 82 *University of Pennsylvania Law Review* 114, 116.

Act 1995 (Cth) (*Classification Act*) and complementary state and territory enforcement legislation.[169]

3.128 Under the classification cooperative scheme some publications, films and computer games may be classified as 'RC'. In addition, s 9A of the *Classification Act* provides that a publication, film or computer game that advocates the doing of a terrorist act must be classified RC. The RC classification category is the highest classification that can be given to media content in Australia. Such content is effectively banned and may not be sold, screened, provided online or otherwise distributed.

3.129 The Law Council observed that s 9A of the *Classification Act* may 'inadvertently capture genuine political commentary and education materials, and stifle robust public debate on terrorist-related issues'.[170]

3.130 The *Broadcasting Services Act 1992* (Cth) provides for restrictions on online content. The Act sets out provisions in relation to internet content hosted outside Australia, and in relation to content services, including some content available on the internet and mobile services hosted in or provided from Australia.[171] Broadly, the scheme places constraints on the types of online content that can be hosted or provided by internet service providers and content service providers. This is expressed in terms of 'prohibited content'.[172]

3.131 Following the passage of the *Enhancing Online Safety for Children Act 2015* (Cth), these provisions, and a new scheme addressed at cyber-bullying material, are to be administered by the Children's e-Safety Commissioner.

3.132 More generally, the *Broadcasting Services Act* regulates aspects of the ownership and control of media in Australia, including through licensing. These rules can also be characterised as interfering with freedom of expression.

3.133 Other communications laws place restrictions on freedom of speech and expression. For example, the *Do Not Call Register Act 2006* (Cth), *Spam Act 2003* (Cth) and *Telecommunications Act 1997* (Cth) all place restrictions on various forms of telephone and online marketing. The *Do Not Call Register Act* prohibits the making of unsolicited telemarketing calls and the sending of unsolicited marketing faxes to numbers on the Register (subject to certain exceptions) and, to this extent, may limit the rights of some people to impart information about commercial matters.

---

169 The *Classification Act* is supplemented by a number of regulations, determinations and other legislative instruments, including the: National Classification Code (May 2005); Guidelines for the Classification of Publications 2005 (Cth); Guidelines for the Classification of Films 2012 (Cth); and Guidelines for the Classification of Computer Games 2012 (Cth).

170 Law Council of Australia, *Submission 75*.

171 *Broadcasting Services Act 1992* (Cth) schs 5, 7.

172 Schedule 7 defines 'prohibited' or 'potentially prohibited' content: Ibid sch 7 cls 20, 21. Generally, 'prohibited content' is content that has been classified by the Classification Board as X 18+ or RC and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a 'restricted access system'.

3.134 The Human Rights Committee considered the *Do Not Call Register Act* in its examination of the Telecommunications Legislation Amendment (Consumer Protection) Bill 2013. The Committee sought clarification from the Minister for Broadband, Communications and the Digital Economy as to whether the prohibitions in the Act were compatible with the right to freedom of expression.[173]

3.135 The Minister responded that under art 19(3) of the ICCPR, restrictions on the right to freedom of expression are permitted in limited circumstances, including to secure or promote the rights of others (but only to the extent necessary and proportionate). In this instance, the relevant right was the right to privacy protected by art 17.[174] The Minister observed:

> While telemarketing and fax marketing are legitimate methods by which businesses can market their goods and services, the DNCR Act enables individuals to express a preference not to be called by telemarketers or receive marketing faxes. Notably, the DNCR Act does not prohibit the making of telemarketing calls, or the sending of marketing faxes, to a number on the Register where the relevant account-holder or their nominee has provided prior consent.[175]

3.136 Australian Lawyers for Human Rights submitted that s 313 of the *Telecommunications Act* unjustifiably limits freedom of speech.[176] This section imposes obligations on telecommunications carriers, carriage service providers and carriage service intermediaries to do their best to prevent telecommunications networks and facilities from being used in the commission of offences against the laws of the Commonwealth or of the states and territories.

3.137 Commonwealth agencies have used s 313 to prevent the continuing operation of online services in breach of Australian law (for example, sites seeking to perpetrate financial fraud). The AFP uses s 313 to block websites which contain child sexual abuse and exploitation material. Questions about how government agencies use this provision to request the disruption of online services were the subject of a report, in June 2015, by the House of Representatives Standing Committee on Infrastructure and Communications.[177] The Committee recommended that the Australian Government adopt whole-of-government guidelines for the use of s 313, proposed by the Department of Communications.[178]

3.138 Australian Lawyers for Human Rights suggested that only services established to be involved in serious crimes or that directly incite serious crimes should be covered by s 313. They stated that 'blocking has resulted in the disruption of thousands of

---

173 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013).

174 Ibid.

175 Ibid.

176 Australian Lawyers for Human Rights, *Submission 43*.

177 Parliament of Australia, House of Representatives Standing Committee on Infrastructure and Communications, *Balancing Freedom and Protection: Inquiry into the Use of Subsection 313(3) of the Telecommunications Act 1997 by Government Agencies to Disrupt the Operation of Illegal Online Services*, June 2015.

178 Ibid rec 1.

legitimate sites with completely legal content, to the commercial disadvantage and inconvenience of the owners'. They went on to argue that s 313 should be redrafted 'so as to draw a proper balance between the potential infringement of human rights and State interests', and made subject to new accountability and oversight mechanisms.[179]

3.139 Finally, a number of stakeholders expressed concern about the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth)—including in relation to its implications for journalism and the protection of media sources.[180] In March 2015, the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) was enacted, including some safeguards applying to the release of metadata that might identify a journalist's source.

Information laws

3.140 In some circumstances, Commonwealth information laws, including the *Privacy Act 1988* (Cth) and *Freedom of Information Act 1982* (Cth) (FOI Act) may operate to interfere with freedom of speech and expression.

3.141 The *Privacy Act* regulates the handling of personal information about individuals by most Australian Government agencies and some private sector organisations, consistently with 13 Australian Privacy Principles. The application of these principles may sometimes limit freedom of speech and expression, because disclosure would breach privacy.

3.142 Free TV stated that the range of privacy-related laws and codes that apply across Commonwealth, state and territory jurisdictions, and at common law, 'collectively operate to limit the ability of the media to report on matters'.[181]

3.143 While the objectives of the *Freedom of Information Act* include promoting public access to information, the application of the exemptions may sometimes mean that information cannot be released, potentially restricting freedom of speech. Freedom of information has been recognised in international law as an 'integral part' of freedom of expression.[182] For example, the ICCPR defines the right to freedom of expression as including freedom to 'seek' and 'receive' information.[183]

3.144 Free TV identified aspects of the current FOI regime that may stifle 'the media's ability to report on government information in a timely way'. In particular, they identified

- routine delays past the 30 day time frame for decision making on FOI requests from media organisations;

---

179 Australian Lawyers for Human Rights, *Submission 43*.

180 Australian Privacy Foundation, *Submission 71*; Joint Media Organisations, *Submission 70*; Public Interest Advocacy Centre, *Submission 55*; Free TV Australia, *Submission 48*; Australian Lawyers for Human Rights, *Submission 43*.

181 Free TV Australia, *Submission 48*.

182 P Timmins, *Submission 27*.

183 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

- agencies often advise journalists that an FOI request has been refused because of s 24AA of the FOI Act, which provides that the work would involve a substantial and unreasonable diversion of agency resources; and
- there is no direct right of appeal to the AAT except in the case of decisions made by the Minister or the head of an agency.[184]

Intellectual property laws

3.145 Intellectual property laws, including the *Copyright Act 1968* (Cth), *Trade Marks Act 1995* (Cth) and *Designs Act 2003* (Cth) are intended to encourage creativity and innovation and protect businesses that develop original intellectual property by providing limited monopoly privileges.[185]

3.146 While the history of intellectual property protection goes back to the 1710 *Statute of Anne*, intellectual property rights can be seen as affecting others' freedom of speech and expression.[186]

3.147 A number of stakeholders commented on the impact of copyright law on freedom of expression. The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) observed a 'fundamental tension' between copyright and free speech. The ADA and ALCC submitted that current copyright exceptions unjustifiably interfere with freedom of speech and should be repealed and replaced with a 'fair use' exception[187]—as recommended by the ALRC in its 2014 report *Copyright and the Digital Economy*.[188]

3.148 Other laws relating to intellectual property place restrictions on freedom of speech and expression, including those relating to the use of national and other symbols. In some cases, the use of certain words and symbols, such as defence emblems and flags, is an offence:

- *Defence Act 1903* (Cth) s 83;
- *Geneva Conventions Act 1957* (Cth);
- *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth);
- *Olympic Insignia Protection Act 1987* (Cth);

---

184 Free TV Australia, *Submission 48*. See also Australia's Right To Know, Submission No 24 to Senate Legal and Constitutional Affairs Legislation Committee, *Freedom of Information Amendment (New Arrangements) Bill 2014 [Provisions]* 2014. PIAC also expressed concern about the implications of the Freedom of Information Amendment (New Arrangements) Bill 2014: Public Interest Advocacy Centre, *Submission 55*.

185 Following amendments to the *Copyright Act* by the *Copyright Amendment (Online Infringement) Act 2015* (Cth) owners of copyright may now apply to the Federal Court for an order requiring a carriage service provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

186 1710, 8 Anne c 19.

187 ADA and ALCC, *Submission 61*. See also D Black, *Submission 6*.

188 Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122 (2014) rec 1.

- *Protected Symbols Determination 2013* (Cth); and
- *Protection of the Word 'ANZAC' Regulations 1921* (Cth).

3.149 The *Tobacco Advertising Prohibition Act 1992* (Cth) and *Tobacco Plain Packaging Act 2011* (Cth), prohibit the advertising of, and regulate the retail packaging and appearance of, tobacco products. The *Therapeutic Goods Act 1989* (Cth) regulates the advertising of therapeutic goods.[189]

3.150 In a response to a question from the Human Rights Committee, the Minister for Health stated that, while the *Tobacco Advertising Prohibition Amendment Regulation 2012* (Cth) 'could be said to engage the right to freedom of expression as it regulates advertising content', art 19(3) of the ICCPR expressly permits restricting this right where necessary for protecting public health.[190]

3.151 The Human Rights Committee also considered the Major Sporting Events (Indicia and Images) Protection Bill 2013 (Cth). The *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) provides special protection in relation to the use for commercial purposes of indicia and images connected with certain major sporting events such as Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games. In its report on the Bill, the Committee stated that it

> accepts that the limitation on freedom of expression is proposed in pursuit of the legitimate objective of promoting or protecting the rights of others (being the right of people to participate in the events in question and the protection of the intellectual property of the event sponsors), and that the proposed restrictions are rationally connected to that objective in seeking to protect the financial interests of event sponsors and investors, and thereby the financial viability of such events.[191]

3.152 In relation to the proportionality of the restriction, the Human Rights Committee noted that exemptions were provided for the purposes of criticism, review or the provision of information.[192]

Other laws

3.153 Many other Commonwealth laws may be characterised as interfering with freedom of speech and expression.

3.154 The *Competition and Consumer Act 2010* (Cth) places restrictions on engaging in secondary boycotts, including through activist campaigning. A secondary boycott—where a party engages with others in order to hinder or prevent a business from dealing with a third party—is prohibited by s 45D if the conduct would have the effect of causing substantial loss or damage to the business of the third person.

---

189 *Therapeutic Goods Act 1989* (Cth) ch 5.

190 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2012* (October 2012). See also Ch 7.

191 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].

192 Ibid [1.94].

3.155 The *Charities Act 2014* (Cth) provides that a charity cannot promote or oppose a political party or a candidate for political office.[193]

3.156 The *Commonwealth Electoral Act 1918* (Cth) regulates the printing and publication of electoral advertisements and notices, requirements relating to how-to-vote cards, and prohibits misleading or deceptive publications and canvassing near polling booths.[194]

3.157 Many laws impose prohibitions on forms of false, deceptive or misleading statements, including the *Competition and Consumer Act* (Cth) (Australian Consumer Law)[195] and the *Corporations Act 2001* (Cth).[196]

3.158 Other laws impose restrictions on the use of certain words or expressions in various contexts. For example:

- *Commonwealth Electoral Act 1918* (Cth) s 129 (restrictions on political party names);
- *Business Names Registration Act 2011* (Cth) ss 27, 28 (restrictions on words that can be used in business names);
- *Banking Act 1959* (Cth) ss 66 and 66A (restrictions on the words 'bank', 'building society', 'credit union' or 'credit society'); and
- *Corporations Act 2001* (Cth) ss 923A, 923B (restrictions on the use of the words 'independent', 'impartial' or 'unbiased', 'stockbroker', 'sharebroker' and 'insurance broker').

Justifications for encroachments

3.159 It is widely recognised that freedom of speech is not absolute. Even the First Amendment of the *United States Constitution* has been held not to protect all speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.[197]

3.160 The difficulty is always balancing the respective rights or objectives. Barendt stated that it 'is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated'.[198]

3.161 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[199]

---

193 *Charities Act 2014* (Cth) ss 5, 11.
194 *Commonwealth Electoral Act 1918* (Cth) pt XXI. See also *Broadcasting Services Act 1992* (Cth) sch 2, cl 3, 3A.
195 *Competition and Consumer Act 2010* (Cth) sch 2, s 18.
196 *Corporations Act 2001* (Cth) ss 1309, 1041E.
197 *Brandenburg v Ohio* 395 US 444 (1969).
198 Barendt, above n 7, 21.

3.162 Some of the principles and criteria that might be applied to help determine whether a law that interferes with freedom of speech is justified, including those under international law, are discussed below. However, it is beyond the practical scope of this Inquiry to determine whether appropriate justification has been advanced for particular laws.[200]

3.163 The literature on freedom of speech is extensive and there is considerable disagreement about the appropriate scope of the freedom. Professor Adrienne Stone observed that the 'sheer complexity of the problems posed by a guarantee of freedom of expression' makes it unlikely that a single 'theory' or 'set of values' might be appropriate in resolving 'the entire range of freedom of expression problems'.[201]

3.164 In the United States, doctrine on the First Amendment is said to be characterised by a categorical approach, according to which freedom of expression law is dominated by relatively inflexible rules, each with application to a defined category of circumstances.[202]

3.165 However, the dominant alternative approach is to use a proportionality test. As discussed in Chapter 1, proportionality is the accepted test for justifying most limitations on rights, and is used in relation to freedom of speech.

3.166 For example, the Human Rights Committee in its examination of legislation, asks whether a limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is proportionate to that objective.[203] A number of stakeholders expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of speech.[204]

Legitimate objectives

3.167 Both the common law and international human rights law recognise that freedom of speech can be restricted in order to pursue legitimate objectives such as the protection of reputation and public safety. Many existing restrictions on freedom of speech are a corollary of pursuing other important public or social needs, such as the conduct of fair elections, the proper functioning of markets or the protection of property rights.

199 *Canada Act 1982 c 11* s 1. See also, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

200 See Ch 1.

201 Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010), *University of Melbourne Legal Studies Research Paper*, No 476 21.

202 Ibid 8.

203 See Ch 1.

204 Law Council of Australia, *Submission 75*; Centre for Comparative Constitutional Studies, *Submission 58*; Public Interest Advocacy Centre, *Submission 55*; UNSW Law Society, *Submission 19*. FamilyVoice Australia referred to the 'harm principle', the ICCPR and the Siracusa Principles as providing a proper basis for determining whether limitations on freedom of expression are justified: FamilyVoice Australia, *Submission 73*. The harm principle was said to be derived from the work of JS Mill.

3.168 In its consideration of legislation, the Human Rights Committee sometimes simply asks whether a limitation of freedom of speech is aimed at achieving a 'legitimate objective of promoting or protecting the rights of others'[205]—a quite open category of limitation. The Centre for Comparative Constitutional Studies agreed that the 'concept of a legitimate end should encompass a wide range of laws and that only exceptionally would a law be considered not to pursue a legitimate end'.[206]

3.169 The power of Australian law-makers to enact provisions that restrict freedom of speech is not necessarily constrained by the scope of permissible restrictions on freedom of speech under international human rights law.[207] However, in considering how restrictions on freedom of speech may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR.

3.170 The ICCPR states that the exercise of freedom of expression 'carries with it special duties and responsibilities':

> It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[208]

3.171 Many of the laws discussed above pursue these objectives. For example, many of the criminal laws—and incitement offences—clearly protect the rights of others, including the right not to be a victim of crime. Some criminal laws, such as counter-terrorism laws, are concerned with the protection of national security or public order.

3.172 The Siracusa Principles define 'public order', as used in the ICCPR, as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded'.[209]

3.173 Some secrecy laws prohibit the disclosure of information that has the potential to damage national security—such as those in the ASIO Act—or public order. It may be harder to justify secrecy offences where there is no express requirement that the disclosure cause, or be likely to cause, a particular harm.[210] Arguably, public order is not necessarily engaged where the objective of a secrecy offence is simply to ensure the efficient conduct of government business or to enforce general duties of loyalty and fidelity on employees.

---

205 See eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].

206 Centre for Comparative Constitutional Studies, *Submission 58*.

207 See Ch 1.

208 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

209 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) cl 22. The Siracusa Principles also state that 'respect for human rights is part of public order'.

210 See, eg, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) ch 8.

3.174 On the other hand, some regulatory agencies, such as taxation, social security and health agencies, and regulatory and oversight bodies such as corporate regulators, need to strictly control disclosures of sensitive personal and commercial information provided to them by the public. For these agencies, the harm caused by the unauthorised disclosure of this information is not only harm to a person's privacy or commercial interests, but harm to the relationship of trust between the government and individuals which is integral to an effective regulatory or taxation system, and the provision of government services.[211] Avoiding this harm may more easily be seen as implicating 'public order', in the sense used in the ICCPR.

3.175 To the extent that contempt laws may be characterised as limiting freedom of speech, the laws may be justified as protecting the rights or reputations of others, and public order, as protecting tribunal proceedings can be seen as essential to the proper functioning of society. However, a limitation to a human right based upon the reputation of others should not be used to 'protect the state and its officials from public opinion or criticism'.[212]

3.176 Restrictions on freedom of speech under anti-discrimination laws may also be justified under the ICCPR as necessary to respect the rights or reputations of others, including the right to effective protection against discrimination, as provided by art 26.

3.177 Laws to prevent or restrict dissemination of indecent or classified material, such as the *Classification Act*, may be justified as protecting public health or morals. As discussed above, limitations on unsolicited telemarketing calls contained in the *Do Not Call Register Act* have been justified as protecting privacy; and tobacco advertising prohibitions as protecting public health.

3.178 There remain other laws restricting freedom of speech and expression that do not as obviously fall within the permissible restrictions referred to in art 19 of the ICCPR.

Proportionality and freedom of speech

3.179 Whether all of the laws identified above as potentially interfering with freedom of speech in fact pursue legitimate objectives of sufficient importance to warrant restricting speech may be contested. However, even if a law does pursue such an objective, it will be important to also consider whether the law is suitable, necessary and proportionate.

3.180 In relation to justifications for limiting freedom of expression, the UN Human Rights Committee has stated:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken,

211 Ibid [8.145].

212 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) cl 37.

> in particular by establishing a direct and immediate connection between the expression and the threat.[213]

3.181 The UN Human Rights Committee has also observed that the principle of proportionality must take account of the 'form of expression at issue as well as the means of its dissemination'. For instance, the value placed on 'uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain'.[214] This is consistent with the additional protection afforded under Australian common law to political communication.

3.182 The Centre for Comparative Constitutional Studies submitted that in applying the principles of proportionality to limitations on freedom of speech, regard should be had to the following:

- whether the law interfering with freedom of speech is 'content-neutral' or 'content-based';
- the extent to which the law interferes with freedom of speech including the availability of alternative, less restrictive means; and
- the nature of the affected speech.[215]

3.183 In relation to the first of these criteria, a content-based law aims to address harms caused by the content of the message communicated. Defamation laws, hate speech laws, laws regulating obscenity or pornography, and laws directed at sedition were given as examples of content-based laws.

3.184 In contrast, a content-neutral law is directed towards some other purpose unrelated to the content of expression. Laws directed to the 'time, place and manner' in which speech occurs such as laws that regulate protest—by requiring that protest be limited to certain places or times—laws that impose noise controls, or a law that limits the distribution of leaflets directed at preventing litter were given as examples of content-neutral laws.[216]

3.185 The Centre for Comparative Constitutional Studies submitted that content-based laws should, 'as a general matter, be considered more difficult to justify than content-neutral laws'.[217] The Centre also submitted that, as a general matter, the more extensive the limitation on speech, the more significant the justification for that limitation must be. Therefore extensive or 'blanket' bans on speech in a particular context or of a particular kind, will be more difficult to justify than laws that apply in only some circumstances or in some places. Further, some speech should be regarded as especially valuable. In particular, speech about political matters, in various forms, was

---

213 United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [35].
214 Ibid [34].
215 Centre for Comparative Constitutional Studies, *Submission 58*.
216 Ibid.
217 Ibid.

said to require a higher level of protection, and laws that operate to interfere with political speech should require special justification.[218]

Conclusions

3.186 Legislation prohibits, or renders unlawful, speech or expression in many different contexts. However, some of these provisions relate to limitations that have long been recognised by the common law itself, such as obscenity and sedition.

3.187 Numerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone.[219]

3.188 In the area of commercial and corporate regulation, a range of intellectual property, media, broadcasting and telecommunications laws restrict the content of publications, broadcasts, advertising and other media products. In workplace relations context, anti-discrimination law, including the general protections provisions of the *Fair Work Act*, prohibit certain forms of speech and expression.

3.189 Some areas of particular concern, as evidenced by parliamentary committee materials and other commentary, are:

- various counter-terrorism offences provided under the *Criminal Code* and, in particular, the offence of advocating terrorism;
- various terrorism-related secrecy offences in the *Criminal Code*, *Crimes Act* and ASIO Act and, in particular, that relating to 'special intelligence operations'; and
- anti-discrimination laws and, in particular, s 18C of the RDA.

3.190 Aspects of Australia's counter-terrorism laws might be reviewed to ensure that the laws do not unjustifiably interfere with freedom of speech.[220] Such a task would fall within the role of the Independent National Security Legislation Monitor (INSLM), who reviews the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis. This role includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.[221] The Acting INSLM, the Hon Roger Gyles AO QC, announced on 30 March 2015 that his first priority was to 'review any impact on journalists' of the operation of s 35P of the ASIO Act. The review of s 35P is now current.[222]

---

218 Ibid.

219 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

220 Aspects of these laws can also be considered as interfering with freedom of movement or freedom of association, discussed in Chs 5–6.

221 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(b).

222 See Australian Government Department of the Prime Minister and Cabinet, above n 112.

3.191 Anti-discrimination law may also benefit from more thorough review in relation to implications for freedom of speech. In particular, s 18C of the RDA has been the subject of considerable recent controversy. Concerns about the operation of anti-discrimination law in relation to freedom of religion[223] may also raise related freedom of speech issues.

3.192 There may also be reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. As discussed above, these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

3.193 Finally, the Australian Government should give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws.[224] In particular, the ALRC recommended that ss 70 and 79(3) of the *Crimes Act* should be repealed and replaced by new offences in the *Criminal Code*.[225] For example, s 70 might be replaced with a new offence requiring that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:

- damage the security, defence or international relations of the Commonwealth;
- prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- endanger the life or physical safety of any person; or
- prejudice the protection of public safety.[226]

223 See Ch 4.
224 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
225 Ibid rec 4–1.
226 Ibid rec 5–1.

4. Freedom of Religion

Contents

The common law

4.1 Generally speaking, Australians enjoy significant religious freedom, particularly by comparison to other jurisdictions. Australians enjoy the freedom to worship and practise religion, as well as the freedom not to worship or engage in religious practices.

4.2 The common law provides limited protection for freedom of religion.[1] The scope of religious freedom at common law is less clear than other related freedoms, such as freedom of speech.

4.3 This chapter discusses the source and rationale for freedom of religion in Australian law; how this freedom is protected from statutory encroachment; and when laws that interfere with freedom of religion may be justified.

---

1 Professor Carolyn Evans writes that 'the common law quite possibly does not protect religious freedom': Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) 88. To support this statement, Evans pointed to the South Australian case of *Grace Bible Church v Redman* where White J concluded that 'the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression': *Grace Bible Church v Reedman* (1984) 36 SASR 376, 388.

4.4 However, in *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (the *Scientology case*), in defining the meaning of 'religion' for taxation purposes, Mason ACJ and Brennan J commented:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.[2]

4.5 In *Evans v New South Wales*, the Federal Court described religious belief and expression as an 'important freedom generally accepted in society'.[3]

4.6 The freedom to engage in religious expression through observance and worship is at times intertwined with freedom of speech and expression, as well the freedom to associate.[4]

Definition

4.7 The High Court of Australia has enumerated various definitions of 'religion'. In the *Adelaide Company of Jehovah's Witnesses Case*, Latham CJ explained that 'it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world'.[5]

4.8 In the *Scientology case*—a case concerned with whether the Church of the New Faith qualified as a religion for the purposes of charitable tax exemptions—Mason ACJ and Brennan J expressed differing views from Wilson and Deane JJ about how religion may be defined.

4.9 Mason ACJ and Brennan J proposed the following definition of religion:

> [T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.[6]

4.10 Wilson and Deane JJ proposed the following definition:

> One of the most important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable

---

2 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.
3 *Evans v New South Wales* 168 FCR 576, [79] (French, Branson and Stone JJ).
4 See Chs 3 and 5.
5 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123.
6 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136.

> groups. A fifth, and perhaps more controversial, indicium … is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.[7]

4.11 The exercise of religion or 'canons of conduct' as described by Mason ACJ and Brennan J is a source of potential conflict between freedom in the exercise of religious beliefs and the exercise by others of other rights and freedoms.

4.12 Broadly speaking, religious freedom involves positive and negative religious liberty. Positive religious liberty involves the 'freedom to actively manifest one's religion or beliefs in various spheres (public or private) and in myriad ways (worship, teaching and so on)'.[8] This notion of positive rights is captured in the preamble to the *Universal Declaration of Human Rights*, which states that the 'recognition of the inherent dignity of individuals' is essential to acknowledging the autonomy of individuals to make decisions about the way they live their lives.[9]

4.13 Negative religious freedom, on the other hand, is freedom from coercion or discrimination on the grounds of religious or non-religious belief.[10] In the *Scientology case*, Mason ACJ and Brennan J commented:

> [A] definition of religion … mark[s] out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.[11]

History

4.14 Legal protection of religious freedom is a relatively modern phenomenon. British history is punctuated by acts of Parliament that discriminated against some groups on the basis of religion.[12] For instance, the *Act of Toleration* of 1689—a reform Act of its day—allowed freedom of worship to Protestants who dissented from the Church of England (known as Nonconformists) but not to Catholics, atheists or believers of other faiths such as Judaism.[13]

4.15 Another example is the *Royal Marriages Act* of 1772 which provided the conditions of a valid royal marriage including that to succeed to the throne, an heir must marry from within the Church of England.[14]

---

7 Ibid 173–74.

8 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press) 128.

9 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

10 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(2).

11 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

12 The treatment of religious freedom in the common law of Australia developed in a different historical and legal context to that in England. This difference—which includes the fact that Australia never has any religion established by law—is outlined in the High Court's joint judgment in *PGA v The Queen* (2012) 245 CLR 355, [26] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

13 *Act of Toleration 1689* (1 Will & Mary c 18).

14 *Royal Marriages Act 1772* (12 Geo 3 c 11). This Act which was an act of the British Parliament, was repealed on 26 March 2015. See further Anne Twomey, 'Power to the Princesses: Australia Wraps up Succession Law Changes' *The Conversation*, 26 March 2015 <https://theconversation.com/power-to-the-princesses-australia-wraps-up-succession-law-changes-39370>.

4.16 The 17th century philosopher, John Locke, wrote about the importance of tolerating other religious beliefs:

> The Toleration of those that differ from others in Matters of Religion, is so agreeable to the Gospel of Jesus Christ, and to the genuine Reason of Mankind, that it seems monstrous for Men to be so blind, as not to perceive the Necessity and Advantage of it, in so clear a light.[15]

4.17 The concept of religious freedom recognises the existence of multiple identity groups in a pluralist democratic society. Respect for another person's religious beliefs has been described as 'one of the hallmarks of a civilised society'.[16]

4.18 Thomas Jefferson, writing in his *Notes on the State of Virginia,* advocated for religious freedom on the basis of natural rights:

> Our rulers have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit, we are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.[17]

4.19 Recognition of freedom of religion in the common law developed significantly towards the end of the 19th century in England. Issues of religious freedom evolved in the context of wills cases, for instance in cases where a testator attempted to influence the religious tendencies of their beneficiaries by attaching conditions to a legacy, such as that the person convert to a particular religion.[18] Generally speaking, the law will make void any condition which is in restraint of religion.[19] Also in succession law, the equitable doctrine of undue influence has developed to extend to religious influence. In the English case of *Allcard v Skinner*, the Court of Appeal of England and Wales voided a gift on the basis of undue religious influence. In that case, Lindley LJ stated that:

> [T]he influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it the Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this

---

15 John Locke, 'A Letter Concerning Toleration (1685)' in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1998) 174. Locke spoke of toleration for Christians and non-Christians.

16 'Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony': *R (Williamson) v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246, [15] (Lord Nicholls).

17 Thomas Jefferson, 'Notes on the State of Virginia (1781–2)' in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1989) 219.

18 There are a large number of reported cases on such facts from the late Victorian period: Peter James Hymers (ed), *Halsbury's Laws of England* (Lexis Nexis Butterworths, 4th ed, 2008) vol 50, [379].

19 The common law has a range of public policy rules about the validity of conditional bequests that involve so-called restraint of religion clauses: see, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) 550. Religious conditions attached to wills have often been held void for uncertainty: *Re Winzar* (1935) 55 WALR 35; *Clayton v Ramsden* [1943] AC 320.

> on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render it impossible.[20]

Protections from statutory encroachment

Australian Constitution

4.20 Religious freedom is one of the few freedoms that receives some constitutional protection in Australia. Section 116 of the *Australian Constitution* provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

4.21 This provision has been read narrowly by the High Court.[21] The provision restrains the legislative power of the Commonwealth to enact laws that would establish a religion or prohibit the free exercise of religion, but does not explicitly create a personal or individual right to religious freedom. Indeed, Latham CJ stated that not all infringements of religion will be invalidated by s 116, but rather only those that exert 'undue infringement[s] of religious freedom'.[22]

4.22 Australian courts have considered s 116 in only a small number of cases. Those cases have concerned the meaning of 'religion', the 'free exercise' clause and the 'establishment of a religion'.

4.23 In *Krygger v Williams* the High Court upheld a law requiring attendance at compulsory peacetime military training by persons who conscientiously objected to military training on religious grounds. The Court found the law requiring attendance at military training did not infringe s 116:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.[23]

4.24 Section 116 is purposive in nature, being directed at laws that explicitly establish a religion or prohibit the free exercise of religion. For instance in *Kruger v Commonwealth*, the High Court explained that laws that indirectly prohibit the 'free exercise' of religion do not restrict s 116.[24]

---

20 *Allcard v Skinner* (1887) 36 Ch D 145 183–85. For more on the principle of undue influence, see Croucher and Vines, above n 19, 255; Pauline Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia' (2003) 26 *University of New South Wales Law Journal* 66.

21 *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559, 604 (Gibbs J); *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 268. See also Tony Blackshield, George Williams and Michael Coper (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 93–4; Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion* (Routledge, 2005) ch 4.

22 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131.

23 *Krygger v Williams* (1915) 15 CLR 366, 369 (Griffith CJ).

24 *Kruger v Commonwealth* (1997) 190 CLR 1.

4.25 Given the limitations of s 116 as a protection of religious freedom,[25] and the limited protection at common law,[26] there is some debate about the extent to which freedom of religion is protected by Australian law.[27]

4.26 The Commonwealth has the power to legislate with regard to 'external affairs'[28] by way of implementing treaty obligations. Given the protections afforded for religious freedom in the *International Covenant on Civil and Political Rights* (ICCPR)—to which Australia is a party—this may be seen as one way that the Australian legislature can legislate with regard to religion.[29]

4.27 A diverse group of stakeholders noted that there is limited legal protection for religious freedom in Commonwealth law.[30] Several of these stakeholders suggested ways to reform the law to better protect religious freedom.

4.28 The Law Society of NSW Young Lawyers advocated that religion be included as a protected attribute in Commonwealth anti-discrimination legislation.[31]

4.29 The Australian Christian Lobby (ACL) submitted that there should be a 'clear statement of legislative intent to protect freedom of religion', modelled on art 18 of the ICCPR.[32] While the ACL did not specify in which act this statement could be introduced, they stated their opposition to a bill of rights.

4.30 The Public Interest Advocacy Centre (PIAC) advocated an amendment to the *Acts Interpretation Act 1901* (Cth) to require that Commonwealth legislation be interpreted in a non-discriminatory way unless it is 'clearly stated that the government intended for the legislative provision to be discriminatory'.[33] PIAC argued that this would 'provide general protection for religious belief'.[34]

Principle of legality

4.31 The principle of legality provides some protection to freedom of religion.[35] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously

---

25 For instance, Wilson J stated that s 116 does 'not form part of a bill of rights': *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559, 652.

26 See for instance, *Grace Bible Church v Reedman* (1984) 36 SASR 376, 385 (Zelling J), 389 (Millhouse J).

27 See for instance, Carolyn Evans's discussion of the limited protection afforded to religious freedom by the common law: Evans, above n 1, 88.

28 Australian Constitution s 51(xxix).

29 Paula Gerber and Melissa Castan, *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters (Professional) Australia, 2013) [19.20].

30 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; Public Interest Advocacy Centre, *Submission 55*; Australian Christian Lobby, *Submission 33*; Freedom 4 Faith, *Submission 23*; Kingsford Legal Centre, *Submission 21*.

31 Law Society of NSW Young Lawyers, *Submission 69*.

32 Australian Christian Lobby, *Submission 33*.

33 Public Interest Advocacy Centre, *Submission 55*.

34 Ibid.

35 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

clear.[36] McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society* suggested that Australian courts should show restraint in upholding provisions which interfere with religious exercise:

> If the ordinance is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so, I think that a court should prefer that construction to one which will prevent them from doing so.[37]

International law

4.32 Article 18 of the *Universal Declaration of Human Rights* enshrines freedom of religion:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[38]

4.33 The ICCPR provides in art 18(i) that 'everyone shall have the right to freedom of thought, conscience and religion'.[39]

4.34 The United Nations Human Rights Committee has explained that the infringement of a person's rights under art 18 will often engage a number of other rights and freedoms protected in the ICCPR, including the right to privacy,[40] the rights to hold opinions and freedom of expression,[41] the right of peaceful assembly,[42] and liberty of movement.[43]

4.35 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[44] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[45]

Bills of rights

4.36 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes

---

36 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

37 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA). See also Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 228–29.

38 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 18.

39 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

40 Ibid art 17.

41 Ibid art 19.

42 Ibid art 21.

43 Ibid art 12.

44 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

45 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

protect freedom of religion in the United States,[46] the United Kingdom,[47] Canada[48] and New Zealand.[49] An example is s 15 of the New Zealand *Bill of Rights Act*, which provides:

> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.[50]

4.37 The *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) also include protection for religious freedom.[51]

Laws that interfere with freedom of religion

4.38 Freedom of religion is infringed when a law prevents individuals from practising their religion or requires them to engage in conduct which is prohibited by their religion.[52] Alternatively, the freedom will also be infringed when a law mandates a particular religious practice.

4.39 There are few Commonwealth laws that can be said to interfere with freedom of religion.[53] The Law Council of Australia advised that it 'has not identified any laws imposing any specific restriction on the freedom of religion' and 'that any specific encroachment is likely to arise in balancing religious freedom with other protected freedoms, such as freedom of speech'.[54]

4.40 Similarly, Freedom 4 Faith stated that 'the laws of the Commonwealth do not particularly encroach upon freedom of religion'.[55]

4.41 Despite the limited number of provisions in Commonwealth law that may be said to interfere with religious freedom, Professor Patrick Parkinson AM stated that there remain important issues to be resolved in Australian law about

> the balance to struck between the rights of religious organisations to conduct their affairs in accordance with their own beliefs and values and general non-discrimination principles in the community.[56]

4.42 This chapter identifies provisions in Commonwealth laws that may be characterised as interfering with freedom of religion in the areas of:

- workplace relations laws;

---

46 *United States Constitution* amend I.
47 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 9(1).
48 *Canada Act 1982 c 11 Sch B Pt 1 (Canadian Charter of Rights and Freedoms)*.
49 *New Zealand Bill of Rights Act 1990* (NZ) s 15.
50 Ibid.
51 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.
52 Radan, Meyerson and Croucher, above n 21, 4.
53 Several stakeholders noted that there are few significant encroachments on religious freedom in Commonwealth laws: Law Council of Australia, *Submission 75*; Public Interest Advocacy Centre, *Submission 55*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.
54 Law Council of Australia, *Submission 75*.
55 Freedom 4 Faith, *Submission 23*.
56 P Parkinson, *Submission 9*.

- anti-discrimination law;
- solemnisation laws under the *Marriage Act 1961* (Cth); and
- counter-terrorism legislation.

Workplace relations laws

4.43 The Terms of Reference ask the ALRC to consider laws that interfere with freedom of religion, particularly in workplace relations, commercial and corporate regulation and environmental regulation.

4.44 There are some provisions in workplace relations laws that prohibit employers from discriminating against an employee on the basis of a protected characteristic. This may be characterised as interfering with freedom of religion as it may affect the employment practices of religious organisations that may wish to select staff who conform to the beliefs of that organisation. For instance, in some circumstances, a religious organisation or body may seek to exclude a potential employee where the prospective employee does not adhere to the teachings of that religious organisation.

4.45 In the *Fair Work Act 2009* (Cth) these provisions include the following:[57]

- section 153, which provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- section 195(1), which lists discriminatory terms in enterprise agreements including those terms that discriminate against an employee on the basis of their religion and other personal characteristics;
- section 351(1), which relates to the General Protections division of the Act and provides that any adverse action taken against an employee on the basis of a protected attribute or characteristic is prohibited; and
- section 772(1)(f), which provides that a person's employment may not be terminated on the basis of a protected attribute, subject to exceptions in s 772(2)(b).

4.46 These provisions do not appear to be particularly controversial. They have not been raised in recent parliamentary inquiries on anti-discrimination law, or by stakeholders to this Inquiry. The next section outlines an area of anti-discrimination legislation that has raised significant discussion in recent years.

---

57 Freedom 4 Faith proposed several changes to the *Fair Work Act 2009* (Cth) including imposing a duty on employers to make reasonable adjustment for an employee who has a conscientious objection to the performance of a particular duty: Freedom 4 Faith, *Submission 23*.

Anti-discrimination law

4.47 Commonwealth anti-discrimination law makes it unlawful to discriminate against a person on the basis of a person's personal attributes, such as their sex or sexual orientation in areas of public life, including employment, education and the provision of goods, services and facilities. Under the *Sex Discrimination Act 1984* (Cth) (SDA), it is unlawful to discriminate against a person on the basis of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding, and family responsibilities.[58]

4.48 However, there are a range of exemptions for religious organisations and religious educational institutions where the discriminatory act or conduct conforms to the doctrines, tenets or beliefs of a religion, or is necessary to avoid injury to the religious sensitivities of adherents of that religion. The exemptions include the following:

- section 23(3)(b), which provides that accommodation provided by a religious body is exempt from s 23(1) making it unlawful to discriminate against a person on the basis of a protected attribute in the provision of accommodation;
- section 37, which exempts the ordination or appointment of priests, Ministers of religion or members of any religious order and accommodation provided by a religious body from the effect of the SDA; and
- section 38, which exempts educational institutions established for religious purposes from the effect of the SDA in relation to the employment of staff and the provision of education and training, provided that the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion'.

4.49 The effect of these exemptions is that a religious school, for instance, may lawfully choose not to employ a pregnant, unmarried teacher, in circumstances where this would be discriminatory conduct for a non-religious organisation.

Religious organisation exemptions in the SDA

4.50 One of the most challenging issues in the interaction between religion and law is the accommodation or 'special treatment' of those who observe religious beliefs.[59] In Australia, one way in which this debate has crystallised is about religious organisation exemptions in anti-discrimination legislation.

---

58 *Sex Discrimination Act 1984* (Cth) ss 5–7. The SDA makes it unlawful to discriminate on those grounds in relation to work and work practices; in the provision of education; in the provision of goods and services; in the provision of accommodation; in the conferral of land or the terms and condition of an offer of land; by refusing membership to a club or in the terms and conditions of membership to a club; in the administration of Commonwealth laws and programs; and in the handling of requests for information: Ibid ss 14–27.

59 Radan, Meyerson and Croucher, above n 21, 5.

4.51 A wide range of stakeholders made submissions on the anti-discrimination provisions and religious organisation exemptions in the SDA.[60] The submissions reflected various views about the existence and form of the religious organisation exemptions in ss 37 and 38.

4.52 Some stakeholders objected to the form of the current exemptions,[61] arguing against the practice of defining religious freedom by way of exceptions to generally applicable laws.[62]

4.53 These exemptions do not interfere with religious freedom—they protect religious freedom. However, some stakeholders argued that the exemptions provide inadequate protection for religious groups. For instance, the ACL argued that 'religious freedom should not be considered as a concession to more fundamental freedoms from non-discrimination'.[63]

4.54 Parkinson argued:

> Faith-based organisations have a right to select staff who fit with the values and mission of the organisation, just as political parties, environmental groups and LGBT organisations do. To select on the basis of 'mission fit' is not discrimination.[64]

4.55 Freedom 4 Faith wrote that it is 'inappropriate for anti-discrimination laws to address issues of religious freedom by means of exceptions or exemptions from otherwise applicable laws'.[65]

4.56 Family Voice considered the current exemptions 'completely inadequate' and argued that courts and tribunals 'should not be asked to determine such things as the "doctrines, tenets or beliefs" or the "injury to the religious susceptibilities of adherents" to a religious creed'.[66]

4.57 Some of these stakeholders proposed new models for religious organisation exemptions. The models vary significantly and are outlined below.

4.58 The Wilberforce Foundation proposed a model exemption based on a so-called 'conscience clause', arguing that the SDA should provide that discrimination is only unlawful and actionable if the service which has been denied is not reasonably

---

60 Law Council of Australia, *Submission 75*; FamilyVoice Australia, *Submission 73*; Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; NSW Gay and Lesbian Rights Lobby, *Submission 47*; Australian Christian Schools Ltd, *Submission 45*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*; A Lawrie, *Submission 03*; P Parkinson and G Krayem, *Submission 1*.

61 Maronite Catholic Society Youth *Submission 51*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; P Parkinson, *Submission 9*.

62 P Parkinson, *Submission 9*. This is discussed in greater detail in the context of freedom of association in Ch 5.

63 Australian Christian Lobby, *Submission 33*.

64 P Parkinson, *Submission 9*.

65 Freedom 4 Faith, *Submission 23*.

66 FamilyVoice Australia, *Submission 73*.

obtainable elsewhere. In its view, a provision of this nature will ensure that the right of religious freedom is on an equal footing with the right of non-discrimination.[67]

4.59 Family Voice favoured a general exemption like that in s 61A of the *Defence Act 1903* (Cth), which exempts certain groups of people such as ministers of religion and others, from military service.[68]

4.60 The ACL favoured a general limitations clause as an alternative to the current religious organisation exemptions. In their view, a general limitations clause is favourable to an exemption, as the language of 'exemptions' implies an 'entitlement to discriminate'.[69]

4.61 In a submission to the Attorney-General's Department's Inquiry into the consolidation of Commonwealth anti-discrimination laws, Professors Parkinson and Aroney proposed a model that redefines discrimination to include limitations on freedom of religion where 'necessary'.[70] The proposed definition is comprehensive and combines direct and indirect discrimination. Further, the definition includes a proportionality test. The definition includes what is *not* discrimination—due to religious beliefs—within the definitional section itself, rather than expressing it as a limitation, exception or exemption:

> 1. A distinction, exclusion, restriction or condition does not constitute discrimination if:
>
> a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
>
> b. it is made because of the inherent requirements of the particular position concerned; or
>
> c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
>
> d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
>
> 2. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 2(a).[71]

4.62 In proposing this model, Parkinson and Aroney aimed to ensure that freedom from discrimination does not diminish freedom of religion. They argued that this

> can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary 'exception' to general prohibitions on discrimination.[72]

---

67 Wilberforce Foundation, *Submission 29*.
68 FamilyVoice Australia, *Submission 73*.
69 Australian Christian Lobby, *Submission 33*.
70 This approach was supported by Freedom 4 Faith, *Submission 23*.
71 P Parkinson and N Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 2011.
72 Ibid.

4.63 Other stakeholders opposed the exemptions altogether. Some of these stakeholders argued that the existence of the exemptions represented an inappropriate balance between freedom of religion and the principle of non-discrimination. These groups would argue that the general application of anti-discrimination legislation is a justifiable interference on religious freedom.

4.64 The Law Society of NSW Young Lawyers argued, for example, that the exemptions 'severely limit the effectiveness of protections against discrimination'.[73] Similarly, the National Association of Community Legal Centres opposed broad 'permanent exemptions from anti-discrimination law for religious organisations', arguing that they 'undermine the effectiveness of anti-discrimination legislation'.[74]

4.65 While PIAC accepted that a religious group may need to discriminate 'on occasions to ensure ongoing manifestation of the core tenets of its faith', it also recommended that current religious exemptions be amended to require that religious organisations justify discrimination in the specific circumstances of each proposed act.[75] Further, PIAC recommended that an appropriate government body be given the function to consider claims of discrimination, in order to assess whether discrimination has occurred and to what extent an individual's right to equality has been infringed.[76]

4.66 Alaistair Lawrie argued that the exemptions amount to the Australian Government's 'tacit endorsement of discrimination, by religious organisations, against lesbian, gay, bisexual and transgender (LGBT) Australians'.[77]

4.67 The NSW Gay & Lesbian Rights Lobby referred to the academic work of Professor Carolyn Evans and Leilani Ujvari who argued:

> The message that such exemptions can give is that discrimination is relatively minor in comparison to other forms of harm against which the law protects and from which most religious schools have no exemptions. Law has a legitimating as well as a regulating function and when religious schools are permitted to avoid discrimination laws, it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value; something which can be avoided if desired.[78]

4.68 Some stakeholders also asked whether it is appropriate to exempt religious organisations that receive public funding from discrimination legislation. For instance, PIAC argued that where a religious organisation is in receipt of public funding or performing a service on behalf of government, it should not be permitted to discriminate in a way that would otherwise be unlawful.[79]

---

73 Law Society of NSW Young Lawyers, *Submission 69*.
74 National Association of Community Legal Centres, *Submission 66*.
75 Public Interest Advocacy Centre, *Submission 55*.
76 Ibid.
77 A Lawrie, *Submission 03*.
78 Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 42.
79 Public Interest Advocacy Centre, *Submission 55*.

4.69 On the other hand, there is an argument that the existence of religious schools that have some degree of autonomy from state control is an important part of a diverse and plural society.[80] Some stakeholders argued that religious observance occurs in all facets of a student's school experience and is not restricted to specific religious ceremonies.[81] Teachers in religious schools may be seen as role models for students in the way they conduct their lives outside of structured classes. Christian Schools Australia Ltd explained that religion is 'not simply taught as a stand-alone subject'. Rather,

> it permeates all that takes place and is lived out in the daily lives of the community of the school … The conduct and character of individuals, and the nature of their relationships with others in the school community, are key concerns in establishing such a Christian learning community. This includes all manner of conduct—the use of appropriate language, the conduct of relationships, attitudes, values and expression of matters of sexuality, and many other aspects of conduct within the community in general.[82]

Previous inquiries

4.70 There have been several parliamentary and other inquiries into the exemptions in the SDA.

4.71 The Senate Standing Committee on Legal and Constitutional Affairs conducted an Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. The Committee recommended that the religious organisation exemptions in the SDA not apply to discrimination on the grounds of sexual orientation, gender identity and intersex status with respect to the provision of aged care accommodation.[83] The recommendation was adopted by the Government when enacting the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). The Hon Mark Butler MP justified this decision on the basis that 'when such services are provided with tax payer dollars, it is not appropriate for providers to discriminate in the provision of those services'.[84]

4.72 The same Senate Standing Committee Inquiry noted the range of opinions on the existence and operation of the exemptions.[85] The human rights statement of compatibility stated that the Bill was

> compatible with human rights because it advances the protection of human rights, particularly the right to equality and non-discrimination. To the extent that it may limit rights, those limitations are reasonable, necessary and proportionate.[86]

---

80 Evans and Ujvari, above n 78, 31.
81 Australian Christian Schools Ltd, *Submission 45*.
82 Ibid.
83 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill* (2013) rec 1.
84 Ibid 13.
85 Ibid [3.9].
86 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

4.73 In 2008, the Senate Standing Committee inquired into the 'Effectiveness of the *Sex Discrimination Act 1984* (Cth) in Eliminating Discrimination and Gender Inequality'. The Committee recommended that the exemptions in s 30 and ss 34 - 43 of the SDA—including those for religious organisations—be replaced by a general limitations clause.[87] In making this recommendation, the Committee wrote that such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. This would allow for a more 'flexible' and 'nuanced' approach to balancing competing rights.[88]

4.74 The Australian Human Rights Commission's 2011 report, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, noted a divergence in stakeholder opinions on exemptions for religious organisations, reporting that the majority of the participants who commented on the issue opposed exemptions. Those who opposed the inclusion of such exemptions held a range of positions on the issue, including that there should be:

- no exemptions;
- no exemptions for organisations that receive public funding;
- no blanket exemptions, but that exemptions should be allowed on a case-by-case basis; or
- only narrow exemptions if any exemptions are contained in federal anti-discrimination legislation.[89]

4.75 The Attorney-General's Department undertook a public consultation process from 2011 to 2013 on a proposed consolidation of Commonwealth anti-discrimination laws. The Department's Discussion Paper raised various models of exemptions in anti-discrimination law—without settling on a preferred model—including discussing the merits of a general limitations clause in the SDA.[90]

Solemnising marriage ceremonies

4.76 It may be argued that the solemnisation provisions in the *Marriage Act 1961* (Cth) (*Marriage Act*) affect freedom of religion.[91] The provisions include the following:

- s 101, which provides that the solemnisation of marriage by an unauthorised person is a criminal offence. To be authorised under s 29, a religious leader must register their status as a marriage celebrant, provided that the denomination is recognised by the Australian Government, and the minister is nominated by their

87 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36.
88 Ibid [11.64].
89 'Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination' (Consultation report, Australian Human Rights Commission, 2011) 33.
90 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, 2011) 37–41. This consolidation process was not carried forward.
91 P Parkinson and G Krayem, *Submission 1*.

denomination. This may discriminate against smaller, less well-known religious groups, or break-away groups or sects within established religious traditions; and

- s 113(5), which makes it unlawful to conduct a religious wedding ceremony, unless it occurs after the performance of a legal civil marriage.

4.77 The *Marriage Act* gives direct legal effect to marriages conducted by religious celebrants. In doing so, the Act makes it unlawful to conduct a religious wedding unless it occurs after a civil marriage, and is conducted by an authorised celebrant. In other jurisdictions, such as in Europe, the civil ceremony creates the legal marriage, while the religious ceremony has no legal effect.[92]

4.78 Parkinson and Krayem argue that the provisions of the *Marriage Act* are a 'fetter on religious freedoms', as they

> operate as restraints upon conducting religious wedding ceremonies other than in accordance with the Act, and indeed s 101 makes doing so a criminal offence. That is a fetter on religious freedom.[93]

4.79 There are clear policy justifications for regulating marriage, including to ensure that parties who enter into marriage do so as consenting adults, as well as to prevent polygamy and incest, and to maintain government records for family taxation and other regulatory purposes. There may be some religious leaders who are unaware of these offences. Criminal sanctions may be seen as an unjustifiable burden on an important form of religious expression.

4.80 There is little departmental or other material that outlines the justifications for the solemnisation provisions of the *Marriage Act*. The Attorney-General's Department has released Guidelines for Marriage Celebrants that explain the process for authorisation of a celebrant under the Act.[94] The Explanatory Memorandum for the Marriage Bill 1960 (Cth) does not refer to justifications for the solemnisation provisions.

4.81 Second Reading speeches from the debate in the House of Representatives on the Marriage Bill evidence some concerns about the celebrant system. For example, Richard Cleaver MP pointed to the burden on religious celebrants:

> One can sympathise with many ministers of religion who ask, 'Why should this not be a civil ceremony of necessity, with a certificate supplied by the civil authority to the minister, freeing him from so much of the clerical duty?' People who desire the blessing of the church on the marriage could have it, and the contract would be completed. … [I]t is also felt that ministers of religion should be freed as much as possible from the clerical and legal obligations that are laid down in the proposed legislation, for this calls upon them virtually to act as assistants to the registrar. That would enable ministers of religion who perform marriages to give their undivided

92 Ibid.
93 Ibid.
94 Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014.

> attention to what is distinctly their duty according to their vocation—the religious guidance and counselling for marriage.[95]

4.82 Parkinson and Krayem proposed that the solemnisation provision in the *Marriage Act* should provide that:

> (1) A person shall not solemnise a marriage, or purport to solemnise a marriage, at a place in Australia or under Part V unless the person is authorised by or under this Act to solemnise marriages at that place or under that Part, as the case may be.
>
> (2) Nothing in this section makes it unlawful for a person who is not authorised by or under this Act to solemnise marriages, to conduct a religious ceremony of marriage, provided that the parties to the marriage are at least 18 years of age and are informed in writing, or otherwise aware, that the celebrant is not authorised to solemnise marriages under the *Marriage Act 1961*, and that the religious ceremony has no legal effect.

4.83 If this model were adopted, ss 113(5) and 113(7) of the *Marriage Act* could be repealed.

Criminal law and national security legislation

4.84 Some offences in the *Criminal Code* (Cth) may be characterised as indirectly interfering with freedom of religion, as they may restrict religious expression. These laws include the following:

- s 80.2C, which creates the offence of 'advocating terrorism'. This may be seen to limit religious expression by limiting the capacity of individuals to express religious views which might be radical and controversial;[96]
- s 102.1(2), which provides that an organisation maybe prescribed as a terrorist organisation, making it an offence to be a member of that organisation, to provide resources or support to that organisation, or to train with that organisation. Some argued that this provision risks criminalising individuals for expressing radical, religious beliefs;[97] and
- s 102.8, which makes it an offence to associate with a proscribed 'terrorist organisation'. There may be interference with religious freedom where a person is seen to associate with a member of a terrorist organisation who attends the same place of worship or prayer group. While there is a defence in s 102.8(4)(b) where the association 'is in a place being used for public religious worship and takes place in the course of practising a religion', this may place a significant burden on defendants to prove that their association arose in the course of practising their religion.[98]

---

95 Commonwealth, *Parliamentary Debates* House of Representatives, Marriage Bill 1960 Second Reading Speech, 18 August 1960 (Richard Cleaver).

96 This provision is discussed in more detail in Ch 3.

97 Gilbert and Tobin Centre of Public Law, *Submission 22*.

98 These last two provisions are discussed in more detail in Ch 5.

Advocating terrorism offence

4.85 The Gilbert and Tobin Centre for Public Law raised concerns about the effect of s 80.2C of the *Criminal Code* on freedom of religion, arguing that it limits the capacity of individuals to express religious views which might be radical and controversial.[99] Section 80.2C was introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

4.86 The Gilbert and Tobin Centre argued that the offence is likely to have a 'significant chilling effect' on religious expression, as individuals may refrain from discussing their religious views and current events overseas out of fear they will be prosecuted.[100]

4.87 The Parliamentary Joint Committee on Human Rights noted that this provision engaged the right to freedom of expression in art 19(3) of the ICCPR. The Committee sought further information from the relevant Minister about the necessity for this provision, writing that a number of existing provisions in the *Criminal Code* may apply to speech that incites violence:

> such incitement offences may capture a range of speech acts, including 'urging', 'stimulating', 'commanding', 'advising' or 'encouraging' a person to commit an unlawful act.[101]

4.88 The Committee concluded that the provision was 'likely to be incompatible with the human right of opinion and expression'.[102] Its comments are primarily related to restrictions on free speech and so are analysed more thoroughly in Chapter 3.[103]

Justifications for laws that interfere with freedom of religion

4.89 It is generally recognised that freedom of religion is not absolute. Instead, 'it is subject to powers and restrictions of government essential to the preservation of the community'.[104] Legislatures and the courts will often have to strike a balance between so-called 'equality' rights like anti-discrimination, and other freedoms like freedom of religion:

> As a practical matter, it is impossible for the legal order to guarantee religious liberty absolutely and without qualification … Governments have a perfectly legitimate claim to restrict the exercise of religion, both to ensure that the exercise of one

---

99 Gilbert and Tobin Centre of Public Law, *Submission 22*.
100 Ibid.
101 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014) [1.254].
102 Ibid [1.258].
103 The Bill was passed without amendment to this provision. See further, Ch 3.
104 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).

> religion will not interfere unduly with the exercise of other religions, and to ensure that practice of religion does not inhibit unduly the exercise of other civil liberties.[105]

4.90 An amicus brief by several legal academics to the US Supreme Court case of *Obergefell v Hodges*,[106] where a majority of that Court upheld the constitutional validity of state-based same-sex marriage legislation, canvassed an argument in favour of balancing different—sometimes competing—rights and interests:

> The Court must protect the right of same-sex couples to marry, and it must protect the right of churches, synagogues, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage … No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own … The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides.[107]

4.91 The common law provides some authority for when it may be justified to encroach on religious freedom. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, Williams J stated that the scope of s 116 of the *Australian Constitution* may be limited in the interests of national security.[108]

4.92 Having said this, the common law provides no significant guidance on the limits of religious freedom in Australia. This may in part be due to Australia's model of parliamentary supremacy:

> Even suitably beefed up common law protection is incapable of dislodging the principle of state parliamentary sovereignty. Although a court intent on maximally protecting the common law right to freedom of religion might exhibit unusual reluctance to find that Parliament intended to invade the right, the presumption that Parliament does not intend to interfere with common law rights and freedoms remains rebuttable.[109]

4.93 Stakeholders expressed different perspectives on the scope of appropriate justifications for laws that interfere with religious freedom. Some argued that considerations of religious freedom will always involve a balance between other, competing rights and interests. For instance, Kingsford Legal Centre argued that a law which interferes with freedom of religion is justified if that law protects other important freedoms, such as the right to be free from unlawful discrimination.[110]

---

105 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204. Some stakeholders disputed this balancing: see discussion below on non-discrimination.

106 *Obergefell v Hodges* 576 US (June 26, 2015).

107 Douglas Laycock, 'Brief of Douglas Laycock, Thomas Berg, David Blankenhorn, Marie Failinger and Edward Gaffney as Amicus Curiae in Support of Petitioners in Same-Sex Marriage Cases (Obergefell v Hodges Etc)' [2015] *Public Law and Legal Research Paper Series* 1–2.

108 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161.

109 Denise Meyerson, 'The Protection of Religious Rights under Australian Law' 3 *Brigham Young University Law Review* 529, 542.

110 Kingsford Legal Centre, *Submission 21*.

4.94 Similarly, the Law Society of NSW Young Lawyers wrote that

> the right to freedom of religion is a fundamental right, but that right is not absolute, and needs to be finely balanced against competing rights, such as the right to be free from discrimination.[111]

4.95 Other stakeholders argued that freedom of religion should not be usurped by other rights or interests. For instance, Freedom 4 Faith argued that no limitations can be justified on the right to freedom of religion, warning that 'religious freedom and associated rights are at risk of being undermined in Australian society due to a disproportionate focus on other, sometimes competing rights'.[112]

4.96 Similarly, the ACL wrote:

> Courts and legislatures need to acknowledge the supremacy of the fundamental rights of freedom of religion, conscience, speech and association … [it is] a freedom which must be placed among the top levels of human rights hierarchy.[113]

4.97 Christian Schools Australia Ltd underscored 'the need to balance rights', while stressing that religious freedom should not merely be an 'afterthought'.[114]

4.98 The Church and Nation Committee, Presbyterian Church of Victoria submitted that balancing freedom of religion with principles such as non-discrimination is 'misguided', stating that while religious freedom 'is a fundamental underpinning of our society, freedom from discrimination is not'. They went on to argue that

> Freedom from discrimination is not a fundamental human right because it is neither attainable nor universal. Discrimination—that is, to choose something or someone over another—needs to be a lawful part of a free society. To label non-discrimination as a 'fundamental right' is inherently misguided.[115]

4.99 Christian Schools Australia Ltd provided the following principles which, in their view, could be applied to test whether laws that interfere with freedom of religion are justified:

- the importance of religious freedom should not be undervalued;
- equity and balance must be sought;
- Christian heritage must be acknowledged and respected;
- minority views must be protected;
- freedom to act on religious belief is essential; and
- the limitations of the law must be recognised.[116]

---

111 Law Society of NSW Young Lawyers, *Submission 69*.
112 Freedom 4 Faith, *Submission 23*.
113 Australian Christian Lobby, *Submission 33*.
114 Australian Christian Schools Ltd, *Submission 45*.
115 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.
116 Australian Christian Schools Ltd, *Submission 45*.

4.100 There is a wide range of justifications advanced by legislatures for laws that interfere with freedom of religion, including but not limited to protecting people from discrimination in public life, preventing a greater harm, and limitations where laws directly interfere with other legal rights and freedoms. By way of example, there are cases where courts have allowed blood transfusions for a minor where their parents or guardians have refused on religious grounds.[117] Courts have not insisted on life-saving treatment where an adult has made the same decision to refuse life-saving treatment.

4.101 Stakeholders primarily focused on whether laws that interfere with freedom of religion may be justified if they advance the principle of non-discrimination. This issue is examined in more detail below.

Legitimate objectives

4.102 In considering how restrictions on freedom of religion may be appropriately justified, one starting point is the ICCPR. Article 18(3) provides that freedom of religion may be limited where it is 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

4.103 The UN Human Rights Committee has strictly interpreted art 18(3), indicating that general public interest criteria, such as national security concerns, may not be sufficient to justify interferences with religious freedom. [118]

4.104 On the issue of the religious and moral education of children, art 18(4) provides that States Parties must ensure 'the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

Non-discrimination

4.105 Non-discrimination is one principle advanced to justify laws that limit freedom of religion. However, the way in which this principle is balanced with the often competing interest of religious freedom, is contested. For instance, stakeholder opinions diverged on the appropriate weight to be afforded to non-discrimination in the application of religious organisation exemptions.

4.106 On the one hand, several stakeholders stressed the importance of safeguarding the right to be free from discrimination when discussing appropriate limitations on religious freedom.[119] Kingsford Legal Centre and PIAC argued, for example, that existing exemptions for religious organisations undermine the Australian

---

117 See, eg, *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294. In this case, the New South Wales Supreme Court held that a 17 year old could not refuse life-saving therapeutic treatment on the basis of their religious belief, despite finding that the minor had '*Gillick*' competency as a mature minor to refuse the treatment.

118 United Nations Human Rights Committee, General Comment No 22 (1993) on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion, CCPR/C/21/Rev.1 [8].

119 Law Society of NSW Young Lawyers, *Submission 69*; Maronite Catholic Society Youth *Submission 51*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

Government's commitment to international law that protects vulnerable groups, such as women, from discrimination.[120]

4.107 Some stakeholders drew specific attention to the way that legislative provisions that protect religious freedom may undermine the rights or freedoms of lesbian, gay, bisexual, trans and intersex (LGBTI) Australians (primarily the right to be free from discrimination).[121]

4.108 Other stakeholders argued that freedom from discrimination should not be considered an equivalent right to religious freedom. For instance, the Church and Nation Committee argued that the 'desire for equality' is incompatible with religious freedom:

> The problem is that freedom and equality are not mutually compatible. Unfortunately, we cannot all be free and completely equal at the same time. Freedom implies an inequality that goes hand-in-hand with difference. We cannot all be equal except in the eyes of the law. As a society we need to work out what we cherish more: freedom or equality.[122]

4.109 There is also an argument advanced by some stakeholders that the practices of religious organisations—such as in the areas of employment—lie outside the 'commons' or public sphere, and should thus be excluded from government intervention.[123] Dr Joel Harrison and Professor Patrick Parkinson defined the 'commons' as 'places or encounters where people who may be different from one another in all kinds of respects, including gender, sexual orientation, beliefs and values, can expect not to be excluded'.[124] They highlighted voluntary associations, like book clubs, educational, voluntary, charitable, commercial and religious associations, as the kind of groups that exist beyond the 'commons'.

4.110 Freedom 4 Faith also argued that religious organisations operate outside the 'commons', explaining that, like voluntary associations, religious groups should be able to set their own criteria for selecting members.[125]

4.111 International human rights law provides some guidance on the relationship between religious freedom and non-discrimination. Article 4 of the ICCPR provides that some ICCPR rights may be derogated from in times of public emergency, however States Parties must ensure that

> such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

---

120 Public Interest Advocacy Centre, *Submission 55*; Kingsford Legal Centre, *Submission 21*.

121 National Association of Community Legal Centres, *Submission 66*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

122 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

123 Freedom 4 Faith, *Submission 23*.

124 Patrick Parkinson and Joel Harrison, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' *Monash University Law Review* 39.

125 Freedom 4 Faith, *Submission 23*.

4.112 Anti-discrimination provisions in international human rights law may constitute a permissible limitation on religious freedom. Articles 2, 4, 21 and 26 of the ICCPR provide that the protection of individual's rights must not be 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, property birth or other status'.

Proportionality and religious freedom

4.113 Some stakeholders adopted a proportionality approach when assessing appropriate limitations on religious freedom.[126] PIAC recommended that the ALRC adopt a proportionality test when determining whether an infringement of religious freedom is justified. PIAC recommended that limitations are only reasonable where it is necessary and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[127]

4.114 Daniel Black also promoted the use of a proportionality approach to reconcile laws that require a balance between freedom of religion and other rights. He was highly critical of the justificatory processes employed by relevant parliamentary committees and government departments, arguing that

> an adequate level of analysis isn't always being provided by departments (including the Attorney-General's department) putting forward human rights compatibility statements in a much more broadly considered approach (as per the APS code of conduct). Rather the current approach seems to avoid controversial areas to push though legislation advocated by the government of the day. As such considering statements of human rights compatibility to legislation without considering the responses of the Joint Parliamentary Committee on Human Rights reports and potentially parliamentary submissions is accepting a potentially biased view, especially on controversial topics.[128]

Conclusions

4.115 Generally speaking, Australians are not constrained in the exercise of religious freedom. There are only a few provisions in Commonwealth laws that interfere with religious freedom.

4.116 A diverse range of stakeholders raised concerns about the scope and application of the religious organisation exemptions in ss 37 and 39 of the *Sex Discrimination Act 1984* (Cth). While these provisions do not, on their face, interfere with religious freedom, some stakeholders objected to the form of the exemptions, arguing against the practice of defining religious freedom by way of exceptions to generally applicable laws. Others argued that the exemptions are an unjustifiable encroachment on the principle of non-discrimination. There have been several recent inquiries conducted by the Australian Human Rights Commission and by parliamentary committees into the operation of anti-discrimination legislation.

---

126 Public Interest Advocacy Centre, *Submission 30*; D Black, *Submission 6*.
127 Public Interest Advocacy Centre, *Submission 55*.
128 D Black, *Submission 6*. For further discussion of parliamentary scrutiny mechanisms, see Ch 2.

4.117 The solemnisation provisions for wedding celebrants in the *Marriage Act 1961* (Cth) raise practical concerns about the authorisation of religious celebrants. Review of these provisions may be desirable. The ALRC is interested on further comment on whether and to what extent the solemnisation provisions in the *Marriage Act 1961* (Cth) unjustifiably interfere with freedom of religion.

5. Freedom of Association

Contents

The common law

5.1 In practice, Australians are generally free to associate with whomever they like, and to assemble to participate in activities including, for example, a protest or demonstration. However, freedom of association and assembly are less often discussed, and their scope at common law less clear than related freedoms, such as freedom of speech.

5.2 This chapter discusses the source and rationale of the common law right of freedom of association; how this right is protected from statutory encroachment; and when laws that interfere with freedom of association may be considered justified, including by reference to the concept of proportionality.[1]

5.3 The approach of the English common law to freedom of assembly has been described as 'hesitant and negative, permitting that which was not prohibited'.[2] In *Duncan v Jones*, Lord Hewart CJ said that 'English law does not recognize any special

1 See Ch 1.
2 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7.

right of public meeting for political or other purposes'.[3] On the other hand, in Australia, there has been some recognition that freedom of association should be considered a common law right.[4] Regardless, freedom of association is widely regarded as a fundamental right.

5.4 The 19th century author of *Democracy in America*, Alexis de Tocqueville, considered freedom of association as 'almost as inalienable as the freedom of the individual':

> The freedom most natural to man, after the freedom to act alone, is the freedom to combine his efforts with those of his fellow man and to act in common … The legislator cannot wish to destroy it without attacking society itself.[5]

5.5 Professor Thomas Emerson wrote in 1964 that freedom of association has 'always been a vital feature of American society':

> In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.[6]

5.6 Freedom of association is closely related to other fundamental freedoms recognised by the common law, particularly freedom of speech. It has been said to serve the same values as freedom of speech: 'the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy'.[7]

5.7 The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association explained the importance of these rights, as empowering people to:

> express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.[8]

---

3 *Duncan v Jones* [1936] 1 KB 218 222. This 'reflected the then current orthodoxy': *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7.

4 *Tajjour v New South Wales* (2014) 313 ALR 221; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414. See Australian Council of Trade Unions, *Submission 44*.

5 Alexis de Tocqueville, *Democracy in America* (Library of America, 2004) 220. See also Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 161.

6 Thomas I Emerson, 'Freedom of Association and Freedom of Expression' [1964] *Yale Law Journal* 1, 1.

7 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272. 'For many people, participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views … Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enables people without media access to contribute to public debate': Ibid 269.

8 UN Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, 15th Sess, UN Doc A/HRC/RES/15/21 (6 October 2010).

5.8 Freedom of assembly and association serve as vehicles for the exercise of many other civil, cultural, economic, political and social rights. Significantly, freedom of association provides an important foundation for legislative protection of employment rights. The system of collective, or enterprise bargaining, which informs much of Australia's employment landscape, relies on the freedom of trade unions and other employee groups to form, meet and support their members.

Protections from statutory encroachment

Australian Constitution

5.9 Freedom of association is not expressly protected in the *Australian Constitution*. There is also no free-standing right to association implied in the *Constitution*.[9] Generally, Australian Parliaments may make laws that encroach on freedom of association.

5.10 This power is subject to general constitutional constraints on the legislative powers of the Commonwealth. For example, in 1951, the High Court ruled that the *Communist Party Dissolution Act 1950* (Cth) was not a valid exercise of express legislative power,[10] and nor was it valid under an implied power to make laws for the preservation of the Commonwealth and its institutions from internal attack and subversion.[11]

5.11 However, just as there is an implied constitutional right to 'political communication', arguably there is also an implied right to 'political association'. As in the case of political communication, any implied right to 'political association' does not protect a personal right, but acts as a restraint on the exercise of legislative power by the Commonwealth.

5.12 The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*'.[12]

5.13 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. People should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in *Australian Capital Television Pty Ltd v Commonwealth* said that the

---

9 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). ('There is no such 'free-standing' right [as freedom of association] to be implied from the *Constitution*'). See also *Tajjour v New South Wales* (2014) 313 ALR 221; *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382, [28]; *Unions NSW v New South Wales* (2013) 304 ALR 266.

10 Under *Australian Constitution* s 51(xxxix) read with s 61 (incidental and executive powers), s 51(vi) (defence power).

11 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

12 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). This position has been supported in subsequent judgements: *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382, [28]; *Unions NSW v New South Wales* (2013) 304 ALR 266; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [158] (Gummow & Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [112] (Gummow, Hayne, Crennan & Bell JJ).

> notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association.[13]

5.14 However, in the Australian constitutional context, it seems this right to free association is *only* a corollary of the right to political communication. The High Court said in *Wainohu v New South Wales*:

> Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.[14]

5.15 The effect of this decision, Professors George Williams and David Hume wrote, 'will be to give freedom of association a limited constitutional vitality'.[15]

The principle of legality

5.16 The principle of legality provides some protection to freedom of association.[16] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of association, unless this intention was made unambiguously clear.

5.17 For example, in *Melbourne Corporation v Barry*, the High Court found that a by-law, made under a power to regulate traffic and processions, could not prohibit traffic and processions. Higgins J said:

> It must be borne in mind that there is this common law right; and that any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted.[17]

5.18 In *Tajjour v New South Wales* (*Tajjour*) the High Court confirmed that there is no constitutionally implied freedom of association, separate from the implied freedom of political communication.[18] However, Keane J cited High Court authority for the proposition that, at common law, freedom of association is a 'fundamental aspect of our legal system'.[19]

---

13 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

14 *Wainohu v New South Wales* (2011) 243 CLR 181, [112].

15 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 217. Williams and Hume go on to write: 'It would be better to reformulate the position in *Wainohu* at least so that any freedoms of political association and political movement were identified as derivative, not of freedom of communication, but of the constitutionally prescribed systems of representative and responsible government and for amending the *Constitution* by referendum. In other words, the *Constitution* protects that freedom of association and movement which is necessary to sustain the free, genuine choices which the constitutionally prescribed systems contemplate': Ibid 217–18.

16 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

17 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

18 *Tajjour v New South Wales* (2014) 313 ALR 221, [95], [136], [244]–[245]. The case concerning the anti-consorting law contained in s 93X of the *Crimes Act 1900* (NSW), which was found not to be invalid for impermissibly burdening the implied freedom of communication under the *Constitution*.

19 Ibid [224]. Citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J).

5.19 In *Minister for Immigration and Citizenship v Haneef* (*Haneef*) the Full Court of the Federal Court approached the construction of the word 'association' in the light of common law principles. The Court concluded that those principles tended against a construction authorising the Minister to find a person to have failed a migration character test[20] 'merely on the basis of an innocent association with persons whom the Minister reasonably suspects have been or are involved in criminal conduct'.[21] The principle of legality, applied to freedom of association, can be seen as an 'integral part' of the Court's approach to statutory interpretation in *Haneef*.[22]

International law

5.20 International law recognises rights to peaceful assembly and to freedom of association. For example, the *International Covenant on Civil and Political Rights* (ICCPR) provides for 'the right of peaceful assembly' and the 'right to freedom of association including the right to form and join trade unions'.[23]

5.21 In addition, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides for the 'right of everyone to form trade unions and join the trade union of his choice'.[24]

5.22 Australia is also bound to respect freedom of association under international labour standards, and through its membership of the International Labour Organization (ILO).[25] International labour standards seek to guarantee the right of both workers and employers to form and join organisations of their choice.[26]

5.23 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[27] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[28]

---

20 Under *Migration Act 1958* (Cth) s 501(6)(b).

21 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [114].

22 Australian Council of Trade Unions, *Submission 44*.

23 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.

24 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8. Williams and Hume stated: 'the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR': Williams and Hume, above n 15, 4.

25 See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 2010) [3.21]–[3.23].

26 See, eg, International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950); International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951). See also International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 1998.

27 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

28 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

Bills of rights

5.24 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of association is protected in the human rights statutes in the United Kingdom,[29] Canada[30] and New Zealand.[31] For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention on Human Rights, art 11 of which provides:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.[32]

5.25 The First Amendment to the *United States Constitution* refers to the 'right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.[33]

5.26 Freedom of association is also provided for in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).[34]

Laws that interfere with freedom of association

5.27 A wide range of Commonwealth laws may be seen as interfering with freedom of association, broadly conceived. Some of these laws impose limits on freedom of association that have long been recognised by the common law, for example, in relation to consorting with criminals and preserving public order. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

5.28 Commonwealth laws may be characterised as interfering with freedom of association in several different contexts, and including in relation to:

- criminal law;
- public assembly;
- workplace relations;
- migration law; and
- anti-discrimination law.

---

29 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).
30 *Canada Act 1982 c 11* s 2(d).
31 *New Zealand Bill of Rights Act 1990* (NZ) s 17. The protection provided by bills of rights and human rights acts is discussed more generally in Ch 1.
32 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).
33 *United States Constitution* amend I.
34 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16(2); *Human Rights Act 2004* (ACT) s 15(2).

5.29 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of association, and public criticisms of laws on that basis, are also discussed.

Criminal law

5.30 A number of offences in the *Criminal Code* (Cth) directly criminalise certain forms of association. Notably, these include counter-terrorism and foreign incursion offences, and anti-consorting laws which criminalise associating in support of criminal activity or criminal organisations.

Counter-terrorism offences

5.31 Section 102.8 of the *Criminal Code* provides for the offence of associating with a member of a terrorist organisation and thereby providing support to the organisation, if the person intends the support to assist it. Terrorist organisations are prescribed by regulations made under s 102.1 of the *Criminal Code*.[35]

5.32 Section 119.5 of the *Criminal Code* provides for offences of allowing the use of buildings, vessels and aircraft to commit offences, by permitting a meeting or assembly of persons to be held with the intention of supporting preparations for incursions into foreign countries for the purpose of engaging in hostile activities.

5.33 In addition, the terms of anti-terrorism control orders issued under the *Criminal Code* may contain a prohibition or restriction on a person 'communicating or associating with specified individuals'.[36]

5.34 The Independent National Security Legislation Monitor (INSLM) reviewed aspects of the associating with terrorist organisations offence in its 2013 Annual Report. The INSLM recommended that s 102.8 be amended to include an 'exception for activities that are humanitarian in character and are conducted by or in association with the [International Committee of the Red Cross], the UN or its agencies, or (perhaps) agencies of like character designated by a Minister'.[37]

5.35 The Law Council of Australia observed that the associating with terrorist organisations offence 'may disproportionately shift the focus of criminal liability from a person's conduct to their membership of an organisation'.[38] It added that assessing justification for the offences is difficult, 'given the broad executive discretion to proscribe a particular organisation and the absence of publicly available binding criteria to be applied'.[39]

---

35 See eg, *Criminal Code (Terrorist Organisation—Al-Qa'ida) Regulation 2013* (Cth). Other specified terrorist organisations include: Al-Qa'ida in the Lands of the Islamic Maghreb; Al-Qa'ida in the Arabian Peninsula; Islamic State; Jabhat al-Nusra; Jamiat ul-Ansar; Jemaah Islamiyah; Abu Sayyaf Group; Al-Murabitun; Ansar al-Islam; Boko Haram; Jaish-e-Mohammad; Lashkar-e Jhangvi.

36 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 104.5(3)(e).

37 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 89.

38 Law Council of Australia, *Submission 75*.

39 Ibid.

5.36 Problems with the process of specifying terrorist organisations were said to include that it 'involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group'. Further, an organisation can be listed as a terrorist organisation simply on the basis that it 'advocates' the doing of a terrorist act.

> The offences may also disproportionately impinge on freedom of association as the current process of proscribing terrorist organisations set out in Division 102 does not afford affected parties the opportunity to be heard prior to an organisation being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution; and the avenues for review after an organisation has been listed may also be inadequate.[40]

5.37 The UNSW Law Society also criticised the associating with terrorist organisations offence. It observed that it is important to understand that 'mere association with a terrorist organisation may not be intentional and is not directly linked to the planning and execution of an attack'. It stated that despite the 'legitimacy of the broad aims of counter-terrorism laws in Australia, it is debatable whether targeting individuals by criminalising association with terrorist organisations is effective and appropriate'.[41]

5.38 The Law Council criticised the control orders and preventative detention orders regimes under divs 104 and 105 of the *Criminal Code* because a 'person's right to associate may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge the restriction of liberty'.[42]

5.39 The Law Council also submitted that the offence of entering or remaining in a 'declared area' contained in s 119.2 of the *Criminal Code* may have the

> unintended effect of preventing and deterring innocent Australians from travelling abroad and associating with persons for legitimate purposes out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately displace the evidential burden.[43]

Anti-consorting offences

5.40 Courts have long held the power to restrict freedom of association in circumstances where criminal associations may pose a threat to peace and order. In *Thomas v Mowbray*, Gleeson CJ referred to counter-terrorism control orders as having similar characteristics to bail and apprehended violence orders.[44]

---

40 Ibid.

41 UNSW Law Society, *Submission 19*.

42 Law Council of Australia, *Submission 75*. See also Human Rights Law Centre, *Submission 39*. These provisions are discussed in more detail in relation to freedom of movement: See Ch 6.

43 Law Council of Australia, *Submission 75*. See Ch 6.

44 *Thomas v Mowbray* (2007) 233 CLR 307, [16]. Quoting Blackstone, who wrote of what he called 'preventive justice': William Blackstone, *Commentaries on the Laws of England*, (1769) Bk IV, 248.

5.41 The High Court has also recognised that there may be circumstances where the legislature is justified in infringing freedom of association in order to disrupt and restrict the activities of criminal organisations and their members.[45]

5.42 This is an object, the High Court observed, that has been 'pursued in the long history of laws restricting the freedom of association of certain classes, groups or organisations of persons involved or likely to be involved in the planning and execution of criminal activities'. The object is 'legitimised by the incidence and sophistication of what is generally called "organised crime"'.[46]

5.43 Anti-consorting laws are not a new phenomenon. In *Tajjour*, French CJ observed that:

> Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon.[47]

5.44 In Australia, these laws are creatures of statute that first emerged early last century in vagrancy legislation.

> Their primary object was (and remains) to punish and thereby discourage inchoate criminality, and the means by which they sought to achieve this was the imposition of criminal liability for keeping company with disreputable individuals.[48]

5.45 In relation to modern NSW anti-consorting laws, the High Court has stated that 'preventing or impeding criminal conduct is compatible with the system of representative and responsible government established by the Constitution'.[49]

5.46 Concerns about the impact on freedom of association of state and territory anti-consorting laws[50] were repeatedly mentioned during the Australian Human Rights Commission's *Rights and Responsibilities 2014* consultation.[51]

5.47 At the Commonwealth level, ss 390.3 and 390.4 of the *Criminal Code* provide for offences of associating in support of serious organised criminal activity and supporting a criminal organisation. Section 390.3 is stated not to apply 'to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'.[52]

---

45 See, eg, *Wainohu v New South Wales* (2011) 243 CLR 181.

46 Ibid [8] (French CJ and Kiefel J).

47 *Tajjour v New South Wales* (2014) 313 ALR 221, [7]. See Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103, 113.

48 McLeod, above n 47, 104.

49 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). Referring to *Crimes Act 1900* (NSW) s 93X. Gageler J held that an 'association' must involve the 'temptation of involvement in criminal activity': Ibid [160].

50 For example, *Crimes Act 1900* (NSW) s 93X; *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Criminal Organisations Control Act 2012* (WA).

51 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 32.

52 *Criminal Code* (Cth) s 390.3(8).

5.48 Some stakeholders in this ALRC inquiry questioned the justification for the Commonwealth anti-consorting laws. The Law Council, for example, stated that the offences in div 390

> shift the focus of criminal liability from a person's conduct to their associations. Offences of this type have the potential to unduly burden freedom of association for individuals with a familial or community connection to a member of a criminal association.[53]

5.49 The UNSW Law Society concluded that, although 'the broad aim of the legislation is legitimate, it is questionable whether targeting unexplained income through criminalising association is effective and suitable'.[54] The Public Interest Advocacy Centre (PIAC) stated:

> Fundamentally, any consorting law, by its very nature, impinges on a person's right to freedom of association and it would be difficult to draft such legislation so as to comply with international human rights law.[55]

5.50 PIAC observed that, while *Tajjour* held s 93X of the *Crimes Act 1900* (NSW) to be constitutionally valid, French CJ (in a dissenting judgment) concluded that the net cast by the provision was 'wide enough to pick up a large range of entirely innocent activity'.[56] The Chief Justice found that the offence was invalid by reason of the imposition of a burden on the implied freedom of political communication, stating that it fails to 'discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not'.[57]

5.51 PIAC submitted that Commonwealth anti-consorting legislation should be 'proportionate to the legitimate aim of public safety by inserting sufficient safeguards, such as ensuring the laws can be limited to a targeted group of persons involved in serious criminal activity'.[58]

Public assembly

5.52 Most legislative interferences with the right of public assembly are contained in state and territory laws including, for example, unlawful assembly[59] and public order offences where there is some form of 'public disturbance', such as riot, affray or violent disorder.[60]

5.53 At Commonwealth level, the *Public Order (Protection of Persons and Property) Act 1971* (Cth) regulates the 'preservation of public order' in the territories and in

---

53 Law Council of Australia, *Submission 75*.
54 UNSW Law Society, *Submission 19*.
55 Public Interest Advocacy Centre, *Submission 55*.
56 *Tajjour v New South Wales* (2014) 313 ALR 221, [41].
57 Ibid [45].
58 Public Interest Advocacy Centre, *Submission 55*.
59 For example, in NSW, *Crimes Act 1900* (NSW) s 545C. The requirements for a 'lawful assembly' are set out in *Summary Offences Act 1988* (NSW) ss 22–27.
60 For example, in NSW, *Crimes Act 1900* (NSW) s 93B (riot), s 93C (affray); *Summary Offences Act 1988* (NSW) s 11A (violent disorder).

respect of Commonwealth premises and certain other places, such as the premises of federal courts and tribunals and diplomatic and special missions.

5.54 Under the Act it is an offence to take part in an assembly in a way that 'gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property'.[61] An assembly consisting of no fewer than twelve persons may be dispersed if it causes police reasonably to apprehend a likelihood of unlawful physical violence or damage to property.[62]

Workplace relations laws

5.55 The *Fair Work Act 2009* (Cth) purports to protect freedom of association. An object of the Act is to recognise the right to freedom of association and the right to be represented.[63]

5.56 Part 3-1 of the Act contains protections for freedom of association and involvement in lawful industrial activities, including protection under s 346 against adverse action being taken because a person is or is not a member of an industrial association or has or has not engaged in 'industrial activity'.[64]

5.57 In *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education*, the Federal Court stated that freedom to associate in this context is 'not simply a freedom to join an association without adverse consequences, but is a freedom to be represented by the association and to participate in its activities'.[65]

5.58 The freedom to participate in an association's lawful industrial activities—such as an industrial protest—does not give participants unfettered protection from being dismissed for their conduct during such activities. For example, in *CFMEU v BHP Coal Pty Ltd*, the decision of an employer to fire an employee (partly) because of an 'offensive and abusive' protest sign was upheld as lawful. Gageler J stated that the protection afforded by s 346(b) is 'not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity'. Rather, Gageler J found that it is 'protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity'.[66]

---

61 *Public Order (Protection of Persons and Property) Act 1971* (Cth) ss 6(1), 15(1). See also *Parliamentary Precincts Act 1988* (Cth) s 11. This applies the *Public Order (Protection of Persons and Property) Act 1971* (Cth) to the Parliamentary precincts in Canberra.

62 *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 8(1).

63 *Fair Work Act 2009* (Cth) s 3(e). In *Barclay v The Board of Bendigo*, Gray and Bromberg JJ stated that the objects of the *Fair Work Act* emphasise that 'recognition of the right to freedom of association and the right to be represented is designed to enable fairness and representation at work': *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

64 *Fair Work Act 2009* (Cth) s 346. Part 3–1 of the *Fair Work Act* is also concerned with protecting a freedom not to associate, a concept that is not mandated by ILO labour standards: Creighton and Stewart, above n 25, [20.06].

65 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

66 *CFMEU v BHP Coal Pty Ltd* (2014) 314 ALR 1, [92].

5.59 The Kingsford Legal Centre stated that, in the workplace, freedom of association protects the right to form and join associations 'to pursue common goals in the workplace, helping to correct the significant power imbalance between employees and employers'. It observed that this principle 'has been a long-standing and beneficial feature of Australian labour law' and that without such protections, the ability of employees to bargain with their employer in their collective interest is greatly reduced. The Centre submitted that 'the current protections for freedom of association in the workplace are integral and that any repeal of these legislative protections or the introduction of laws that interfere with these protections would not be justified'.[67]

5.60 The *Fair Work Act* also contains a range of provisions that can be characterised as interfering with freedom of association, which are discussed below.[68] Arguably, however, some of these provisions may be seen as regulating the activities of associations and their office holders, rather than as directly affecting the scope of freedom of association, as understood by the common law.

5.61 The Australian Council of Trade Unions (ACTU) stated that provisions of the *Fair Work Act* 'unjustifiably interfere with the right to freedom of association and should be reconsidered'—including restrictions on the right to strike, the duration of industrial action and union access to workplaces.

5.62 The ACTU stated that the ILO Committee of Experts on the Application of Standards and Recommendations (ILO Committee of Experts) has 'repeatedly found that Australian law breaches international labour law'.[69]

5.63 The Australian Institute of Employment Rights (AIER) observed that, in the workplace relations context, freedom of association is the 'base from which other rights flow, in particular the right to collectively bargain and the right to strike'. It argued that the practical application of the right to freedom of association in the workplace is subject to 'considerable and unjustified encroachment by the laws of the Commonwealth'.[70]

5.64 The AIER observed that the Australian Government has been 'put on notice'[71] that a number of provisions of the *Fair Work Act* infringe on freedom of association[72] as understood under the ILO *Freedom of Association and Protection of the Right to Organise Convention*.[73]

---

67 Kingsford Legal Centre, *Submission 21*.

68 For more analysis on how the *Fair Work Act* may be seen as failing to accord with international labour standards on freedom of association, see, eg, Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) ch 10; Breen Creighton, 'International Labour Standards and Collective Bargaining under the Fair Work Act 2009' in Anthony Forsyth and Breen Creighton (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2014) ch 3.

69 Australian Council of Trade Unions, *Submission 44*.

70 Australian Institute of Employment Rights, *Submission 15*.

71 Ibid.

72 See 'Reports of the Committee on Freedom of Association' (357th Report, International Labour Office, 2010) Case No. 2698 (Australia), [213]–[229].

73 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

> Laws of the Commonwealth, including the *Fair Work Act* and the secondary boycott provisions of the *Competition and Consumer Act*, unjustifiably encroach on freedom of association rights. The right to form and join trade unions for the promotion and protection of collective economic and social interests is a right that goes to the heart of creating a socially just society and allowing the freedom for people to pursue their material well-being.[74]

5.65 Australian Lawyers for Human Rights also submitted that the *Fair Work Act* now unjustifiably limits the right of employees to collectively bargain for terms and conditions of employment under international law.[75]

5.66 A group of legal academics submitted that, on close analysis, while the protections set out in pt 3–3 of the *Fair Work Act* 'fall some considerable way short' of ILO and ICESCR standards, the protections nevertheless 'at least go some way towards meeting Australia's international obligations in relation to freedom of association in general, and the right to strike in particular'.[76]

Protected industrial action

5.67 Protected industrial action is acceptable to support or advance claims during collective bargaining. When an action is 'protected', those involved are granted immunity from legal actions that might otherwise be taken against them under any law, including, for example, in tort or contract.[77]

5.68 Industrial action will generally be unlawful if it does not meet the criteria for 'protected industrial action', which are set out in the *Fair Work Act*.[78] Each of the criteria for protected action can be interpreted as interfering with freedom of association, including:

- the definitions of an employee claim action, employee response action and employer response action;[79]
- the prohibition on 'pattern bargaining';[80]
- the requirement to be genuinely trying to reach an agreement;[81]
- the notice requirements in relation to industrial action;[82] and
- the requirements for protected action ballots.[83]

---

74 Australian Institute of Employment Rights, *Submission 15*.
75 Australian Lawyers for Human Rights, *Submission 43*.
76 Professor Creighton and Others, *Submission 24*.
77 *Fair Work Act 2009* (Cth) s 415. The immunity does not apply to actions likely to involve personal injury, damage to property or the taking of property. Defamation is also excluded. See also Ch 17.
78 Ibid ss 408–414.
79 Ibid ss 409–411.
80 Ibid ss 409–411, 412.
81 Ibid ss 409–411, 413.
82 Ibid ss 409–411, 413, 414.
83 Ibid s 409(2), pt 3–3, div 8.

5.69 The AIER noted criticism of these provisions by the ILO Committee on Freedom of Association, including in relation to: ss 408–411 of the *Fair Work Act*, which effectively prohibit sympathy strikes and general secondary boycotts; s 413(2), which removes protection for industrial action in support of multiple business agreements; and ss 409(4) and 412 in relation to pattern bargaining.[84]

5.70 In particular, restrictions on the right to strike contained in the *Fair Work Act* have been criticised by the ILO Committee of Experts on the basis that industrial action is only protected during the process of bargaining for an agreement.[85]

5.71 The emphasis within the *Fair Work Act* on enterprise level bargaining can be seen as an unnecessary encroachment on the right to collectively bargain.[86] For example, while pattern bargaining by employees is restricted, there is no corresponding restriction on pattern or industry-wide coordinated bargaining by employer or other representatives. This is said to conflict with the principle of free and voluntary collective bargaining embodied in art 4 of the ILO *Right to Organise and Collective Bargaining Convention*,[87] under which 'the determination of the bargaining level is essentially a matter to left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law'.[88]

5.72 The ACTU criticised provisions of the *Fair Work Act* concerning the circumstances in which industrial action is authorised by protected action ballot. The Act requires a quorum and a majority vote by secret ballot before industrial action can be taken.

5.73 Section 459(1)(b) provides that at least 50% of the employees on the roll of voters must actually vote. The ACTU noted that the ILO Committee of Experts has commented that, where legislation requires votes before a strike can be held, account should be taken only of the votes cast, and the required quorum and majority fixed at a reasonable level.[89]

5.74 Section 459(1)(c) provides more that than 50% of the valid votes must be in favour of taking action. The ILO Committee of Experts has commented that such a requirement is 'excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises'.[90] The ACTU submitted that these restrictions on the right to strike unjustifiably interfere with the right to freedom of association.[91]

5.75 The ACTU and the AIER also considered that the powers of the Fair Work Commission to suspend or terminate industrial action on various grounds, including

---

84 Australian Institute of Employment Rights, *Submission 15*.
85 Australian Council of Trade Unions, *Submission 44*.
86 Australian Institute of Employment Rights, *Submission 15*. See, eg, *Fair Work Act 2009* (Cth) pt 2–4, ss 3(f), 186(2)(ii), 229(2).
87 International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951).
88 'Reports of the Committee on Freedom of Association', above n 72, Case No. 2698 (Australia), [220].
89 Australian Council of Trade Unions, *Submission 44*.
90 Ibid.
91 Ibid.

economic harm, health and safety, third party damage and cooling off,[92] are cast too broadly and unjustifiably interfere with the right to freedom of association.[93]

Right of entry

5.76 The *Fair Work Act* provides a framework for right of entry to workplaces for union officials to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions.[94]

5.77 The object of these provisions is to balance the right of unions to represent people and to provide information to employees and the 'right of occupiers of premises and employers to go about their business without undue inconvenience'.[95] In introducing amendments to the right of entry provisions in 2013, the Government's expressed intention was to

> balance the right of employers to go about their business without undue interference; to balance it, though, with the democratic right, the right of employees in a functioning democracy, to be represented in their workplace and to participate in discussions with unions at appropriate times.[96]

5.78 Some limitations on rights of entry may be characterised as interfering with union members' freedom of association.[97] The legislative limitations include:

- the requirement to hold a valid entry permit, which may only be issued to a 'fit and proper person';[98]
- the required period of notice before entry;[99] and
- limitations on the circumstances in which an official can gain entry.[100]

5.79 The ACTU stated that the range of issues the Fair Work Commission can consider in determining whether an applicant is 'fit and proper' to hold an entry permit is 'expansive and non-exhaustive' and includes considerations such as 'appropriate training'.[101]

---

92 *Fair Work Act 2009* (Cth) ss 423–426. See also s 431, which allows for the Minister to terminate industrial action without reference to the parties or to any process: Australian Institute of Employment Rights, *Submission 15*.

93 Australian Council of Trade Unions, *Submission 44*; Australian Institute of Employment Rights, *Submission 15*.

94 *Fair Work Act 2009* (Cth) pt 3–4.

95 Ibid s 480.

96 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2907–08 (the Hon Bill Shorten, MP).

97 At the same time, rights of entry may also be characterised as 'authorising the commission of a tort' (ie, the tort of trespass to land), another encroachment on traditional rights, freedoms and privileges referred to in the Terms of Reference.

98 *Fair Work Act 2009* (Cth) ss 512–513.

99 Ibid s 487(3).

100 For example, to investigate a suspected contravention of the Act or a fair work instrument, to hold discussions with employees, to investigate an occupational health and safety matter: see Ibid ss 481, 484, 494.

101 Australian Council of Trade Unions, *Submission 44*.

5.80 The ILO Committee of Experts found that these provisions breach the *Freedom of Association and Protection of the Right to Organise Convention* because the right of trade union officials to have access to places of work and to communicate with management is a basic activity of trade unions, which should not be subject to interference by the authorities.[102] The ACTU submitted that it is likely that the requirements placed on the right of entry unjustifiably interfere with the right to freedom of association.[103]

5.81 On the other hand, the National Farmers' Federation criticised div 7 of pt 3–4 of the *Fair Work Act*, concerning arrangements in remote areas. These provisions may compel occupiers of remote premises to enter into arrangements to provide accommodation and transport to persons exercising the right of entry. The Federation submitted:

> These requirements are extraordinary in the sense that they authorise what would otherwise be the tort of trespass. Occupiers (usually employers) bear the lion's share of the risk, including in relation to compliance with workplace health and safety obligations. The provisions infringe the fundamental common law right of a person in possession to exclude others from their premises in a way that is unreasonable. The provisions should be repealed.[104]

Registration of organisations

5.82 The *Fair Work (Registered Organisations) Act 2009* (Cth) includes requirements for the registration and operation of trade unions and other similar organisations. Registered organisations are required to meet the standards set out in the Act in order to gain the rights and privileges accorded to them under the Act and under the *Fair Work Act*.

5.83 These standards are intended, among other things, to ensure that employer and employee organisations are representative of and accountable to their members, and are able to operate effectively; and provide for the democratic functioning and control of organisations.[105]

5.84 By requiring registration and prescribing rules for employer and employee organisations, the *Fair Work (Registered Organisations) Act* can be interpreted as interfering with freedom of association. For example, the statement of compatibility with human rights for the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth) stated that

> it is arguable that the amendments in the Bill are limiting insofar as they all effectively restrain individuals from forming industrial organisations in any way they wish. In particular the amendments which would enhance the requirements for disclosure of remuneration, expenditure and pecuniary interests of officials under the

102 See Ibid.
103 Ibid.
104 National Farmers' Federation, *Submission 54*.
105 *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3).

> rules of registered organisations limit the rights set out in Articles 3 and 8 of ILO Convention 87.[106]

5.85 However, from another perspective, provisions of the *Fair Work (Registered Organisations) Act*, which enhance the financial and accountability obligations of employee and employer organisations, to ensure that the fees paid by members of such organisations are used for the purposes intended, and that the officers of such organisations use their positions for proper purposes, are not inconsistent with freedom of association.

5.86 The ILO Committee of Experts on the Application of Conventions and Recommendations has stated, with regard to the ability of governments to intervene in employee or employer organisations:

> Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference which is incompatible with the Convention. Where such provisions are deemed necessary, they should simply establish an overall framework within which the greatest possible autonomy is left to the organizations for their functioning and administration. The Committee considers that restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body against any act of this nature by the authorities.[107]

5.87 The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth), which increased the financial and accountability obligations of registered organisations and their office holders, stated that the limitations which the Bill placed on the right to freedom of association fell within the express permissible limitations in the ICCPR and the ICESCR 'insofar as they are necessary in the interests of public order and the protection of the rights and freedoms of others'.[108]

> Relevantly, parties to decisions made by the General Manager of Fair Work Australia under the Bill's amendments are entitled to review of such decisions by impartial and independent judicial bodies.
>
> Further, the amendments in the Bill are permissible insofar as they are prescribed by law, pursue a legitimate objective (protecting the interests of members and guaranteeing the democratic functioning of organizations), are rationally connected to that objective and are no more restrictive than is required to achieve the purpose of the limitation.[109]

---

106 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth). Referring to the right of workers' and employers' organisations to draw up their constitutions and rules (art 3), and the obligation on members of the ILO not to enact laws that impair this right (art 8): International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

107 'General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 2012) [108].

108 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth).

109 Ibid. Referring to the right of workers' and employers' organisations to draw up their constitutions and rules (art 3), and the obligation on members of the ILO not to enact laws that impair this right (art 8):

Other issues

5.88 A number of other workplace relations issues were raised by stakeholders. Daniel Black submitted that restrictions on trade union membership and collective bargaining by members of the Australian Defence Forces, constitute an unjustified interference with freedom of association.[110]

5.89 The National Farmers' Federation submitted that s 237 of the *Fair Work Act* overrides the voluntary nature of collective bargaining and, therefore, infringes the right to freedom of association.[111] Section 237 permits the Fair Work Commission to make a majority support determination if a majority of employees want to bargain with their employer, and the employer has not yet agreed to do so, effectively compelling the employer to bargain.

Migration law

5.90 Freedom of association is also implicated by provisions of the *Migration Act 1958* (Cth) concerning the circumstances in which a visa may be refused or cancelled on character grounds. Some temporary and permanent visas, depending on their conditions, have rights attached to them, including, the right to live freely, to work, and associate with others.[112]

5.91 Section 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. Section 501(6) provides that a person does not pass the character test if, among other things, the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and that the group, organisation or person has been or is involved in criminal conduct.[113]

5.92 The Explanatory Memorandum made it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct is, by itself, grounds for cancellation on character grounds:

> The intention of this amendment is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a criminal motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking, does not pass the character test. The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no

---

International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

110 D Black, *Submission 6*.

111 National Farmers' Federation, *Submission 54*.

112 ANU Migration Law Program, *Submission 59*. Citing *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [110].

113 *Migration Act 1958* (Cth) s 501(6)(b).

> requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.[114]

5.93 A number of stakeholders expressed concern about the scope of s 501(6)(b). The UNSW Law Society, for example, submitted that the provision should be considered as failing a test of proportionality because 'people should be able to choose their acquaintances and connections without government interference'.[115]

5.94 The Refugee Advice and Casework Service (RACS) stated that s 501 'plainly encroaches on freedom of association'. RACS submitted that, because the consequence of failing the character test is generally the detention of the individual,[116] the test in effect 'authorises the detention of a person based on a suspicion in relation to that person's lawful association with others':[117]

> The effect of these provisions is the establishment of wide-ranging restrictions on the people with whom a person can associate without being liable to visa refusal or cancellation. As it fails to take into account the nature of the suspected association or the nature of the suspected criminal conduct, this restriction goes far beyond any encroachment on freedom of association that may be justified in order to prevent criminal activity.[118]

5.95 The Australian National University (ANU) Migration Law Program submitted:

> This provision is neither a reasonable or proportionate curtailment of the right to freedom of association. The provision is now so broad that it would cover a range of circumstances where there is no appreciable risk to Australian society. For example, the provision would cover instances where a person was, but is no longer, a member of a group or organisation that is involved in criminal activities. Similarly, it would cover members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity.[119]

5.96 The ANU Migration Law Program observed that the broadening of 'reasonable suspicion', beyond considering whether the group or person has been involved in criminal activity, 'heightens the risk of unnecessary curtailment on a person's freedom of association'. The ANU Migration Law Program suggested that the legislation should be amended to provide definitions of 'association' and 'membership' consistent with the Full Federal Court's finding in *Haneef*.[120]

---

114 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

115 UNSW Law Society, *Submission 19*.

116 That is, the result of being suspected of having or having had such an association is the refusal or cancellation of a visa, rendering the person an unlawful non-citizen and subject to mandatory detention: Refugee Advice and Casework Service, *Submission 30*.

117 Ibid.

118 Ibid.

119 ANU Migration Law Program, *Submission 59*.

120 Ibid. That is, something beyond mere membership and innocent association is required to judge a person's character. For example, legislation could make it clear that association or membership requires that 'the person was sympathetic with or supportive of the criminal conduct': referring to *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414. The character test was later significantly broadened: see *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1.

Other laws

5.97 Commonwealth anti-discrimination laws potentially interfere with freedom of association by making unlawful certain forms of discrimination that can be manifested by excluding others from participating in an association (of a kind covered by the laws) on prohibited grounds.[121]

5.98 For example, the *Disability Discrimination Act 1992* (Cth) makes it unlawful for a club or incorporated association to discriminate against a person by refusing membership on the ground of the person's disability.[122] A club for these purposes is defined as 'an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association'.[123]

5.99 Professor Patrick Parkinson AM observed that

> One of the major tensions, in terms of freedom of association, is between the right of people to form associations of various kinds and the claims of advocates for an expansion in the reach of anti-discrimination law. Having an association inevitably means creating either explicit or implicit rules of membership. Those rules both include and exclude.[124]

5.100 Parkinson submitted that freedom of association needs to be protected from a 'new fundamentalism about "equality"'. For example, faith-based organisations should have a right to

> select staff who fit with the values and mission of the organisation, just as political parties, environmental groups and LBGT organisations do. To select on the basis of 'mission fit' is not discrimination. Rather it is essential to the right of freedom of association.[125]

5.101 Similarly, FamilyVoice submitted that the 'development of voluntary associations in Australia today is hindered by the unnecessary, intrusive and counterproductive constraints imposed on voluntary associations by anti-discrimination laws'.[126] FamilyVoice stated that there are numerous examples of 'interference by antidiscrimination bodies to prevent Australians from being free to associate with others in accordance with their wishes, for social, cultural, sporting or other purposes'.[127] It submitted that

---

121 Commonwealth anti-discrimination laws prohibit breaches of human rights and discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, sexual preference and trade union activity: see *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984 (Cth)*; *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Australian Human Rights Commission Act 1986* (Cth).

122 *Disability Discrimination Act 1992* (Cth) s 27(1).

123 Ibid s 4.

124 P Parkinson, *Submission 9*.

125 Ibid.

126 FamilyVoice Australia, *Submission 73*.

127 Ibid.

> Antidiscrimination laws should be either abolished or amended so that restrictions are limited to the protection of national security or public safety, order, health or morals, or the freedom of association of others, as provided in Article 22 of the International Covenant on Civil and Political Rights.[128]

5.102 On the other hand, some anti-discrimination legislation contains exemptions that permit certain forms of association that would otherwise be discriminatory. For example, the *Sex Discrimination Act 1984* (Cth) permits a voluntary body to discriminate against a person on certain grounds and in connection with membership and the provision of members' benefits, facilities or services.[129]

5.103 In a response to the Parliamentary Joint Committee on Human Rights, in its consideration of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), the Attorney-General observed that the 'voluntary bodies' exemption

> recognises that rights may be limited to pursue a legitimate objective, such as limiting the right to equality and non-discrimination in order to protect the right to freedom of association. While the right to freedom of association allows people to form their own associations, it does not automatically entitle a person to join an association formed by other people. However, nothing prevents other people from forming their own associations.[130]

5.104 Some concerns were also expressed about the operation of s 100–25 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). This makes it an offence, in some circumstances, for a person who has been removed from the governing body of a charity, to communicate instructions to remaining members on the governing body. The Law Council submitted:

> While addressing legitimate concern over continuing influence of former directors and decision-makers, these powers may extend beyond those conferred upon the Australian Securities and Investments Commission over companies. The [Queensland Law Society] has noted that it does not seem appropriate to regulate charities and other forms of voluntary association more rigorously than commercial enterprises and inquiry into this limitation on freedoms is a proper subject for investigation.[131]

Justifications for encroachments

5.105 It has long been recognised that laws may be justified in interfering with freedom of association, including to restrict the ability of certain classes, groups or organisations of persons involved, or likely to be involved, in crime.

---

128 Ibid.
129 *Sex Discrimination Act 1984* (Cth) s 39.
130 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013).
131 Law Council of Australia, *Submission 75*.

5.106 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[132]

5.107 Bills of rights include certain general circumstances in which limits on freedom of association may be justified, for example, to:

- protect the rights or freedoms of others;
- protect national security or public safety;
- prevent public disorder or crime.[133]

5.108 The following discusses some of the principles and criteria that might be applied to help determine whether a law that interferes with freedom of association is justified, including those under international law. However, it is beyond the practical scope of this Inquiry to determine whether appropriate justification has been advanced for particular laws.[134]

5.109 As discussed in Chapter 1, proportionality is the accepted test for justifying most limitations on rights, and is used in relation to freedom of association.

5.110 For example, the Parliamentary Joint Committee on Human Rights in its examination of proposed legislation, asks whether a limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is proportionate to that objective.[135] A number of stakeholders expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of association.[136]

Legitimate objectives

5.111 Both the common law and international human rights law recognise that freedom of association can be restricted in order to pursue legitimate objectives such as the protection of public safety and public order.

5.112 The power of Australian law-makers to enact provisions that restrict freedom of association is not necessarily constrained by the scope of permissible restrictions on freedom of association under international human rights law.[137] However, in considering how restrictions on freedom of association may be appropriately justified,

---

132 *Canada Act 1982 c 11* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

133 See, eg, *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(2). See also, *Canada Act 1982 c 11* s 1; *New Zealand Bill of Rights Act 1990* (NZ) s 5; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.

134 See Ch 1.

135 See Ch 1.

136 Law Council of Australia, *Submission 75*; National Association of Community Legal Centres, *Submission 66*; ANU Migration Law Program, *Submission 59*; Public Interest Advocacy Centre, *Submission 55*; UNSW Law Society, *Submission 19*.

137 See Ch 1.

one starting point is international human rights law, and the restrictions permitted by the ICCPR.

5.113 Article 22(2) of ICCPR provides that no restrictions may be placed on the exercise of the right to freedom of association with others,

> other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.[138]

5.114 Many of the laws discussed above pursue these objectives. For example, many criminal laws, including counter-terrorism and anti-consorting law, clearly protect the rights of other people, and public order. Criminal laws, such as counter-terrorism laws or those addressing serious organised crime, are also concerned with the protection of national security or public order.

5.115 As discussed above, preventing people from 'getting together to hatch crimes' has long been considered one justification for restrictions on freedom of association.[139] The High Court has recognised a 'public interest' in restricting the activities, or potential activities, of criminal associations and criminal organisations.[140]

5.116 In *South Australia v Totani*,[141] French CJ explained that legislative encroachments on freedom of association are not uncommon where the legislature aimed to prevent crime. He found that the *Serious and Organised Crime (Control) Act 2008* (SA)

> does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of association of persons connected with organisations which are or have been engaged in serious criminal activity.[142]

5.117 Similarly, in *Tajjour*, the High Court upheld the validity of s 93X of the *Crimes Act 1900* (NSW):

> Section 93X is a contemporary version of a consorting law, the policy of which historically has been 'to inhibit a person from habitually associating with persons … because the association might expose that individual to temptation or lead to his

---

138 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(2).

139 Professors Campbell and Whitmore wrote, concerning vagrancy laws, that 'New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes': Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 135. This was quoted in *Tajjour v New South Wales* (2014) 313 ALR 221, [8] (French CJ).

140 *South Australia v Totani* (2010) 242 CLR 1, [92] (Gummow J).

141 In that case, South Australia's *Serious and Organised Crime (Control) Act* 2008 s 4 aimed to disrupt and restrict the activities of organisations involved in serious crime and their members and associates and to protect the public from violence associated with such organisations.

142 *South Australia v Totani* (2010) 242 CLR 1, 36 [44].

> involvement in criminal activity'. The object of the section is to prevent or impede criminal conduct.[143]

5.118 Limits on free association are also sometimes said to be necessary for other people to enjoy freedom of association and assembly. For example, a noisy protest outside a church interferes with the churchgoers' freedom of association. Laws that facilitate the freedom of assembly of some may therefore need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

5.119 In *Melbourne Corporation v Barry*, Higgins J distinguished between people's right to 'freely and at their will to pass and repass without let or hindrance' from a right to assemble on a public highway. Quoting *Ex parte Lewis* (the Trafalgar Square Case), Higgins J said:

> A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.[144]

5.120 Freedom of association is sometimes limited by laws that regulate protests, laws perhaps aimed at ensuring the protests are peaceful and do not disproportionately affect others. Protest organisers might be required to notify police in advance, so that police may prepare, for example by cordoning off public spaces. Police may also be granted extraordinary powers during some special events, such as sporting events and inter-governmental meetings like the G20 or APEC.

5.121 In the workplace relations context, additional starting points for considering justifications for restrictions on freedom of association are established under international conventions. Essentially, these provide extra protections for freedom of association in the context of trade unions and workplace relations. Arguably, however, these protections operate in areas that are beyond the scope of the common law or traditional understandings of freedom of association.

5.122 Under art 22(3) of the ICCPR, the permissible reasons for restricting freedom of association are not to be taken to authorise 'legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for' in the ILO *Freedom of Association and Protection of the Right to Organise Convention*.[145]

---

143 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). References omitted.

144 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J). Quoting *R v Cunningham Graham and Burns; ex parte Lewis* (1888) 16 Cox 420.

145 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

5.123 Further, art 8 of the ICESCR guarantees the right of everyone to form trade unions and to join the trade union of his or her choice. Limitations on this right are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.[146]

5.124 Article 8 also sets out the rights of trade unions, including the right to function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with art 22 of the ICCPR, art 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in the ILO *Freedom of Association and Protection of the Right to Organise Convention*.

Proportionality and freedom of association

5.125 Whether all of the laws identified above as potentially interfering with freedom of association, in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom may be contested. However, even if a law does pursue such an objective, it will also be important to consider whether the law is suitable, necessary and proportionate.

5.126 The recognised starting point for determining whether an interference with freedom of association is justified is the international law concept of proportionality. In art 22 of the ICCPR, the phrase 'necessary in a democratic society' is seen to incorporate the notion of proportionality.[147]

5.127 In relation to one element of proportionality, the UNSW Law Society stated that a requirement for there to be a 'rational connection' between the objectives of the law and the need to infringe the right 'is particularly relevant to Australian association laws, given that the evidence regarding the effectiveness of such legislation is highly disputed amongst scholars'.[148]

Conclusions

5.128 A wide range of Commonwealth laws may be seen as interfering with freedom of association, in the contexts of criminal law; public assembly; workplace relations; migration law; and anti-discrimination law. However, many provisions relate to limitations that have long been recognised by the common law itself, for example, in relation to consorting with criminals, public assembly and other aspects of preserving public order.

---

146 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8.

147 See, eg, Australian Government Attorney-General's Department, *Right to Freedom of Assembly and Association* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets>.

148 UNSW Law Society, *Submission 19*. The Society observed that, for example, while association laws 'have been thought to reduce crime owing to the fact that they prevent communication and planning, there have also been instances where anti-association laws have had the opposite effect as in Canada, where following the introduction of legislation to ban Bikie clubs there was a proliferation in ethnic gangs'.

5.129 Some areas of particular concern, as evidenced by parliamentary committee materials, submissions and other commentary, involve:

- various counter-terrorism offences provided under the *Criminal Code* and, in particular, the offence of associating with a member of a terrorist organisation and thereby providing support to it;
- workplace relations laws, which are centrally concerned with freedom of association and the right to organise;
- the operation of the so-called 'character test' in the *Migration Act*, which provides a ministerial discretion to refuse a visa to a person who the Minister reasonably suspects is a member of or has an association with certain groups or organisations or persons; and
- the operation of Commonwealth anti-discrimination laws.

5.130 Some counter-terrorism offences raise freedom of association issues. Review of these laws falls within the role of the INSLM, who reviews the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis.

5.131 Workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with ILO Conventions concerning freedom of association and the right to organise. However, the extent to which obligations under ILO Conventions engage the scope of common law or traditional understandings of freedom of association may be contested.

5.132 A Productivity Commission inquiry, due to report in November 2015, is examining the performance of the Australian workplace relations framework. In undertaking this inquiry, the Productivity Commission has been asked to review the impact of the workplace relations framework on matters including: unemployment, underemployment and job creation; fair and equitable pay and conditions for employees; small businesses; and productivity, competitiveness and business investment.

5.133 As it is not expected that the Productivity Commission inquiry will focus on concerns that the existing workplace relations framework may unjustifiably interfere with the right to freedom of association, further review of this aspect of the framework may be desirable.

5.134 The character test in s 501 of the *Migration Act* has been criticised by stakeholders. The decision of the Full Federal Court in *Haneef*[149] provides a possible rationale for reform to narrow the scope of the concept of 'association'.

149 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

5.135 Anti-discrimination laws have been criticised for potentially interfering with freedom of association by making unlawful certain forms of discrimination. This issue overlaps with the discussion of freedom of religion, which is also centrally concerned with the operation of anti-discrimination law.[150]

150 See Ch 4.

6. Freedom of Movement

Contents

The common law

6.1 Freedom of movement at common law primarily concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.[1]

6.2 Freedom of movement, broadly conceived, may also be engaged by laws that restrict the movement or authorise the detention of any person—not only a citizen—lawfully within the territory of a state. That is, any non-citizen lawfully within

1 Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27, 6. See also Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) ch 4; Harry Street, *Freedom, the Individual and the Law* (Penguin Books, 1972) ch 11.

Australia, whose entry into Australia has not been subject to restrictions or conditions, is entitled to the same right to freedom of movement as an Australian citizen.

6.3 This chapter discusses the source and rationale of the common law right of freedom of movement; how this right is protected from statutory encroachment; and when laws that interfere with freedom of movement may considered justified, including by reference to the concept of proportionality.[2]

6.4 In 13th century England, the *Magna Carta* guaranteed to local and foreign merchants the right, subject to some exceptions, to 'go away from England, come to England, stay and go through England'.[3]

6.5 William Blackstone wrote in his *Commentaries on the Laws of England* that every Englishman under the common law had the right to 'go out of the realm for whatever cause he pleaseth, without obtaining the king's leave'.[4]

6.6 In 1806, Thomas Jefferson, then President of the United States, wrote that he held 'the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken away from him even by the united will of every other person in the nation'.[5]

6.7 In *Potter v Minahan*, O'Connor J of the High Court of Australia said:

> A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary.[6]

6.8 However, freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not, of course, extend to people trying to evade punishment for a crime, and in practice, a person's freedom to leave one country is very much limited by the willingness of other countries to allow that person to enter.

---

2 See Ch 1.

3 *Magna Carta 1297* (UK) 25 Edw 1 c 42.

4 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 7, s II, 256. Quoted in McAdam, above n 1, 12.

5 Thomas Jefferson, *The Works of Thomas Jefferson: Correspondence and Papers, 1803-1807* (Cosimo Inc, 2010) 273. In this same letter, Jefferson wrote: 'Congress may by the Constitution "establish a uniform rule of nationalization", that is, by what rule an alien may become a citizen. But they cannot take from a citizen his natural right of divesting himself of the character of a citizen by expatriation': Ibid 274. McAdam notes that Jefferson drew on Blackstone's natural rights thinking about freedom of movement: McAdam, above n 1, 13.

6 *Potter v Minahan* (1908) 7 CLR 277, 305.

Protections from statutory encroachment

Australian Constitution

6.9 Section 92 of the *Australian Constitution* provides:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.[7]

6.10 In *Gratwick v Johnson*, Starke J said that the 'people of Australia are thus free to pass to and from among the states without burden, hindrance or restriction'.[8] However, in *Cole v Whitfield*, the High Court said that this does not mean that 'every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom':[9]

> For example, although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State.[10]

6.11 In *Cunliffe v The Commonwealth*, Mason CJ said that the freedom of intercourse which s 92 guarantees is not absolute:

> Hence, a law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end. Once again, it would be a matter of weighing the competing public interests.[11]

6.12 It has also been suggested that a right to freedom of movement is implied generally in the *Constitution*. In *Miller v TCN Channel Nine*, Murphy J said that freedom of movement between states and 'in and between every part of the Commonwealth' is implied in the *Constitution*.[12]

---

7 *Australian Constitution* s 92. (Emphasis added.)

8 *Gratwick v Johnson* (1945) 70 CLR 1, 17.

9 *Cole v Whitfield* (1988) 165 CLR 360, 393.

10 Ibid, 393. See also: *AMS v AIF* (1999) 199 CLR 160, [40]–[45] (Gleeson CJ, McHugh, Gummow JJ).

11 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307–8 (Mason CJ).

12 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 581–2. 'The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society ... They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest'. Williams and Hume wrote that freedom of movement, is arguably 'implicit in the system of free trade, commerce and intercourse in s 92, the protection against discrimination based on state residence in s 117 and any protection of access to the seat of government as well as in the very fact of federalism': George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 120. In *Williams v Child Support*

6.13 However, this view has not been more broadly accepted by the High Court.[13] Professors George Williams and David Hume wrote:

> This reflects the lack of a clear textual basis for such a freedom and for the incidents of the constitutionally prescribed system of federalism which would support it, and an implicit view that the Constitution's federalism is not intended to protect individuals.[14]

6.14 In any event, a right to freedom of movement implicit in federalism would only extend to movement within Australia.

6.15 In relation to citizens returning to Australia, the High Court has held that the right of Australian citizens to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the executive; and that, therefore, any such impost 'could not be regarded as a charge for the privilege of entry'.[15]

Principle of legality

6.16 The principle of legality provides some protection to freedom of movement, because freedom of movement is an essential part of personal liberty.[16] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of movement, unless this intention was made unambiguously clear.

6.17 For example, in *Potter v Minahan*, O'Connor J said:

> It cannot be denied that, subject to the *Constitution*, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication.[17]

6.18 In relation to non-citizens, the High Court in *Plaintiff M47 v Director General of Security* held that provisions of the *Migration Act 1958* (Cth) should not be interpreted to mean that an unlawful non-citizen may be kept in immigration detention permanently or indefinitely—at least where the Parliament has not 'squarely confronted' this issue.[18] Bell J stated that 'the application of the principle of legality

---

Registrar, the applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia: *Williams v Child Support Registrar* (2009) 109 ALD 343.

13 In *Kruger v Commonwealth*, Brennan J said that a constitutional right to freedom of movement and association, which restricts the scope of s 122, had not been held to be implied in the Constitution and 'no textual or structural foundation for the implication has been demonstrated in this case': *Kruger v Commonwealth* (1997) 190 CLR 1, 45.

14 Williams and Hume, above n 12, 120.

15 *Air Caledonie v Commonwealth* (1988) 165 CLR 462, 469. This case concerned a 'fee' payable under of the *Migration Act 1958* (Cth) s 34A by passengers, citizens and non-citizens, for immigration 'clearance', with power vested in the executive to grant exemptions by regulation. This law was held to be a tax, at least in so far as it related to passengers who were Australian citizens.

16 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 256.

17 *Potter v Minahan* (1908) 7 CLR 277, 305.

18 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [116].

requires that the legislature make plain that it has addressed that consequence and that it is the intended consequence'.[19]

International law

6.19 Freedom of movement is widely recognised in international law and bills of rights. For example, art 13 of the *Universal Declaration of Human Rights* provides:

> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.

6.20 Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR) provides, in part:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> ...
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

6.21 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[20] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[21]

Bills of rights

6.22 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of movement is protected in the *United States Constitution*,[22] and in the human rights statutes in Canada[23] and New Zealand.[24]

6.23 Freedom of movement is also expressly protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[25] Section 12 of the Victorian Act provides:

> Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

---

19 Ibid [529].
20 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).
21 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.
22 *United States Constitution* amend IV.
23 *Canada Act 1982 c 11* sch B pt 1 ('Canadian Charter of Rights and Freedoms') s 6(1)–(2).
24 *New Zealand Bill of Rights Act 1990* (NZ) s 18.
25 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12; *Human Rights Act 2004* (ACT) s 13.

Laws that interfere with freedom of movement

6.24 A wide range of Commonwealth laws may be seen as interfering with freedom of movement, broadly conceived. Some of these laws impose limits on freedom of movement that have long been recognised by the common law, for example, in relation to official powers of arrest or detention, customs and quarantine. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

6.25 Commonwealth laws that prohibit or constrain the movement of individuals include:

- criminal laws;
- customs and border protection laws;
- citizenship and passport laws;
- environmental regulation;
- child support laws; and
- laws restricting entry to certain areas.

6.26 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of movement, and public criticisms of laws on that basis, are also discussed.

Criminal laws

6.27 Part 5.3 of the *Criminal Code* (Cth) contains a range of provisions with implications for freedom of movement.[26] Importantly, these include provisions concerning:

- counter-terrorism control orders, which may contain a prohibition or restriction on a person being at specified areas or places or leaving Australia or a requirement that a person remain at specified premises;[27] and
- counter-terrorism preventative detention orders, which may be issued where it is suspected that a person will or has engaged in a terrorist act.[28]

---

26 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*). The control orders and preventative detention orders regimes also have implications for freedom of speech and freedom of association: see Chs 3, 5. For example, under the *Criminal Code* (Cth) s 104.5(3)(e), a prohibition or restriction on the person communicating or associating with specified individuals may be imposed.

27 *Criminal Code* (Cth) s 104.5(3)(a)–(c).

28 Ibid s 105.4.

6.28 The *Criminal Code* also criminalises entering or remaining in 'declared areas' in foreign countries.[29]

Criminal Code—control orders

6.29 The objects of div 104 of the *Criminal Code* are to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for one or more of the following purposes:

- protecting the public from a terrorist act;
- preventing the provision of support for or the facilitation of a terrorist act; or
- preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[30]

6.30 Among the restrictions that may be placed on an individual subject to a control order is that they may be restricted from being in specified areas or places; prohibited from leaving Australia; and required to remain at specified premises between specified times.[31] An individual may be required to wear a tracking device.[32]

6.31 In making an interim control order at the request of the Australian Federal Police (AFP), the issuing court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person 'is reasonably necessary, and reasonably appropriate and adapted' for the purpose of preventing terrorism.[33]

6.32 The control order regime, along with preventative detention, was first introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth). Following the expiration of a ten-year sunset period, the regime was extended for a further ten years by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (*Foreign Fighters Act*).

6.33 The Explanatory Memorandum for the legislation extending these regimes observed that the restriction of freedom of movement implicit in control orders must be 'reasonable, necessary and proportionate' to achieving the objective of protecting the Australian public.[34] It stated that these requirements ensure that

> the restrictions on freedom of movement caused by a control order are no greater than is required to protect the welfare of the Australian public. The gravity of consequences likely to be occasioned by a terrorist act justifies a reasonable and proportionate limitation of free movement.[35]

---

29 Ibid s 119.2.
30 Ibid s 104.1.
31 Ibid s 104.5(a)–(c).
32 Ibid s 104.5(3)(d).
33 Ibid s 104.4(1)(d). See *Jabbour v Hicks* [2008] FMCA 178.
34 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [156].
35 Ibid.

6.34 Although expressing a justification in terms of a proportionality standard, and notwithstanding safeguards, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) concluded that the control order regime may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of its legitimate objective. The Human Rights Committee considered that, in the absence of further information regarding its necessity and proportionality, the control order regime was likely to be incompatible with human rights, including the right to freedom of movement.[36]

6.35 The control order regime was subsequently amended by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) to, among other things, expand the objects of the control order regime to include preventing support for a terrorist act or hostile activity in a foreign country; reduce the documentation the AFP is required to provide when seeking the Attorney-General's consent to apply for a control order; and streamline certain other requirements.[37]

6.36 The Bill was examined by the Human Rights Committee, which observed that these amendments would

> significantly expand the circumstances in which control orders could be sought against individuals, and significantly alter the purpose of control orders. As a result, control orders are likely to be used more widely and, as such, circumvent ordinary criminal proceedings … [38]

6.37 The Human Rights Committee stated that, by extending the grounds for control orders to acts that 'support' or 'facilitate' terrorism, the Bill would allow an order to be sought in circumstances where there is not necessarily an imminent threat to personal safety—a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes. Accordingly, the Committee concluded that the amendments to control orders impose limits on human rights, including freedom of movement, that are neither necessary nor reasonable.[39]

6.38 Further, under the amendments, when requesting the court to make an interim control order, a senior AFP member would no longer be required to provide the court with an explanation of 'each' obligation, prohibition and restriction sought to be imposed. Rather, the AFP member would only be required to provide an explanation as to why the obligations, prohibitions or restrictions generally should be imposed and, to the extent known, a statement of facts as to why the obligations, prohibitions or

---

36 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.74]–[1.75]. The concerns expressed did not meet with a response from the Attorney-General and the control order provisions were enacted without significant change: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixteenth Report of the 44th Parliament* (November 2014) [1.28]–[1.29].

37 See Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (Cth) [30].

38 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixteenth Report of the 44th Parliament* (November 2014) [1.35].

39 Ibid [1.36].

restrictions—as a whole rather than individually—should not be imposed.[40] The Human Rights Committee stated that it therefore considered that these amendments would result in

> control orders not being proportionate because they are not appropriately targeted to the specific obligation, prohibition or restriction imposed on a person. This is not addressed in the statement of compatibility. As a control order is imposed in the absence of a criminal conviction, it is critical that the individual measures comprising the control order are demonstrated in each individual instance to be proportionate. As a result, the committee considers that these amendments are not proportionate to the stated legitimate objective.[41]

6.39 Accordingly, the Human Rights Committee sought the Attorney-General's further advice on how the limits the legislation imposes on human rights are reasonable, necessary or proportionate to achieve the legitimate aim of responding to threats of terrorism.[42]

6.40 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) also raised concerns about the extension of the control order regime, in relation to their potential to trespass on personal rights and liberties.[43] In response, the Attorney-General observed, among other things, that:

> Despite having been in operation for almost nine years, only two control orders have been requested or made to date. This demonstrates both the extraordinary nature of the regime and the approach of Australia's police service to utilise traditional law enforcement tools where appropriate, relying on control orders only when absolutely necessary.[44]

6.41 The control order regime was continued by the *Foreign Fighters Act*, without significant amendment, on 12 December 2014.

6.42 Several stakeholders submitted that the control order regime constituted an unjustified interference with freedom of movement.[45] The Law Council referred to its concerns, expressed previously in submissions to parliamentary, United Nations and other bodies, that control orders and preventative detention orders 'allow restriction of freedom of movement based on suspicion rather than charge'.[46]

6.43 The Human Rights Law Centre raised the particular concern that control orders can be made even in circumstances where a person has not been charged and may never be tried and 'irrespective of a person's ongoing dangerousness'. The Centre

---

40 Ibid [1.37].
41 Ibid [1.38].
42 Ibid [1.39].
43 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 797.
44 Ibid 799.
45 Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.
46 Law Council of Australia, *Submission 75*.

submitted that the Australian Government should repeal the control order regime or substantially amend it to ensure it does not disproportionately limit rights.[47]

6.44 The Gilbert and Tobin Centre for Public Law submitted that control orders clearly infringe the rights to freedoms of movement and association, and undermine the idea that individuals should not be subject to severe constraints on their liberty without a finding of criminal guilt by a court. The Centre stated that if control orders are to be retained, they should be 'substantially amended to require prior conviction for a terrorism offence and some finding as to the ongoing dangerousness of the person'.[48]

6.45 The UNSW Law Society highlighted that, unlike in the UK, there is no express requirement for less restrictive alternatives to be considered before a control order is issued—including the viability of a criminal prosecution.[49]

Criminal Code—preventative detention orders

6.46 The objects of div 105 of the *Criminal Code* are to allow a person to be taken into custody and detained for a short period of time in order to:

- prevent an imminent terrorist act occurring; or
- preserve evidence of, or relating to, a recent terrorist act.[50]

6.47 The preventative detention orders regime was also extended by the *Foreign Fighters Act*.

6.48 The Explanatory Memorandum, in addressing proportionality issues, stated that the preventative detention order regime provides sufficient protection against unreasonable and disproportionate limitations of an individual's right to freedom of movement. It stated:

> This is evidenced by the high threshold required to be satisfied when applying for and issuing a [preventative detention order]. The application for a [preventative detention order] requires that an AFP member must be satisfied on reasonable grounds that the suspect will engage in a terrorist act, possess a thing related to or done an act in preparation for or planning a terrorist act … Even if this is satisfied, an AFP member must still demonstrate that the [preventative detention order] will substantially assist in preventing a terrorist act occurring and demonstrate that detention is reasonably necessary for the purpose of preventing a terrorist act.[51]

6.49 These limitations on the instances under which a preventative detention order may be sought were said to demonstrate that an order can be applied only when reasonable, necessary and proportionate.[52]

---

47 Human Rights Law Centre, *Submission 39*.

48 Gilbert and Tobin Centre of Public Law, *Submission 22*. The Centre stated: 'Given their extraordinary nature, control orders should only be available for the purpose of protecting the community from direct harm, and not for the purpose of preventing support or facilitation of terrorism as ends in themselves'.

49 UNSW Law Society, *Submission 19*.

50 *Criminal Code* (Cth) s 105.1.

51 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [194].

52 Ibid.

6.50 The Human Rights Committee observed that the preventative detention regime 'involves very significant limitations on human rights', including freedom of movement.

> Notably, it allows the imposition of a [preventative detention order] on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. Effectively, [preventative detention orders] permit a person's detention by the executive without charge or arrest.[53]

6.51 The Human Rights Committee concluded that, in the absence of further information, the preventative detention order regime was likely to be incompatible with human rights, including the right to freedom of movement.[54]

6.52 The Scrutiny of Bills Committee also raised concerns about the extension of the preventative detention order regime, in relation to its potential to trespass on personal rights and liberties.[55] In response, the Attorney-General observed, among other things, that only one preventative detention order has been made to date, demonstrating the approach of Australia's police service to utilise the other law enforcement tools available to them, relying on preventative detention only when absolutely necessary.[56]

6.53 The preventative detention order regime was continued by the *Foreign Fighters Act* without significant amendment.

Offence of entering or remaining in a 'declared area'

6.54 The *Foreign Fighters Act* also amended the *Criminal Code* to criminalise entering or remaining in declared areas in foreign countries, thus engaging freedom of movement.[57] As at 17 July 2015, these declared areas were Al-Raqqa Province, Syria and Mosul District, Ninewa Province, Iraq.[58]

6.55 The Explanatory Memorandum stated that this restriction is justified on the basis that it achieves the legitimate objective of deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so:

> People who enter, or remain in a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may

53 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.100].

54 Ibid [1.104].

55 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 776.

56 Ibid 777.

57 *Criminal Code* (Cth) s 119.2.

58 Ibid; *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2014—Al-Raqqa Province, Syria* (Cth); *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq* (Cth).

> enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil.[59]

6.56 The Explanatory Memorandum cited several factors indicating that the restriction achieves 'an appropriate balance between securing Australia's national security and preserving an individual's civil liberties'.[60]

6.57 These factors included that a legitimate purpose defence is provided—the breadth of which is intended to ensure that legitimate travel is not unduly restricted by the new offence—and the existence of safeguards to ensure that the declaration process and prosecution processes are rigorous. On this basis, it was claimed that the 'impact of the new declared area offence on the right to freedom of movement is reasonable, necessary and proportionate in order to achieve the legitimate objective of protecting Australia and its national security interests'.[61]

6.58 The Human Rights Committee, in its examination of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill), considered the new 'declared area' offence provision. The Committee observed that there are significant numbers of Australians with connections to countries that may be subject to a declaration, and many of these individuals could have legitimate and innocent reasons to travel and could be affected by the new offence.[62]

6.59 It stated that, as a result, there is 'not a necessary or strong link between travel to a certain area and proof of intent to engage in terrorist activity'. Further, it was not a defence to visit friends, transact business, retrieve personal property, attend to personal or financial affairs or to undertake a religious pilgrimage and, therefore, there were 'a number of significant, innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the sole legitimate purpose defence'.[63] The Human Rights Committee expressed concern that:

> [T]he offence provision will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence. As such, the committee considers that the declared area offence provision law unnecessarily restricts freedom of movement, and is therefore likely to be impermissible as a matter of international human rights.[64]

6.60 The Scrutiny of Bills Committee also examined the declared area offence. The Committee stated that:

> One concern with the proposed offence is that it is very broad in scope. To the extent that it may apply despite any intentional wrongdoing, it may be considered to unduly trespass on personal rights and liberties. In particular, it is not necessary for the person

---

59 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [234].

60 Ibid.

61 Ibid [237].

62 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.197].

63 Ibid [1.199].

64 Ibid [1.203].

> to specifically know that an area has been declared under section 119.3. Moreover, there is no requirement that the person intend to commit any particular crime or undertake any specific action when in the territory …[65]

6.61 The Scrutiny of Bills Committee observed that, notwithstanding the power to prescribe further legitimate purposes,[66] the absence of some purposes on the list, such as business travel, would limit personal freedom of movement until such time as it is included in the regulations. Persons might also be prosecuted for travel which is 'legitimate' until such time as it has been included on the list—even where they have no intent to commit a wrongful act and are not aware that an area is a declared area.[67]

6.62 The Scrutiny of Bills Committee expressed concern that the declared area offence might unduly trespass on personal rights and liberties, and sought advice from the Attorney-General as to 'why it is not possible to draft the offence in a way that more directly targets culpable and intentional actions'.[68]

6.63 The concerns of the Human Rights and Scrutiny of Bills Committees did not result in significant changes being made to the proposed declared area offence.

6.64 Stakeholders in this ALRC Inquiry identified the declared area offence as unjustifiably interfering with freedom of movement.[69]

6.65 Australian Lawyers for Human Rights, for example, highlighted that there is a 'very limited list of permitted defences to what is effectively a blanket prohibition'. Further, it is 'perfectly possible that an Australian could be in a declared area with no knowledge that it has been made illegal for Australians to be there and no with no guilty intent'. A related concern was that the 'humanitarian aid exception' only applies where providing humanitarian aid (or another listed reason) is the sole reason for being in a declared area.[70]

6.66 Similar concerns were expressed by the Gilbert and Tobin Centre for Public Law. The Centre stated that the declared area offence is unjustified because it criminalises a range of legitimate behaviours that are not sufficiently connected to the threat of foreign fighters:

> This is clear for two reasons. First, the list of specified defences does not include a range of other legitimate reasons why somebody might travel to a foreign country in a state of conflict … Second, the offence may prevent individuals from travelling not only to Syria and Iraq, but also areas of other countries where terrorist organisations operate and which might plausibly be designated as declared areas (such as in Israel and Indonesia).[71]

---

65 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 57.

66 *Criminal Code* (Cth) s 119.3(h).

67 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 58.

68 Ibid.

69 Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

70 Australian Lawyers for Human Rights, *Submission 43*.

71 Gilbert and Tobin Centre of Public Law, *Submission 22*.

6.67 The Human Rights Law Centre stated that the declared area offence is 'extraordinary' because it substantially interferes with a person's freedom of movement, and 'because the operation of the provisions will effectively, although not technically, reverse the onus of proof'.[72] That is, the offence

> may require a defendant to prove a negative—that they did not travel to the declared area for a purpose or purposes other than the sole legitimate purpose on which they wish to rely. This limits the presumption of innocence and unjustifiably reverses the burden of proof in substance if not in form.[73]

Other criminal laws

6.68 Many other Commonwealth criminal laws can be considered to interfere with freedom of movement, including those that allow for arrest, refusal of bail and for the imprisonment of offenders. Traditional powers of arrest, and the jurisdiction of courts over bail and the sentencing of offenders are arguably matters that limit the scope of common law or traditional understandings of freedom of association, rather than interfering with the freedom.

6.69 Some Commonwealth laws concerning police powers have been criticised. The Law Council, for example, pointed to the police search and seizure powers in relation to terrorist acts and terrorism offences contained in the *Crimes Act 1914* (Cth).[74]

6.70 These provisions empower the Attorney-General to prescribe a security zone where anyone in the zone can be subject to police stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. The Law Council submitted:

> Detention for searching based only on an individual's presence in a particular geographical location is an encroachment on freedom of movement. The broad nature and significant scope of this power brings into question its proportionality, particularly as, once a security zone is prescribed, there are few restrictions on the exercise of the power.[75]

6.71 The Law Council also raised questions about provisions of the *Crimes Act* that prescribe periods for which a person may be detained without charge, on arrest for a terrorism offence.[76] These provisions allow for up to seven days to be excluded from the calculation of the investigation period in terrorism cases. The Law Council submitted:

> This is considerably longer than the period of pre-charge detention permitted under the *Crimes Act* in non-terrorism cases. While national security is a balancing factor, detention for lengthy periods without charge brings into question whether the encroachment is proportionate or justified.[77]

---

72 Human Rights Law Centre, *Submission 39*.
73 Ibid.
74 *Crimes Act 1914* (Cth) pt 1AA, div 3A.
75 Law Council of Australia, *Submission 75*.
76 *Crimes Act 1914* (Cth) ss 23DB–23DF.
77 Law Council of Australia, *Submission 75*.

ASIO questioning and detention powers

6.72 The *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) allows for the detention of a person in connection with the issuing of a questioning warrant where there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[78]

6.73 The *Foreign Fighters Act* repealed a requirement in the ASIO Act that the Attorney-General must be satisfied that 'relying on other methods of collecting that intelligence would be ineffective' prior to issuing a questioning warrant. This requirement was substituted with a requirement that the Minister must be satisfied that it is reasonable in all the circumstances, including whether other methods of collecting that intelligence would likely be as effective.[79]

6.74 The Explanatory Memorandum observed that the right to liberty of movement is restricted to 'the extent that the issuing of a questioning warrant requires a specified person to appear before a prescribed authority for questioning immediately after the person is notified of the issue of the warrant or at a time specified by the warrant'.[80] It stated that the restriction

> can be justified on the basis that it achieves a legitimate objective—that the questioning warrant will 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence'. Given the statutory objective of ASIO is to 'obtain, correlate and evaluate intelligence relevant to security' (section 17), this amendment significantly enhances ASIO's abilities to carry out its function. Moreover, terrorism offences constitute the most serious threats to Australia and its national security interests. The amendment improves the efficacy of the questioning warrant power and improves the tools by which terrorist threats may be mitigated.[81]

6.75 Further, the restrictions on freedom of movement were considered to be reasonable, necessary and proportionate due to the safeguards already built into the questioning warrant framework, including under the Attorney-General's Guidelines that require ASIO to consider the intrusiveness and proportionality of its avenues for obtaining information.[82]

6.76 The *Foreign Fighters Act* also ensured the continuation of div 3 of the ASIO Act, which contains ASIO's special powers relating to terrorism offences and, in particular, ASIO's questioning and detention powers.

6.77 Under div 3, a questioning and detention warrant authorises a person to be taken into custody immediately by a police officer and to be brought before a prescribed authority immediately for questioning under the warrant for a period of time described in s 34G(4).

---

78 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34E, 34K.
79 Ibid s 34D(4)(b).
80 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [61].
81 Ibid [63].
82 Ibid [64].

6.78 The Explanatory Memorandum observed that these warrants infringe an individual's right to freedom of movement by requiring their presence before a prescribed authority. However, 'this is permissible on the basis it achieves the legitimate objective of protecting Australia's national security interests'; and because the warrants are only available where there are reasonable grounds for believing that the warrant will 'substantially assist' in the collection of 'intelligence that is important in relation to a terrorism offence'.[83]

6.79 The Human Rights Committee examined these provisions and other special powers of ASIO covered by the Foreign Fighters Bill. The Parliamentary Joint Committee concluded that, in the absence of further information, the ASIO special powers regime was likely to be incompatible with human rights, including the right to freedom of movement.[84]

6.80 The Scrutiny of Bills Committee also expressed concern about the questioning warrants regime and whether lowering the threshold requirements 'increases the risk that questioning warrants will be used when other less invasive means could also have reasonably been used to collect intelligence'—in particular because the safeguards provided by ASIO guidelines and procedures do not have statutory force.[85]

6.81 In response, the Attorney-General explained in detail why relevant content in these documents should not be included in primary legislation, or in disallowable legislative instruments,[86] and the Committee left the question of whether the proposed approach was appropriate to the Senate as a whole.[87]

6.82 The Gilbert and Tobin Centre submitted to this ALRC Inquiry that the power for ASIO to detain individuals for questioning 'clearly infringes the right to freedom of movement and the idea that individuals should not be held in custody without at least a reasonable suspicion of involvement in criminal activity'. This infringement is unjustified 'not only on principled grounds, but also because the provisions appear to have little practical benefit in preventing terrorism'.[88]

Customs and border protection

6.83 Under the *Customs Act 1901* (Cth) customs officers have extensive powers of detention.[89] For example, under s 219ZJB, a customs officer has power to detain persons suspected of committing a serious Commonwealth offence or a prescribed state or territory offence.

---

83 Ibid [78].

84 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.49].

85 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 758.

86 See Ibid 759–765.

87 Ibid 766.

88 Gilbert and Tobin Centre of Public Law, *Submission 22*. See Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 105. See also Human Rights Law Centre, *Submission 39*.

89 *Customs Act 1901* (Cth) pt XII div 1.

Customs Act detention powers

6.84 The *Foreign Fighters Act* amended the detention power in s 219ZJB of the *Customs Act 1901* (Cth). Broadly, the amendments extended the definition of 'serious Commonwealth offence'; expanded the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence; expanded the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours; and introduced a new section with a new set of circumstances in which a person may be detained in a designated area because of concerns about national security or security of a foreign country.[90]

6.85 The Explanatory Memorandum stated that these restrictions on freedom of movement are permissible on the basis that 'the primary reason underlying the expanded detention powers is to target individuals thought to be threats to Australia's national security leaving the country':

> The detention powers of Customs are not indefinite and are subject to significant safeguards including the right in all but the most extreme situations to notify a family member or others of their detention … and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody … accordingly, the restriction on the freedom of movement is reasonable, necessary and proportionate to achieving the legitimate objective of securing Australia's national security. [91]

6.86 The Human Rights Committee observed that the statement of compatibility provided 'no discussion of why the current powers are regarded as not sufficient in respect of the range of Commonwealth offences in relation to which they may be exercised, the range of circumstances to which they may be applied and the length of time for which a person may be detained'. In the absence of a 'sufficiently well-defined objective', analysis of whether the provisions might be regarded as reasonable and proportionate was not possible.[92]

6.87 The Scrutiny of Bills Committee also examined this provision, commenting that it was not clear precisely how increasing the scope of 'serious Commonwealth offence' for the purposes of triggering the exercise of detention powers under s 219ZJB is a necessary response to the problem of foreign fighters.[93]

6.88 In response, the Attorney-General stated that the provisions are part of the targeted response to the threat posed by foreign fighters.

> The extension of the detention power, which is only a temporary power, is aimed at the Australian Customs and Border Protection Service facilitating other law

---

90 Ibid s 219ZJCA.

91 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [288].

92 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.316]–[1.317].

93 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 816–17.

> enforcement agencies to exercise their powers to address national security threats. The current power may limit this facilitation across the full range of offences that are relevant to addressing national security threats. The new definition of 'serious Commonwealth offence' will, for example, allow officers of Customs to detain a person in respect of an offence under the *Australian Passports Act 2005* of using a passport that was not issued to the person.[94]

Quarantine

6.89 The Commonwealth has extensive powers to detain Australian citizens and non-citizens under the *Quarantine Act 1908* (Cth).[95] For example, under s 18 of the Act, every person who is on board a vessel or aircraft arriving in Australia from a place outside Australia is subject to quarantine. Such a person potentially may be detained, placed in exclusion or under observation for the purposes of preventing or controlling diseases or pests that could cause 'significant damage to human beings, animals, plants, other aspects of the environment or economic activities'.[96]

Environmental regulation

6.90 The operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) can result in restrictions being placed on freedom of movement. The Act provides for the making of management arrangements (management plans, regimes and policies) for environmentally significant areas, such as World Heritage properties.

6.91 These arrangements may include restrictions on freedom of movement, for example, to protect endangered plants or animals. Regulations may be made to regulate or prohibit access to conservation zones.[97]

6.92 Under the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), the Director of National Parks may restrict entry to areas of Commonwealth reserves on a temporary or permanent basis.[98] For example, in the Uluru-Kata Tjuta National Park there are sites where visitors are generally not allowed to go, including the domes of Kata Tjuta, sacred sites around Uluru and the Mutitjulu Community.[99]

6.93 In addition, under the *Great Barrier Marine Park Act 1975* (Cth), the Minister may make a direction prohibiting a certain person from entering and using the Marine Park; or imposing conditions on the person's entry to and use of the Marine Park.[100] Breach of such directions is an offence.[101]

---

94 Ibid 817.
95 See *Quarantine Act 1908* (Cth) pt IV.
96 Ibid s 4.
97 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 390E.
98 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) r 12.23.
99 Uluru-Kata Tjuta National Park Board of Management, *Uluru-Kata Tjuta National Park Management Plan 2010-2020*, 2010 85.
100 *Great Barrier Reef Marine Park Act 1975* (Cth) s 61AEA. Where the person has been convicted of repeated offences against the Act, or repeatedly subject to penalties under the Act.
101 Ibid s 61AEB.

Citizenship and passport laws

6.94 A citizen's freedom of movement may be interfered with following revocation of citizenship under the *Australian Citizenship Act 2007* (Cth).

6.95 Australian citizenship can be revoked if citizenship was granted as a result of false statements or fraud, or a person was convicted of a serious criminal offence before becoming a citizen, and the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.[102]

6.96 However, revocation of citizenship by conferral, on the basis of a criminal conviction, may not occur if the person would be rendered stateless.[103] An Australian citizen by birth cannot have their Australian citizenship revoked under these provisions.

6.97 Australian citizenship, including of a citizen by birth, may be revoked if the person is a national or citizen of a foreign country; and serves in the armed forces of a country at war with Australia.[104]

6.98 The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) would allow Australian citizenship to cease in specified circumstances where a dual citizen repudiates their allegiance to Australia by engaging in terrorism-related conduct.[105] Under the Bill, there would be three new ways in which a person, who is a dual citizen, can cease to be an Australian citizen. A person would:

- renounce their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct;
- cease to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation;[106]
- cease to be an Australian citizen if the person is convicted of a specified terrorism offence as prescribed in the *Criminal Code*.[107]

Passports

6.99 Under the *Australian Passports Act 2005* (Cth) an Australian passport may be refused or cancelled, interfering with a citizen's ability to leave or re-enter Australia, or other countries.

6.100 A passport or other travel document may be refused for a range of reasons set out in div 2 of the *Australian Passports Act*. A competent authority may, for example,

---

102 *Australian Citizenship Act 2007* (Cth) s 34(1), (2).
103 Ibid s 34(3).
104 Ibid s 35.
105 At the time of writing, the Bill was before the Parliamentary Joint Committee on Intelligence and Security. The Committee is due to report to Parliament by 21 August 2015.
106 A declared terrorist organisation is a terrorist organisation, as defined by s 102.1 of the *Criminal Code*, and specified by regulation eg, *Criminal Code (Terrorist Organisation—Al-Qa'ida) Regulation 2013* (Cth).
107 Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).

request that the Minister cancel or refuse to issue a passport to a person who is the subject of a domestic or foreign arrest warrant for serious crimes or where the person will likely engage in harmful conduct in Australia or overseas if they were allowed to travel.[108]

6.101 A passport or other travel document may also be cancelled by the Minister for a range of prescribed reasons.[109] These include where the person has lost their Australian citizenship or a competent authority makes a request that the issue of a passport be refused or a passport be cancelled.

6.102 'Competent authorities' may make cancellation requests for reasons relating to Australian law enforcement matters, international law enforcement cooperation, potential for harmful conduct, repeated loss or thefts, the provision of financial assistance to travellers, and concurrently valid or suspended Australian travel documents.[110]

6.103 These authorities include Australian federal, state and territory police; Australian courts and parole boards; bankruptcy (public) trustees; the Australian Securities and Investments Commission; ASIO; specified officers of the Attorney-General's Department; the Australian Customs and Border Protection Service; and the Australian Crime Commission.[111]

6.104 For example, passports may be cancelled as a result of recommendations made by ASIO following adverse security assessments under pt IV of the *Australian Security Intelligence Organisation Act 1979* (Cth).[112]

6.105 The *Foreign Fighters Act* amended the *Australian Passports Act 2005* (Cth) to enable the Minister for Foreign Affairs to suspend a person's Australian travel documents for a period of 14 days if requested by ASIO.[113]

6.106 These amendments enable ASIO to make a request that the Minister for Foreign Affairs suspend, for a period of 14 days, all Australian travel documents issued to a person if it suspects on reasonable grounds both that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country, and that all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.[114]

6.107 The Explanatory Memorandum noted that the new suspension mechanism will temporarily restrict a person's right to liberty of movement if that person seeks to travel while their Australian travel documents are suspended but that, consistent with

---

108 *Australian Passports Act 2005* (Cth) ss 11–14.

109 Ibid s 22.

110 Ibid ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.

111 *Australian Passports Act 2005* (Cth) ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.

112 *Australian Passports Act 2005* (Cth) s 22.

113 Ibid s 22A. The *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) contains similar provisions under which the Minister for Foreign Affairs may order the surrender of a person's foreign travel documents if requested by ASIO: *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) ss 15A, 16A.

114 *Australian Passports Act 2005* (Cth) s 22A.

art 12(3) of the ICCPR, the restriction will be provided by law and is necessary for the protection of Australia's national security.[115]

6.108 It was further stated that the introduction of the new suspension mechanism 'is reasonable and necessary to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern'.[116]

6.109 The Human Rights Committee expressed concern that the 'asserted necessity of a power to suspend passports for longer than seven days'—the period proposed by the Independent National Security Legislation Monitor (INSLM)—was not supported by empirical evidence.[117]

6.110 In terms of proportionality, the Human Rights Committee also noted that the measures excluded both administrative review of a decision to suspend a passport and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and would provide, in certain circumstances, that a person did not have to be notified of a decision not to issue or to cancel a passport on the grounds of national security.[118]

6.111 In light of these factors, the Human Rights Committee considered that the statement of compatibility in the Explanatory Memorandum had not established that the measure could be regarded as proportionate and sought further advice from the Attorney-General on whether the measure was compatible with the right to freedom of movement, and particularly whether the limitation was reasonable and proportionate.[119]

6.112 The Scrutiny of Bills Committee also commented on these provisions of the Foreign Fighters Bill. It drew attention to the 'significant difference between the INSLM's proposal of rolling 48 hour suspensions (up to a maximum of seven days), with the 14-day suspension period as proposed in the bill' and sought further advice from the Attorney-General.[120]

6.113 In response, the Attorney-General asserted that the INSLM's proposed timeframe of up to seven days 'would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents'.[121] The Scrutiny of Bills Committee resolved to leave the question of whether the proposed approach is appropriate to the Senate as a whole.[122]

---

115 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [49].
116 Ibid [50].
117 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.244].
118 Ibid [1.245].
119 Ibid [1.246]–[1.247].
120 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 749.
121 Ibid 750.
122 Ibid.

6.114 The Law Council, in a submission to this Inquiry, queried whether s 22A contains 'sufficient safeguards to ensure proportionality'. For example, the Law Council noted that there is no legislative safeguard preventing multiple suspensions of a travel document. The Law Council suggested that, as long as there is new information that was not before ASIO at the time of the suspension request and during the period of the suspension, 'multiple requests of suspension are conceivable'.[123] The Law Council also observed that the absence of a notification obligation where passports are refused or cancelled for security or law enforcement reasons might affect whether the measures can be interpreted as proportionate under the ICCPR.[124]

Bankruptcy

6.115 The *Bankruptcy Act 1966* (Cth) provides that a bankrupt must, unless excused by a trustee in bankruptcy, give his or her passport to the trustee.[125] This provision appeared in the Act as originally enacted, pre-dating modern parliamentary committee scrutiny processes.

6.116 Associate Professor Christopher Symes submitted that this restriction on freedom of movement should be reviewed, in view of the increased frequency of travel, ease of international communication and the fact that no similar requirement is placed on directors of insolvent corporations.[126]

Child support

6.117 Under the *Child Support (Registration and Collection) Act 1988* (Cth) (*Child Support Act*) the Child Support Registrar may make a 'departure prohibition order' prohibiting a person from departing from Australia for a foreign country if, among other things, the person has a child support liability and the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.[127]

6.118 The justifications for the making of 'departure prohibition orders' under the *Child Support Act*[128] were discussed in the Federal Magistrates Court of Australia in *Williams v Child Support Registrar*.[129]

6.119 In this case, the applicant, Williams, sought orders varying a decision to issue a departure prohibition order against him. The applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia. The Federal Magistrate held that s 72D of the *Child Support Act* did not effectively burden freedom of communication about government or political matters.

---

123 Law Council of Australia, *Submission 75*.
124 Ibid. Referring to *Criminal Code* (Cth) s 48A. See also UNSW Law Society, *Submission 19*.
125 *Bankruptcy Act 1966* (Cth) s 77.
126 C Symes, *Submission 40*.
127 *Child Support (Registration and Collection) Act 1988* (Cth) s 72D. The Explanatory Memorandum to the Child Support Legislation Amendment Bill (No. 2) 2000, introducing s 72D did not refer to freedom of movement.
128 Ibid.
129 *Williams v Child Support Registrar* (2009) 109 ALD 343.

6.120 In dismissing the appeal, the Magistrate expressed the opinion that, even if the *Child Support Act* did burden freedom of movement, it was 'nevertheless a law reasonably appropriate and adapted to serve the object intended'—being that children receive financial support that a parent is liable to provide and that that support is paid on a regular and timely basis.[130]

6.121 In a submission to this Inquiry, Professor Patrick Parkinson AM highlighted problems with the application of this provision to parents who are visiting Australia, but live permanently overseas. These problems arise particularly in situations where the alleged child support debt is seriously contested, or is associated with a conflict of laws.[131]

Laws restricting entry to specific areas

6.122 Many Commonwealth laws interfere with freedom of movement by providing that it is unlawful to 'enter or remain' in certain prescribed areas.

6.123 Laws restrict entry to specific areas in Australia, including in relation to Aboriginal land. For example, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) restricts entry to Aboriginal land generally, and sacred sites in particular.[132]

6.124 Other laws that may restrict entry to specific areas in Australia include:

- *Defence Act 1903* (Cth) s 51R (designated areas);
- *Offshore Minerals Act 1994* (Cth) s 404 (declared safety zones);
- *Parliamentary Precincts Act 1988* (Cth) s 6 (the Parliamentary precincts);
- *Sea Installations Act 1987* (Cth) s 57 (safety zones); and
- *Space Activities Act 1998* (Cth) s 103 (accident sites).

Migration law

6.125 The object of the *Migration Act 1958* (Cth) is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.[133] To advance this object, the Act provides for visas, requires people entering Australia to do so legally, and provides for the removal and deportation of non-citizens whose presence in Australia is not permitted, and for the taking of unauthorised maritime arrivals from Australia to a regional processing country.[134]

6.126 Clearly, the *Migration Act* constrains the movement of people into Australia. However, to the extent that it applies to non-citizens it does not appear to engage freedom of movement, as that right has been interpreted in common law and international law.

---

130 Ibid [35] (Lucev FM).
131 P Parkinson, *Submission 9*.
132 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 70, 69.
133 *Migration Act 1958* (Cth) s 4(1).
134 Ibid s 4(2)–(4).

6.127 As discussed above, in relation to international borders, the right of movement concerns the freedom of citizens to leave and return to their own country. Therefore, laws which infringe a non-citizen's freedom of movement by, for example, restricting or imposing conditions on entry into or departure from Australia; establishing visa conditions on non-citizens that might restrict their movement; or requiring permanent residents to leave Australia under immigration processes, are not generally considered to engage freedom of movement.[135]

Other laws

6.128 Many other Commonwealth laws may be characterised as interfering with freedom of movement, to some degree.

6.129 For example, provisions of the *Social Security Act 1991* (Cth) mean that some benefits and allowances may not be payable if a person has reduced his or her employment prospects by moving to a new place of residence without sufficient reason.[136]

6.130 Dr Shelley Bielefeld submitted that the restrictions on contractual freedom in the purchase of goods, imposed through the BasicsCard, 'have impeded the freedom of movement of numerous welfare recipients'.[137]

6.131 Australian Lawyers for Human Rights submitted that the *Native Title Amendment Act 1998* (Cth) unjustifiably interferes with traditional (native title) rights regarding freedom of movement, in that it extinguished and encroached on these traditional rights in various parts of Australia. This was said to have occurred through the Act's confirmation and validation of other forms of title, and the primary production upgrade provisions.[138]

Justifications for encroachments

6.132 Freedom of movement will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for example, for reasons of public health and safety.

6.133 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[139]

---

135 The Inquiry received a number of submissions addressing these issues.

136 *Social Security Act 1991* (Cth) ss 553B, 634, 745N.

137 S Bielefeld, *Submission 62*. The legislative basis for the BasicsCard is the income management scheme established under *Social Security (Administration) Act 1999* (Cth) pt 3B.

138 Australian Lawyers for Human Rights, *Submission 43*.

139 *Canada Act 1982 c 11* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

6.134 The following section discusses some of the principles and criteria that may be applied to help determine whether a law that interferes with freedom of movement is justified, including those under international law.[140] However, it is beyond the practical scope of this Inquiry to determine whether appropriate justification has been advanced for particular laws.[141]

6.135 As discussed in Chapter 1, proportionality is the accepted test for justifying most limitations on rights, and is used in relation to freedom of movement.

6.136 For example, the Human Rights Committee in its examination of legislation, asks whether a limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is proportionate to that objective. A number of stakeholders to this Inquiry expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of movement.[142]

Legitimate objectives

6.137 Both the common law and international human rights law recognise that freedom of movement can be restricted in order to pursue legitimate objectives such as the protection of national security and public health. Some existing restrictions on freedom of movement are a corollary of pursuing other important public or social needs, such as the need to ensure bankrupts do not defeat creditors by leaving the jurisdiction or that children receive financial support from their parents.

6.138 The power of Australian law-makers to enact provisions that restrict freedom of movement is not necessarily constrained by the scope of permissible restrictions on the freedom under international human rights law.[143] However, in considering how restrictions on freedom of movement may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR.

6.139 The ICCPR provides grounds for restrictions on freedom of movement in general terms. Article 12(3) of the ICCPR provides that freedom of movement

> shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

6.140 Many of the laws discussed above pursue these objectives. For example, counter-terrorism and other criminal laws clearly protect the rights of others, including the right not to be a victim of terrorism or other crime. They are also are concerned with the protection of national security or public order.

---

140 As discussed in Ch 2, international law principles of proportionality inform the scrutiny processes of the Human Rights Committee.

141 See Ch 1.

142 For example, Law Council of Australia, *Submission 75*.

143 See Ch 1.

6.141 Other counter-terrorism laws affecting aspects of citizenship, passports and border protection may also be necessary to protect legitimate national security and other interests. Some aspects of quarantine laws, such as quarantine zones, are necessary to protect public health.

6.142 A range of laws that restrict entry, for example, into military security zones, safety zones and accident sites may be necessary to protect legitimate objectives such as protecting public safety and health and ensuring public order.

6.143 There remain other laws that restrict freedom of movement and do not as obviously fall within the permissible restrictions referred to in art 12(3) of the ICCPR, for example, the requirement placed on bankrupt persons to automatically surrender their passports.

Proportionality and freedom of movement

6.144 Whether all of the laws identified above as potentially interfering with freedom of movement in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom, may be contested. However, even if a law does pursue such an objective, it will be important also to consider whether the law is suitable, necessary and proportionate.

6.145 The United Nations Human Rights Committee has said that restrictions on freedom of movement 'must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'.[144] The UN Committee has also said:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution … it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[145]

Conclusions

6.146 A range of Commonwealth laws may be seen as interfering with freedom of movement. However, some of these provisions relate to limitations that have long been recognised by the common law itself, for example, in relation to official powers of arrest or detention, customs and quarantine. Further, while the *Migration Act* constrains the movement of people into Australia, to the extent that it applies to non-citizens, it does not implicate freedom of movement, as interpreted in common law and international law.

---

144 United Nations Human Rights Committee, *General Comment No 27 (1999) on Article 12 of the Convention–Freedom of Movement*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13]–[14].

145 Ibid [13]–[14]. Legal and bureaucratic barriers were, for the Committee, a 'major source of concern': Ibid [17].

6.147 In the area of environmental legislation, the operation of the *Environment Protection and Biodiversity Conservation Act* can result in restrictions being placed on freedom of movement, in order to protect environmentally or culturally significant areas, such as the Great Barrier Reef Marine Park or the Uluru-Kata Tjuta National Park.

6.148 While many laws interfering with freedom of movement have strong and obvious justifications, it may be desirable to review some laws to ensure that they do not unjustifiably interfere with the right to freedom of movement.

6.149 As with freedom of speech and freedom of association, the areas of particular concern, as evidenced by parliamentary committee materials, submissions and other commentary, include various counter-terrorism measures. These include *Criminal Code* provisions concerning control orders and preventative detention orders, the offence of entering or remaining in a 'declared area',[146] and questioning and detention powers contained in the ASIO Act and the *Crimes Act*.[147]

6.150 Some of these laws were introduced in the *Foreign Fighters Act*, in response to the potential threat of individuals returning from conflict zones in Syria and Iraq. This legislation also extended the operation of powers: namely control orders, preventative detention orders and ASIO's questioning and detention warrants.

6.151 All these provisions have been subject to critical scrutiny in parliamentary committee and other inquiries.[148] These previous inquiries include that conducted in 2011–2012 by the INSLM.[149] Any further review, with a particular focus on freedom of speech and movement, would also fall within the responsibilities of the INSLM.[150]

6.152 In addition, there may be reason to review s 77 of the *Bankruptcy Act 1966* (Cth), which provides that a bankrupt must, unless excused by a trustee in bankruptcy, give his or her passport to the trustee. This requirement may not be a proportionate response to concerns about bankrupts absconding.

---

146 *Criminal Code* (Cth) divs 104, 105, s 119.2. These laws can also be considered as interfering with freedom of association, discussed in Ch 5.

147 *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3; *Crimes Act 1914* (Cth) ss 23DB–23DF.

148 See eg, 'Review of Counter-Terrorism Legislation' (Council of Australian Governments, 2013) 68; Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 44, 67, 106. See Gilbert and Tobin Centre of Public Law, *Submission 22*.

149 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012).

150 This role includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary: see *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(b).

7. Property Rights

Contents

The common law and private property

7.1 The common law has long regarded a person's property rights as fundamental. William Blackstone said in 1773: 'There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property'.[1] In the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission (AHRC) in 2014, 'property rights' was one of the four areas identified as being of key concern.[2]

7.2 This chapter and Chapter 8 are about the common law protection of vested property rights. This chapter considers what is comprised in the concept of 'property' rights and how vested property rights are protected from statutory encroachment. The chapter focuses upon interferences with personal property rights; Chapter 8 considers interferences with real property and the rights of landowners.

---

1 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol II, bk II, ch 1, 2.

2 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 8.

7.3 Almost a century before Blackstone wrote, conceptualisations of property were bound up in the struggle between parliamentary supremacy and the power of the monarch. This conflict resulted in the 'Glorious Revolution' of 1688, in which the Roman Catholic king, James II, was overthrown in favour of his Protestant daughter, Mary, and her husband, William of Orange, Stadtholder of the Netherlands, as Mary II and William III. John Locke (1632–1704) celebrated property as a 'natural' right, advocating the protection of a citizen in 'his Life, Health, Liberty, or Possessions'.[3] Jeremy Bentham (1748–1832) continued the philosophical argument about property, anchoring it in laws:

> Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[4]

7.4 By the period following World War II, the protection of private property rights from interference had become enshrined in the first international expression of human rights, the *Universal Declaration of Human Rights* (UNDHR) in 1948,[5] in providing that '[n]o one shall be arbitrarily deprived of his property'.[6]

7.5 Property and possessory rights are explicitly protected by the law of torts and by criminal laws and are given further protection by rebuttable presumptions in the common law as to statutory interpretation, under the principle of legality, discussed below. An interference with real property in the possession of another may give rise to the tort of trespass to land or of nuisance.[7] In the leading case of *Entick v Carrington*, Lord Camden LCJ said:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.[8]

7.6 Similarly, the common law provides protection against unauthorised interference or detention of chattels. *Entick v Carrington* concerned not just an unauthorised search but also a seizure of private papers. *Wilkes v Wood*[9] set out enduring common law principles against unauthorised search and seizure, later reflected in the fourth amendment to the *United States Constitution.*

---

3 John Locke, *Two Treatises of Government* (Cambridge University Press, First Published 1690, 2nd Ed, Peter Laslett Ed, 1967) 289. The timing of the publication relevant to the negotiation of the ascension of William and Mary is explained by Peter Laslett, in ch III of his introduction to the *Two Treatises*.

4 Jeremy Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham, Published under the Supervision of His Executor John Bowring* (1843) vol 1 pt I ch VIII 'Of Property', 309a. One of the main 17th century arguments about property was whether it was founded in 'natural' or 'positive' law. Bentham is representative of the positivist approach that was the foundation of modern thinking about property.

5 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

6 Ibid art 17(2).

7 See Ch 8.

8 *Entick v Carrington* (1765) 19 St Tr 1029. The version of the report included in the English Reports, 95 ER 807, is an abbreviated form and does not include this precise quote.

9 *Wilkes v Wood* [1763] 2 Wilson 203; 98 ER 489.

7.7 Unauthorised interferences with chattels may be a trespass or conversion of the chattels, while unauthorised detention, even if initially authorised by statute, may give rise to tort actions in conversion or detinue once that authority has lapsed. For example, in *National Crime Authority v Flack*, the plaintiff, Mrs Flack, successfully sued the National Crime Authority and the Commonwealth for the return of money found in her house and seized by the Authority. Heerey J noted a common law restriction on the seizure of property under warrant:

> [A]t common law an article seized under warrant cannot be kept for any longer than is reasonably necessary for police to complete their investigations or preserve it for evidence. As Lord Denning MR said in *Ghani v Jones* [1970] 1 QB 693 at 709: 'As soon as the case is over, or it is decided not to go on with it, the article should be returned'.[10]

7.8 Within the modern parliamentary context, many laws have been made that interfere with property rights. The focus then is upon how far such interference can go, before it may be regarded, for example, as an 'arbitrary deprivation', in the language of the UDHR. In his *Commentaries on the Laws of England*, while calling the right to property an absolute right[11] anchored in the *Magna Carta*, Blackstone described the limited power of the legislature to encroach upon it in terms that are still reflected in laws today:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land ... The laws of England are ... extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.[12]

7.9 Property rights could be encroached upon 'by the law of the land', but only where reasonable compensation was given:

> But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[13]

---

10 *National Crime Authority v Flack* (1998) 86 FCR 16, 27. Heerey J continued: 'Section 3ZV of the *Crimes Act* ... introduced by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) ... did not come into force until after the issue and execution of the warrant in the present case. However it would appear to be not relevantly different from the common law'. For the current law, see *Crimes Act 1914* (Cth) ss 3ZQX–3ZQZB.

11 Blackstone named two other absolute rights: the right of personal security and the right of personal liberty.

12 Blackstone, above n 1, vol I, bk I, ch 1, 134.

13 Ibid vol I, bk I, ch 1, 135. This passage is cited in, eg, *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41] (French CJ).

7.10 As French CJ affirmed in *R & R Fazzolari Ltd v Parramatta City Council*, it 'was and has remained the case in England and Australia that compulsory acquisition and compensation for such acquisition is entirely the creation of statute'.[14]

Definitions of property

What is 'property'?

7.11 The idea of property is multi-faceted. The term 'property' is used in common and some legal parlance to describe types of property that is both real and personal. 'Real' property encompasses interests in land and fixtures or structures upon the land. 'Personal' property encompasses tangible or 'corporeal' things—chattels or goods. It also includes certain intangible or 'incorporeal' legal rights, also known in law as 'choses in action', such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation[15] and some contractual rights, including, for example, many debts.[16] Intangible rights are *created* by law. Tangible things exist independently of law but law governs rights of ownership and possession in them—including whether they can be 'owned' at all.[17]

7.12 In law, the term 'property' is perhaps more accurately or commonly used to describe types of rights—and rights in relation to things. In *Yanner v Eaton*, the High Court of Australia said:

> The word 'property' is often used to refer to something that belongs to another. But ... 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.[18]

7.13 The 'bundle of rights' that property involves, acknowledges that rights in things can be split: for example, between rights recognised at common law ('legal' interests) and those recognised in equity ('equitable' or 'beneficial' interests); and between an

---

14 *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41]. French CJ cited the following authorities: *Rugby Joint Water Board v Shaw-Fox* 1973 AC 202, 214 (Lord Pearson); *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, [29].

15 *Greville v Williams* (1906) 4 CLR 694.

16 *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

17 In *Yanner v Eaton*, the High Court cited the common law example of wild animals, or *ferae naturae*: 'At common law, wild animals were the subject of only the most limited property rights. ... An action for trespass or conversion would lie against a person taking wild animals that had been tamed, or a person taking young wild animals born on the land and not yet old enough to fly or run away, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land. Otherwise no person had property in a wild animal': *Yanner v Eaton* (1999) 201 CLR 351, 366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ); 80–81 (Gummow J). See also Blackstone, above n 1, vol II, bk II, ch 1, 14.

18 *Yanner v Eaton* (1999) 201 CLR 351, 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). 'Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J). O'Connor traces the theoretical development of the 'bundle of rights' approach: Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50, 54–6.

owner as lessor and a tenant as lessee. Equitable interests may further be subdivided to include 'mere equities'.[19]

7.14 In *Yanner v Eaton*, Gummow J summarised this complexity:

> Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties. Ownership may be divorced from possession. At common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry. Property need not necessarily be susceptible of transfer. A common law debt, albeit not assignable, was nonetheless property. Equity brings particular sophistications to the subject. The degree of protection afforded by equity to confidential information makes it appropriate to describe it as having a proprietary character, but that is not because property is the basis upon which protection is given; rather this is because of the effect of that protection. Hohfeld identified the term 'property' as a striking example of the inherent ambiguity and looseness in legal terminology. The risk of confusion is increased when, without further definition, statutory or constitutional rights and liabilities are so expressed as to turn upon the existence of 'property'. The content of the term then becomes a question of statutory or constitutional interpretation.[20]

7.15 As Gummow J suggests in this passage, 'possession' is a distinct and complex concept. Its most obvious sense is a physical holding (of tangible things), or occupation (of land). An example is when goods are in the custody of another, where things are possessed on account of another.[21]

7.16 A 'property right' may take different forms depending on the type of property. Implicit in a property right, generally, are all or some of the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.[22] Property rights also depend on the statutory framework of laws and property rights affecting the particular type of property, for example, the system of land tenure in a particular state or territory, or a scheme such as the *Personal Property Securities Act 2009* (Cth), and the interaction between that statutory scheme and the common law.

7.17 For land and goods, both of which may be possessed by someone other than the lawful owner, property rights in the sense of ownership must be distinguished from mere possession of the land or goods, even though the latter may give rise to qualified legal rights,[23] and from mere contractual rights affecting the property. The particular

---

19 See, eg, the discussion of the 'enforceability of equities' in Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 401–16.

20 *Yanner v Eaton* (1999) 201 CLR 351, 388–9. Gummow J refers to Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

21 See, eg, Edgeworth et al, above n 19, 94–110.

22 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See discussion in Edgeworth et al, above n 19. See also: Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252. Some property rights may however be unassignable: see, Edgeworth et al, above n 19, 6.

23 Actual possession may give the possessor better rights than others whose interest does not derive from the true owner: see *Newington v Windeyer* (1985) 3 NSWLR 555 (land) or *National Crime Authority v Flack* (1998) 86 FCR 16 (goods). See also the quote of Gummow J in *Yanner v Eaton*, above. Possession may, in effect, give the possessor rights akin to proprietary rights. Note, 'Not only is a right to possession a

right may be regarded as 'proprietary' even though it is subject to certain rights of others in respect of the same property: a tenancy of land, for example, gives the tenant rights that are proprietary in nature as well as possessory.

7.18 The 'bundle of rights' approach has presented some contemporary challenges, particularly in relation to land holding. Laws that limit what a landowner can do, for example by creating rights in others in the same land, may give rise to arguments about compensability, expressed in the question, when does regulating what someone may do with land become a 'taking' of that land? This is considered later and in Chapter 8.

7.19 What may amount to a property right is of ongoing philosophical and practical interest. One clear historical example is the recognition of copyright from the 17th century, as a new form of intangible personal property created by statute and the development of a specialist body of law governing its creation and transfer. Trade marks and registered designs have a similar genesis, as statutory creations.[24]

7.20 The recognition of new forms of intangible property may be argued in the context of s 51(xxxi) of the *Constitution*, which is considered below. Arguments concerning rights over one's person, for example claims over bodies and body parts, including reproductive material, are lively.[25] The need to recognise 'traditional knowledge and traditional cultural expressions of Aboriginal and Torres Strait Islander people' has also been advanced. In this Inquiry, the Arts Law Centre argued for recognition of cultural knowledge as intellectual property and subject to appropriate protection, noting that the *Native Title Act 1993* (Cth) did not do so.[26] Similar intellectual property issues were raised in the Rights and Responsibilities consultation.[27]

7.21 The significance of recognising cultural knowledge was identified by the ALRC in the report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*. While this issue lay outside the Terms of Reference for that Inquiry, the ALRC concluded that

> the question of how cultural knowledge may be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review. An independent inquiry could bring to fruition the wide-ranging and valuable work that has already been undertaken but which still

---

right of property but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

24 Patent rights were held to be property rights that attracted the presumption against divesting by legislation or delegated regulations: *UWA v Gray* [2008] FCA 498 [89].

25 See, eg, Margaret Davies and Ngaire Naffine, *Are Persons Property?* (Ashgate, 2001); Rosalind Croucher, 'Disposing of the Dead: Objectivity, Subjectivity and Identity' in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324; Donna Dickenson, *Property in the Body: Feminist Perspectives* (Cambridge University Press, 2007); Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007); Muireann Quigley, 'Property in Human Biomaterials—Separating Persons and Things' (2012) 32 *Oxford Journal of Legal Studies* 659; Muireann Quigley, 'Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials' (2014) 77 *Modern Law Review* 677. The issue was tested, for example, in *Roblin v Public Trustee for the Australian Capital Territory* [2015] ACTSC 100. The case concerned whether cryogenically stored semen constitutes property which, upon the death of the person, constitutes property in his estate.

26 Arts Law Centre of Australia, *Submission 50*.

27 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 44–5.

> incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.[28]

7.22 Understandings about what amounts to property reveal a certain fluidity when viewed historically. As one stakeholder commented:

> The rights that attach to different objects, be they land, personal or intellectual property are not frozen in time. Just as for all legal rights, the nature and content of property rights will evolve and potentially change quite significantly over time.[29]

7.23 Similarly, with respect to land, Professor Peter Butt noted that the 'categories of interests in land are not closed' and they 'change and develop as society changes and develops'.[30]

7.24 Another challenge in terms of property rights in the Australian context is the recognition of native title; and understanding how such interests in land or waters fit within, or relate to, the understanding of property rights of the common law.[31]

The reach of property rights

7.25 Complex interactions of property rights of different forms fill chapters of books on property law under the generic heading of 'priorities', where rules of law and equity, including statute law, have, over the centuries, established what property interest takes priority over another in given circumstances, regulating competing property interests. Each circumstance may involve a 'loser' in the sense of someone losing out in a contest of proprietary rights (rights *in rem*), and being relegated in such circumstances to whatever rights may be pursued against the individuals concerned (rights *in personam*). Some examples, expressed in very general terms, suffice to illustrate:

- the priority of the bona fide purchaser of a legal estate for value without notice of a prior equitable interest;[32]
- the indefeasibility of registered interests under Torrens title land systems;[33]

---

28 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) [8.176]–[8.177]. The ALRC noted extensive work on the topic: eg, IP Australia, *Australia's Indigenous Knowledge Consultation* <www.ipaustralia.gov.au>; World Intellectual Property Organization, *Protection of Traditional Cultural Expressions and Traditional Knowledge–Gap Analyses* <http://www.wipo.int/tk/en/igc/gap-analyses.html>.

29 Environmental Justice Australia, *Submission 65*.

30 Peter Butt, 'Carbon Sequestration Rights—A New Interest in Land?' (1999) 73 *Australian Law Journal* 235. The particular example Butt cited was of 'the slow emergence of an interest not previously known to the law, the "carbon sequestration right"', which has been given statutory force: in New South Wales within the well-known common law interest in land, the profit à prendre; in Victoria within a specific legislative framework, the *Forestry Rights Act 1996* (Vic).

31 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Chs 4 and 6.

32 See, eg, Edgeworth et al, above n 19, ch 4.

33 See, eg, Ibid ch 5.

- the effect of registration on priority of registered security interests in personal property;[34] and
- the doctrine of fixtures, in which items of personal property—chattels—may lose their quality as personal property and become part of the land.[35]

7.26 A further illustration of property rights being lost may come through the operation of statutory limitation over time. So, for example, a person may be held to acquire title to land by long 'adverse' possession. The adage, 'possession is nine-tenths of the law', is reflected in the modern expression of title by possession in the Limitation of Actions legislation.[36] Under such legislation, the claim of a person may be barred after a designated period, generally between 12 and 15 years.[37] There is authority that even under Torrens title systems, title may be gained by adverse possession.[38]

7.27 A further question about the extent of property rights includes how far the title of a landowner extends in the air above and the earth below. Cases involving scaffolding, overflying and cranes, have tested airspace rights.[39] Cases involving subterranean caves, treasures and minerals have tested the limits below the surface.[40] An aspect of such issues concerns prerogative claims to minerals, including substances like coal.[41]

7.28 The extent of property rights can be at issue when it is argued that rights of property have been taken away and therefore that the property owner is entitled to compensation for that 'taking'. This was raised by stakeholders in this Inquiry in the context of environmental regulation issues, water rights and intellectual property.

'Vested' property

7.29 The ALRC's Terms of Reference refer to 'vested property rights'. 'Vested' is primarily a technical legal term in property law used to differentiate a presently existing interest from a contingent interest.[42] However, particularly in the United

---

34 Under the *Personal Property Securities Act 2009* (Cth). The system is explained on the website of the Australian Financial Security Authority, which administers the legislation: https://www.afsa.gov.au/.

35 See, eg, Edgeworth et al, above n 19, [1.79].

36 See, eg, Ibid 139–72. In *Yanner v Eaton*, Gummow J noted that '[o]wnership may be divorced from possession', giving the example that, '[a]t common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry': *Yanner v Eaton* (1999) 201 CLR 351, 388.

37 See, eg, Edgeworth et al, above n 19, 144–5.

38 See, eg, Ibid 517–20.

39 See, eg, Ibid 66–7.

40 See eg, *Bulli Coal Mining Co v Osborne* [1899] AC 351; *Edwards v Sims* (1929) 24 SW 2D 619; *Elwes v Brigg Gas Co* (1883) Ch D 33 562. See also Adrian J Bradbrook, 'Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land' (1987) 11 *Adelaide Law Review* 462.

41 See Ch 8.

42 That is, contingent on any other person's exercising his or her rights: 'an immediate right of present or future enjoyment': *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496, 501. See also *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30. The term 'vested' has been used to refer to personal property, including a presently existing and complete cause of action: see *Georgiadis v AOTC* (1994) 179 CLR 297.

States, the term has acquired rhetorical force in reinforcing the right of the owner not to be deprived of the property arbitrarily or unjustly by the state[43] or, in disputes over land use, to reflect the confrontation between the public interest in regulating land use and the private interest of the owner—including a developer—in making such lawful use of the land as he or she desires.[44] The tension is particularly strong with respect to retrospective legislation.[45]

7.30 In this Inquiry the ALRC considers 'vested property rights' more in its broad, rhetorical sense, than in its technical sense, in which there are distinct shades of meaning of 'vested'.[46]

Protections from statutory encroachment

7.31 Property rights find protection in the *Australian Constitution*, through the principle of legality at common law, and, to some extent, in international law.

Australian Constitution

7.32 The *Constitution* protects property from one type of interference: acquisitions by the Commonwealth other than 'on just terms'. Section 51(xxxi) of the *Constitution* provides that the Commonwealth Parliament may make laws with respect to:

> the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

7.33 There is no broader constitutional prohibition on the making of laws that interfere with vested property rights. The language of s 51(xxxi) was adapted from the fifth amendment to the *United States Constitution*. However, the American provision is 'formulated as a limitation on power', while the Australian provision is 'expressed as a grant of power'[47]—to acquire property. Nevertheless, this constitutional protection is significant and is regarded as a constitutional guarantee of property rights.[48] Barwick CJ described s 51(xxxi) as 'a very great constitutional safeguard'.[49] Because of the potential of invalidity of legislation that may offend s 51(xxxi), express

---

43 *American States Water Service Co v Johnson* 31 Cal App 2d 606, 614; 88 P2d 770, 774 (1939).

44 Walter Witt, 'Vested Rights in Land Uses—A View from the Practitioner's Perspective' (1986) 21 *Real Property, Probate and Trust Journal* 317. A right is described as immutable and therefore 'vested' when the owner has made 'substantial expenditures or commitments in good faith reliance on a validly issued permit': Terry Morgan, 'Vested Rights Legislation' (2002) 34 *Urban Lawyer* 131.

45 'There is no remedial act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side': *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434 (Isaacs J).

46 For example: 'vested in interest', 'vested in possession'. See, eg, Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [612].

47 Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) 1274.

48 *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349. Dixon J. The provision reflects the ideal enunciated by Blackstone in the 1700s that, where the legislature deprives a person of their property, fair payment should be made: it is to be treated like a purchase of the property at the market value. This provision does not apply to acquisitions by a state: *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. See Ch 8.

49 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403.

provisions for compensation have been included. In addition to a general statute—the *Lands Acquisition Act 1989* (Cth)—a number of specific compensatory provisions have been included in many statutes.[50] There are also 'fail safe' provisions,[51] collectively described as 'historic shipwrecks clauses', that provide that if the legislation does acquire property other than on just terms, within the meaning of s 51(xxxi), the person from whom the property is acquired is entitled to compensation.[52]

7.34 In ascertaining whether the 'just terms' provision of s 51(xxxi) is engaged, four questions arise: is there property; has it been acquired by the Commonwealth; have 'just terms' been provided; and is the particular law outside s 51(xxxi) because the notion of fair compensation is 'irrelevant or incongruous' and incompatible with the very nature of the exaction.[53]

7.35 The High Court has taken a wide view of the concept of 'property' in interpreting s 51(xxxi) of the *Constitution*, reading it as 'a general term': '[i]t means any tangible or intangible thing which the law protects under the name of property'.[54] For example, a statute extinguishing a vested cause of action or right to sue the Commonwealth at common law for workplace injuries was treated as an acquisition of property in *Georgiadis v AOTC*.[55] However, claimants seeking to argue the invalidity of laws under s 51(xxxi) may fail because there was no property right.[56]

7.36 The second question concerns whether there has been an 'acquisition' of property in circumstances where a Commonwealth law has an adverse effect on valuable legal rights.

7.37 In *JT International SA v Commonwealth*, French CJ expanded on the meaning of 'acquisition':

---

50 See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 12AD, 44A; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a); *Copyright Act 1968* (Cth) s 116AAA; *Corporations Act 2001* (Cth) s 1350; *Designs Act 2003* (Cth) s 106; *Lands Acquisition Act 1989* (Cth) s 97; *Life Insurance Act 1995* (Cth) s 251; *Native Title Act 1993* (Cth) ss 20, 23J; *Northern Territory (Self-Government) Act 1978* (Cth) s 50; *Patents Act 1990* (Cth) s 171.

51 A description by Kirby J in *Wurridjal v Commonwealth* (2009) 237 CLR 309, 424.

52 *Historic Shipwrecks Act 1976* (Cth) s 21. This was the first of such clauses, hence the generic description of them by reference to this Act.

53 *Airservices Australia v Canadian Airlines International* (1999) 202 CLR 133, [340]–[341] (McHugh J).

54 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 295 (McTiernan J). In the *Bank Nationalisation Case*, Dixon J said s 51(xxxi) 'extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property': *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349.

55 *Georgiadis v AOTC* (1994) 179 CLR 297. This was upheld in *Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493. A majority in *Georgiadis v AOTC*—Mason CJ, Deane and Gaudron JJ, with Brennan J concurring—held that the Commonwealth acquired a direct benefit or financial gain in the form of a release from liability for damages: see further, Blackshield and Williams, above n 47, 1280.

56 For example, '[a] right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is not susceptible of any form of repetitive or continuing enjoyment and cannot be exchanged or converted into any kind of property ... That is not a right of a proprietary nature': *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 243–4 (Brennan J).

> Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights.[57]

7.38 As Deane and Gaudron JJ said in *Mutual Pools & Staff Pty Ltd v Commonwealth*:

> s 51(xxxi) is directed to 'acquisition' as distinct from 'deprivation'. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.[58]

7.39 Particular difficulty with the phrase 'acquisition of property' has arisen where federal law affects rights and interests which exist not at common law but under other federal law. By s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act), 'leases' to the Commonwealth of land held by Aboriginal peoples under the *Aboriginal Land Rights Act* 1976 (Cth) were 'granted' for five years.[59] In *Wurridjal v Commonwealth* (*Wurridjal*) the High Court, by majority, held that the creation of a lease under this section was an 'acquisition' of property by the Commonwealth.[60]

7.40 The effect of the High Court authorities was explained by Crennan J:

> It can be significant that rights which are diminished by subsequent legislation are statutory entitlements. Where a right which has no existence apart from statute is one that, of its nature, is susceptible to modification, legislation which effects a modification of that right is not necessarily legislation with respect to an acquisition of property within the meaning of s 51(xxxi). It does not follow, however, that all rights which owe their existence to statute are ones which, of their nature, are susceptible to modification, as the contingency of subsequent legislative modification or extinguishment does not automatically remove a statutory right from the scope of s 51(xxxi).
>
> Putting to one side statutory rights which replace existing general law rights, the extent to which a right created by statute may be modified by subsequent legislation without amounting to an acquisition of property under s 51(xxxi) must depend upon the nature of the right created by statute. It may be evident in the express terms of the statute that the right is subject to subsequent statutory variation. It may be clear from the scope of the rights conferred by the statute that what appears to be a new impingement on the rights was in fact always a limitation inherent in those rights. The statutory right may also be a part of a scheme of statutory entitlements which will inevitably require modification over time.[61]

---

57 *JT International SA v Commonwealth* (2012) 250 CLR 1, [42]. In relation to the impact on land see Ch 8.

58 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, 184–5.

59 *Northern Territory National Emergency Response Act 2007* (Cth) s 31(1).

60 *Wurridjal v Commonwealth* (2009) 237 CLR 309, (French CJ, Gummow, Hayne, Kirby and Kiefel JJ, Crennan J dissenting and Heydon J not deciding). The High Court found that adequate compensation for acquisition of property under the NTNER Act was paid to those who had pre-existing rights, title or interests in this land. The High Court also found that *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), which provided that permits for entry onto Aboriginal land and townships were no longer required, provided reasonable compensation for the acquisition of property.

61 Ibid [363]–[364]. References omitted.

7.41 The third question is about 'just terms'. In contrasting the provision in the *United States Constitution*, *Blackshield and Williams* explains that:

> The Fifth Amendment to the United States Constitution requires 'just compensation', whereas s 51(xxxi) requires 'just terms'. While 'just compensation' may import equivalence of market value, it is not clear that the phrase 'just terms' imports the same requirement. In cases decided in the immediate aftermath of World War II, the Court said that the arrangements offered must be 'fair' or such that a legislature could reasonably regard them as 'fair' (*Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495). Moreover, this judgment of fairness must take account of all the interests affected, not just those of the dispossessed owner.[62]

7.42 In *Wurridjal*, the NTNER Act excluded the payment of 'rent', but did include an 'historic shipwrecks clause'. Section 60(2) provided that, in the event of there being 'an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms', the Commonwealth was liable to pay 'a reasonable amount of compensation'. The provision prevented the potential invalidity of the legislation.

7.43 The fourth question concerns the characterisation of the law. Under this approach, 'although a law may appear to be one with respect to the acquisition of property, it is properly or relevantly characterised as something else'.[63] As explained in *Blackshield and Williams*:

> From time to time the Court has said that it would be 'inconsistent', 'incongruous' or 'irrelevant' to characterise a government exaction as one that attracts compensation. An obvious example is taxation, which involves the compulsory taking for Commonwealth purposes of a form of property. Because this taking is the very essence of taxation, the express power with respect to taxation in s 51(ii) must obviously extend to this kind of taking; and it follows that such a taking will not be characterised as an 'acquisition of property' within the meaning of s 51(xxxi).[64]

7.44 An example of a law that does not attract the just terms provision is that of forfeiture of prohibited goods under *Customs Act 1901* (Cth). In *Burton v Honan*, the High Court held that such a forfeiture was not an acquisition. Dixon CJ said that

> [i]t is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within s 51(xxxi) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender.[65]

7.45 Stakeholders in this Inquiry put forward arguments concerning s 51(xxxi) in the context of copyright and water rights. Copyright is considered below; water rights in

---

62 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) [27.130].

63 Ibid [27.90].

64 Ibid [27.92].

65 *Burton v Honan* (1994) 86 CLR 169, 181. Other illustrations are *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Theophanous v The Herald and Weekly Times Ltd* (1994) 182 CLR 104. See discussion in Williams, Brennan and Lynch, above n 62, 1232–58.

Chapter 8. Contemporary arguments often focus on whether a particular action is a 'taking' ('acquisition') or a 'regulation': the former being amenable to compensation, the latter within the 'allowance of laws' acknowledged as the province of government.

Principle of legality

7.46 The principle of legality provides some protection for vested property rights.[66] When interpreting a statute, courts will presume that Parliament did not intend to interfere with vested property rights, unless this intention was made unambiguously clear. As early as 1904, Griffith CJ in *Clissold v Perry* referred to the rule of construction that statutes 'are not to be construed as interfering with vested interests unless that intention is manifest'.[67]

7.47 More narrowly, legislation is presumed not to take vested property rights away without compensation. The narrower presumption is useful despite the existence of the constitutional protection because, it is 'usually appropriate (and often necessary) to consider any arguments of construction of legislation before embarking on challenges to constitutional validity'.[68]

7.48 The general presumption in this context is longstanding and case law suggests that the principle of legality is particularly strong in relation to property rights.[69] The presumption is also described as even stronger as it applies to delegated legislation.[70] The wording of a statute may of course be clear enough to rebut the presumption.[71]

International law

7.49 Article 17 of the UNDHR provides:

> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property.

7.50 Article 17 is reflected in art 5(d)(v) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[72] which guarantees 'the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the

---

66 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

67 *Clissold v Perry* (1904) 1 CLR 363, 373.

68 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, [27] (Kirby J). See also Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [5.21]–[5.22].

69 'This rule certainly applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to common law principles respecting property rights': *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 683 (Mason J). See also *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, [37] (Gaudron J).

70 *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1986) 120 CLR 400, 406 (Kitto J). Kitto J was citing *Newcastle Breweries Ltd v The King* [1920] 1 KB 854. See also *UWA v Gray* [2008] FCA 498 [87] (French J).

71 *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, [43].

72 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

law' in the exercise of a range of rights, including the 'right to own property alone as well as in association with others'.

7.51 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[73] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[74]

7.52 In *Maloney v The Queen* the High Court had occasion to consider the effect of art 5(d)(v) of the CERD. The High Court decided that laws that prohibit an Indigenous person from owning alcohol engage the human right to own property, citing the effect of art 5(d)(v) as implemented by the *Racial Discrimination Act 1975* (Cth).[75] In that case, the High Court found that s 168B of the *Liquor Act 1992* (Qld) was inconsistent with s 10 of the *Racial Discrimination Act*, which protects equal treatment under the law. However, the High Court upheld the prohibition on alcohol possession as a 'special measure' under s 8 of the *Racial Discrimination Act* and art 1(4) of the CERD designed to protect the residents of Palm Island from the effects of alcoholism.

7.53 The protection of property stated in the UNDHR is a limited one. As Professor Simon Evans has noted 'the prohibition on arbitrary deprivation is rather more limited than a guarantee of compensation for all deprivations of property' and the 'extent of protection afforded by the *Universal Declaration* in relation to private property ownership is vague at best'.[76]

7.54 Environmental Justice Australia submitted that

> Unlike other protected human rights which have a fundamental foundation in the integrity and dignity inherent in every person, particular rights to certain property as they exist at a particular point in time, as opposed to the principle right to ownership of property and against the arbitrary deprivation of that property, enjoy no such status.[77]

7.55 There is no guarantee of property rights in either the *International Covenant on Civil or Political Rights* (ICCPR) or the *International Covenant on Economic, Social and Cultural Rights*. Evans has concluded, therefore, that:

> At the very least it can be said that a property rights guarantee (of compensation for government action that acquires property rights or deprives a person of property rights) does not reflect a human right recognised under general international law.[78]

---

73 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

74 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

75 *Maloney v The Queen* (2013) 252 CLR 168.

76 Simon Evans, 'Should Australian Bills of Rights Protect Property Rights' (2006) 31 *Alternative Law Journal* 19, 20. Quoting Jonathan Shirley, 'The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe's Land Crisis' (2004) 27 *Boston College International & Comparative Law Review* 161, 166.

77 Environmental Justice Australia, *Submission 65*.

78 Evans, above n 76, 20.

Bills of rights

7.56 In some jurisdictions, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Constitutional and ordinary legislation prohibits interference with vested property rights in some jurisdictions, for example the United States,[79] New Zealand[80] and the state of Victoria.[81]

7.57 The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*) expressly added a recognition of property interests in Protocol 1, art 1.[82] Headed, 'Protection of property', art 1 states:

> Every natural or legal person is entitled to the *peaceful enjoyment of his possessions*. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[83]

Relevant statutory provisions

7.58 A wide range of Commonwealth laws may be seen as interfering with property rights. Some apply to personal property, some to real property, and some to both. Grouped into areas, provisions affecting personal property will be considered under the following headings:

- banking laws;
- taxation;
- personal property securities;
- intellectual property laws;
- criminal laws.

7.59 These laws are summarised below. Some of the justifications that have been advanced for laws that encroach on property rights, and public criticisms of laws on that basis, are also discussed.

Banking laws

Unclaimed money laws

7.60 Laws dealing with unclaimed money have a long history. On a person's death, in default of 'next of kin', the person's personal property would default to the Crown

---

79 *United States Constitution* amend V, the 'due process' provision.
80 *New Zealand Bill of Rights Act 1990* (NZ) s 21.
81 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.
82 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
83 Emphasis added.

as 'bona vacantia' (vacant or ownerless goods). This became, over time, part of the consolidated revenue of the states and territories, with an ability for certain persons to seek ex gratia payments in deserving cases.[84]

7.61 Banking is a head of Commonwealth legislative competence under s 51(xiii) of the *Australian Constitution.* In 1911, the Commonwealth enacted unclaimed money laws analogous to the laws concerning bona vacantia in intestate estates, including the concept of property vesting in the Crown.[85] The *Commonwealth Bank Act 1911* (Cth) provided that all moneys in an account which had not been operated on for 'seven years and upwards' would be transferred to a designated fund and if not claimed for a further ten years, would become the property of the Bank.[86]

7.62 The modern successor to the 1911 Act provision was s 69 of the *Banking Act 1959* (Cth), which provided that, after a designated period, if there have been no deposits or withdrawals from an account, it is deemed 'inactive' and the bank is required to close the account and transfer the balance to the Commonwealth of Australia Consolidated Revenue Fund. The money remains in the possession of the Commonwealth until claimed, which requires an administrative process on behalf of the inactive account holder.

7.63 In 2012, the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012* (Cth) reduced the relevant period to three years. Similar changes were made to first home owner accounts, life insurance and superannuation under the same amending Act.[87]

7.64 The Explanatory Memorandum to the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 asserted that the amendments to the *Banking Act 1959* (Cth) were 'compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights*

---

84 See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [5.31]. The Uniform Succession Laws Project produced a Model Intestacy Bill in 2007. See Ibid [5.12]. See also the discussion of the National Committee recommendations in New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* Report No 116 (2007). The history of the bona vacantia jurisdiction is described in *Brown v NSW Trustee and Guardian* [2012] NSWCA 431 [94]–[112.

85 The Bills Digest concerning the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 notes the origin of the unclaimed money laws in bona vacantia, and also the laws of escheat: Kai Swoboda, Parliament of Australia, *Bills Digest, No 50 of 2012–2013* (November 2012) 5. Escheat was a doctrine concerning land, where bona vacantia concerned personal property. Only the latter would concern bank accounts, as choses in action.

86 Provision was made for the Governor of the Bank, with the consent of the Treasurer, to allow any claim after that period has expired, 'if he is satisfied that special reasons exist for the allowance of the claim': *Commonwealth Bank Act 1911* (Cth) s 51.

87 *First Home Saver Accounts Act 2008* (Cth); *Life Insurance Act 1995* (Cth); *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth). A number of exceptions and different types of rules apply for particular accounts under the *Banking Regulations 1966* (Cth). For example, term deposits and farm management accounts are exempt from s 69 provided the account satisfies the criteria in s 69(1A). Further, children's accounts must remain inactive for at least seven years before they are characterised as unclaimed moneys: reg 20(10).

(Parliamentary Scrutiny) Act 2011'.[88] However, it did not elaborate on this proposition.

7.65 The Hon Bernie Ripoll, the then Parliamentary Secretary to the Treasurer, noted that 'the reforms will ensure this lost money is properly protected so people can get what is rightfully theirs'.[89]

7.66 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the 2012 Bill. It stated that a person's right to property is 'not guaranteed as a freestanding right in the human rights treaties' that fell under its consideration.[90] However, it noted that any 'discrimination in the enjoyment of the right to property' would be contained in a number of human rights guarantees, such as art 26 of the ICCPR.

7.67 Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7.68 The Human Rights Committee applied the three-pronged test set out in Chapter 2. First, the Committee noted that the objective to 'preserve a person's funds from being eroded by fees and charges ... *could be* seen as a legitimate objective'. Secondly, the Human Rights Committee considered that the removal of funds and the procedure in place to reclaim them did have a rational connection to preserving bank account balances. Thirdly, with respect to whether the limitation was proportionate to the restriction, the Committee considered this point less clear:

> The objective advanced is thus to preserve the person's funds from being eroded by fees and charges, which could be seen as a legitimate objective. The removal of funds to the ATO and the establishment of procedures for the reclaiming of those funds as well as the requirement to pay interest on balances, would have the effect of preserving balances. The issue of proportionality is less clear, and the explanatory memorandum does not offer an justification for the dramatic reduction in the period that must elapse before the obligation to transfer the funds to the ATO is activated.
>
> The committee seeks clarification of the basis for determining that the significant reduction in the time which must elapse before funds are required to be transferred is a proportionate means of achieving the objectives pursued by the bill.[91]

---

88 Explanatory Memorandum, Banking Amendment (Unclaimed Money) Bill 2012 (Cth). The Act came into force on 1 July 2013.

89 See The Hon Bernie Ripoll, 'Media Release' (Media Release No 051, 26 November 2012).

90 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Seventh Report of 2012* (November 2012) [1.104].

91 Ibid [1.107].

7.69 The Senate Standing Committee on Economics conducted an inquiry into the 2012 Bill. The Committee endorsed the Bill, arguing that the amendments

> will be of significant benefit to consumers … The amendments will help reunite people with their unclaimed money sooner, and will protect the real value of that money while it remains unclaimed.[92]

7.70 The Committee went on to address concerns that the reduction in the period of inactivity before accounts were treated as unclaimed could potentially lead to moneys that are not genuinely unclaimed being treated as such. However, the Committee considered that the Bill provides an 'appropriate measure of flexibility to address the concerns of financial institutions and protect the interests of consumers as required'.[93]

7.71 In contrast, criticism of the 2012 legislation was reflected, for example, in a press release by the Institute of Public Affairs, that stated:

> People should be able to leave money in bank accounts for as long as they wish without the fear that the government might come along and steal it from them. To do so is an arbitrary acquisition of property by the government. ...
>
> Parents saving for their children's education, young people saving for a home and others putting money aside for retirement are all at risk of losing their savings as a result of these changes ...[94]

7.72 In 2015, following a change of government, amending legislation was introduced.[95]

7.73 The Explanatory Guide to the Exposure Draft Bill set out the reasons for the shift in policy, on the basis of the regulatory burden for authorised deposit-taking institutions (ADIs) and account holders:

> Evidence suggests that many of the accounts that are declared unclaimed and transferred to the Commonwealth are effectively active as the account holder remains aware of them. For example, around 15 per cent of unclaimed funds transferred from ADIs are reclaimed in the same year they are transferred to the Commonwealth. Approximately 50 per cent of all funds transferred to the Commonwealth as unclaimed are reclaimed within two years.
>
> The high proportion of effectively active accounts transferred to the Commonwealth each year under the current provisions increases the regulatory burden of the unclaimed moneys provisions for ADIs and account holders. ADIs have to assess and transfer all accounts with unclaimed moneys to the Commonwealth even though many of the accounts are still effectively active. Once these accounts are transferred,

---

92 Senate Standing Committee on Economics, Parliament of Australia, *Treasury Amendment (Unclaimed Money and Other Measures) Bill 2012* (2012) [3.54]. There was a dissenting report released by the Coalition members of the Committee.

93 Ibid [3.54]–[3.55].

94 Institute of Public Affairs, 'Gillard Government Seizure of Inactive Bank Accounts Is an Attack on Property Rights' (Media Release, 28 February 2013).

95 An exposure draft of the amending legislation was released on 28 May 2015 in the form of the Banking Amendment (Unclaimed Money) Regulation 2015 (Exposure Draft Regulation); Banking Laws Amendment (Unclaimed Money) Bill 2015 (Exposure Draft). Submissions were sought by 26 June 2015.

> account holders have to complete the necessary paperwork and verify their details in order to reclaim their accounts.[96]

7.74 The unclaimed moneys legislation is an example of an interference with vested personal property rights in the form of deposit accounts, forms of choses in action. Such interference has a long history. The period after which the interference occurs, and the process by which a person may seek to reclaim what has been deemed to be 'unclaimed' are both relevant to any consideration of whether the interference is justified. The parliamentary review processes may provide an effective vehicle for the assessment of the justification for any proposed legislation.

Taxation

7.75 The Tax Institute suggested a range of provisions that may be considered as interfering with property rights. The Institute referred in particular to the Commissioner of Taxation's powers to withhold refunds and to attach property.

7.76 The practice of staff of the Australian Taxation Office (ATO) is guided by Law Administration Practice Statements, 'which provide instructions to ATO staff on the way they should perform certain duties involving the application of the laws administered by the Commissioner'.[97]

Withholding refunds

7.77 Under s 8AAZLGA of the *Taxation Administration Act 1953* (Cth), the Commissioner of Taxation has the power to withhold a refund, pending verification of certain information. The Tax Institute suggested that a 'right to a refund' had certain property characteristics and that 'a lay person would see a right to a refund of tax as a practical and important property right'.[98]

7.78 The Tax Institute pointed to a number of 'defects' in the Commissioner's power to withhold a refund that should be addressed:

> The power does not contain a requirement for written notice, giving rise to uncertainty as to the time at which the power has been exercised. There is also uncertainty as to time at which the Commissioner must begin considering entitlement to refund, and when the Commissioner must conclude that consideration.[99]

7.79 The Institute also noted that a taxpayer has limited review rights in relation to the exercise of the Commissioner's power to withhold a refund.[100]

7.80 Section 8AAZLGA of the *Taxation Administration Act* includes a number of matters to which the Commissioner must have regard when considering whether to withhold a refund, including, for example

> (c) the impact of retaining the amount on the entity's financial position;

---

96 *Banking Laws Amendment (Unclaimed Money) Bill 2015—Explanatory Guide* [1.4]–[1.5].
97 Australian Taxation Office, 'Law Administration Practice Statements' (PS LA 1998/1) [1].
98 The Tax Institute, *Submission 68*.
99 Ibid.
100 Ibid. The particular provisions identified were: s 14ZW(1)(aad)(i) and s 14ZYA.

(d) whether retaining the amount is necessary for the protection of the revenue, including the likelihood that the Commissioner could recover any of the amount if the notified information were found to be incorrect after the amount had been refunded.

Attaching property

7.81 The ATO's administrative practices with respect to the collection of tax liabilities is framed within the following expectations:

> We expect tax debtors to pay their debts as and when they fall due for payment because:
>
> - we are not a lending institution or a credit provider
> - we expect tax debtors to organise their affairs to ensure payment of tax debts on time
> - we expect tax debtors to give their tax debts equal priority with other debts.[101]

7.82 The *Taxation Administration Act* includes provisions to facilitate the collection of taxation debts by attaching to property in the hands of third parties through 'garnishee' powers:

> Any third party who pays money to the Commissioner as required by a notice is taken to have been authorised by the tax debtor or any other person who is entitled to all of part of that amount. The third party is indemnified for any money paid to the Commissioner.[102]

7.83 The Tax Institute acknowledged the existence of Practice Statements guiding the ATO's actions in this area, but submitted that 'there is no prior external oversight'. For example, a Practice Statement on enforcement measures provides for the Commissioner to give directions to ATO officers as to the appropriateness, timing of and amounts subject to garnishee notices. The Tax Institute expressed concern with respect to this power in that this direction 'represents the only oversight of this power prior to its exercise, and it occurs within the Commissioner's own office'. It submitted that

> [t]he Commissioner's powers to act without prior external oversight are extraordinary. There are policy reasons for those extraordinary powers, such as the necessity for the Commissioner to move quickly to prevent the withdrawal of funds from Australian shores. However, the existence of these powers makes it essential that there are quick, cost-effective and clearly defined mechanisms for reviewing those decisions once made.[103]

---

101 Australian Taxation Office, 'General Debt Collection Powers and Principles' (PS LA 2011/14) [6]–[7].

102 Australian Taxation Office, 'Enforcement Measures Used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts' (PS LA 2011/18) [98]–[99].

103 The Tax Institute, *Submission 68*.

7.84 While the Practice Statements are for the guidance of ATO staff, they are regularly updated and available online.[104] There are public interest arguments in support of the powers, including the preservation of revenue and encouraging taxpayer compliance, notwithstanding that there may be some interference with property rights. Decisions of the Commissioner are reviewable as administrative decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 39B of the *Judiciary Act 1903* (Cth) and s 75(v) of the *Constitution*.

Personal property securities

7.85 The Personal Properties Securities Register has replaced a number of Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sale, liens, chattel mortgages and security interests in motor vehicles such as the Register of Encumbered Vehicles and the Vehicle Securities Register.[105] As noted above, schemes such as these have rules of priority of interests.

7.86 The Arts Law Centre submitted that the *Personal Property Securities Act 2009* (Cth) encroaches on property rights by determining the circumstances in which an owner of personal property may be deprived of their vested property rights in commercial transactions that are deemed to be arrangements for personal property securities. The Centre drew attention to the impact on individual artists and Indigenous Art Centres of the complexity of the registration system and commercial consignment arrangements.[106]

7.87 A review of the operation of the *Personal Property Securities Act* was conducted in 2014–15 by Bruce Whittaker.[107] One aspect of the review considered commercial consignment arrangements for artworks. Whittaker recommended an amendment to the definition of 'commercial consignment' in s 10(e) of the Act,[108] on the basis that

> a sale of an artwork on consignment through an art gallery is unlikely to give rise to a commercial consignment for the purposes of the Act, and the artist should not need to register a financing statement or take other steps to protect their interest.[109]

7.88 Regular review mechanisms for new statutory schemes provide a way of ensuring that the operation of legislation is meeting its objectives. Whittaker made 394 recommendations for reform of the legislation and advocated that they be implemented 'as a package'.[110] He urged that a collaborative drafting process be conducted, with

---

104 PS LA 2011/18, for example, was issued first on 14 April 2011, and updated on 17 May 2013 and 3 July 2014.

105 See further Australian Financial Security Authority, *Personal Property Securities Register* <www.ppsr.gov.au>.

106 Arts Law Centre of Australia, *Submission 50*.

107 Bruce Whittaker, *Review of the Personal Property Securities Act 2009—Final Report* (2015). The report was tabled on 18 March 2015. A review of the Act was required under s 343.

108 Ibid rec 17.

109 Ibid 73.

110 Ibid [10.1.1].

private-sector input and public consultation, through an exposure draft bill.[111] Whittaker also recommended that whether a further review was needed be considered five years after his review.[112] Regular reviews of such a kind are one mechanism for assessing whether the justifications for legislation still apply.

Intellectual property

Acquisition and the Constitution

7.89 It was claimed in *JT International SA v Commonwealth* that the *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act) interfered with vested intellectual property rights.[113] The TPP Act imposed significant restrictions upon the colour, shape and finish of retail packaging for tobacco products. It prohibited the use of trade marks on such packaging, other than as permitted by the TPP Act, which allowed the use of a brand, business or company name for the relevant tobacco product. In addition, pre-existing regulatory requirements for health messages and graphic warnings remained in place.[114]

7.90 The plaintiff tobacco companies argued that the TPP Act effected an acquisition of their intellectual property rights and goodwill other than on just terms, contrary to s 51(xxxi) of the *Constitution*. The TPP Act was enacted pursuant to the power of the Commonwealth Parliament to make laws with respect to external affairs, giving effect in this instance to the *World Health Organization Framework Convention on Tobacco Control*.[115]

7.91 The High Court held that these statutory requirements for the plain packaging of tobacco did not constitute an acquisition of the intellectual property rights of the cigarette companies in their trademarks, designs and get up.[116] French CJ concluded:

> In summary, the TPP Act is part of a legislative scheme which places controls on the way in which tobacco products can be marketed. While the imposition of those controls may be said to constitute a taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition. That conclusion is fatal to the case of both [tobacco company plaintiffs].[117]

7.92 The case is an illustration of an 'interference' with the enjoyment of vested property rights, in the trade marks held by the plaintiff companies, that did not amount to an acquisition by the Commonwealth invoking the compensation provision under the *Constitution*.

---

111 Ibid [10.1.2].
112 Ibid [10.3].
113 *JT International SA v Commonwealth* (2012) 250 CLR 1.
114 *Tobacco Plain Packaging Act 2011* (Cth) ss 18–19; Tobacco Plain Packaging Regulations 2011 (Cth).
115 *Tobacco Plain Packaging Act 2011* (Cth) s 3(1)(b). See also *World Health Organization Framework Convention on Tobacco Control*, opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005). The legislation also relied on other constitutional powers, as set out in s 14.
116 *JT International SA v Commonwealth* (2012) 250 CLR 1.
117 Ibid [44].

Copyright

7.93 Protection of intellectual property rights was an aspect of property rights identified in the Rights and Responsibilities consultation conducted by the AHRC in 2014.[118] Protection from 'music theft' and online copyright infringement were concerns expressed during the consultation.[119] The *Copyright Amendment (Online Infringement) Act 2015* (Cth), passed on 22 June 2015, is intended to address some of these concerns.[120]

7.94 One stakeholder in this Inquiry drew attention to the ALRC's Copyright report, in recommending a 'fair use' exception to copyright.[121] Dr Lucy Cradduck made a property rights argument from the perspective of the user, in arguing that

> just as authors/owners of copyright have *vested rights* regarding copyright works, so do users of those works—these are the *vested rights* represented in the statutorily created *fair dealing exceptions* to fairly deal with copyright works. These rights are being 'intruded upon' by the ongoing 'advancement' of authors/owners rights 'beyond proper limits' by means of contracting out of the fair dealing exceptions.[122]

7.95 This is essentially an argument for recognising another novel kind of property interest. Such a proposed 'right' has not been identified yet in law. In the AHRC's Rights and Responsibilities consultation, one online survey response suggested that current copyright laws did not provide 'adequate protections for fair use for comment and artistic expression'.[123]

7.96 The Arts Law Centre of Australia also pointed to intellectual property issues, but from the perspective of the copyright owner.

> Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. The recognition and protection of property rights are argued to be essential for promoting the intellectual and cultural development of society. The generally accepted rationale for those property rights is that the income that can be generated from copyright material is the incentive to innovation and creativity.[124]

7.97 Such arguments were traversed by the ALRC in the copyright inquiry and the recommendations are still under consideration by the Australian Government.

---

118 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015).
119 Ibid 44.
120 The *Copyright Amendment (Online Infringement) Act 2015* (Cth) allows owners of copyright to apply to the Federal Court for an order requiring a carriage service provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.
121 Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122 (2014).
122 L Cradduck, *Submission 67*. Cradduck recommended that contracting out of copyright exceptions should be prohibited.
123 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 44.
124 Arts Law Centre of Australia, *Submission 50*.

Proceeds of crime

7.98 Each Australian jurisdiction has legislation concerning the confiscation of the proceeds of crime.[125] An expansion of such laws sought to attach 'unexplained wealth'. As explained by Dr Lorana Bartels:

> Laws of this nature place the onus of proof on the individual whose wealth is in dispute. In other words, in jurisdictions with unexplained wealth laws, it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead, the state places the onus on an individual to prove that their wealth was acquired by legal means.[126]

7.99 The Commonwealth laws include the *Proceeds of Crime Act 1987* (Cth) and the *Proceeds of Crime Act 2002* (Cth). The 1987 Act was developed in consultation with the states and territories 'in what was intended to form a consistent, if not uniform, Commonwealth wide legislative package providing for conviction based forfeiture of property with orders made in one jurisdiction being capable of enforcement in any other'.[127] In its 1999 report, *Confiscation that Counts—A Review of the Proceeds of Crime Act 1987*, the ALRC proposed legislation that is reflected in the 2002 Act, recommending the expansion of the earlier legislation to include a civil forfeiture regime.[128]

7.100 The 1987 Act is a conviction-based forfeiture regime; the 2002 Act, as explained in the Explanatory Memorandum, is 'a civil forfeiture regime, that is, a regime directed to confiscating unlawfully acquired property, without first requiring a conviction'. One particular aspect was the targeting of 'literary proceeds'. As set out in the Explanatory Memorandum to the 2002 Bill:

> The Bill introduces provisions for the forfeiture of literary proceeds, which are benefits a person derives from the commercial exploitation of their notoriety from committing a criminal offence. The expression 'literary proceeds' is intended to include 'cheque-book journalism' related to criminal activity. In general those proceeds tend to fall outside the scope of recoverable proceeds of crime as they are often not generated until after the person has been convicted (and achieved notoriety). The Bill sets out provisions for the confiscation of proceeds derived from the exploitation of criminal notoriety by means of a type of pecuniary penalty order against the person.[129]

7.101 Proceeds of crime legislation and other laws providing for forfeiture of property have a long history. As the ALRC commented in the 1999 report, '[f]orfeiture as a consequence of wrongful action is a concept whose origins in English law can be

---

125 See summary in Lorana Bartels, 'Unexplained Wealth Laws in Australia' (Trends & Issues in Criminal Justice No 395, Australian Institute of Criminology, 2010).

126 Ibid. See also Ch 11.

127 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [1.6], [2.10]–[2.19].

128 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999).

129 Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth).

traced back to antiquity'.[130] The ALRC cited two early examples: the feudal law of 'deodand' (Deo—to god; dandam, to be given), and the felony forfeiture rule.[131] The effect of deodand was 'to render forfeit any instrument or animal that was the cause of accidental death of a person'.[132] With respect to forfeiture, the ALRC cited the common law rule under which the goods and chattels of a person convicted of a felony 'became forfeit to the Crown' and the related concept of 'attainder', 'under which all civil rights and capacities were automatically extinguished on sentence of death upon conviction for treason or felony'.[133]

7.102 With the disappearance of the old common law rules,[134] new ones were developed, such as the rule that prevented a killer from benefiting from the estate of the person killed.[135] In addition, new statutory forms of forfeiture have been introduced: '*in rem* forfeiture laws which permit confiscation of goods employed for, or derived from, illegal activity'.[136] In the Australian context, the *Customs Act 1901* (Cth) was an early Commonwealth example—a modern iteration of the old law of deodand as its focus was upon the goods themselves, rather than upon conviction.[137]

7.103 The *Proceeds of Crime Act 2002* (Cth) was said to implement Australia's obligations under the International Convention for the Suppression of the Financing of

---

130 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.1].

131 The origin of the word 'felony' is referred to by Gageler J in *Attorney-General (NT) v Emmerson* [2014] HCA 13 [103]. As Gageler J points out, there is a difference of view as to its origin: Blackstone, above n 1, vol IV, bk IV, ch 7, 95; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed) vol II, vol ii, 464–465.

132 'This, in turn, had its genesis in the even earlier Anglo-Saxon concept of brana (the slayer) where the object causing death was forfeited and given to the family of the deceased': Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.2]. Deodand became a problem in the age of railways and industrial equipment. It was abolished at the same time as the introduction of a statutory right to seek compensation for wrongful death in Lord Campbell's Act: see Richard Fox and Arie Freiberg, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6 *Australian Journal of Legal History* 1, 36.

133 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.4]. The common law rule required the forfeiture of property in the case of offences punishable by death (the felony forfeiture rule). Dr KJ Kesselring cites two examples from the UK national archives in the public record office: KJ Kesselring, 'Felony Forfeiture in England, *c.* 1170–1870' (2009) 30 *The Journal of Legal History* 201, 201. For a consideration of the old rules see, also, eg, Jacob J Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty' (1973) 46 *Temple Law Quarterly*; Richard Fox and Arie Freiberg, above n 132.

134 *Forfeitures for Treason and Felony Act 1870* 33 & 34 Vict, c 23. The legislation was followed in Australia: see Richard Fox and Arie Freiberg, above n 132, 44–7.

135 See, eg, *Forfeiture Act 1995* (NSW).

136 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.5].

137 Richard Fox and Arie Freiberg, above n 132, 38. Freiberg and Fox trace the customs forfeiture provisions to the reign of Richard II and the attempts to regulate trade and encourage English shipping. To restrict coastal trade to English ships, goods carried on foreign vessels were forfeited. This approach was chosen as it was administratively convenient, and did not require customs staff to have to prove the elements of a crime: 39–41. The authors refer in particular to Lawrence Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering* (Columbia University Press, 1939); Norman Gras, *The Early English Customs System* (Harvard University Press, 1918).

Terrorism, and resolutions of the United Nations Security Council relevant to the seizure of terrorism related property.[138]

7.104 In 2010 the reach of the legislation was expanded to include 'unexplained wealth' provisions.[139] These provisions

> allow the court to make orders with respect to the restraint and forfeiture of assets where the court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired.[140]

7.105 The Revised Explanatory Memorandum said that the expansion of the legislation invoked art 20 of the *United Nations Convention Against Corruption*, entitled 'Illicit Enrichment':

> Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.[141]

7.106 The Commonwealth unexplained wealth regime draws on the Northern Territory and Western Australian experience, but the Commonwealth's scheme is limited to confiscating unexplained wealth derived from offences within Commonwealth constitutional power.[142] In the background to the Commonwealth provisions was an agreement by the Standing Committee of Attorneys-General,[143] in April 2009, to a set of resolutions 'for a comprehensive national response to combat organised crime', including to strengthen criminal asset confiscation by the introduction of unexplained wealth provisions.[144]

7.107 However, proceeds of crime legislation may raise concerns about its breadth. In 2006, Tom Sherman AO, conducted the first independent review of the 2002 legislation, pursuant to the requirement for such a review in s 327 of the Act. He stated:

---

138 Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth).

139 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

140 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 18.

141 *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005). The Convention entered into force on 14 December 2005. See also, Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

142 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

143 This body is now referred to as the Law, Crime and Community Safety Council (LCCSC).

144 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 1. SCAG issued a communiqué on a national response to organised crime. In this communiqué, Ministers agreed to 'arrangements to support the comprehensive national response … to effectively prevent, investigate and prosecute organised crime activities and target the proceeds of organised criminal groups': Standing Committee of Attorneys-General, *Communiqué 6–7 August 2009* <www.lccsc.gov.au>.

> Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community?[145]

7.108 The Law Council submitted to this ALRC Inquiry that civil confiscation proceedings and unexplained wealth proceedings under the *Proceeds of Crime Act 2002* (Cth) 'have the potential to interfere with property rights' and that consideration should be given as to 'whether these schemes contain adequate safeguards to ensure proportionality and that intrusion upon property rights is justified'.[146] Similarly, in the Rights and Responsibilities consultation, concern was expressed particularly about state and territory legislation:

> Property rights may be undermined by disproportionate criminal confiscation laws, which provide for the forfeiture of all assets owned by a person who is a declared 'drug trafficker'. The submission from the Australian Lawyers Alliance noted:
>
> > ... [C]riminal confiscation laws in the Northern Territory and Western Australia are currently grossly disproportional to an offence, and deeply impact upon an individual and their family's rights to own property and for any acquisition to be on 'just terms'.[147]

7.109 In 2014, in *Attorney-General (NT) v Emmerson*, the High Court considered the forfeiture scheme of the Northern Territory. The Northern Territory Court of Appeal had held that a statutory scheme for the forfeiture of property of those convicted three or more times within a 10 year period of drug trafficking was invalid.[148] One ground of alleged invalidity of the scheme was that it provided for an acquisition of property otherwise than on just terms.[149]

7.110 The objectives of the scheme were two-fold: to deter criminal activity and to prevent the unjust enrichment of persons involved in criminal activities. The objects were penal and in addition to punishment imposed in criminal proceedings.[150]

7.111 A majority of the High Court (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) in *Emmerson* upheld the Northern Territory legislation. The Court stated:

> The proper inquiry ... is the subject of the statutory scheme. The question is whether the statutory scheme can be properly characterised as a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe a rule of conduct. That inquiry must be answered positively, which

---

145 Tom Sherman, 'Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)' (Attorney-General's Department, 2006) 37.

146 Law Council of Australia, *Submission 75*.

147 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 46.

148 *Emmerson v DPP* (2013) 33 NTLR 1. Under *Criminal Property Forfeiture Act* (NT) s 94(1). The history of such provisions is described in the judgment of the majority at *Attorney-General [NT] v Emmerson* [2014] HCA 13 [15]–[21].

149 *Emmerson v DPP* (2013) 33 NTLR 1, [100] (Barr J in agreement with Riley CJ).

150 *Attorney-General [NT] v Emmerson* [2014] HCA 13 [37]. It was argued that the penal aspect of the scheme was revenue-raising and played 'no legislative role in the enforcement of the criminal law in relation to drug offences or in the deterrence of such activities'.

> precludes any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures.[151]

7.112 As the Court further explained,

> The provisions comprising the statutory scheme in respect of declared drug traffickers do not cease to be laws with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment. As Dixon CJ said, concerning the customs legislation providing for forfeiture considered in *Burton v Honan*:
>
> > 'once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislative and not for the Judiciary'.[152]

7.113 With respect to the argument that the provisions in their breadth amounted to an acquisition of property without provision of just terms, the Court said that characterising them in this way was 'erroneous':

> It is within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both 'deter' and 'deal with' such activities. The political assessments involved are matters for the elected Parliament of the Territory and complaints about justice, wisdom, fairness or proportionality of the measures adopted are complaints of a political, rather than a legal, nature.[153]

7.114 As the law was considered outside s 51(xxxi), the Court's judgment is an example of an application of the principle of legality in the context of proceeds of crime legislation: the legislature having made its intention clear, the question of assessing things like 'proportionality' were not a matter for the Court, but for the 'elected Parliament'.[154]

7.115 In 2012 the Parliamentary Joint Committee on Law Enforcement recommended strengthening the proceeds of crime legislation further (the 2012 report).[155] The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2014* (Cth) was passed on 9 February 2015 to amend the *Proceeds of Crime Act 2002* (Cth).

---

151 Ibid [80].

152 Ibid [81]; *Burton v Honan* (1994) 86 CLR 169, 180.

153 *Attorney-General [NT] v Emmerson* [2014] HCA 13 [85]. Compare Gageler J who concluded that the dominant character of the laws was one with respect to the acquisition of property, and as such were laws for acquisition otherwise than on just terms: Ibid [140].

154 A clear intention could not have overcome s 51(xxxi), if it applied.

155 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012). Legislation reflecting some of the Committee's recommendations was introduced in November 2012: Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (Cth) sch 1.This Bill lapsed.

7.116 The Parliamentary Joint Committee on Law Enforcement recommended 'major reform of the way unexplained wealth is dealt with in Australia as part of a harmonisation of Commonwealth, state and territory laws'.[156]

> Unexplained wealth legislation represents a new form of law enforcement. Where traditional policing has focused on securing prosecutions, unexplained wealth provisions contribute to a growing body of measures aimed at prevention and disruption. In particular, unexplained wealth provisions fill an existing gap which has been exploited, where the heads of criminal networks remain insulated from the commission of offences, enjoying their ill-gotten gains.[157]

7.117 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee). The Legal and Constitutional Affairs Committee supported the amendments to strengthen the *Proceeds of Crime Act 2002* (Cth), informed by its view that 'serious and organised crime poses a significant threat to Australian communities'.[158]

7.118 The Parliamentary Joint Committee on Law Enforcement made two recommendations of relevance to this chapter that were included in the Bill: one concerning the evidence relevant to unexplained wealth proceedings that could be seized under a search warrant;[159] the other concerning the removal of a court's discretion to make unexplained wealth restraining orders where a person's wealth is over $100,000.[160]

7.119 There are three types of orders that can be sought in relation to unexplained wealth: unexplained wealth restraining orders—s 20A; preliminary unexplained wealth orders—s 179B; and unexplained wealth orders—s 179E.

7.120 The removal of discretion was traversed fully in the 2012 report and by the Legal and Constitutional Affairs Committee. As explained in the 2012 report:

> In the making of final orders for most proceedings under the [*Proceeds of Crime Act*], if the appropriate conditions and tests are satisfied, then the court must make that final order. In the case of unexplained wealth orders, however, the court retains a discretion

156 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) viii.

157 Ibid.

158 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014) [2.43]. There was a single recommendation in the report: to support the passage of the Bill in the Senate: Ibid Rec 1, [2.51].

159 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) rec 5; Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) sch 1 items 27–28.

160 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) recs 12–13; Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) sch 1 items 2, 4, 18.

> and may, rather than must, make the order, even though the CDPP or the agency bringing the application meets all of the requirements.[161]

7.121 The 2012 report recommended that the court's discretion to make a restraining or preliminary unexplained wealth order be removed in cases where the amount of unexplained wealth was more than $100,000.[162] The Legal and Constitutional Affairs Committee supported this approach, noting the additional safeguards in cases concerning unexplained wealth restraining orders and final unexplained wealth orders, which provided that the court may refuse an order if 'it is not in the public interest to make the order':[163]

> In relation to concerns raised in respect of removing the court's discretion to make an unexplained wealth order, the committee considers that the safeguards provided by the bill to retain the discretion where unexplained wealth is less than $100,000 or where it is not in the public interest to make the order are adequate and will reinforce the purpose of the unexplained wealth provisions to target the 'Mr and Mrs Bigs' of organised crime.[164]

7.122 The kinds of concerns addressed by the Legal and Constitutional Affairs Committee are reflected in the submission of the Law Council, which was concerned about there being 'adequate safeguards ... to protect individual rights, or clear limits on the scope of prescribed power'.[165]

7.123 An assessment that takes into account safeguards and issues of proportionality is one that may occur within the parliamentary context, forming part of the scrutiny mechanisms applying to parliamentary bills. This is discussed in Chapter 2. As noted above, the various bills to expand or 'strengthen' the proceeds of crime legislation have been subject to such scrutiny. The 2002 legislation expressly included a review requirement. This is one mechanism for ensuring that the potential width of legislation is reviewed periodically. Since 2010 the confiscation scheme has been expressly subject to the oversight of the Parliamentary Joint Committee on Law Enforcement.[166]

7.124 With the expansion of the legislation in 2015, to achieve a national coordinated approach, a review that considers the operation of the legislation across Australia may be appropriate. Such a review could also take into account issues of proportionality and

---

161 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) [3.183]. The Committee noted that when the original Bill was first introduced in 2009 it did not include a discretion, but it was included by amendments in the Senate.

162 Ibid rec 12. Additional statutory oversight mechanisms were recommended: Ibid rec 13.

163 *Proceeds of Crime Act 2002* (Cth) ss 20A(4), 179E(6).

164 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014) [2.45].

165 Law Council of Australia, Submission No 5 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014). See also Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) rec 13.

166 *Proceeds of Crime Act 2002* (Cth) s 179U. This provision was introduced by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

scope. Specific areas of review may concern safeguards and procedural fairness issues.[167]

Search and seizure provisions

7.125 A number of Commonwealth criminal law provisions may interfere with property rights.[168] The Law Council identified, in particular, search and seizure provisions.[169]

7.126 Under provisions introduced into the *Crimes Act 1914* (Cth) through the *Crimes Legislation Amendment Act 2011* (Cth) electronic equipment may be temporarily removed from warrant premises for the purposes of examination.[170] An executing officer need not inform the person where and when the equipment will be examined if he or she believes on reasonable grounds that having the person present might endanger the safety of a person or prejudice an investigation or prosecution. The Law Council submitted that the 14 day time limit allowed for examination of removed electronic equipment, 'may involve a significant disruption to business and unjustifiably interfere with property rights, if a more proportionate measure is available to achieve the same end'.[171]

7.127 While the Crimes Legislation Amendment Bill 2010 was discussed by the Scrutiny of Bills Committee, there was no comment on these provisions.

7.128 The Law Council also drew attention to pt 1AAA of the *Crimes Act*, which was introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). These provisions allow an Australian Federal Police member or special member to search a property under a delayed notification search warrant without immediate notification to the occupier. The Law Council submitted that, as there is 'only provision for compensation for damage to electronic equipment (section 3ZZCI) rather than other property owned by an individual, questions arise as to whether the scheme is reasonable or proportionate'.[172]

7.129 In reviewing the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Scrutiny of Bills Committee commented that there was a 'potential for a delayed notification search warrant scheme to trespass on personal rights and liberties (by allowing AFP officers to covertly enter and search premises, without the knowledge of the occupier of the premises)'.[173] However, these comments addressed

---

167 These were matters raised during parliamentary committee scrutiny: see, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014).

168 The definition of 'property' in the *Crimes Act 1914* (Cth) is very broad, including 'money and every thing, animate or inanimate, capable of being the subject of ownership': Ibid s 3.

169 Law Council of Australia, *Submission 75*.

170 *Crimes Act 1914* (Cth) ss 3K(3), (3AA).

171 Law Council of Australia, *Submission 75*.

172 Ibid.

173 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 786.

the extension of powers to issue warrants to new categories of legal officers, rather than addressing issues of interference with personal property.

7.130 The Parliamentary Joint Committee on Intelligence and Security's Advisory Report into the Bill also noted that submissions had raised the 'adequacy of compensation' as a concern with the delayed notifications search warrant scheme.[174] The Committee did not make specific recommendations about compensation for the seizure of property.

7.131 The Attorney-General's Department's submission to that Committee's report included the following justificatory comments for pt 1AAA:

> These amendments are a response to the challenge posed by current requirements to notify the occupier of the premises in relation to the execution of a search warrant. Such notification alerts suspects of police interest in their activities, and can disrupt the investigation allowing a person to avoid further detection, conceal or destroy evidence, or notify their associates, who may not yet be known to police. The item introduces a new scheme, limited to terrorism offences, to allow delaying notification of the execution of the warrant. This will give the AFP the significant tactical advantage of allowing an investigation to remain confidential. An application for a delayed notification search warrant will be subject to multiple levels of scrutiny and authorisation. Extensive safeguards will ensure that the Bill balances the legitimate interests of law enforcement in preventing serious terrorism offences with the need to protect important human rights.[175]

7.132 While not specifying which provisions in the Bill act as 'extensive safeguards', it may be understood that they include the threshold for issuing a warrant under pt 1AA of the *Crimes Act*, which provides that a magistrate may issue a warrant to search premises where there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, any evidentiary material at the premises.[176] Sections 3F and 3J outline the things that are authorised by the search warrant and the powers of executing officers. Section 3M provides that the owner be afforded compensation for damage to equipment sustained in the execution of a warrant, in some circumstances. Powers of search and seizure relating to terrorist acts and offences are subject to a sunset clause.[177] The inclusion of such a clause is one way of counterbalancing concerns about potential encroachment on rights—by giving it a limited duration.

7.133 A further aspect of search and seizure powers raised by the Law Council concerns s 35K of the *Australian Security and Intelligence Organisation Act 1979* (Cth) which excuses the Commonwealth from liability to pay a person compensation for property damage in the course of, or as a direct result of, a special intelligence operation. The Law Council submitted that

---

174 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter–Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014) [2.49].

175 Attorney-General's Department, Submission No 8 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014* (2014).

176 *Crimes Act 1914* (Cth) s 3E(1).

177 Ibid s 3UK.

> [t]his may not be justified in many cases as a matter of national security if, for example, the property is owned by a third party or becomes damaged incidentally to the special intelligence operation. Further, precluding payment of compensation tends to increase the likelihood that such an encroachment is disproportionate.[178]

7.134 Section 35K was also introduced by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The Scrutiny of Bills Committee requested information from the Attorney-General as to whether the payment of compensation in respect of damage to property is consistent with that taken in relation to other controlled operations scheme. The Committee did not note a response. The Explanatory Memorandum to the Bill also did not provide a justification for s 35K, noting only that 'there remains scope for the payment of compensation to aggrieved individuals in appropriate cases'.[179]

7.135 A number of aspects of counter-terrorism legislation have been raised by stakeholders in this Inquiry, as well as through the parliamentary scrutiny processes. Some of these concerns may prompt further review.

Justifications for interferences

7.136 The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest.

7.137 Protocol 1, Article 1 of the *European Convention* provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

7.138 Bills of rights and international law commonly provide exceptions to the right not to be deprived of property, usually provided the exception is reasonable, in accordance with the law, and/or subject to just compensation.[180] For example, the Fifth Amendment to the *United States Constitution* provides:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[181]

7.139 The compensation on just terms provision in the *Australian Constitution* is considered above.

---

178 Law Council of Australia, *Submission 75*.

179 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

180 See, *New Zealand Bill of Rights Act 1990* (NZ) s 21; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

181 *United States Constitution* amend V.

7.140 There are many laws and regulations that interfere with property rights. Laws limit land use to protect the environment, to balance competing private interests or for the public interest.[182] Other laws might regulate the content and advertising of products, such as food, drinks, drugs and other substances, to protect the health and safety of Australians. Many such laws will be 'justified'.

7.141 In the Issues Paper, the ALRC invited submissions identifying those Commonwealth laws that interfere with property rights and that are *not* justified, explaining why these laws are not justified. The ALRC also asked what general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified.[183]

7.142 The Law Council submitted that additional criteria for justifying encroachments on property rights might be whether:

> (a) the public interest in acquisition, abrogation or erosion of the property right outweighs the public interest in preserving the property right; and
>
> (b) is the acquisition, abrogation or erosion of the property right lawful.[184]

7.143 The Arts Law Centre of Australia recommended the application of the balancing process described by French CJ in *JT International SA v Commonwealth*. His rejection of the claim by the plaintiff tobacco companies of 'acquisition', such as to attract compensation under s 51(xxxi) of the *Constitution*, reflected

> a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs.[185]

7.144 The Arts Law Centre submitted that the criteria should also include an assessment of whether the law that 'interferes' with vested property rights is implemented and operated in practice in the most optimal way available.

> It is possible that what are otherwise justified public purposes and public benefits to be gained from an 'interference' with vested property rights are not implemented or operated in the optimum manner possible in the circumstances.[186]

Conclusions

7.145 A number of Commonwealth laws may be seen as interfering with vested personal property rights.

7.146 In the constitutional context, the central issue is whether the particular interference by Commonwealth laws amounts to an 'acquisition' by the Commonwealth other than on just terms under s 51(xxxi) of the *Constitution*, which

---

182 See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

183 See Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Questions 6–1, 6–2.

184 Law Council of Australia, *Submission 75*.

185 *JT International SA v Commonwealth* (2012) 250 CLR 1, [43].

186 Arts Law Centre of Australia, *Submission 50*.

may lead to the invalidity of laws. For owners of property rights, actions through Commonwealth laws may not amount to an acquisition, so as to trigger the compensatory provision in s 51(xxxi), but they may nonetheless be regarded as an 'interference'. Most of such concerns arise in the context of real property rights, which are considered in the next chapter.

7.147 With respect to personal property rights, the key areas of concern examined in this chapter have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. With respect to unclaimed money laws, these are the subject of an amending bill at the time of writing.

7.148 The width of the proceeds of crime legislation is one area that may require further consideration. The 2002 Act provided for a review, which took place in 2006. The further expansion in 2015 suggests that another review of the *Proceeds of Crime Act 2002* (Cth) should take place in addition to ongoing scrutiny of the Commonwealth legislation by the Parliamentary Joint Committee on Law Enforcement. As the expansion and coverage of this legislation was undertaken as a national initiative, with both the Commonwealth and states and territories involved, any such review would need to take into account the scheme as a whole and in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*.

8. Property Rights—Real Property

Contents

The common law protection of real property

8.1 This chapter is about the common law protection of vested property rights in land (real property). The chapter builds on the discussion in Chapter 7 and discusses how vested property rights in land are protected from statutory encroachment; laws that interfere with rights in land; and how such laws might be justified. As noted in Chapter 7, the common law has long regarded a person's property rights as fundamental, and 'property rights' was one of the four areas identified of concern in the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission in 2014.[1]

8.2 In Chapter 7, reference was made to the case of *Entick v Carrington* which concerned trespass in order to undertake a search—an interference with real property in the possession of another. Rights such as those protected by the tort of trespass to land have long been exercisable even against the Crown or government officers acting outside their lawful authority. In *Plenty v Dillon*, Mason CJ, Brennan and Toohey JJ

1 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 8.

said that the principle in *Entick v Carrington* 'applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons'.[2]

8.3 Similarly, in *Halliday v Nevill*, Brennan J said:

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.[3]

8.4 Implicit in this statement of the law is the recognition that the law—common law or statute—may authorise entry onto private property. Examples of such statutes are discussed in Chapter 17, which deals with laws authorising what would otherwise be a tort.

8.5 The protection of the landowner was so strong that protection of uninvited entrants from intentional or negligent physical injury by occupiers was slow to develop. It was only in 1828, in *Bird v Holbrook*, that the courts declared unlawful the deliberate maiming of a trespasser, albeit only if it was without prior warning.[4]

Protections from statutory encroachments

8.6 As outlined in Chapter 7, property rights find protection in the *Australian Constitution*, through the principle of legality at common law, and in international law.

Australian Constitution

8.7 Section 51(xxxi) of the *Constitution* concerns acquisition of property on just terms.[5] Section 100 of the *Constitution* is also relevant to the issues considered in this chapter.[6] It provides that:

---

2 *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). Their honours then quoted Lord Denning adopting a quotation from the Earl of Chatham. '"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement." So be it—unless he has justification by law': *Southam v Smout* (Unreported, [1964] 1 QB) 308, 320.

3 *Halliday v Neville* (1984) 155 CLR 1, 10 (Brennan J). Brennan J was quoted in *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). In *Plenty v Dillon*, Gaudron and McHugh JJ said 'If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official': Ibid 655.

4 *Bird v Holbrook* (1828) 4 Bing 628; *Southern Portland Cement v Cooper* [1974] AC 623 (PC); *Hackshaw v Shaw* (1984) 155 CLR 614. For negligent injury, trespassers were at first owed no duty of care; then, after *Southern Portland Cement v Cooper*, only a duty of common humanity. The High Court of Australia in *Hackshaw v Shaw* recognised a limited duty of reasonable care when there was a real risk that a trespasser might be present and injured: *Southern Portland Cement v Cooper* [1974] AC 623 (PC); *Hackshaw v Shaw* (1984) 155 CLR 614.

5 Chapter 7 considered the application of this provision to Commonwealth laws concerning personal property. This chapter focuses upon real property.

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

8.8 Lorraine Finlay has argued that 'the "just terms" guarantee in s 51(xxxi) in fact offers only limited protection to property rights in Australia, with there being two main limitations to its efficacy—one structural, and the other interpretive'.[7] The structural limitation is that it does not extend to state governments.[8] As Latham CJ observed in *PJ Magennis Pty Ltd v Commonwealth*, state parliaments do not have a constitutional limitation equivalent to s 51(xxxi) of the *Australian Constitution*: '[t]hey, if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'.[9] However, states are able to, and often do, provide compensation even though there is no constitutional requirement for them to do so. On some occasions the Commonwealth has used its influence to encourage states to do so.[10]

8.9 The Commonwealth has imposed a requirement for just terms for any acquisition of property on both the Northern Territory and the Australian Capital Territory in their respective self-government statutes.[11] The High Court in *Wurridjal v Commonwealth* overruled *Tau v Commonwealth*,[12] which was long standing authority for the proposition that s 122 of the *Constitution* (the so-called 'territories power' which confers power on the Commonwealth Parliament to make laws for the government of the territories) confers power to acquire property which is unconstrained by the requirement for just terms.[13]

8.10 Finlay sees the other limitation to the efficacy of s 51(xxxi) as stemming from the way that the provision requires an 'acquisition', 'with the result that the just terms guarantee can effectively be side-stepped by the Commonwealth Government if it limits or restricts property rights in a manner that does not amount to an actual acquisition'.[14]

---

6 For example, in the *Lee* litigation which is discussed later in the chapter, Mr Lee and Mr Gropler sought, among other things, damages from the alleged abridgment of their reasonable use of waters of rivers. See *Lee v Commonwealth* (2014) 220 FCR 300.

7 Lorraine Finlay, 'The Attack on Property Rights' (The Samuel Griffith Society, 2010) 23 <http://samuelgriffith.org.au/>.

8 Ibid.

9 *PJ Magennis Pty Ltd v Commonwealth* 80 CLR 382, 397–8.

10 See, eg, *Native Title Act 1993* (Cth) s 20(1). The states and territories are liable to pay compensation when their acts extinguish native title.

11 *Northern Territory (Self-Government) Act 1978* (Cth) s 50; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a).

12 *Tau v Commonwealth* (1969) 119 CLR 564.

13 *Wurridjal v Commonwealth* (2009) 237 CLR 309, [46]–[86] (French CJ); [175]–[189] (Gummow and Hayne JJ); [287] (Kirby J). French CJ explained the result of applying s 51(xxxi) to s 122: 'The result of its application to s 122 is that no person anywhere within the Commonwealth of Australia can be subjected to a law of the Commonwealth acquiring the property of that person other than on just terms. It will also protect States where laws made under s 122 effect or authorise the acquisition of State property': Ibid [79].

14 Finlay, above n 7, 23.

Takings v regulation

8.11 In the context of arguments about s 51(xxxi), a distinction is often made between a 'taking' (that is, an 'acquisition') and a 'regulation'. The regulation of land use for a number of purposes, particularly related to the environment and biodiversity, has 'produced a strong backlash' from landowners, arguing that such measures are effectively 'takings',[15] and therefore amenable to compensation.

8.12 What amounts to the acquisition of property is a subject of lively academic debate. O'Connor, for example, identifies three propositions underpinning property rights arguments, influenced to a great extent by analysis of the US takings clause:

> The first is that the property rights of a landowner are not just a unitary estate or interest in land, but a bundle of rights which include the rights to use and enjoy the land, to dispose of or alienate it, and to exclude others from it. ... Gray calls this an 'atomic' conception of property, ...
>
> The second proposition is premised on the idea of property as 'an ad hoc collection of rights in resources'. It holds that any regulation which curtails one or more of the rights in the owner's bundle is a prima face 'taking' ['conceptual severance']. ...
>
> The third proposition is that compensation must be paid whenever a disproportionate burden has been unfairly imposed on some citizens for the benefit of the public as a whole ['distributional fairness']. ...[16]

8.13 A further issue concerns substances that sit within the Crown prerogative. This has arisen particularly in the context of states. If a landowner does not own minerals in that land, for example, then a taking of them is not compensable.

8.14 An illustration of the width of the power of states is the acquisition of coal. At common law the Crown had the right to 'royal' minerals—gold and silver—with the power to enter, dig and remove them.[17] This common law position also became the law in the Australian colonies.[18] In *Wade v New South Wales Rutile Mining Co Pty Ltd* (*Wade*), Windeyer J commented that

> Gold, the 'royal metal', has always had a special position in law: a position which silver is perhaps entitled to share. Gold in the Australian colonies belonged always to the Crown, whether it was in Crown land or in lands alienated by the Crown. No express reservation was necessary to preserve the Crown's rights. They depended upon prerogative rights recognized by the common law. Thus gold did not pass by a Crown grant of the land in which it lies. If this were once debatable, all doubts were dispelled, for Victoria, by the decision of the Privy Council in *Woolley v Attorney-General (Vict)* (1877) 2 App Cas 163. And in New South Wales the position was expressly recognized by the legislature when in the Preamble to the Mining on Private Lands Act of 1894 it was recited that

---

15 See Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50. O'Connor describes the development of the property rights movement in the US from the 1990s and the theoretical arguments supporting it, particularly Locke's writings and the proposition that 'the social contract from which civil government derives its power does not authorise it to take away any part of property rights of citizens without compensation': 51.

16 Ibid 53–4.

17 *The Case of Mines* (1568) 1 Plowd 310, 336.

18 *Woolley v A-G (Vic)* (1877) 2 App Cas 163.

> ... certain other lands have from time to time been alienated without express reservation of any minerals which might afterwards be found therein, but having regard to the well established laws of England whereby it has been held from time immemorial that the royal metal gold does not pass from the Crown unless by express conveyance in the grant of such lands ...[19]

8.15 *Cadia Holdings Pty Ltd v New South Wales* concerned a mine in which gold and copper were intermingled and could not be mined separately.[20] The High Court held that by the time the common law was received in New South Wales the prerogative rights described in *Wade* had been abridged by s 3 of the *Royal Mines Act* 1688 (Imp), so that where copper and gold were intermingled in the ore there was no 'mine of gold' for the purposes of the prerogative.

8.16 *Wade* concerned mining leases under the *Mining Act 1906* (NSW). Under that Act a mining warden could grant an authority to enter private lands and search for minerals not reserved to the Crown. Rent and compensation were required to be paid to the landowner; and royalties for minerals taken had to be paid. As Windeyer J remarked, 'the obvious policy of this is to encourage mining', but

> [t]he means adopted involve a further, and quite radical, interference with the common law rights of a landowner. Even when he owns the minerals in his land he must suffer them to be mined unless he be active in mining them himself.[21]

8.17 Windeyer J referred to

> the elementary principle of the common law that a freeholder for an estate of inheritance is entitled to take from his land anything that is his. Except for those minerals which belong to the Crown, the soil and everything naturally contained therein is his.[22]

8.18 In the Australian colonies minerals were 'reserved' in Crown grants of land, reflecting the Crown right to minerals. The general pattern in each jurisdiction was 'to progressively reserve various minerals from Crown grants by legislation'.[23] What amounts to 'minerals' is a matter of construction. Professor Peter Butt explains:

> A reservation of 'minerals' is widely construed. It includes whatever substances are encompassed by the vernacular meaning of that word as used in the mining world, the commercial world, and by landowners, at the time of the Crown grant. Within that meaning, it includes even minerals of a kind which, at the time of the Crown grant, were thought unworthy of extraction or were technologically incapable of extraction.
>
> More recent Crown lands legislation attempts to obviate arguments over the meaning of 'minerals' by defining the term. These statutory definitions are very wide—so wide

19 *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 186 (Windeyer J).
20 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.
21 *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 195.
22 Ibid 184 (Windeyer J). This case concerned the right to mine for zircon, rutile and ilmenite on lands in NSW.
23 Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 2002) [15.18]. See also JRS Forbes and Andrew Lang, *Australian Mining and Petroleum Laws* (Butterworths, 1987).

> that one writer has commented that modern landowners may not even own the soil on their land.[24]

8.19 However the practice was not consistent until 1861, with the enactment of the *Crowns Land Alienation Act*. As Professor Butt explains:

> Until 1824, Crown grants in New South Wales did not reserve minerals to the Crown. From 1828 until 1844 Crown grants variously reserved gold, silver and coal. From 1844 until 1850 only coal was reserved. In 1850 the Crown rescinded all former reservations of coal, except in land within a city, township or village; reservations of coal continued to be made, however, in relation to urban land. From 1850 until 1861 Crown grants generally did not reserve minerals (although there were some exceptional cases).[25]

8.20 This has meant that the dates of the original Crown grants and the particular legislation in each jurisdiction 'assume great significance in determining in each instance whether a landowner owns a particular mineral beneath her or his land'.[26]

8.21 On 1 January 1982, the *Coal Acquisition Act 1981* (NSW) vested all coal in the Crown, with provision made for payments of compensation. At the time the legislation was passed there were substantial coal reserves in the Hunter Valley that were still in private ownership and there were major coal mining developments planned.[27] Moreover, the rate of compensation was capped under the legislation.[28] As explained by Tony Wassaf:

> This meant that owners of those [privately owned] reserves were set to receive substantial royalties from those developments. The Government decided that it would be better for the State if the Crown received those royalties rather than the private owners.[29]

8.22 The validity of this legislation was tested in *Durham Holdings Pty Ltd v New South Wales*.[30] It was argued that the capping of compensation amounted to the denial of 'just' or 'adequate' compensation and as such was invalid. As Blackshield and Williams point out, '[i]f the acquisition had arisen under a Commonwealth statute, it would have breached the requirement in s 51(xxxi) of the Constitution that such

---

24 Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [218].

25 Ibid [217].

26 Bradbrook, MacCallum and Moore, above n 23, [15.18]. See also Adrian J Bradbrook, 'Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land' (1987) 11 *Adelaide Law Review* 462.

27 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimation' (2001) 20 *Australian Mining and Property Law Journal* 10, 10.

28 Wassaf explains that '[t]his meant that owners of those [privately owned] reserves were set to receive substantial royalties from those developments. The Government decided that it would be better for the State if the Crown received those royalties rather than the private owners': Ibid. Wassaf explains that the specific cap of the compensation payable to BHP, CRA and RGC (Durham Holdings was the RGC subsidiary) was made on the basis that budgetary restraint was required and these companies could afford it: Ibid 11.

29 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimation' (2001) 20 *Australian Mining and Property Law Journal* 10, 10.

30 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

acquisitions be made on "just terms"'.[31] The argument drew upon the judgment of the court in *Union Steamship Co of Australia Pty Ltd v King*, in leaving open the possibility that there was a constitutional limit in state power founded on 'rights deeply rooted in our democratic system of government and the common law'.[32]

8.23 The Court of Appeal rejected this argument and the High Court refused special leave to appeal. Gaudron, McHugh, Gummow and Hayne JJ held that:

> What the Court of Appeal said is true of the application to this Court, namely:
>
> The [applicant] was unable to point to any judicial pronouncements, let alone a decided case, which indicated, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia. It advocated the development of the common law, by the recognition of such a principle for the first time in this case.
>
> The applicant sought to rely upon statements respecting the common law in decisions respecting the powers of several of the states of the United States before the inclusion in those written state constitutions of guarantees respecting the taking of property. However, what would be involved if the applicant's submission were accepted would not be the development of the common law of Australia. Rather, it would involve modification of the arrangements which comprise the constitutions of the states within the meaning of s 106 of the Constitution, and by which the state legislatures are erected and maintained, and exercise their powers.
>
> ... Further, whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description 'just' or 'properly adequate' falls outside that field of discourse.[33]

8.24 The legal result was that the states could acquire property without having to pay just compensation.

8.25 The 1988 referendum included a proposed law to alter the Constitution, amongst other things, 'to ensure fair terms for persons whose property is acquired by any government'. The vote in favour of the resolution was 30%.[34] As one commentator remarked, the 'true level of public support for the idea was, however, impossible to gauge due to the way in which the question was presented as part of a larger package'.[35]

---

31 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) [16.24].

32 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).

33 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10. Kirby J, while agreeing with the outcome, suggested that there may be a constitutional limit with respect to 'extreme' laws: 431. He referred to this, speaking extra-curially: Michael Kirby, 'Deep Lying Rights—A Constitutional Conversation Continues' (The Robin Cooke Lecture, 2004) 19–23.

34 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimation' (2001) 20 *Australian Mining and Property Law Journal* 10, 12.

35 Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth-State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15 *Australian Indigenous Law Review* 74, 74.

8.26 The Law Council of Australia submitted that 'the lack of any constitutional or general protection from acquisition other than on just terms under State constitutions or statutes' amounted to 'a significant gap in property rights protection'.

> In some cases, this has resulted in States compulsorily or inadvertently acquiring or interfering with property rights, without any corresponding compensation for the right-holder.[36]

8.27 The Law Council stated that an area of concern was a utilisation by the Commonwealth of this limit in constitutional compensatory provisions in the states:

> Of particular concern to this Inquiry is where this may have occurred due to intergovernmental arrangements or agreements between the Commonwealth and States, which require or encourage States to interfere with property rights but with no corresponding duty to compensate on just terms.
>
> In such cases, there has been no remedy available to the land-owner because the scheme might have been established informally, through mutual agreement, rather than through a federal statute.[37]

8.28 The Law Council drew attention to *Spencer v Commonwealth*,[38] as appearing to demonstrate a possible inconsistency in relation to protection of property rights under Australian law.[39] The plaintiff, Peter Spencer, owned a farm in New South Wales. He claimed that the restrictions on the clearing of vegetation imposed on his farm by the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW)—in furtherance of agreements between New South Wales and the Commonwealth—constituted an acquisition of property other than on just terms pursuant to s 51(xxxi) of the *Constitution*.[40]

8.29 Under the *Natural Resources Management (Financial Assistance) Act 1992* (Cth), the Commonwealth may enter into an agreement with a state to provide financial assistance in respect of projects jointly approved by the relevant Commonwealth and State Ministers or specified in the agreement.[41] The *Natural Heritage Trust of Australia Act 1997* (Cth) established the Natural Heritage Trust of Australia Account, one purpose of which is to conserve remnant native vegetation.[42] Pursuant to an agreement with the Commonwealth in 1997, the state of New South Wales undertook to enact native vegetation conservation legislation. In 1997 the *Native Vegetation Conservation Act 1997* (NSW) was introduced, restricting the clearing of native vegetation on land. Further agreements provided for compensation to assist where property rights were lost, which were to be addressed in developing catchment or regional plans.

---

36 Law Council of Australia, *Submission 75*.
37 Ibid.
38 *Spencer v Commonwealth* (2010) 241 CLR 118.
39 Law Council of Australia, *Submission 75*.
40 The relationship between the various Acts and agreements is set out in the judgment of French CJ and Gummow J: *Spencer v Commonwealth* (2010) 241 CLR 118 [5].
41 *Natural Resources Management (Financial Assistance) Act 1992* (Cth) s 5(1).
42 *Natural Heritage Trust of Australia Act 1997* (Cth) s 10(a).

8.30 Mr Spencer argued that his property acquired pursuant to this scheme included carbon sequestration rights. Such a right is defined in New South Wales legislation as a right to the 'legal, commercial or other benefit ... of carbon sequestration by any existing or future tree or forest on the land after 1990'.[43] It is also deemed to be a profit à prendre, a defined interest in land.[44] Mr Spencer alleged that, by reason of the state legislation, he had been prevented from clearing native vegetation on his land, which amounted to an acquisition of his property. His inability to clear his land rendered it commercially unviable. He argued that the scheme between the Commonwealth and New South Wales was designed to avoid the 'just terms' constraint on the exercise of legislative power under s 51(xxxi) of the *Constitution*.

8.31 The Federal Court rejected Mr Spencer's claim. The High Court granted special leave to appeal. French CJ and Gummow J stated:

> The case which Mr Spencer seeks to raise potentially involves important questions of constitutional law. It also involves questions of fact about the existence of an arrangement between the Commonwealth and the State of New South Wales which may justify the invocation of pre-trial processes such as discovery and interrogatories. The possible significance of those questions of fact has become apparent in the light of this Court's judgment in *ICM Agriculture Pty Ltd v The Commonwealth ...* , which had not been delivered when the primary judge and the Full Court delivered their judgments.[45]

8.32 The decision in *ICM Agriculture Pty Ltd v Commonwealth* is discussed in detail below in relation to water rights. For present purposes it is relevant to note that the challenge was to a funding agreement (and related legislation) under which the Commonwealth had paid financial assistance to New South Wales. While the claim failed, the High Court held that a grant under s 96 of the *Constitution*—which relevantly provides that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'—cannot be made on terms and conditions that may require a state to acquire property on other than just terms.[46] Hayne, Kiefel and Bell JJ noted that a law may contravene s 51(xxxi) 'directly or indirectly, explicitly or implicitly'.[47] Further, French CJ, Gummow and Crennan JJ indicated that the limitation in s 51(xxxi) may extend to executive action.[48] These comments suggest awareness by the High Court of the need to consider the indirect and implicit effect of legislation, and grants and executive actions in relation to s 51(xxxi).

8.33 The Law Council stated:

> While, the [*Spencer*] case was struck out by the Federal Court and Full Federal Court as not having reasonable prospects of success, the High Court ruled that the Federal Court had erred in finding that the case did not have reasonable prospects of success

---

43 *Conveyancing Act 1919* (NSW) s 87A.
44 Ibid s 88AB.
45 *Spencer v Commonwealth* (2010) 241 CLR 118 [4].
46 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [46] (French CJ, Gummow and Crennan JJ), [174] (Hayne, Kiefel and Bell JJ). See also [138]–[141] (Hayne, Kiefel and Bell JJ).
47 Ibid [139].
48 Ibid [29].

> and referred it back for reconsideration. The case appears to demonstrate a possible inconsistency in relation to protection of property rights under Australian law.[49]

8.34 In June 2010, the Hon Bob Katter MP introduced a private member's Bill, entitled the Constitution Alteration (Just Terms) Bill 2010, into the Commonwealth Parliament. The Bill sought to do two things. First, it sought to alter the *Constitution* so as to extend the constitutional requirement for just terms to 'any restrictions on the exercise of property rights'. Secondly, it sought to alter the *Constitution* so as to 'prohibit state laws acquiring property or restricting the exercise of property rights of any person, except on just terms'.[50] The first reading speech referred to Mr Spencer's legal action.[51]

8.35 As at the time of writing, Mr Spencer's case is before the Federal Court, with Mortimer J scheduled to deliver judgment on 24 July 2015.

8.36 There is no clear boundary between a taking or acquisition of property by government and the regulation of use rights. The way that property rights are envisaged conceptually and politically also drives arguments about which side of the boundary a particular government initiative should fall. O'Connor refers to a 'shifting paradigm of property rights' that is 'increasingly evident in public debates about regulatory changes':

> It used to be assumed that laymen implicitly accepted the molecular conception of property as a 'discrete asset', or the whole package of rights in a thing. We are now seeing evidence, in submissions to government inquiries and even in government documents, that the atomic or bundle of rights paradigm and conceptual severance are gaining wide acceptance among landowners affected by regulation. ... [T]his changing public perception of property can be expected to make a significant difference to the willingness of citizens to tolerate regulatory interference with their property.[52]

8.37 This chapter considers particular areas of concern in Commonwealth laws affecting real property and the rights of landowners.

Principle of legality

8.38 As discussed in Chapter 7, the principle of statutory interpretation now known as the 'principle of legality' provides some protection to vested property rights. Blackstone commented:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land ... Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In

---

49 Law Council of Australia, *Submission 75*.

50 Diane Spooner, '*Property' and Acquisition on Just Terms* <www.aph.gov.au> 1.

51 For further information about the Bill see Diane Spooner, '*Property' and Acquisition on Just Terms* <www.aph.gov.au>.

52 O'Connor, above n 15, 78.

> this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[53]

8.39 In *R & R Fazzolari Ltd v Parramatta City Council*, a case which concerned the Parramatta City Council's attempt to acquire land by compulsory process, French CJ stated:

> Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. ... The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights.[54]

International law

8.40 Article 17(2) of the *Universal Declaration of Human Rights* provides that '[n]o one shall be arbitrarily deprived of his property'.[55] This protection is, however, a limited one.

8.41 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[56] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[57]

Bills of rights

8.42 As noted in Chapter 7, in other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*) expressly added a recognition of property rights in Protocol 1, art 1—'for the peaceful enjoyment of one's possessions'.[58]

---

53 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press reprinted by Legal Classics Library, 1765) vol I, bk I, ch 2, 135.

54 *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [43] (French CJ).

55 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

56 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

57 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

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

Laws that interfere with property rights

8.43 A range of statutory provisions may be characterised as interfering with vested property rights—whether or not this interference may be considered justified.

8.44 The *Lands Acquisition Act 1989* (Cth) is the key piece of legislation concerning Commonwealth acquisition of land. With some exceptions, the Commonwealth cannot acquire an interest in land[59] other than in accordance with the procedures outlined in that Act.[60] The Act provides a detailed process for Commonwealth acquisitions of land[61] and protections—including compensatory mechanisms—for people whose interests in land are adversely affected by a compulsory acquisition.[62] The *Lands Acquisition Act* was largely based on recommendations in the ALRC's report *Lands Acquisition and Compensation*.[63] The Act was designed to modernise Australia's system of compulsory land acquisition. Previously, the law lacked procedures to ensure fairness in decision-making, including 'a mechanism for an individual adversely affected by a decision to compulsorily acquire property to require the acquiring authority to justify publicly the need for, and choice of, their property'.[64]

8.45 A number of Commonwealth laws may be seen as encroaching on real property rights. These include:

- environmental laws;
- native title laws; and
- criminal laws.

8.46 These laws are summarised below. Some of the justifications that have been advanced for environmental laws that encroach on property rights, and public criticisms of laws on that basis, are also discussed.

Environmental laws

8.47 Environmental legislation may be understood as any statute that includes provisions intended 'to protect the environment [including national heritage] and conserve natural resources in the public interest'.[65] There are approximately 60 Commonwealth environment-related statutes in force.[66]

---

59 'Interest in land' is broadly defined as 'any legal or equitable estate or interest in land', a restriction on the use of land, whether or not annexed to other land', or 'any other right (including a right under an option and a right of redemption), charge, power or privilege in connection with the land or an interest in the land': *Lands Acquisition Act 1989* (Cth) s 6(a), (b), (c).

60 Ibid s 21(1).

61 See for example, Ibid pts IV, V, VI. These parts provide procedures for the acquisition of interests in land, as well as pre-acquisition procedures and the right to seek review of a decision to acquire land.

62 See, for example, the compensation scheme in pt VII of the Act.

63 Australian Law Reform Commission, *Lands Acquisition and Compensation*, ALRC Report 14 (1977).

64 Department of the Parliamentary Library (Cth), *Bills Digest*, No 114 of 1988, 24 October 1988, 1.

65 Australian Network of Environmental Defender's Offices, *Submission 60*.

66 See Australian Government, Department of the Environment, 'Legislation' <http://www.environment.gov.au/about-us/legislation>.

8.48 Commonwealth environmental laws may be seen as interfering with real property rights by authorising, for example:

- the compulsory acquisition of property;
- the regulation of land use, development and activities;[67]
- restrictions on the sale or lease of real property;[68]
- actions which adversely affect the 'enjoyment' (for example, search and enter powers), or value of real property;[69] and
- restrictions on the assignment/sale of tradeable resource-use property rights.[70]

8.49 Many environmental planning statutes that may be considered to interfere with property rights are state—not Commonwealth—Acts.[71] While particular concerns have been expressed about the actions of state governments,[72] state legislation is not the concern of this Inquiry.

8.50 The Australian Network of Environmental Defender's Offices (ANEDO) submitted that 'there are currently no Commonwealth environmental laws that unjustifiably interfere with vested property rights'.[73] While some Commonwealth environment-related statutes which may interfere with property rights may be widely accepted in the community as justified, this Inquiry heard particular concerns about the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the *Water Act 2007* (Cth) (*Water Act*).

Compulsory acquisition of property

8.51 Most Commonwealth environmental statutes include an express provision precluding the Commonwealth from compulsorily acquiring property without providing compensation on just terms.[74] While both the EPBC Act and the *Water Act* contain such provisions,[75] concerns have been expressed that these two statutes may unjustifiably interfere with property rights in a way that falls short of triggering invalidity pursuant to s 51(xxxi) of the *Australian Constitution*, as it has been interpreted.

---

67 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15A, 15B, 15C, 16, 17B, 18, 18A, 20, 20A; *Comprehensive Nuclear-Test-Ban Treaty Act 1988* (Cth); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) div 1; *Great Barrier Reef Marine Park Act 1975* (Cth) s 38DD.

68 *Building Energy Efficiency Disclosure Act 2010* (Cth) s 11.

69 *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *National Radioactive Waste Management Act 2012* (Cth) s 11.

70 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); *Water Act 2007* (Cth); *Renewable Energy (Electricity) Act 2000* (Cth).

71 See eg, *Environmental Planning and Assessment Act 1979* (NSW).

72 National Farmers' Federation, *Submission 54*. See also Finlay, above n 7.

73 Australian Network of Environmental Defender's Offices, *Submission 60*.

74 See, eg, *Greenhouse and Energy Minimum Standards Act 2012* (Cth) s 174. See the discussion of s 51(xxxi) in Ch 7.

75 *Water Act 2007* (Cth) s 254; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 519.

EPBC Act

8.52 The EPBC Act is the Australian Government's main piece of environmental legislation. The Act affects a landowner's real property rights by imposing environmental land use restrictions. For example, a person is prohibited from taking an 'action'[76] that

- has or will have, or is likely to have a significant impact on the world heritage values of a declared 'World Heritage property'—s 12(1) (civil penalty);
- results or will result in, or is likely to have a significant impact on the world heritage values of a declared 'World Heritage property'—s 15A(1), (2) (offence);
- has or will have, or is likely to have a significant impact on the ecological character of a 'declared Ramsar wetland'—s 16(1) (civil penalty);
- results or will result in, or is likely to have a significant impact on the ecological character of a 'declared Ramsar wetland'—s 17B(1), (2) (offence);
- has or will have, or is likely to have a significant impact on a 'listed threatened species' that are included in the extinct in the wild, critically endangered, endangered or vulnerable categories—s 18(1)–(4) (civil penalty);
- has or will have, or is likely to have a significant impact on a 'listed threatened ecological community' included in the critically endangered or endangered categories—s 18(5), (6) (civil penalty);
- results or will result in, or is likely to have a significant impact on a 'listed threatened species or a listed threatened ecological community'—s 18A(1), (2) (offence);
- has or will have, or is likely to have a significant impact on a 'listed migratory species'—s 20(1) (civil penalty); and
- results or will result in, or is likely to have a significant impact on a 'listed migratory species'—s 20A(1), (2) (offence).

8.53 The provisions with respect to a World Heritage property, a declared Ramsar wetland and a listed migratory species do not apply if the person has been approved to take the action under pt 9 of the Act; is exempted from needing such approval by pt 4 of the Act; or in certain other circumstances.[77] The Act gives certain, different, circumstances when the offence provisions with respect to a listed threatened species or a listed threatened ecological community (s 18A(1) and (2)) will not apply.[78] The civil penalty provisions with respect to a listed threatened species (s 18(1)–(4)) and a listed threatened ecological community (s 18(5) and (6)) do not have exclusions.

---

76 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 523.

77 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2), 15A(4), 16(2), 17B(4), 20(2) and 20A(4).

78 Ibid s 18A(4).

8.54 Justification for the prohibition of these actions and interference with vested property rights draws primarily on the requirement for an action to have, or be likely to have, a 'significant' impact. The Explanatory Memorandum implicitly suggests that this requirement strikes a balance between an owner's rights and the public interest. For example, in relation to s 12, the Explanatory Memorandum states that

> Not all actions impacting on a world heritage property will have, or are likely to have, a *significant impact* on the *world heritage values* of that property. This clause therefore does not regulate all actions affecting a world heritage property.[79]

8.55 Dr Gerry Bates has commented that the question of significance is 'for subjective determination by the minister'.[80]

8.56 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) considered the provisions of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) but it did not express concerns about any impact on vested property rights.[81] Nor did it express concerns in this regard about a subsequent Bill that, among other things, sought to amend the EPBC Act by imposing strict liability on certain elements of the offences in ss 15A, 17B, 18A and 20A of the *EPBC* Act (outlined above).[82]

8.57 Since the commencement of the EPBC Act in 2000, there have been a number of reviews of the Act and natural resource management more broadly,[83] including an independent review of the Act[84] undertaken pursuant to s 522A.[85] Two of them are of particular relevance to the matters considered in this Inquiry.[86]

---

79 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill (Cth) 23 [23] (emphasis in original). See other examples at [49] ('Not all actions affecting a nationally threatened species or community will have, or are likely to have, a *significant impact* on that species or community'); [59] ('Not all actions affecting a migratory species will have, or are likely to have, a *significant impact* on that species').

80 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2013) 174 [5.71].

81 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 1999* (1999).

82 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Eleventh Report of 2006* (2006). The Committee did express concerns about the imposition of strict liability.

83 Some of these reviews are outlined in National Farmers' Federation, Submission No 136 to 'Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (2009) 4, 7–12; 'The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (Final Report, October 2009) 4, 8. Further, in its submission to this ALRC Inquiry, ANEDO outlined a number of inquiries and consultations that it had been involved in that were concerned with 'cutting green tape', see Australian Network of Environmental Defender's Offices, *Submission 60*.

84 'The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999', above n 83.

85 This section provides that the Minister must cause an independent review, of the operation of the Act and the extent to which the Act's objects have been achieved, to be undertaken within 10 years of commencement and thereafter in intervals of not more than 10 years.

86 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010); 'Impacts of Native Vegetation and Biodiversity Regulations' (Inquiry Report 29, Productivity Commission, 2004).

8.58 The potential for the EPBC Act to encroach on vested property interests is illustrated in *Greentree v Minister for the Environment and Heritage*.[87] The Full Court of the Federal Court upheld the Federal Court's decision that Mr Greentree had taken an action which had a 'significant impact on the ecological character of a declared Ramsar wetland', contrary to s 16(1) of the EPBC Act.[88] The property had been farmed by Greentree Farming (a partnership),[89] which cleared, ploughed and sowed the land.[90] Consequently, the farmer and his company had to pay $150,000 and $300,000 respectively to the Commonwealth, conflicting with Mr Greentree's asserted right to use and enjoy his own property.

8.59 In March 2010, the National Farmers' Federation (NFF) submitted to the Senate Finance and Public Administration References Committee's Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures, that where the operation of the EPBC Act results in landholders' property rights being reduced, the Act should require landholders to be compensated.[91] The Committee reported that

> While the committee does not believe that it is always inappropriate for government to regulate the use or utilisation of private landholdings, there comes a point at which regulation of land may be so comprehensive as to render it of a substantially lower economic value to the landowner. In such circumstances consideration should be given to compensation being provided to the landowner in recognition of this.[92]

8.60 However, the Committee did not make a specific recommendation in this regard.

8.61 In this ALRC Inquiry, the NFF again expressed the view that the degree of interference by the EPBC Act with property rights may be unjustified. The NFF's main argument was that the Act 'is having a significant financial impact on farmers as a consequence of the limitations it places on property development and land use change'.[93] It suggested that the land use restrictions were resulting in adverse economic and environmental outcomes by preventing the effective introduction of modern agricultural technology. For example, it suggested that prohibitions on cutting down isolated paddock trees frustrates precision cropping practices, which may: reduce chemical and fertiliser use, prevent run-off into waterways, lower fuel consumption and mitigate soil loss. In its view, such restrictions—where referral is required—'substantially limit the continued profitability and viability of farms'.[94] It submitted

---

87 *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388.
88 Ibid [45]–[50].
89 Ibid [4].
90 Ibid [45].
91 National Farmers' Federation, Submission No 265 to Senate Finance and Public Administration References Committee, *Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures*, 2010 4.
92 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010) [5.13].
93 The NFF also claimed that the 'complexity' of the Act's operation frustrates farmers from achieving 'optimum value from their land assets': National Farmers' Federation, *Submission 54*.
94 Ibid.

that the fact that 'there is no compensation directly available under the EPBC Act' should be of interest to this Inquiry.[95]

8.62 By contrast, ANEDO submitted that the common law has 'long accepted that government regulation of activities that can occur on private property (for example, restricting water use, land-clearing or requiring development consents) is not an acquisition of property, and therefore does not trigger a right to compensation'.[96] ANEDO cited two cases to support this statement: *Commonwealth v Tasmania*[97] and *ICM Agriculture Pty Ltd v Commonwealth*.[98] Both cases concerned s 51(xxxi) of the *Constitution*, among other provisions.

8.63 In *Commonwealth v Tasmania*, Tasmania argued that the relevant Commonwealth statute and regulations—which prohibited the construction of a hydro-electric dam in an area in south-western Tasmania—were invalid because they constituted an acquisition of property on other than just terms. The state argued that an 'acquisition can occur through the operation of legislation which so restricts the use of land that it assumes the owner's rights for an indefinite period'.[99] An analogous argument could potentially be made by a landowner prevented from carrying out certain activities by the EPBC Act. The High Court, however, did not accept this contention by Tasmania.

8.64 Three of the four Justices who considered the issue rejected Tasmania's argument about s 51(xxxi) of the *Constitution* as they did not consider that there had been an 'acquisition' of property by the Commonwealth. While Mason J observed that the property is 'sterilized' in terms of its potential for use—as the provisions prevented any development of the property without the Minister's consent—he did not consider that the Commonwealth or anyone else had acquired a proprietary interest in the property.[100] Similar views were expressed by Murphy J[101] and Brennan J.[102] Dr Bates has explained this judicial reasoning: 'sterilising this particular form of land use did not ... prohibit other uses to which the property might be put and the Commonwealth had not effectively acquired the property'.[103]

8.65 By contrast, Deane J concluded that there had been an acquisition of property on other than just terms as the 'Commonwealth has, by the Wilderness Regulations, brought about a position where the HEC land is effectively frozen unless the Minister consents to development of it'.[104] His Honour continued:

---

95 Ibid.
96 Australian Network of Environmental Defender's Offices, *Submission 60* citing *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; *Commonwealth v Tasmania* (1983) 158 CLR 1, 145–6.
97 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145–6.
98 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
99 *Commonwealth v Tasmania* (1983) 158 CLR 1, 24.
100 Ibid 145–6.
101 Ibid 181.
102 Ibid 248.
103 Bates, above n 80, 151.
104 *Commonwealth v Tasmania* (1983) 158 CLR 1, 286.

> ... the Commonwealth has, under Commonwealth Act and Regulations, obtained the benefit of a prohibition, which the Commonwealth alone can lift, of the doing of the specified acts upon the HEC land. The range of the prohibited acts is such that the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property...[105]

8.66 Andrew Macintosh and Deb Wilkinson have argued that '[s]everal High Court decisions in the 1990s and early 2000s have cast doubt over the weight of Mason, Brennan and Murphy JJ's findings in the *Tasmanian Dam case*'.[106] It is a matter of ongoing debate about 'exactly where the dividing line for constitutional acquisition lies in relation to laws that regulate natural resources'.[107] They concluded that 'when the EPBC Act goes beyond minor interferences so as to significantly reduce the commercial uses to which property can be applied, or if it deprives property of any commercial use, questions may arise about acquisition'.[108]

8.67 Even if not a compulsory acquisition of property, the interference of the EPBC Act with property rights may still be considered to be unjustified if compensation is not provided. Indeed, the NFF claims that farmers should receive compensation for 'shouldering the burden of providing a public benefit' provided by the EPBC Act.[109]

Water Act 2007

8.68 The Scrutiny of Bills Committee did express some concerns about vested property rights when considering the provisions of the *Water Act*. Specifically, it expressed concern about provisions relating to entry to premises, without warrant, as it considered that they may trespass unduly on personal rights and liberties.[110]

8.69 In this Inquiry, the NFF had a different complaint. It submitted that the *Water Act* has the potential to cause unjustified interferences with property rights. Its two particular concerns were first, that the Act, particularly the Murray-Darling Basin Plan, has the potential to 'erode' farmers' water rights and entitlements without full

---

105 Ibid 287.

106 Andrew Macintosh and Deb Wilkinson, 'Evaluating the Success or Failure of the EPBC Act; A Response to McGrath' (2007) 24 *Environmental and Planning Law Journal* 81, 82. The article they were responding to was Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 *Environmental and Planning Law Journal* 165.

107 Macintosh and Wilkinson, above n 106, 83. See also McGrath, above n 106.

108 Macintosh and Wilkinson, above n 106, 83. O'Connor makes a similar point. 'Landowner lobby groups argue that the effect of Australia's land clearing laws is to make some private land effectively conservation estate, depriving the owners of all economically viable uses. In Australia, as in the US, it is generally accepted that compensation should be paid when regulation crosses that threshold': O'Connor, above n 15, 78. She argues that '[i]n many if not most cases, land affected by clearing restrictions may be suitable for other viable uses'.

109 National Farmers' Federation, *Submission 54*.

110 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (2008) 43–4.

compensation and secondly, that the Murray-Darling Basin Plan's Constraints Management Strategy could potentially result in the flooding of private land.[111]

8.70 With respect to the first issue, the NFF expressed concern that Commonwealth laws 'fail to fully ensure that full compensation provisions are in place for any diminution in water access'. It submitted that '[w]here such action undertaken by government results in diminution of entitlement reliability, water access entitlement holders should be fully compensable at the market rate'. It called for the Commonwealth to provide just compensation 'where States fail to do so'.[112] An access entitlement is 'the long term right to receive annual allocations'.[113]

8.71 The National Water Initiative is an intergovernmental agreement between the Commonwealth and all state and territory governments.

> The States and Territories are to make plans to address any existing overallocation for all river systems and groundwater resources. The use of water for private consumption (such as for irrigation, industry and domestic use) is to require a water access entitlement (such as a water licence), as determined by a State or Territory water plan.
>
> Water access entitlements are to be described as a share of the water available for consumption (the consumptive pool) from a specified water resource. They must be separate from land and will, among other things, be mortgageable, capable of being traded ...
>
> Water plans are to be prepared by States and Territories for surface water and groundwater management units in which water entitlements are issued. They are to provide for secure ecological outcomes by defining appropriate water management arrangements to achieve environmental and other public benefit outcomes ...They are also to ... determin[e] the shares in the consumptive pool, and the rules to allocate water during the life of the plan.[114]

8.72 The *Water Act*, the Murray-Darling Basin Plan and other intergovernmental agreements have developed the approach in the National Water Initiative.

8.73 Water entitlements may constitute a form of personal property. For example, Michael McKenzie has analysed rights under the *Water Management Act 2000* (NSW) and observed that the NSW Government had 'stopped short of explicitly defining water rights under a water access licence as personal property'.[115] He explained that the case law, however, has made it clear that 'whether the water rights amount to property rights depends on the terms of the legislation'.[116] While water entitlements may constitute a form of personal property, they are discussed in this chapter, rather than Chapter 7, because many conceive of rights to water in a non-technical way, as intrinsically related to real property.

---

111 National Farmers' Federation, *Submission 54*.
112 Ibid.
113 Henning Bjornland and Geoff Kuehne, 'Water Soft Path Thinking in Other Developed Economies—Part C: Australia' in David B Brooks, Oliver M Brandes and Stephen Gurman (eds), *Making the Most of the Water We Have: The Soft Path Approach to Water Management* (Earthscan) 220, 223.
114 Westlaw AU, *The Laws of Australia* (at 1 March 2015) 14 Environment and Natural Resources, '14.9 Water' [14.9.570].
115 Michael McKenzie, 'Water Rights in NSW: Properly Property?' (2009) 31 *Sydney Law Review* 443, 462.
116 Ibid.

8.74 With respect to the *Water Act*, as noted earlier, s 254 provides for just terms compensation for any acquisition of property. Further, pt 2 div 4 of the Act, which concerns management of Basin water resources and specifically allocates risks in relation to reductions in water availability, is in effect a compensation regime for losses suffered by the holders of water rights.

8.75 The Murray-Darling Basin Plan is a legislative instrument authorised under the *Water Act*[117] for the purpose of facilitating the integrated management of the Murray-Darling Basin water resources in a way that promotes the objects of the Act.[118] The objects of the Act include the promotion of 'the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes'.[119] For present purposes, key aspects of the *Water Act* include the following:

> The central concept of the *Water Act* is the development of the Basin Plan (Pt 2 div 1).
>
> The Basin Plan must identify water resource plan areas and they must align as far as possible with the areas provided under State legislation for the management of water resources (s 2(1) item 2).
>
> The Basin Plan must establish the maximum long-term annual average quantities of water that can be taken in a sustainable basis from the Basin water resources as a whole and from the water resources of each of the water resource plan areas (s 22(1) item 6). These averages are called SDLs [sustainable diversion limits].[120]

8.76 The Full Court of the Federal Court gave this overview of the *Water Act* in the case of *Lee v Commonwealth*, which involved, among other things, an appeal by two landowners from the Federal Court's rejection of their claim for compensation under s 254 of the *Water Act*—the statutory just terms provision in that Act. Each landowner operated an irrigated horticultural farm that draws water from the Murray River. Before the Federal Court, the landowners had argued that

> by reducing the amount of water they could carry over from one year to the next pursuant to State legislation, and by detrimentally affecting the cost of access to irrigation delivery infrastructure, the value of their farms, and the price at which they were able to sell their water entitlements to the Commonwealth, the Act had effected an acquisition of property otherwise than on just terms, which entitled them to compensation under s 254 of the Act.[121]

8.77 That is, there were essentially four claims in respect of s 254.[122] The Federal Court concluded that the two landowners—Mr Lee and Mr Gropler—had 'no

---

117 *Water Act 2007* (Cth) s 33.

118 Ibid s 20.

119 Ibid s 3(c).

120 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [31]–[34].

121 *Lee v Commonwealth* (2014) 220 FCR 300, 301. The Federal Court commented that the allegations in the amended statement of claim in respect of the s 254 claims 'lack clarity': Ibid [192]. The Court sought to detail the claims at Ibid [193]–[200].

122 Claims in respect to: (1) carryover water; (2) an increase in the cost of access to the irrigation delivery system; (3) a decline in the value of the properties; and (4) a reduction in the price at which the landowners were able to sell their water entitlements to the Commonwealth.

reasonable prospect of prosecuting the s 254 claim successfully'.[123] The focus of discussion in this chapter is the claim concerning carryover water.[124] In respect of this claim, the Federal Court stated that '[i]t is alleged that as a result of the Commonwealth Environmental Water Holder conserving water for environmental use, Mr Lee's entitlement to carryover water will be reduced and the value of his water entitlements has, as a result, been reduced'.[125] The Court continued:

> It seems that these [carryover] entitlements arise under State laws. For the purpose of argument, let it be assumed that those rights were taken from Mr Lee. He still faces the obstacle that there was no acquisition of property from him by any other person. Sections such as s 254 are directed to acquisition, not deprivation.[126]

8.78 The Federal Court found that 'there was no acquisition of property from the appellants and no measurable advantage conferred on the Commonwealth'.[127] The trial judge ordered summary judgment in favour of the Commonwealth and the Murray-Darling Basin Authority in respect of all the claims made in the proceeding.[128]

8.79 On appeal, the Full Court explained that the Federal Court had found the case in respect of s 254 to be analogous to that in *ICM Agriculture Pty Ltd v Commonwealth*, rather than that in *Newcrest Mining (WA) Limited v Commonwealth*, as the appellants had contended.[129]

> His Honour explained ... that the appellants' case was governed by *ICM* and not *Newcrest* 'in that there was no measurable or identifiable advantage conferred on the Commonwealth in consequence of Mr Lee and Mr Groper's alleged loss of carryover entitlements'.
>
> We respectfully agree with his Honour's legal analysis and conclusion, which disclose no appealable error.[130]

---

123 *Lee v Commonwealth* (2014) 220 FCR 300, [221].

124 With respect to the claim that there had been an increase in the cost of access to the irrigation delivery system, the Federal Court explained that the applicants 'seek to claim that the Commonwealth Environmental Water Holder has acquired water entitlements for use for environmental purposes from farmers who previously used the rights to operate irrigation farms' with a consequence that '[t]he costs of maintenance of the infrastructure must be borne by fewer users and as a result the cost for the remaining users is increased': [212]. The Court concluded that this economic consequence did not result in the Commonwealth having acquired any property: [215]. With respect to the claim that there had been a decline in the value of the two properties 'because irrigators in their localities sold out to the Commonwealth and their farms are no longer used as irrigation properties', resulting in the 'Swiss cheese effect' where 'the remaining irrigation farms are left isolated and surrounded by empty blocks which were previously irrigation properties', the Federal Court concluded that such economic consequences 'have not resulted in any acquisition of property by the Commonwealth': [214]–[215]. With respect to the claim that there had been a reduction in the price at which the landowners were able to sell their water entitlements to the Commonwealth, the Federal Court observed that the rights had been sold on the market for the market price—a price which fluctuates—and concluded that '[t]he complaint that Mr Lee and Mr Gropler did not achieve a better price in the market when they sold to the Commonwealth is not a suitable claim under s 254': [220].

125 *Lee v Commonwealth* (2014) 220 FCR 300, [197].

126 Ibid [200].

127 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [15].

128 *Lee v Commonwealth* (2014) 220 FCR 300, [234].

129 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [174]–[175].

130 Ibid [176]–[177].

8.80 The Federal Court had also observed some 'misconceptions'[131] about the landowners' concern that the 'fixing' of the sustainable diversion limits (SDLs) has the effect of reducing their water entitlements 'by around 25% and thereby denying them water to such a degree that their farms are no longer viable'.[132] The SDLs were to come into operation in 2019.[133]

8.81 The Court outlined the Commonwealth Government's policy in relation to the operation of the *Water Act*.[134] It referred to the Sustainable Water Use and Infrastructure Program[135] and the Restoring the Balance in the Murray-Darling Basin program.[136] The first program provided for Commonwealth funding to be used to invest in projects which would improve and modernise irrigation infrastructure so as to address significant water losses caused by leakage and evaporation. The second program provided for the Commonwealth to purchase water entitlements in the Murray-Darling Basin from those who volunteered to sell and then to use that water for environmental purposes. The Court also referred to a Government commitment to '"bridge the gap" between the current diversion levels, being the baseline diversion limits, and the proposed level of diversion reflected in the Basin SDL'.[137] The Court stated of the latter that 'the Commonwealth's intention was to reduce the current diversion level without reducing irrigators' water entitlements'.[138]

8.82 The Court explained that under the policy,[139] the Commonwealth committed to purchase a certain amount of water entitlements from willing sellers in the market and then to use that water for environmental purposes.[140] The remaining irrigators who did not sell their entitlements would retain their same entitlements.[141]

> The reduction in water entitlements for use in irrigation is achieved by devoting the water purchased by the Commonwealth to environmental uses.
>
> ... Whilst government policy may change, the evidence in this case is that the policy means irrigators who retain their entitlements will suffer no loss of entitlement to water as a result of the fixing of the SDLs.[142]

8.83 The Full Federal Court included this extract in the Court's reasons[143] and also recounted the Federal Court's explanation of the Government's policy.[144] The Court granted leave to appeal but dismissed the appeal.[145]

---

131 *Lee v Commonwealth* (2014) 220 FCR 300, [228].
132 Ibid [227].
133 Ibid [225].
134 Ibid [71]–[78].
135 Ibid [73].
136 Ibid [74].
137 Ibid [75].
138 Ibid.
139 Presumably the Restoring the Balance in the Murray-Darling Basin program.
140 *Lee v Commonwealth* (2014) 220 FCR 300, [229].
141 Ibid.
142 Ibid [229]–[230].
143 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [20].
144 Ibid [56]–[61].
145 Ibid [187].

8.84 The application for special leave to the High Court in this case was refused. Keane J remarked:

> Given the findings of the courts below as to the likely and actual operation of the *Water Act* upon the applicants' rights, any adverse effect upon their legal rights is so remote that their standing to challenge the validity of the Act is doubtful ... [146]

8.85 It is useful now to refer to *ICM Agriculture Pty Ltd v Commonwealth* and *Newcrest Mining (WA) Limited v Commonwealth* as the distinction between the two cases was key to the outcome in *Lee* in respect of the s 254 claim.

8.86 In *ICM Agriculture Pty Ltd v Commonwealth*, three landowners commenced proceedings in the High Court claiming that a reduction in their water entitlements amounted to an acquisition of property other than on just terms, contrary to s 51(xxxi). The case did not concern the *Water Act*. Each landowner conducted farming enterprises near the Lachlan River in New South Wales.[147] The land was within the area known as the Lower Lachlan Groundwater System (LLGS).[148] Agricultural enterprises in this area were reliant upon both groundwater and surface water.[149] The case concerned the replacement of bore licences with aquifer access licences under New South Wales legislation. The aquifer access licences reduced the amount of groundwater to which the plaintiffs were entitled—for two plaintiffs by about 70%.[150] The state of New South Wales offered the plaintiffs 'structural adjustment payments' which the landowners considered to be inadequate.[151] The Commonwealth, as represented by the National Water Commission, and the state of New South Wales had earlier entered into a funding agreement which provided that each was to provide equal funds to be used for structural adjustment payments.[152]

8.87 The majority of the High Court decided that the replacement of the bore licences did not constitute an 'acquisition' of property within the meaning of s 51(xxxi). It is important to note that the case concerned groundwater. Since 1966 the right to the use, flow and control of sub-surface water has been vested by statute in the state 'for the benefit of the Crown'[153] and New South Wales legislation imposed a prohibition on access to, and use of, groundwater without a licence.[154] So, while the cancelled bore licences were a species of property,[155] there was no 'acquisition' by New South Wales.[156]

---

146 Transcript of Proceedings, *Lee v Commonwealth* [2015] HCATrans 123 (15 May 2015) 16.
147 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [91].
148 Ibid.
149 Ibid [1].
150 Ibid [6].
151 Ibid [7].
152 Ibid [10]–[11].
153 Ibid [72]–[73] (French CJ, Gummow and Crennan JJ); [108], [124], [144] and [146] (Hayne, Kiefel and Bell JJ).
154 Ibid [58]–[59], [84] (French CJ, Gummow and Crennan JJ); [122]–[123], [144] (Hayne, Kiefel and Bell JJ).
155 Ibid [147] (Hayne, Kiefel and Bell JJ).
156 Ibid [84] (French CJ, Gummow and Crennan JJ), [148]–[154] (Hayne, Kiefel and Bell JJ).

8.88 French CJ, Gummow and Crennan JJ concluded that

> ... in the present case, and contrary to the plaintiff's submissions, the groundwater in the LLGS was not the subject of private rights enjoyed by them. Rather ... it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. ... The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an 'acquisition' by the State in the sense of s 51(xxxi).[157]

8.89 Hayne, Kiefel and Bell JJ concluded that

> Neither the existence, nor the replacement or cancellation, of particular licences altered what was under the control of the State or could be made the subject of a licence to extract. If, as was hoped or expected, the amount of water in the aquifer would thereafter increase (or be reduced more slowly) the State would continue to control that resource. But any increase in the water in the ground would give the State no new, larger, or enhanced 'interest in property, however slight or insubstantial', whether as a result of the cancellation of the plaintiff's bore licences or otherwise.[158]

8.90 By contrast, in his dissent, Heydon J determined that the increase in water in the ground 'will be a benefit or advantage which New South Wales has acquired within the meaning of s 51(xxxi)'.[159]

8.91 In *Newcrest Mining*, the termination of the right to mine was found to constitute an 'acquisition' of property partly because 'there was no other form of land use open to the plaintiff following the sterilisation of that particular form of land use'.[160] The benefit that passed to the Commonwealth was the unexpired term of the mining leases.[161]

8.92 In *ICM Agriculture Pty Ltd v Commonwealth*, French CJ, Gummow and Crennan JJ distinguished the case before them from *Newcrest Mining*:

> To acquire the substance of proprietary interests in the mining tenements considered in that case is one thing, to cancel licences to extract groundwater is another. The mining tenements were interests carved out of the radical title of the Commonwealth to the land in question, and the radical title was augmented by acquisition of the minerals released from the rights of another party to mine them. As Brennan CJ later explained [in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [17]], the property of the Commonwealth had been enhanced because it was no longer liable to suffer the extraction of minerals from its land in exercise of the rights conferred by the mining tenements held by Newcrest.[162]

8.93 As noted earlier, the NFF views a 'diminution' of water access entitlements (caused by the Commonwealth's administration of the *Water Act*), unaccompanied by compensation 'at market rates', as an unjustifiable interference with property rights. However, the judgments in the *Lee* litigation suggest that any diminution of the consumptive pool caused by the Commonwealth under the *Water Act* will be by

---

157 Ibid [84].
158 Ibid [153].
159 Ibid [235]. See [232]–[235].
160 Bates, above n 80, 151 [5.34].
161 Ibid.
162 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [85].

consensual purchase of water entitlements and from water savings associated with investments in more efficient infrastructure. In such circumstances, the argument could be advanced that the Commonwealth was sufficiently concerned about property issues that it implemented a policy that required consensual arrangements which overcame the need for compulsory acquisition and compensation. That is, that it introduced measures to address any unjustifiable interference with property rights. Accordingly, some might say that the operation of the *Water Act* does not amount to an unjustifiable interference with property rights.

Native title laws

8.94 Native title laws were also raised in a submission to this Inquiry.[163] Two reports have been released in 2015 which have outlined consultations about the *Native Title Act 1993* (Cth) (*Native Title Act*) and raise issues of relevance to this Inquiry.

8.95 In 2014, the Australian Human Rights Commission consulted nationally on the protection of human rights and freedoms in Australia. In the subsequent report, the 'freedom to exercise native title' was identified as an issue emerging from the consultation on property rights.

> Consultations with native title holders revealed that they face complex legislative and bureaucratic regulations that impede their capacity to use their native title to achieve economic development. These barriers obstruct the potential for Aboriginal and Torres Strait Islander peoples to build and own houses on their native title lands, and use their native title as a foundation to create and participate in businesses.[164]

8.96 The ALRC conducted an Inquiry into aspects of the *Native Title Act* from August 2013 to April 2015, including national consultations. The final report was released in June 2015.[165] The Terms of Reference asked the ALRC to examine, among other things, whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'.

8.97 Section 223(2) of the *Native Title Act* states that native title rights and interests include, but are not limited to, hunting, gathering, or fishing, rights and interests. That is, the provision provides a non-exhaustive list of some native title rights and interests. The ALRC drew upon the approach to native title rights taken in *Akiba v Commonwealth*[166] and recommended that s 223(2) be amended to confirm that native title rights and interests may comprise a broadly-framed right that may be exercised for any purpose, including commercial or non-commercial purposes where the evidence supports such a finding.[167] The ALRC recommended that the *Native Title Act* should further provide a non-exhaustive list of kinds of native title rights and interests,

163 D Wy Kanak, *Submission 38*.
164 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 42.
165 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015).
166 *Akiba v Commonwealth* (2013) 250 CLR 209.
167 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Rec 8–1, see recommended text for s 223(2)(a).

including trading rights and interests that might be established on the evidence.[168] This part of the recommendation reflects case law where a right to trade has been recognised in principle.[169] The ALRC recommended that the terms 'commercial purposes' and 'trading' should not be defined in the Act.[170]

8.98 The ALRC's recommendations will contribute to the ongoing discussions about how native title holders may be empowered to use their native title to create economic development opportunities.

Criminal laws

8.99 A number of Commonwealth criminal law provisions may interfere with property rights. A number of these are considered in Chapter 7, dealing with personal property.

8.100 There are few criminal offences that may be characterised as interfering with a person's interests in real property.

8.101 In the *Crimes Act 1914* (Cth), s 3ZB empowers a police constable to enter premises to arrest an offender if the constable has a warrant for that person's arrest and has a reasonable belief that the person is on the premises.

8.102 In the *Criminal Code* (Cth), s 105.22 allows the police to enter premises if a preventative detention order is in force against a person and the police have a reasonable belief that the person is in the premises.

8.103 Other Commonwealth statutes also contain offence provisions for preventing entry to land where an officer or other specified person is empowered to enter.[171]

Search warrants to enter premises

8.104 While entry powers for law enforcement authorise what would otherwise be a trespass, they may be considered, broadly conceived, as an interference with real property.

8.105 At common law, whenever a police officer has the right to arrest, with a warrant, they may enter private premises without the occupier's permission in order to execute the warrant.[172] Police powers to enter and search private premises through the issue of search warrants are, however, a relatively modern phenomenon. Historically, courts were not empowered to issue search warrants on private property, unless in relation to the search and seizure of stolen goods.[173]

---

168 Ibid Rec 8–1, see recommended text for s 223(2)(b).

169 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153], [155].

170 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Rec 8–2.

171 See, eg, *Taxation Administration Act 1953* (Cth) s 353–10.

172 Australian Law Reform Commission, *Criminal Investigation*, Interim Report No 2 (1975) [60]. See also, *Handock v Baker* (1800) 2 Bos & P 260.

173 See, eg, *Entick v Carrington* (1765) 19 St Tr 1029. See discussion in Ch 7.

8.106 Where legislation has been passed to derogate from the principle of a person's right to undisturbed enjoyment of their premises, the legislation is to be construed so as not to derogate from the common law right without express words or necessary implication.[174] This is underscored by the principle that there is no common law right for law enforcement to enter private property without a warrant.[175]

8.107 By way of example, s 3ZB of the *Crimes Act* was introduced through the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) which amended the *Crimes Act 1914* (Cth). When introducing the Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (Cth) to the House of Representatives, the then Minister for Justice explained the purpose of the Bill was to implement the recommendations of the Review of Commonwealth Criminal Law, in order

> to make much needed reforms of the law relating to search, arrest and related matters for the investigation of most Commonwealth offences. These areas of the law have been the subject of careful examination by the Australian Law Reform Commission in its report entitled Criminal Investigation, and more recently by the Review of Commonwealth Criminal Law established by Mr Bowen as Attorney-General and chaired by the Rt. Hon. Sir Harry Gibbs. The bill closely follows the recommendations made by the Review of Commonwealth Criminal Law in its fourth and fifth interim reports.[176]

8.108 In the ALRC's 1975 *Criminal Investigation* report, the ALRC wrote that

> A power to enter should be available, first, in order to arrest a person named in a warrant of arrest and reasonably believed to be on the premises, and, secondly, where no warrant exists, to accomplish the lawful arrest of a person reasonably believed to have committed a serious offence and reasonably believed to be on the premises.[177]

8.109 In light of this commentary, s 3ZB appears to be fairly uncontroversial.[178]

Justifications for encroachment

8.110 Arguably there are a number of laws that interfere with real property rights. This section focuses on justifications which have been used with respect to environmental laws, as these laws generated the most debate among stakeholders in this Inquiry.

8.111 This Inquiry heard from two groups of stakeholders: those who emphasised an environmental perspective and those who emphasised a private property perspective. The NFF represented the views of those who emphasised a private property

---

174 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (The Court).

175 *Entick v Carrington* (1765) 19 St Tr 1029.

176 Commonwealth, *Parliamentary Debates*, House of Representatives, Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (Cth) 3 May 1994 (Minister Keen). These aims are also reflected in the Explanatory Memorandum, Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (Cth). There was a significant Review of Commonwealth Criminal Law established in 1987 and chaired by Sir Harry Gibbs. The Review published five interim reports and a final report (1988–1991).

177 Australian Law Reform Commission, *Criminal Investigation*, Interim Report No 2 (1975) [60].

178 The ALRC did not receive any submissions on this provision or other entry pursuant to arrest or search warrants under Commonwealth or state and territory law.

perspective. In the wider public debate, others have also defended private property.[179] Lorraine Finlay has argued that '[t]he link between property rights and individual liberty remains relevant in the modern context'[180] and, in her view, 'the existing protections are insufficient and largely symbolic'.[181]

8.112 Environmental Justice Australia and ANEDO represented the view of those who emphasise an environmental perspective. Generally, environmental defenders put forward the justifications for interferences with real property rights. Environmental Justice Australia noted '[t]he recognition, both internationally and domestically, of the right to property is tempered with the recognition that it will be subject to lawful limitations imposed by the state'.[182] Laws limit land and water use to balance competing private interests, to protect the environment[183] or for the public interest. ANEDO explained that planning and environmental laws 'evolved in part to address land use conflict arising from incompatible uses of private property (for example, industrial and urban uses), and competing use of natural resources'.[184]

Necessary and in the public interest

8.113 The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest. This is also an often used justification in respect of laws which may be seen to interfere with rights in real property.

8.114 Those who emphasise an environmental perspective argued that environmental regulation—which may interfere with real property rights—is both necessary and in the public interest. There are a range of environmental treaties which require Australia to take actions which may affect property rights.[185] For example, a number of relevant provisions in the EPBC Act were enacted so as to comply with Australia's international obligations.[186]

8.115 ANEDO and Environmental Justice Australia referred to the rationale for environmental laws as being in the public interest. As ANEDO put it, '[e]nvironmental laws exist to protect the environment and conserve natural resources in the public interest, for the benefit of all Australians, including property owners'. ANEDO cited Dr Nicole Graham, who has argued that '[e]nvironmental laws indicate the

---

179 See, eg, Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 41.

180 Finlay, above n 7, 21.

181 Ibid 19.

182 Environmental Justice Australia, *Submission 65*.

183 See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

184 Australian Network of Environmental Defender's Offices, *Submission 60*.

185 See, eg, *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 June 1993); *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983); *Convention on Wetlands of International Importance Especially Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

186 See Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill (Cth); Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No 1) 2006 (Cth). See also Department of Parliamentary Services (Cth), *Bills Digest*, No 135 of 1998-99, 23 March 1999, 3–4.

government's prerogative, indeed responsibility, to balance private rights against the public's interest in health and environmental protection'.[187] Environmental Justice Australia cited Professor Kevin Gray, who stated that

> ... privileges of ownership have always been intrinsically curtailed by community-oriented obligation. ... The community is already entitled—has *always* been entitled—to the benefit of a public-interest forbearance on the part of the landowner.[188]

8.116 ANEDO called for recognition that rights and freedoms operate in an ecological context, and stated that the need for ecological sustainability meant that the public interest is more prominent today than in Blackstone's 18th century England.[189] It referred to Preston CJ of the NSW Land and Environment Court who has argued that the increasing strain on ecological systems will mean that 'the *public benefit demands* from these resources will increasingly have to be met first, before the resources are available for *private benefits*'.[190] ANEDO submitted that there is 'evidence that the wider community values the environment and feels that regulation across a wide range of sectors is "about right"'.[191]

8.117 Another argument pertaining to the public interest is that a requirement to pay compensation to landholders would discourage regulators from implementing environmental protections.[192] ANEDO referred to 'takings' legislation in the US which, it argued, has had a 'chilling effect' on government regulatory activity.[193] Some consider that s 51(xxxi) of the *Constitution* can have a similar effect.

8.118 ANEDO also submitted that the ALRC should consider 'the right of all Australians to a healthy environment' which is 'emerging' in human rights law.[194] However, as noted in Chapter 1, in this Inquiry the ALRC is focusing on existing common law rights rather than any parallel human right that may be understood, or developing, in international law.

Adequacy of existing protection

8.119 Both ANEDO and Environmental Justice Australia submitted that existing protections are adequate to safeguard against any encroachments.[195] Both stakeholders

---

187 Australian Network of Environmental Defender's Offices, *Submission 60*.

188 Environmental Justice Australia, *Submission 65*.

189 ANEDO submitted that, for the purposes of this ALRC Inquiry, the principles of ecologically sustainable development should be 'an integral part of any public interest test': Australian Network of Environmental Defender's Offices, *Submission 60*.

190 Ibid.

191 Ibid. They cited a 2013 publication.

192 O'Connor, above n 15, 73.

193 Australian Network of Environmental Defender's Offices, *Submission 60*. See the submission for a list of other concerns about the implications of any changes to compensation laws.

194 Ibid. ANEDO acknowledged that 'the human right to a healthy environment currently has an uncertain status in international law, and has not been formally recognised in any binding global international agreement'. It argued that '[d]espite lacking formal recognition, there are existing civil and political rights which could provide a basis for an individual to argue that they have a right to a healthy or sound environment' and that 'there is an increasing push for its formal recognition'.

195 Environmental Justice Australia, *Submission 65*; Australian Network of Environmental Defender's Offices, *Submission 60*. See also Andrew Macintosh and Richard Denniss, 'Property Rights and the

referred to s 51(xxxi) of the *Constitution*. Environmental Justice Australia saw this protection as adequate: '[t]he protection against the acquisition of property by Parliament without compensation operates to protect individuals and ensure that they do not bear a disproportionate burden for the benefit of the community'.[196]

8.120 Both also referred to other measures which they considered to be important to ensure that private and public interests are balanced fairly. Environmental Justice Australia referred to the requirement that laws not be arbitrary or without foundation but rather for a proper purpose.[197] ANEDO referred to 'public participation and transparency in decision-making, court review mechanisms and other procedural fairness'.[198]

8.121 With respect to the EPBC Act, ANEDO submitted that the embedded objective of 'promot[ing] ecologically sustainable development'[199] guides decision-makers to effectively balance and integrate economic, environmental and social considerations before making a decision that affects property rights.[200]

Economic arguments

8.122 ANEDO also referred briefly to some economic arguments. It referred to a 2012 Senate Inquiry that 'called into question' the suggestion that environmental laws are causing private developers to shoulder an unreasonable burden.[201] It also referred to a number of economic arguments that have been raised to criticise US-style 'takings' legislation.[202]

8.123 Others have also assessed the economic arguments which have been used to justify encroachments on real property rights. For example, in 2004 the Productivity Commission considered such arguments in one of its reports.[203] Andrew Macintosh and Richard Denniss analysed both equity and economic arguments in their paper assessing whether farmers should have 'additional statutory rights to compensation when restrictions are placed on their ability to use or clear land and when water allocations are reduced for environmental purposes'.[204] In part, Macintosh and Denniss' study responded to the claim that 'the provision of more secure property rights will stimulate greater investment and improve the allocation of scarce agricultural resources'.[205]

Environment: Should Farmers Have a Right to Compensation?' (Discussion Paper 74, The Australia Institute, 2004).

196 Environmental Justice Australia, *Submission 65*.

197 Ibid.

198 Australian Network of Environmental Defender's Offices, *Submission 60*.

199 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b).

200 Australian Network of Environmental Defender's Offices, *Submission 60*.

201 The reference was to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (2013).

202 Australian Network of Environmental Defender's Offices, *Submission 60*.

203 'Impacts of Native Vegetation and Biodiversity Regulations', above n 86.

204 Macintosh and Denniss, above n 195, v.

205 Ibid. A counter argument is that farmers and irrigators obtain a significant economic benefit from having healthy land and a healthy functioning river system.

8.124 With respect to the economic arguments, Macintosh and Denniss explained that, because market failure causes many environmental problems, policy makers can choose between polluter-pays policies and beneficiary-pays policies.[206] The NFF advocated the implementation of a beneficiary-pays model. Under such a model, the person who obtains a benefit should pay the cost of undertaking it. So if a land owner is prohibited from clearing land for the benefit of the wider community, then the community should pay that land owner compensation. Under the polluter-pays model, a person taking an action should be required to pay the full costs associated with taking that action. So if a land owner does clear the land, that land owner will have to pay the community for any environmental damage caused.

8.125 Macintosh and Denniss explain that while polluter-pays policies are generally considered to be more economically efficient than beneficiary-pays policies, they typically have higher political costs.[207] They concluded that farmers should not be provided with additional statutory rights to compensation in respect of interferences with land use, in part because such an approach would be unlikely to result in a significant increase in agricultural investment or output.[208] While they acknowledged that there was a more convincing economic argument with respect to the claim for compensation with respect to interferences with water use, they similarly opposed the creation of additional statutory rights here, explaining that a number of studies had concluded that the economic gains could be limited.[209]

8.126 In its report, the Productivity Commission stated that a 'major aim' of its recommendations was 'to make the cost-benefit trade-offs involved in achieving various environmental objectives more transparent, so that optimal policy choices are made'.[210] It stated that the cost-benefit is 'obscured' in cases concerning native vegetation and biodiversity regulation of private land 'because the costs of regulation are largely borne by landholders'.[211] It observed that

> Regulation of native vegetation clearing on private property effectively asserts public ownership of remnant native vegetation while leaving its ongoing day-to-day management in the hands of the (uncompensated) landholder. From the landholder's perspective, native vegetation loses much of its private value and becomes a liability. ... When regulation reduces the private value to landholders of native vegetation, incentives to care for it are reduced. The prospective private loss also creates an incentive to circumvent the regulations ... or to bring forward clearing as insurance against possible strengthening of regulations in future.[212]

8.127 It continued:

> Poor incentives for landholders to comply with current regulatory arrangements could be addressed to some extent by compensating landholders for their losses. Payment of compensation would also make the costs of regulation more transparent to the

206 Ibid vi.
207 Ibid.
208 Ibid.
209 Ibid vi–vii.
210 'Impacts of Native Vegetation and Biodiversity Regulations', above n 86, 221.
211 Ibid 224.
212 Ibid 225.

> community, facilitating comparison with environmental benefits. However, the Commission does not recommend simply compensating landholders for the impacts of *existing* compulsory regulatory regimes. This is not only because of the numerous difficulties in assessing appropriate farm-level compensation ... but because continued reliance on regulation to achieve a range of broadly-defined environmental goals appears unlikely to be the most effective, least-cost option from a whole-of-community perspective. In this case, compensation would merely shift an unnecessary large cost burden from landholders to taxpayers.[213]

8.128 Relevantly, it recommended:

> Landholders individually, or as a group, should bear the cost of actions that directly contribute to sustainable resource use (including, for example, land and water quality) and, hence, the long-term viability of agriculture and other land-based operations.[214]

8.129 Another relevant recommendation was that

> Over and above landholder responsibilities, additional conservation apparently demanded by society (for example, to achieve biodiversity, threatened species and greenhouse objectives), should be purchased from landholders where intervention is deemed cost-effective.[215]

8.130 Macintosh and Denniss explained that farm lobby groups welcomed the Productivity Commission's report, considering it to support their claims for a statutory right to compensation.

> Despite the enthusiastic response by farm lobby groups, the Commission's position on the creation of a statutory right to compensation is unclear. The report does, however, support the notion that public good environmental benefits associated with the retention of native vegetation should be purchased from landholders. It is likely that a statutory right to compensation for the impacts of some native vegetation and biodiversity laws that are designed to achieve 'public good environmental benefits' could fit within the framework envisaged by the Productivity Commission.[216]

Distinguishing between rights

8.131 Some stakeholders conceived of an individual's rights pertaining to a particular property as being of a different order from human rights. In ANEDO's view, '[t]he identification by the Inquiry terms of reference of environmental law as an area that potentially unreasonably impinges upon personal freedoms evidences a misunderstanding of human rights principles as they relate to property rights'.[217] Environmental Justice Australia submitted that clearing land of native vegetation is not an innate human right.[218] It submitted that

---

213 Ibid.
214 Ibid 238 (rec 10.7).
215 Ibid 239 (rec 10.9).
216 Macintosh and Denniss, above n 195, 2.
217 Australian Network of Environmental Defender's Offices, *Submission 60*.
218 Environmental Justice Australia, *Submission 65*. Similarly, ANEDO argued that 'there is no general proprietary right to clear vegetation or to undertake development'. Rather, activities such as clearing vegetation and farming are 'privileges' afforded to land holders on terms subject to change. See Australian Network of Environmental Defender's Offices, *Submission 60*.

> The principle of a right to own property and not to be arbitrarily deprived of that property should not be confused with the substantive rights that an individual may have to any particular property and does not and should not be seen as a limitation on the ability of governments to enact laws to protect the environment.[219]

8.132 In its view, the rights to ownership of property and against arbitrary deprivation of that property that are protected in international law enjoy 'a fundamental foundation in the integrity and dignity inherent in every person' whereas 'particular rights to certain property as they exist at a particular point in time' do not have such a foundation.[220]

8.133 Environmental Justice Australia also pointed to the universality of human rights. In its view it would be problematic to protect the content of a particular interest in particular property as it would 'not be universal', but rather would 'be concentrated in the hands of the very few'.[221] Both it and ANEDO were critical of any attempt to use a human rights argument to challenge environmental law and regulation. ANEDO saw it as 'nonsensical'.[222] Environmental Justice Australia submitted that '[t]he protection of the content of particular property rights is simply not suitable to a human rights style evaluation framework', such as using a proportionality test.[223]

8.134 It is important to note that this Inquiry is concerned with a review of Commonwealth laws for consistency with traditional rights, freedoms and privileges. That is, the Inquiry is focused on the recognition of rights, freedoms and privileges by the common law rather than the recognition of human rights in international law.[224]

Proportionality

8.135 In the European context, a proportionality test has been used to determine whether interferences with real property rights caused by environmental laws are justified. Article 1 of Protocol 1 to the *European Convention on Human Rights* protects the right of Europeans to 'the peaceful enjoyment' of their 'possessions'. Further, it stipulates that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

8.136 The European Court of Human Rights has heard a significant number of cases where a citizen has alleged that a State has violated—unjustifiably interfered with—their right to property by taking measures (authorised by environment-related legislation) to protect the environment.[225] There are a number of steps in the test for determining whether environmental legislation has unjustifiably interfered with

---

219 Environmental Justice Australia, *Submission 65*.
220 Ibid.
221 Ibid.
222 Australian Network of Environmental Defender's Offices, *Submission 60*.
223 Environmental Justice Australia, *Submission 65*.
224 See Ch 1.
225 See, eg, *Hamer v Belgium* [2007] V Eur Court HR 73; *Papastavrou v Greece* [2003] IV Eur Court HR 257; *Pine Valley Developments Ltd v Ireland* (1991) 222 Eur Court HR (ser A); *Oerlemans v The Netherlands* (1991) 219 Eur Court HR (ser A); *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A); *James v United Kingdom* (1986) 98 Eur Court HR (ser A).

property rights. With respect to the proportionality part of the test, which asks whether there was a 'reasonable relationship of proportionality between the means employed and the aim pursued', the Court in *Fredin v Sweden (No 1)* stated that States enjoy 'a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question'.[226]

Conclusions

8.137 The common law has long regarded a person's property rights as fundamental. Property rights find some protection from statutory encroachments in s 51(xxxi) of the *Australian Constitution*, through the principle of legality at common law, and in international law. Section 51(xxxi) provides that any 'acquisition' of property must be on 'just terms'.

8.138 Some Commonwealth laws may be seen as interfering with real property rights. These laws impose upon property owners in different contexts and in different ways. The laws that raised the most controversy and debate among stakeholders in this Inquiry—and in a series of cases, some of which have gone to the High Court—were provisions in environmental laws imposing restrictions on the use of land and water. For example, the prohibition of 'action' such as clearing, ploughing and sowing land which has or will have a significant impact on the ecological character of a declared Ramsar wetland.[227] Concerns have been expressed that such laws may actually significantly reduce the commercial uses to which property can be applied.

8.139 Sometimes the complaints have been about state laws. This reflects the fact that state and territory governments are primarily responsible for the management of native vegetation and biodiversity, and that state governments have legislative power in relation to internal waters.[228] Most states do not have an equivalent provision to s 51(xxxi) of the *Australian Constitution*.[229] State legislation is not the concern of this Inquiry. However, concerns have been expressed about potential Commonwealth involvement through partnerships. The Commonwealth has sought to become involved in the management of water resources within Australia, sometimes by the provision of financial assistance.[230] Notably, the Commonwealth now has primary responsibility for

226 *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A) [51].

227 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 16(1); *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388.

228 Westlaw AU, *The Laws of Australia* (at 1 March 2015) 14 Environment and Natural Resources, '14.9 Water' [14.9.420].

229 For a discussion of moves to change the position in Western Australia see Lorraine Finlay, *Strengthening Property Rights in Western Australia* (13 March 2015) <www.freedomwatch.ipa.org.au>.

230 'In practice, the provision of financial assistance has been one of the principal mechanisms used by the Commonwealth to become involved in the management of the water resources of Australia': Westlaw AU, *The Laws of Australia* (at 1 March 2015) 14 Environment and Natural Resources, '14.9 Water' [14.9.430].

water management in the Murray-Darling Basin.[231] The Commonwealth may also financially assist states with respect to natural resources management.[232]

8.140 This Inquiry heard particular concerns about the EPBC Act and the *Water Act*. While the restrictions on the use of land and water brought about by these statutes do not necessarily amount to 'acquisitions' attracting s 51(xxxi) of the *Constitution*, there is evident concern about the impact of legislative interventions that are considered as interfering with a landowner's enjoyment of land—beyond minor interferences. For example, the Productivity Commission was concerned that regulation of native vegetation clearing on private property can result in a loss of value for the landholder.[233] It recommended that conservation aimed at achieving biodiversity and threatened species, which is over and above landholder responsibilities, should be purchased from landholders where it is cost-effective to do so.[234]

8.141 Although the Commonwealth is under no constitutional obligation to compensate for interferences that fall short of constituting 'acquisitions' of property, this does not mean that such interferences never warrant compensation or are always justified. In developing policies and laws, the Commonwealth could investigate whether consensual arrangements with the property holders could deliver the policy outcomes so as to address both s 51(xxxi) issues and broader concerns about the effect on property rights.[235] Further, the EPBC Act and the *Water Act* could be reviewed to ensure that these laws do not unjustifiably interfere with rights pertaining to real property. The ALRC is interested in comments on these suggestions and on other approaches to assessing whether Commonwealth laws unjustifiably encroach on rights pertaining to real property.

231 *Water Act 2007* (Cth).
232 *Natural Resources Management (Financial Assistance) Act 1992* (Cth).
233 'Impacts of Native Vegetation and Biodiversity Regulations', above n 86, 225.
234 Ibid 239 (Recommendation 10.9).
235 This is the approach that the Commonwealth took with respect to water in the Murray-Darling Basin as noted in the discussion in the judgments in *Lee v Commonwealth* (2014) 220 FCR 300; *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014).

9. Retrospective Laws

Contents

A common law principle

9.1 One element of the rule of law is that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. It follows that laws should not retrospectively change legal rights and obligations, or create offences with retrospective application. The principle that a person should not be prosecuted for conduct that was not an offence at the time the conduct was committed is sometimes known as *nulla crimen, nulla poena sine lege*, or 'no punishment without law'.[1]

9.2 This chapter discusses the reasons for the objection to retrospective laws and identifies some protections against statutory encroachment. It also identifies some laws with retrospective operation and considers how these encroachments have been justified.

1 Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).

9.3 In *Retroactivity and the Common Law*, Ben Juratowich writes:

> Retroactive creation of a criminal offence is a particularly acute example of infraction by the state of individual liberty ... Holding a person criminally liable for doing what it was lawful to do at the time that he did it, is usually obviously wrong. The retroactive removal of an actual freedom coupled with the gravity of consequences that may accompany a breach of the criminal law mean that retroactive imposition of a criminal liability is rarely justified.[2]

9.4 The common law on the subject of retrospective law making was influenced by Roman law. It may also be reflected in cl 39 of the *Magna Carta*, which prohibited the imprisonment or persecution of a person 'except by the lawful judgement of his peers and by the law of the land'.[3]

9.5 In *Leviathan*, Thomas Hobbes wrote that 'harm inflicted for a fact done before there was a law that forbade it, is not punishment, but an act of hostility: for before the law, there is no transgression of the law'.[4] William Blackstone wrote in his *Commentaries on the Laws of England*:

> Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement.[5]

9.6 Retrospective laws are commonly considered inconsistent with the rule of law. In his book on the rule of law, Lord Bingham wrote:

> Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.[6]

Certainty and predictability

9.7 Retrospective laws make the law less certain and reliable.[7] A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints 'justified expectations'.[8]

---

2 *Magna Carta 1297* cl 39. See further Ben Juratowich, *Retroactivity and the Common Law* (University of Oxford, 2007) 52. The terms 'retrospective' and 'retroactive' are sometimes used interchangeably. The High Court has noted a distinction between a statute which provides that at a past date the law should be taken to have been that which it then was not (sometimes called 'retroactive'), and a statute which now creates further particular rights and liabilities with respect to past matters or transactions: *Chang v Laidley Shire Council* (2007) 234 CLR 1 [111]; [2007] HCA 37, and *AEU v Fair Work Australia* (2012) 246 CLR 117 [94]. In each case the High Court relied on *Coleman v Shell Co of Australia Ltd* 45 SR NSW 27.

3 Ben Juratowitch, *Retroactivity and the Common Law* (Bloomsbury Publishing, 2008) 28. Juratowitch notes however, that this clause is more concerned with placing limits on the exercise of *executive* power.

4 Thomas Hobbes, *Leviathan* (Oxford University Press 1996, 1651) 207.

5 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol 1, 46.

6 Tom Bingham, *The Rule of Law* (Penguin UK, 2011).

7 Lord Diplock said: 'acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal

9.8 In *Director of Public Prosecutions (Cth) v Keating*, the Australian High Court emphasised the common law principle that the criminal law 'should be certain and its reach ascertainable by those who are subject to it'.[9] This idea is 'fundamental to criminal responsibility' and 'underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability'.[10] The Court quoted *Bennion on Statutory Interpretation*:

> A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.[11]

9.9 In *Polyukhovich v Commonwealth* (*Polyukhovich*), Toohey J said:

> All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.[12]

Efficacy

9.10 Concerns about the efficacy of retrospective laws are closely related to concerns about uncertainty. If a person does not know or is uncertain about the law, it is difficult for the person to comply with it. The law does not, in this circumstance, guide or deter behaviour. As the Law Council of Australia submitted:

> If such laws cannot be known ahead of time, individuals and businesses may not be able to arrange their affairs to comply with them. It potentially exposes individuals and businesses to sanctions for non-compliance and despite the high societal cost, such retrospective laws cannot guide action and so are unlikely to achieve their 'behaviour modification' policy objectives in any event.[13]

9.11 Similarly, the Tax Institute emphasised that laws need to be certain and prospective for the proper functioning of the tax system, particularly to allow:

(a) taxpayers to self-regulate behaviour in order to minimise tax risk;

(b) the fostering of voluntary and informed compliance with tax laws;

(c) taxpayers to make investment decisions and strike commercial bargains with certainty as to the tax cost resulting from the relevant transaction;

---

consequences that will flow from it': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591.

8 HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276. ('retrospective law-making is unjust because it 'disappoints the justified expectations of those who, in acting, having relied on the assumption that the legal consequences of their acts will be determined by the known state of the law established at the time of their acts').

9 *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

10 Ibid [48] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

11 Ibid [48] (French CJ, Hayne, Crennan, Kiefel, Bell And Keane JJ).

12 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

13 Law Council of Australia, *Submission 75*.

(d) corporate taxpayers to make informed dividend policy decisions; and

(e) listed companies to produce timely financial statements that accurately reflect their tax expense.[14]

9.12 The Law Council observed that retrospective laws can cause a 'number of practical difficulties for business, and the wider economy', including: actual and reputational damage to the market (sovereign risk); disruption to business planning processes resulting in high compliance costs; and unintended consequences from increased regulatory complexity.[15]

9.13 In relation to commercial and corporate laws, the Law Council stated that it is possible for laws to be 'effectively retrospective'. That is, where laws are introduced so abruptly that they do not give businesses sufficient time to adjust their practices; or capture activities which will occur after the law has commenced but which are the result of arrangements entered into before the law commenced.[16]

Protections from statutory encroachment

Australian Constitution

9.14 There is no express or implied prohibition on the making of retrospective laws in the *Australian Constitution*. In *R v Kidman*, the High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect.[17] In that case, which concerned a retrospective criminal law, Higgins J said:

> There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit.[18]

9.15 The *Constitution* also permits retrospective laws that affect rights in issue in pending litigation.[19]

9.16 The power of the Australian Parliament to create a criminal offence with retrospective application has been affirmed in a number of cases, and is discussed in *Polyukovich*.[20] In that case, McHugh J said that '*Kidman* was correctly decided'[21] and that

---

14 The Tax Institute, *Submission 68*.

15 Law Council of Australia, *Submission 75*.

16 Ibid.

17 *R v Kidman* (1915) 20 CLR 425.

18 Ibid 451. 'No doubt a provision making criminal and punishable future acts would have more direct tendency to prevent such acts than a provision as to past acts; but whatever may be the excellence of the utilitarian theory of punishment, the Federal Parliament is not bound to adopt that theory. Parliament may prefer to follow St Paul (Romans IX 4), St Thomas Aquinas, and many others, instead of Bentham and Mill': Ibid 450.

19 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.

20 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

21 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).

> numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since *Kidman*, the validity of their retrospective operation has not been challenged. And I can see no distinction between the retrospective operation of a civil enactment and a criminal enactment.[22]

9.17 However, retrospective laws that amount to the exercise of judicial power by the legislature, or interfere with the exercise of judicial power by Ch III courts, may be unconstitutional. Chapter III of the *Constitution* requires a separation of power between the legislature and the courts. A bill of attainder is a statute that finds 'a specific person or specific person is guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence'.[23] In *Polyukhvich*, the High Court said that such a statute would contravene Ch III of the *Constitution* which requires judicial powers to be exercised by courts, and not the legislature.[24] Emeritus Professor Suri Ratnapala noted that the

> common theme in [the] judgments was that a law that retrospectively makes an act punishable as a crime does not offend the separation doctrine, provided it is general and not directed at specific individuals.[25]

9.18 Thus, bills of attainder are prohibited not because they are retrospective, but because determining the guilt or innocence of an individual amounts to an exercise of judicial power.[26]

9.19 Similarly, a retrospective law that interferes with the functions of the judiciary, such as by altering the law of evidence or removing discretion regarding sentencing of particular persons, may be unconstitutional because of Ch III.[27] Again, the concern is not the retrospective nature of the law, but its interference with the judicial process.[28]

Principle of legality

9.20 The principle of legality provides some protection from retrospective laws.[29] When interpreting a statute, courts will presume that Parliament did not intend to create offences with retrospective application, unless this intention was made unambiguously clear.[30] For example, in *Maxwell v Murphy*, Dixon CJ said:

---

22 Ibid 718 [23] (McHugh J).
23 Ibid [30].
24 Ibid 539, 649, 686, 721.
25 Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law' [2007] *The Indian Journal of Constitutional Law* 140.
26 Ibid 539, 649, 686, 721.
27 *Liyanage v The Queen* [1967] AC 259; approved in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.
28 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.
29 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.
30 See also, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [67] (Warren CJ with whom Hansen JA expressed general agreement at [133].

> the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.[31]

9.21 However, this presumption does not apply to procedural (as opposed to substantive) changes to the application of the law. Dixon CJ went on to say:

> given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are enforced or their enjoyment is to be secured by judicial remedy is not within the application of the presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed.[32]

International law

9.22 There are prohibitions on retrospective criminal laws in international law. Article 15 of the *International Covenant on Civil and Political Rights* (ICCPR), expressing a rule of customary international law,[33] provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

9.23 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[34] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[35]

---

31 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ). See also *Rodway v The Queen* (1990) 169 CLR 515, 518 ((Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). In that case, the Justices stated, 'the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation'.

32 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ). For further on the distinction between matters of substance and matters of procedure, see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99].

33 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ).

34 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

Bills of rights

9.24 In other countries, bills of rights or human rights statutes provide some protection from retrospective laws. There are prohibitions on the creation of offences that apply retrospectively in the United States,[36] the United Kingdom,[37] Canada[38] and New Zealand.[39] For example, the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right

> not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.[40]

9.25 The right not to be charged with a retrospective offence is also protected in the Victorian and ACT human rights statutes.[41]

Laws with retrospective operation

9.26 Commonwealth laws with retrospective operation have been identified in a range of contexts including in criminal laws, taxation laws and migration laws. These laws are summarised below. Some of the justifications that have been advanced for laws that have retrospective operation, and public criticisms of laws on that basis, are also discussed.[42]

Criminal laws

9.27 The Guide to Framing Commonwealth Offences states that 'an offence should be given retrospective effect only in rare circumstances and with strong justification'. Further, if legislation is amended with retrospective effect, this should generally be 'accompanied by a caveat that no retrospective criminal liability is thereby created'.[43]

9.28 However, laws that create criminal offences with retrospective application have occasionally been created by the Australian Parliament. The Guide to Framing Commonwealth Offences states that such exceptions have 'normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity'.[44]

---

36 *United States Constitution* art I § 9, 10. ('No Bill of Attainder or ex post facto Law shall be passed': § 9).
37 *Human Rights Act 1998* (UK)) c 42, sch 1 pt I, art 7.
38 *Canada Act 1982 c 11* s 11(g).
39 *Bill of Rights Act 1990* (NZ) s 26(1).
40 *Canada Act 1982 c 11* s 11(g).
41 *Charter of Human Rights and Responsibilities 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.
42 As discussed in Ch 1, international law principles of proportionality inform the scrutiny processes of the Parliamentary Joint Committee.
43 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 15.
44 Ibid.

War crimes

9.29 Perhaps the most well-known retrospective criminal law is the *War Crimes Act 1945* (Cth), which was amended by the *War Crimes (Amendment) Act 1988* (Cth). The amending act created an offence of committing a war crime in Europe between 1 September 1939 and 8 May 1945.[45] A person who is an Australian citizen or resident at the time of charge may be liable for the offence.[46]

9.30 At the time of the Second World War, there was no Australian legislation which criminalised such acts committed by Australians in Europe.[47]

9.31 The constitutional validity of s 9 of the *War Crimes Act* was challenged on two grounds, including that the section 'attempts to enact that past conduct shall constitute a criminal offence, is an invalid attempt to usurp the judicial power of the Commonwealth'.[48] The validity of the provision was upheld in *Polyukhovich*. In that case, Dawson J commented that

> the ex post facto creation of war crimes may be seen to be justifiable in a way that is not possible with other ex post facto criminal laws, particularly where the conduct proscribed would have been criminal conduct had it occurred within Australia. The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law.[49]

9.32 This is consistent with art 15(2) of the ICCPR which creates an exception for retrospective laws prohibiting acts which are criminal 'according to the general principles of law recognised by the community of nations'.[50] It is also consistent with the Guide to Framing Commonwealth Offences which indicates that retrospective laws may be justified where the 'moral culpability of those involved means there is no substantive injustice in retrospectivity'.[51]

Hoaxes using the postal service

9.33 In 2001, following the terrorist acts of 11 September 2001 and anthrax attacks in the United States, s 471.10 of the *Criminal Code* (Cth), concerning hoaxes using the postal service, was enacted by the *Criminal Code Amendment (Anti-Hoax and other Measures) Act 2002* (Cth). The amending legislation was assented to on 4 April 2002, with retrospective operation from 16 October 2001.

---

45 *War Crimes Act 1945* (Cth) ss 5, 9.

46 Ibid s 11.

47 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [1].

48 Ibid [3].

49 Ibid [18].

50 Brennan J found that the offence created in s 9 of the *War Crimes Act* did not correspond with the international law definition of international crimes existing at the relevant time', so the retrospective provision is therefore 'offensive to international law' and not supported by the external affairs power: Ibid [49]–[71]; See further Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy LH MacCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Martinus Nijhoff Publishers, 1997) 143.

51 Attorney-General's Department, above n 43, 15.

9.34 The offences created were said to be in response to a 'significant number of false alarms involving packages or letters containing apparently hazardous material' in late 2001.[52] These had resulted in an announcement by the Prime Minister on 16 October 2001 that new anti-hoax legislation would be introduced if the Coalition was returned to Government.

9.35 The Explanatory Memorandum stated that it was necessary to ensure that hoaxes using the postal service were 'adequately deterred in the period before the resumption of Parliament'.[53] The Prime Minister's announcement provided this deterrent. While one of the criticisms that can be directed at retrospective criminal legislation is that people will be unaware that their conduct is an offence, the Prime Minister's announcement was said to be in very clear terms, and received immediate, widespread publicity.[54] An additional consideration was outlined in the Explanatory Memorandum:

> there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process.[55]

Offences against Australians overseas

9.36 Sections 115.1 to 115.4 of the *Criminal Code* provide that any person may be prosecuted in Australia for murder or manslaughter of, or causing serious harm to, an Australian citizen or resident outside Australia.

9.37 These provisions were enacted in the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth), assented to on 14 November 2002, with retrospective application from 1 October 2002.

9.38 The Attorney-General's Department advised the Human Rights Committee that the impetus for the introduction of these offences was the Bali bombings, which occurred on 12 October 2002. To allow for the prosecution of the perpetrators of the Bali bombings, the offences were given 'very limited retrospective operation to commence on 1 October 2002, only 45 days prior to the enactment of the Act'.[56]

9.39 The Explanatory Memorandum to the Bill explained that retrospective application was justifiable in the circumstances because

> the conduct which is being criminalised—causing death or serious injury—is conduct which is universally known to be conduct which is criminal in nature. These types of offences are distinct from regulatory offences which may target conduct not widely

52 Explanatory Memorandum, Criminal Code Amendment (Anti-Hoax and Other Measures) Act (Cth) 2002.
53 Ibid.
54 Ibid.
55 Ibid.
56 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014) Appendix, Submission from Attorney–General's Department.

> perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[57]

Proceeds of crime

9.40 The *Proceeds of Crime Act 2002* (Cth) applies to offences and convictions regardless of whether they occurred before or after the commencement of the Act, with the result that proceeds of crime proceedings, including unexplained wealth proceedings, may involve consideration of offences that were committed, or are suspected to have been committed, at any time in the past.[58]

9.41 The *Crimes (Superannuation Benefits) Act 1989* (Cth) and the *Australian Federal Police Act 1979* (Cth) pt VA contain similar provisions providing for the forfeiture and recovery of employer funded superannuation benefits of Commonwealth employees who have been convicted of corruption offences and sentenced to more than 12 months imprisonment.

9.42 As these statutes apply in relation to offences and convictions regardless of whether they occurred before or after the commencement of the legislation, they can be seen as operating retrospectively. That is, the legislation imposes penalties in the form of forfeiture and recovery of assets that were not applicable at the time when a criminal offence was committed.

9.43 It has been suggested that proceeds of crime proceedings need to involve consideration of offences that were committed, or are suspected to have been committed, at any time in the past, 'due to the fact that criminal conduct from which a person may have profited or gained property may continue over several years or may not be discovered immediately'.[59]

9.44 For example, in determining 'unexplained wealth amounts' under the *Proceeds of Crime Act*,[60] the amount of wealth a person has is calculated having regard to property owned, effectively controlled, disposed of or consumed by the person, including before the time the law commenced. This is said to be necessary to ensure that

> orders are not frustrated by requiring the precise point in time at which certain wealth or property was acquired to be established, as this can be extremely difficult for law enforcement agencies to obtain evidence of and prove.[61]

9.45 In addition, while human rights jurisprudence views asset confiscation as a penalty capable of engaging the prohibition on retrospective criminal laws, orders under proceeds of crime legislation are 'civil asset confiscation orders that cannot

---

57 Explanatory Memorandum, Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth).

58 Proceeds of crime legislation is also discussed in Ch 7.

59 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

60 *Proceeds of Crime Act 2002* (Cth) s 179G.

61 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions'.[62]

9.46 The Parliamentary Joint Committee has argued, however, that the fact that a sanction or proceeding is characterised as civil under Australian law, and has civil rather than criminal consequences, is not determinative of whether a sanction is 'criminal' for the purposes of human rights law.[63] In this context, it stated that a 'punitive and deterrent goal'—as intended by unexplained wealth proceedings—is generally seen as something that would lead to characterisation of a measure as 'criminal'.

9.47 The Human Rights Committee has also expressed concern about proceeds of crime legislation to the extent that provisions that have retrospective application involve 'detriment to any person'.[64]

Taxation laws

9.48 It is not uncommon for taxation measures to be enacted with retrospective operation. Indeed, budget measures often commence from the date of the budget announcement, rather than the date of enactment. Such legislation does not retrospectively alter the rights and obligations of taxpayers before the date of the announcement—mitigating any negative impact that arises from the retrospective application.

9.49 There is wide acceptance that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce legislation, with the legislation providing for commencement dated to the time of the announcement. The situation is common enough for the Australian Taxation Office (ATO) to have issued guidance on its administrative treatment of taxpayers where taxation legislation has retrospective operation.

9.50 One ATO practice note provides that, when legislation has been announced but not yet enacted, taxpayers who exercise reasonable care and follow the existing law will suffer no tax shortfall penalties and nil interest charges up to the date of enactment for the legislative change. Taxpayers will also be given a 'reasonable time' to get their affairs in order, post enactment of the measure, without incurring any interest charges.[65]

---

62 Ibid.

63 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2013* (May 2014) 191.

64 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fifth Report of 2014*, (May 2014) 193.

65 See Australian Taxation Office, 'Law Administration Practice Statements' (PS LA 2007/11). This statement addresses '[a]dministrative treatment of taxpayers affected by announced but unenacted legislative measures which will apply retrospectively when enacted'.

9.51 Another practice note provides that, where the ATO changes its view or practices, the Commissioner of Taxation has a general policy of not applying these changed views and practices retrospectively. Typically, retrospective application will only be justified where the ATO has not contributed to the taxpayer adopting a contrary view, where there is fraud or evasion, or where tax avoidance may be involved.[66]

9.52 The Senate has scrutiny processes intended to minimise periods of retrospectivity. Standing Order 44 provides that where taxation legislation has been announced by press release more than six months before the introduction of the relevant legislation into Parliament (or publication of a draft bill), that legislation will be amended to provide for a commencement date after the date of introduction (or publication).

9.53 In 2004, a Treasury Department review of aspects of income tax self-assessment considered suggestions that Parliament should not pass retrospective tax laws. The review concluded that the commencement date of measures should remain an issue to be 'examined and determined by Parliament on a measure-by-measure basis'.[67]

9.54 The review stated that while, ideally, tax measures imposing new obligations should apply prospectively, retrospective commencement dates may be appropriate where a provision:

- corrects an 'unintended consequence' of a provision and the ATO or taxpayers have applied the law as intended;
- addresses a tax avoidance issue; or
- might otherwise lead to a significant behavioural change that would create undesirable consequences, for example bringing forward or delaying the acquisition or disposal of assets.68

9.55 Retrospective taxation measures have included provisions creating criminal offences in relation to entering arrangements to avoid regulation of 'bottom of the harbour' tax schemes.[69]

9.56 In general, however, taxation provisions with retrospective operation concern liability for tax. Four recent examples are outlined below.

Tax offset for films

9.57 Sch 1 of the *Tax and Superannuation Laws Amendment (2013 Measures No. 2) Act 2013* (Cth) altered the definition of 'documentary' in s 376-25 of the *Income Tax*

---

66 Australian Taxation Office, *Practice Statement Law Administration PS LA 2011/27*,(2011). This statement addresses '[m]atters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively'.

67 Australian Government Department of the Treasury, 'Report on Aspects of Income Tax Self Assessment' (2004) 70.

68 Ibid [7.3].

69 *Crimes (Taxation Offences) Act 1980* (Cth) ss 5, 8, 13.

Assessment Act 1997 (Cth) to limit the types of films eligible for tax offsets. The amending Act was assented to on 28 June 2013, but the amendments were stipulated to 'apply to films that commence principal photography on or after 1 July 2012'.

9.58 This amendment followed the 'Lush House' decision in the Administrative Appeals Tribunal.[70] The amendments were consistent with the guidelines previously used in offset applications prior to the tribunal decision and were seen as restoring an original understanding of the term 'documentary' in the taxation context.

Dividend washing

9.59 The *Tax and Superannuation Laws Amendment (2014 Measures No. 2) Act 2014* (Cth) included provisions intended to close a loophole that allowed sophisticated investors to acquire dividend franking credits disproportionate to their shareholdings, through a process known as 'dividend washing'. It was assented to on 30 June 2014 with application to distributions made on or after 1 July 2013.

9.60 The retrospective nature of the Bill was justified in the Explanatory Memorandum on the grounds that affected taxpayers would be aware of the change from the date of the announcement and would be unlikely to be affected in an unexpected way. The statement of compatibility with human rights stated that the laws limit 'the tax benefits that are available in respect of certain financial transactions without any wider impact'.[71]

9.61 While retrospective legislation may disadvantage individual taxpayers, this might be justified when the overall fairness of taxation laws is considered. The ATO reported that

> [w]hile relatively modest amounts of revenue are being lost as a result of this conduct, significant amounts of revenue would be at risk if the practice were to become widespread.[72]

9.62 The Tax Institute agreed that dividend washing 'threatens the integrity of the dividend imputation system'.[73]

Tax avoidance

9.63 In relation to concerns about tax avoidance, the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth) was enacted on 29 June 2013 with retrospective operation to 16 November 2012—the date on which an exposure draft of the legislation was released.

---

70 *EME Productions No 1 Pty Ltd and Screen Australia* [2011] AATA 439.

71 Explanatory Memorandum, Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014 (Cth).

72 Australian Tax Office, 'Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing. Dividend Washing' (Discussion Paper, 2013) 2.

73 Tax Institute, Submission to ATO Consultation, *Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing Dividend Washing*.

9.64 The Act inserted new provisions into the *Income Tax Assessment Act 1936* (Cth), making changes to the general anti-avoidance provisions of pt IVA, which operate to protect the integrity of the tax law from contrived or artificial arrangements designed to obtain a tax advantage.

9.65 The statement of compatibility with human rights noted that retrospective operation was 'necessary to ensure that taxpayers are not able to benefit from artificial or contrived tax avoidance schemes entered into in the period between that date and the date of Royal Assent' and that application from that date does not affect the operation of any criminal law.[74]

Transfer pricing

9.66 An important example of retrospectivity in taxation law arose in relation to amendments to Australia's transfer pricing rules. Transfer pricing rules seek to ensure that the appropriate return for the contribution made by Australian operations is taxable in Australia for the benefit of the community. The opportunity to shift profits is most prevalent between related parties who conduct their affairs on a transnational basis.[75]

9.67 The *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012* (Cth), enacted on 8 September 2012, made amendments to the *Income Tax Assessment Act 1997* (Cth), with retrospective operation to apply to income years starting on or after 1 July 2004.

9.68 The Explanatory Memorandum observed that the introduction of retrospective taxation is not done lightly and generally only 'where there is a significant risk to revenue that is inconsistent with the Parliament's intention'. The arguments for retrospective operation were set out at length in the Explanatory Memorandum.

9.69 In brief, in 1982, transfer pricing rules were introduced into Australian tax law in div 13 of the *Income Tax Assessment Act 1997* (Cth). Each of Australia's tax treaties also contains articles that deal with transfer pricing, which are used as a basis for transfer pricing adjustments.

9.70 In June 2011, the Full Federal Court considered its first substantive transfer pricing case in *Commissioner of Taxation v SNF (Australia) Pty Ltd*.[76] The case was argued only on the basis of div 13 and the Court did not have to decide whether the Commissioner could apply the relevant treaty rules as an alternate basis for transfer pricing adjustments. However, the decision was said to highlight that div 13 'may not adequately reflect the contributions of the Australian operations to multinational groups, and as such in some cases treaty transfer pricing rules may produce a more robust outcome'.[77]

---

74 Explanatory Memorandum, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013.

75 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012.

76 *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74.

77 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012.

9.71 Consequently, on 1 November 2011, the Australian Government proposed amendments to confirm that the transfer pricing rules contained in Australia's tax treaties provide a power, through express incorporation into Australia's domestic law, to make transfer pricing adjustments independently of div 13, applying from 1 July 2004.[78]

9.72 In introducing the legislation, it was explained that this would 'ensure the Parliament's view as to the way in which treaty transfer pricing rules operate is effective, that the Australian revenue is not compromised, and that international consistency is maintained with our tax treaty partners'.[79] Further, the Explanatory Memorandum stated:

> There are strong arguments … for concluding that under the current income tax law, treaty transfer pricing rules apply alternatively to Division 13. If this is the case, these amendments constitute a mere rewrite of those rules. To the extent that some deficiency exists in the current law, these amendments ensure the law can operate as the Parliament intended.[80]

9.73 This analysis has been criticised. The Law Council, for example, submitted to the Senate Economics Legislation Committee that the provisions of the Bill cannot be regarded as merely 'clarifying' the law:

> To the contrary, the Bill introduces a new test for interpretation. This test requires taxpayers and the Court to read relevant provisions of the tax treaties 'consistently' with OECD guidance, fundamentally changing the interpretation and application of the law.[81]

9.74 In a submission to this ALRC Inquiry, the Law Council argued that these retrospective laws were not justified for two reasons. First, it could not be said that the amendments merely restored a prior understanding of the law, as differing views and questions had been raised by the courts. Secondly, there was no evidence of avoidance behaviour.[82]

9.75 There may be significant public interest reasons for these laws—for example, to allow the Commissioner to re-examine past transfer pricing transactions, in light of overseas examples of unacceptable abuse of corporate tax arrangements.[83] Any disadvantage to taxpayers needs to be balanced against concerns about protection of

---

78 The 2004 income year commenced immediately after the Parliament's most recent amendment to the income tax laws in 2003, which 'again evidenced the Parliament's understanding that tax treaties could be used as a separate basis for making transfer pricing adjustments': Ibid.

79 Ibid.

80 Ibid.

81 Law Council of Australia, Submission to Senate Economics Legislation Committee, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1)*, 2012.

82 Law Council of Australia, *Submission 75*. Bridie Andriske has also challenged the assertion that taxpayers should have assumed that the law was always intended to operate in the way that the amendments provided: Bridie Andriske, *Are the Retrospective Transfer Pricing Measures Unconstitutional?* <www.corrs.com.au/thinking/insights>.

83 Parliament of Australia, Bills Digest No. 91 2012–13, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (Cth) 22.

public revenue and the extent to which major multinational companies are contributing tax in Australia—a matter of concern to Australian governments.[84]

Concerns about retrospective taxation laws

9.76 Concerns about the scope of retrospective taxation laws have been widely expressed. For example, in 2012, the Tax Institute made a submission to Treasury in which it noted an 'extremely concerning trend in recent months of the Government announcing retrospective changes to the tax law'. It stated that

> [c]hanges to reverse consolidation tax laws were preceded by amendments to the Petroleum Resource Rent Tax backdated to 1990; and an overhaul of transfer pricing laws, with effect from 2004. More recently, amendments to the general anti-avoidance law in Part IVA, were announced to apply from the date of announcement in March 2012, despite the community not knowing the detail of those changes and most likely not being able to know the detail for some months hence.[85]

9.77 The Tax Institute warned that retrospective changes in tax law are likely to 'interfere with bargains struck between taxpayers who have made every effort to comply with the prevailing law at the time of their agreement'.[86] Similar concerns were expressed in the Institute's submission to this ALRC Inquiry.[87]

9.78 The Australian Institute of Company Directors (AICD) expressed concerns about provisions enacted by the *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth),[88] which amended the *Taxation Administration Act 1953* (Cth). It observed that these provisions 'make new directors personally liable for the actions of the company', in relation to unpaid superannuation guarantee amounts and PAYG withholding amounts, 'even when the person was not a director at the time of the company's breach'.[89]

9.79 The AICD explained that these measures extended the law to make new directors liable for amounts that are overdue at the date of their appointment and which the company does not pay within 30 days of that appointment. It stated:

> We are of the view that these types of provisions offend a fundamental tenet of the rule of law. In these circumstances, regardless of whether the amount remains outstanding when a new director is appointed, the fact is, the breach occurred at a time when the new director had no actual or legal ability to influence the conduct of the corporation.[90]

---

84 See, eg, Will Ockenden, *Apple Pays $193m Tax in Australia on $27b Revenue as Federal Government Vows to Capture Lost Taxes* <www.abc.net.au/news/2014-03-06/tax-expert-explains-how-apple-pays-193m-tax-on-27b-revenue>.

85 Tax Institute, *2012–13 Federal Budget Submission*, 2012 covering letter.

86 Ibid.

87 The Tax Institute, *Submission 68*.

88 *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth) sch 1, pt 1, div 2.

89 Australian Institute of Company Directors, *Submission 42*.

90 Ibid.

9.80 The Tax Institute accepted that retrospective tax laws are justified in the case of

(a) concessional announcements, where it is proposed that a person should have a benefit from a given date but the legislative programme does not allow for immediate enactment; and

(b) strengthening of tax laws, where an issue has come to the attention of the Commissioner requiring prompt attention (subject again to the legislative programme).[91]

9.81 The Tax Institute stressed that once an announcement has been made, legislation should be introduced promptly.

Migration laws

9.82 Laws with retrospective operation are not uncommon in migration law. As noted in Chapter 1, the enjoyment of common law rights and freedoms is not confined to Australian citizens, and a non-citizen is entitled to the same protection of the law as a citizen.[92] It follows that the presumption against retrospective operation of law would apply to laws affecting non-citizens, but of course that presumption can be rebutted by plain words in the statute. Similarly, retrospective laws affecting non-citizens require appropriate justification, as do those affecting citizens. Some examples are discussed below.

Migration Act s 45AA: unauthorised maritime arrivals

9.83 *Migration Act* s 45AA allows an application for one type of visa to be considered as an application for a different type of visa, as specified by regulations.[93] It was inserted by sch 6 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). Regulation 2.08F was then inserted into the *Migration Regulations 1994* to convert all protection visas into temporary protection visas.[94] The amendment changes rights and obligations retrospectively in that an existing application is taken to have never been a valid application for a permanent protection visa, and always to have been an application for a temporary protection visa.[95]

9.84 The Explanatory Memorandum to the amending Bill indicated that the measures were intended to 'make it clear that there will not be permanent protection for those who travel to Australia illegally'. It also said the 'intention is that those who are found

91 The Tax Institute, *Submission 68*.
92 *Bradley v The Commonwealth* 1128 CLR 557, [26].
93 Section 45AA(8)(b) expressly excludes the operation of s 7(2) of the *Acts Interpretation Act 1901* (Cth).
94 Briefly, a temporary protection visa is valid for up to three years. It allows a person to work and have access to various benefits but unlike a permanent protection visa does not confer any family reunion rights and requires the holder to apply for permission to travel outside of Australia.
95 Melinda Jackson, Clare Hughes, Marina Brizar, Besmellah Rezaee, Submission No 129 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.

to be in need of protection … will be eligible only for grant of temporary protection visas'.[96]

9.85 Stakeholders commented critically on the effect of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* on protection visa applications.[97] For example, the Refugee Council of Australia claimed that, as a result of these provisions,

> thousands of asylum seekers who arrived in Australia without valid visas and whose protections claims have not yet been finally determined are now no longer eligible for permanent Protection Visas. If they are found to be refugees, they will have far fewer rights than was previously the case ...[98]

9.86 The Council submitted that retrospective reintroduction of temporary protection is unjustified:

> The Australian Government maintains that Temporary Protection Visas act as a deterrent to unauthorised arrival. If the Government believes this to be the case, it makes little sense to apply these changes to people who could not possibly have known that they would be eligible for temporary protection only should they arrive without a visa and thus could not possibly have been deterred from seeking to arrive in an authorised manner.[99]

9.87 The Refugee Advice and Casework Service (RACS) also expressed concern about s 45AA of the *Migration Act.* RACS considered that these changes destabilised an administrative framework that should be certain, predictable and impartial.[100] Similarly, the Human Rights Law Centre stated that:

> The justification offered by the Government, namely to deter asylum seekers from coming, does not justify retrospectively offering an inferior form of protection to those already here.[101]

9.88 The Australian National University Migration Law Program observed that the provisions converting visa applications are 'an attempt to give effect to the government's policy that no unauthorized maritime arrival will be granted a permanent protection visa'. It submitted that:

> This policy position is an inadequate justification for retrospectively removing the accrued rights of those who applied for a permanent protection visa. The retrospective nature of the provision will mean that those found to be genuine refugees [will be] on

---

96 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

97 ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Centre, *Submission 30*.

98 Refugee Council of Australia, *Submission 41*. For example, 'they will not be permitted to sponsor family members for resettlement in Australia, have limited access to support services and can only travel overseas with right of return if there are "compassionate or compelling circumstances" necessitating travel and only with written approval from Minister for Immigration': Ibid.

99 Refugee Council of Australia, *Submission 41*. See also Human Rights Law Centre, *Submission 39* regarding the absence of a deterrent effect.

100 Refugee Advice and Casework Centre, *Submission 30*.

101 Human Rights Law Centre, *Submission 39*.

> rolling temporary protection visas, which in our view, may give rise to a breaches of fundamental rights, including the right to freedom of movement.[102]

Migration Act s 228B: people smuggling offences

9.89 Sections 233A and 233C of the *Migration Act* establish a primary people smuggling offence and an aggravated people smuggling offence. Section 233A was introduced in 1999, and s 233C in 2001.[103]

9.90 Both of these offences are established where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of another person who is a non-citizen, and that non-citizen had, or has, 'no lawful right to come to Australia'.

9.91 The *Deterring People Smuggling Act 2011* (Cth) was enacted on 29 November 2011 and inserted s 228B which defined the words 'no lawful right to come to Australia', with retrospective effect from 16 December 1999. It was introduced to Parliament at a time when the Victorian Court of Appeal was being asked to consider the meaning of the phrase.

9.92 The Explanatory Memorandum stated that the people smuggling offences 'have been consistently interpreted since 1999 as applying where a person does not meet the requirements for coming to Australia under domestic law'. The amendments were intended to 'ensure that the original intent of the Parliament is affirmed', and

> to address doubt that may be raised about convictions that have already been made under sections 233A and 233C of the Migration Act, and previous section 232A of the Migration Act as in force before 1 June 2010.[104]

9.93 A number of agencies and individuals raised concerns before the Senate Legal and Constitutional Affairs Committee about the retrospective nature of this provision.[105] The Human Rights Law Centre said that this retrospective law is in breach of art 15 of the ICCPR, other human rights instruments, and government policy, and could not (unlike the war crimes legislation) be justified by reference to the seriousness of the offence.[106] Another submission to the Senate Committee emphasised that it is the function of the courts to interpret legislation, and if that interpretation is not consistent with the 'existing understanding' held by the government or prosecutorial agencies, 'then that understanding is incorrect'.[107] Adam Fletcher noted:

---

102 ANU Migration Law Program, *Submission 59*.

103 *Migration Legislation Amendment Act (No. 1) 1999* (Cth) sch 1, cl 7; *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) sch 2, cl 5.

104 Explanatory Memorandum, Deterring People Smuggling Bill 2011 (Cth).

105 See, eg, New South Wales Council for Civil Liberties, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011.

106 Human Rights Law Centre, *Submission to the Senate Legal and Constitutional Affairs Committee Regarding the Deterring People Smuggling Bill 2011* (2011).

107 Thomas Bland et Al, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011.

> Unlike the law in question in *Polyukhovich*, the present Bill does not create any new offence. However, it arguably enlarges an offence retrospectively by removing a potential defence. The law may render an act—namely the unauthorised transportation of asylum-seekers (as opposed to other migrants)—criminal retrospectively and pre-empt findings of the courts in ongoing prosecutions.[108]

Migration Act ss 500A(3)(d), 501(6)(aa): the character test

9.94 These sections were inserted by sch 1 of the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth). They provide that the Minister may refuse to grant, or may cancel, a person's safe haven visa on the grounds that the person committed an offence while in immigration detention, while escaping from immigration detention or when having escaped from immigration detention. They also provide that a person does not pass the character test if the person has been convicted of an offence.

9.95 The amending Act received assent on 25 July 2011, and was stated to commence on 26 April 2011 (the date of the announcement of the intention to make the changes). However the changed powers apply regardless of whether the conviction or immigration detention offence concerned occurred before, on or after 26 April 2011.

9.96 The Explanatory Memorandum explained that, on 26 April 2011, the Minister's announcement 'put all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it'.[109]

9.97 The Law Council submitted that these retrospective measures may not be justified in that they impose a penalty—liability to have one's visa application refused—for an offence that may have occurred before the legislation commenced.[110]

Other laws

Social security law

9.98 Section 66A of the *Social Security (Administration) Act 1999* (Cth) imposes a duty on social security claimants to inform the Department of a change of circumstances which might affect payments. The section was inserted on 4 August 2011, and was described as having commenced on 20 March 2000. However, the High Court held that, while s 66A operates with retrospective effect, it does not have the effect of attaching criminal liability to a failure to advise the Department of an event:

---

108 Adam Fletcher, *Retrospective People Smuggling Bill: A Breach of Our Constitution?* <http://castancentre.com/2011/11/09/retrospective-people-smuggling-bill-a-breach-of-our-constitution>. The Act provides that it applies to 'proceedings (whether original or appellate) commenced before the day on which this Act receives the Royal Assent, being proceedings that had not been finally determined as at that day': *Deterring People Smuggling Act 2011* (Cth) sch 1, item 2.

109 Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth).

110 Law Council of Australia, *Submission 75*.

> A clear statement of legislative intention is required before the courts will find that liability for a serious Commonwealth offence is imposed by means of a statutory fiction.[111]

Native title law

9.99 The *Native Title Act 1993* (Cth) may be characterised as having retrospective operation in that, as well as providing for determinations of native title, it provides for the validation of past acts that extinguished native title. It was passed in response to *Mabo v Queensland [No 2]* which is an example of a judicial decision that unsettled existing understandings of the law, with extensive retrospective effect.[112] The *Native Title Act* addressed the relationship between the newly articulated native title rights and existing land tenures. It validated, or allowed states and territories to validate, certain acts that took place before the commencement of the Act on 1 January 1994; and would otherwise be invalid because of native title.[113]

Validating decisions and powers

9.100 In a range of contexts legislation with retrospective operation may be enacted to validate decisions that have been made, or powers exercised, by government agencies, the validity of which is in doubt for 'technical' reasons. Such legislation may be seen as retrospectively changing legal rights and obligations. These statutes are sometimes known as 'declaratory statutes' and the presumption against retrospectivity does not apply.[114]

9.101 An example is the *Australian Education Amendment Act 2014* (Cth). Schedule 2 of this legislation concerned Commonwealth school funding entitlements. The provisions commenced retrospectively in order to 'correct errors and omissions that have become apparent since the introduction of the Act' and to 'ensure significant errors in relation to the calculation of Commonwealth funding entitlements for certain approved authorities are corrected'.[115]

9.102 Another example is the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth). Schedule 5 validates access by the Australian Federal Police to certain investigatory powers in designated state airports. The stated aim of the legislation was to 'ensure continuity in policing services at Australia's major airports, required as a result of an administrative error that led to certain investigatory powers not being available to AFP and special members in those airports for a short period of time'.[116]

---

111 *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, [47] (footnote omitted).

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

113 *Native Title Act 1993* (Cth) div 2A.

114 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 374.

115 Explanatory Memorandum, Australian Education Amendment Act 2014 (Cth). The original Act required funding to be worked out by reference to the 'old per student amount', and the amending Act ensured that funding was worked out by reference to the 'old *Commonwealth* per student amount'.

116 Explanatory Memorandum, Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Cth).

9.103 An Act which overrides an earlier judicial interpretation of a statute is not simply declaratory.[117] In this case the presumption against retrospectivity will apply, but may be rebutted by plain words in the statute. For example, the *Environment Legislation Amendment Act 2013* (Cth) retrospectively validated decisions that were made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act). This amendment followed a Federal Court finding that the Minister's decision to approve a mine was invalid, because it was made in breach of s 139(2) of the EPBC Act, which required the Minister to have regard to approved conservation advice.[118] The Explanatory Memorandum indicated that the amendment was 'to address the implications arising from the Tarkine case' and would 'apply retrospectively and prospectively to provide certainty for past and future decisions'.[119]

Powers to make subordinate legislation

9.104 Subordinate legislation with retrospective operation may be more difficult to justify as these instruments are less visible to the public. Unless the enabling Act specifies to the contrary, a legislative instrument has no effect if it has retrospective operation and, as a result, disadvantages or imposes liabilities on a person.[120] A range of statutes specifically allow for legislative instruments to have effect before the date on which they are registered:

- *Customs Tariff Act 1995* (Cth) s 16A(5), concerning special safeguards for goods originating from Thailand;
- *Excise Tariff Act 1921* (Cth) s 6CA(1D), (5), concerning duties of excise on condensate;
- *Income Tax Assessment Act 1997* (Cth) s 293-115, concerning defined benefit contributions, and s 293-145, concerning constitutionally protected superannuation funds;
- *Liquid Fuel Emergency Act 1984* (Cth) ss 9(2), 10(5), 11(6), 12(7), 13(4), 14(5), 14A(5), 17(6), 20(6), 21(5), 21(8), 22(8), 23(8), 24(8): concerning Ministerial directions and determinations regarding fuel emergencies;
- *Migration Act 1958* (Cth) s 198AB, concerning the designation of a regional processing country;
- *National Rental Affordability Scheme Act 2008* (Cth) s 12 regulations, concerning the operation of the scheme;
- *Petroleum Excise (Prices) Act 1987* (Cth) s 4(1C), concerning excise on condensate;

---

117 *Panochini v Jude* (2000) 2 Qd R 322, [14]. See further Thomson Reuters, *The Laws of Australia*, (at 15 April 2013) 25 Interpretation and Use of Legal Sources, '25.1 Statutory Interpretation' [25.1.2230].

118 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (17 July 2013).

119 Explanatory Memorandum, Environment Legislation Amendment Bill 2013 (Cth).

120 *Legislative Instruments Act 2003* (Cth) s 12.

- *Superannuation Act 1990* (Cth) s 5A, concerning amendments of trust deeds to implement family law interest splitting, and s 45(6), concerning ministerial amendment of trust deed;
- *Taxation Administration Act 1953* (Cth) s 133-130, concerning superannuation end benefits; and
- *Veterans' Entitlements Act 1986* (Cth) s 29(11), concerning assessment of rates of veterans' pensions 45TO(1A), concerning members of pension bonus schemes, and s 196B(13) concerning the functions of the Repatriation Medical Authority.

9.105 The ALRC has not sought to establish the extent to which these regulation-making powers have actually been exercised in a retrospective manner.

Judicial clarification of uncertain laws

9.106 Professor Jeremy Gans observed that the requirement that laws be sufficiently clear is breached when the scope of an offence is unclear until it has been interpreted by the courts. He gave the example of the offence of 'market manipulation' in the Corporations Act 2001 (Cth), which prohibits actions that create or maintain an 'artificial price' in financial products'.[121] This offence came into effect on 11 March 2002, but its scope was not defined until it was considered by the High Court in 2013.[122] Professor Gans suggested that the ALRC should consider whether 'current criminal offences are sufficiently certain, precise and accessible to give a reasonably informed lay person fair warning of what conduct is prohibited'.[123]

9.107 The Law Council raised a related concern about statutes with key terms that are not defined, so that 'business is unable to gauge the compliance burden and feasibility until after the legislation has commenced'.[124]

9.108 The clarification by the courts of an uncertain law necessarily imports an element of retrospectivity. Indeed, all judicial decisions about common law, constitutional matters or statutory interpretation are essentially retrospective.[125] In *PGA v The Queen*, Heydon J commented that to 'the extent that they may be changed retrospectively, uncertainty is inherent in common law rules'.[126]

9.109 The courts do not state what the law is from the date of a decision, but declare the law as it has always been. Where this declaration is in conflict with the previous understanding, this may be used to justify a statute that reinstates the previous understanding with retrospective effect, as is discussed above with regard to taxation. However there are practical difficulties in reviewing laws on the basis that they are

---

121 *Corporations Act 2001* (Cth) s1041A.
122 *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135.
123 J Gans, *Submission 02*.
124 Law Council of Australia, *Submission 75*.
125 Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 822.
126 *PGA v The Queen* (2012) 245 CLR 355, [126].

uncertain and require statutory interpretation. This chapter focuses on Commonwealth laws with declared retrospective operation, rather than those which may require clarification.

Justifications for encroachments

9.110 Are retrospective laws necessarily unjust? In *George Hudson Limited v Australian Timber Workers' Union*, Isaacs J said that '[u]pon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation'.[127] He then said:

> That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.[128]

9.111 After quoting this passage, Pearce and Geddes write that while 'a legislative instrument may take away some rights it may confer others and the overall aggregate justice may indicate that retrospectivity was intended'.[129] It may also suggest that the retrospective law was justified. But are there more specific principles that might help determine whether a retrospective law is justified?

Legitimate reasons for retrospective laws

9.112 Creating retrospective *criminal* offences may be more difficult to justify than other retrospective laws. Article 4 of the ICCPR provides that some rights may be derogated from in 'times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'—but this expressly excludes art 15, which concerns the creation of retrospective criminal offences. Article 15(2) itself contains one specific limitation, in that:

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

9.113 For example, retrospective provisions criminalising war crimes (as in *Polyukhovich*, discussed earlier) might fall within the permissible limitation in art 15(2), if drafted appropriately.

9.114 Laws retrospectively criminalising marital rape might also fall within the limitation. Australian Lawyers for Human Rights observed that as marital rape is 'a gross breach of human rights', but has been 'historically protected or not prosecuted',

---

127 Isaacs J was quoting from *Maxwell on Statutes*, 6th ed.

128 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.

129 Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014) [10.8].

retrospective liability may be justified.[130] Laws regarding marital rape are a state or territory responsibility and are not explored in this Inquiry.

9.115 The RACS agreed that in 'extreme circumstances, retrospective laws may be justified in order to prevent particularly grave injustices'.[131]

9.116 A review of the literature has revealed that retrospective laws in the civil arena have not been as energetically condemned as have those in the criminal sphere. Justifications offered for retrospective laws in the civil arena, as noted above, include that:

- the law operates retrospectively only from the date upon which it was announced by the Government that it intended to legislate, thereby ameliorating some of the problems with retrospective laws;
- the retrospective law operates to restore the understanding of the law that existed before a court decision unsettled that understanding (sometimes known as 'declaratory statutes');
- the retrospective law operates to address the consequences of a court decision that unsettled previous understandings of the law;
- the retrospective law operates to validate decisions that have been subsequently found to be invalid, in the interests of certainty; and
- the law addresses tax avoidance behaviour that was not foreseen and that poses a significant threat to revenue.

9.117 Whether these justifications are considered acceptable and sufficient by those affected by the retrospective law will depend upon the particular circumstances. For example, as the Tax Institute indicated, if the Government announces an intention to legislate, and then legislates promptly, with retrospective operation to the date of the announcement, this will be more acceptable than if the legislation is delayed. A retrospective law that operates to restore a prior understanding will be more acceptable if that prior understanding was widely held and uncontested.

Conclusions

9.118 A wide range of Commonwealth laws have been enacted with retrospective operation, including criminal, taxation and migration laws. However, retrospective criminal offences are rare and the areas of most recent controversy and comment concern taxation and migration laws.

9.119 Taxation law provides numerous examples of laws with retrospective operation. Taxation measures are often enacted with some retrospective operation and it is a 'constant fact that a change to tax law is announced and applied to transactions that

130 Australian Lawyers for Human Rights, *Submission 43*.
131 Refugee Advice and Casework Centre, *Submission 30*.

took place before the relevant legislation commences'.[132] There is widespread acceptance of retrospective taxation laws that commence from the date of the announcement, where the period of retrospectivity is short and the announcement is clear.

9.120 Taxation laws that provide for lengthy periods of retrospectivity might be reviewed to ensure that these laws do not unjustifiably change legal rights and obligations.

9.121 There are concerns that the retrospective operation of some of Australia's migration laws has not been sufficiently justified, including changes to the protection visa regime, the people smuggling offences and the character test. Some of the changes have very significant consequences for the people affected, and it is not clear that retrospective operation is necessary to achieve the objectives of the legislation. However, these laws have been subject to inquiries by the Senate Standing Committee on Legal and Constitutional Affairs in 2011 and 2014. The ALRC is interested in comment as to whether these laws should be subject to further review.

132 Parliament of Australia, Bills Digest No. 91 2012–13, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (Cth) 22.

10. Fair Trial

Contents

A common law right

10.1 The right to a fair trial has been described as 'a central pillar of our criminal justice system',[1] 'fundamental and absolute',[2] and a 'cardinal requirement of the rule of law'.[3]

10.2 Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes. It protects liberty, property, reputation and other fundamental interests. Being wrongly convicted of a crime has been called a 'deep injustice and a substantial moral harm'.[4] Fairness also gives a trial its integrity and moral legitimacy or authority.[5]

10.3 Furthermore, fair trials are presumably more likely to reach correct verdicts than unfair trials, and therefore they may not only help prevent wrongful convictions of the innocent, but also indirectly promote the prosecution and punishment of the guilty.

10.4 The right to a fair trial is 'manifested in rules of law and of practice designed to regulate the course of the trial'.[6] Strictly speaking, it is 'a right not to be tried unfairly' or 'an immunity against conviction otherwise than after a fair trial', because 'no person has the right to insist upon being prosecuted or tried by the State'.[7]

10.5 This chapter discusses the source and rationale of the right to a fair trial; how the right is protected from statutory encroachment; and when Commonwealth laws that limit accepted principles of a fair trial may be justified. It focuses on some widely recognised components of a fair trial that have been subject to statutory limits, for example:

- a trial should be held in public and the court's reasons for its decision should be delivered in public;
- a defendant has a right to a lawyer; and
- a defendant has the right to confront the prosecution's witnesses and to test the evidence said to prove his or her guilt.

10.6 Other important components of a fair trial are discussed in separate chapters of this Interim Report: the burden of proof and the right to be presumed innocent;[8] the

1 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
2 *Brown v Stott* [2003] 1 AC 681, 719.
3 Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.
4 Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 247. Ashworth goes on to say: 'It is avoidance of this harm that underlies the universal insistence on respect for the right to a fair trial, and with it the presumption of innocence': Ibid.
5 See Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 5th ed, 2013) 51–62.
6 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.
7 *Jago v The District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J).
8 See Ch 11.

right not to incriminate oneself;[9] and the right to have one's communications with one's lawyer kept confidential.[10]

10.7 The right to a fair trial 'extends to the whole course of the criminal process'.[11] It has been said that there is 'no aspect of preparation for trial or of criminal procedure which is not touched by, or indeed determined by, the principle of a fair trial'.[12] However, given the practical scope of this Inquiry, this report does not seek to identify all Commonwealth laws that might affect the fairness of a trial, but rather highlights particular examples of laws that interfere with accepted principles of a fair trial.[13]

10.8 Further, because some state courts exercise federal jurisdiction and, by virtue of s 68 of the *Judiciary Act 1903* (Cth) (*Judiciary Act*), the courts apply their own state procedures, a more thorough review of fair trial laws might need to consider all these state laws.

10.9 This chapter and the burden of proof chapter focus on criminal laws, although many of the principles will also be relevant to civil trials, which must of course also be fair, particularly considering the very serious consequences—including sometimes substantial legal costs and civil penalties—that may follow a civil trial.[14]

A traditional right?

10.10 Although a fair trial may now be called a traditional and fundamental right, clearly recognised under the common law, what amounts to a fair trial has changed over time. Many criminal trials of history would now seem strikingly unfair.

10.11 In *X7 v Australian Crime Commission*, Hayne and Bell JJ said that it was necessary to 'exercise some care in identifying what lessons can be drawn from the history of the development of criminal law and procedure'. Even some fundamental features of the criminal trial process 'are of relatively recent origin':

> So, for example, what now are axiomatic principles about the burden and standard of proof in criminal trials were not fully established until, in 1935, *Woolmington v The Director of Public Prosecutions* decided that '[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'. Any reference to the history of the privilege against self-incrimination, or its place in English criminal trial process, must also

9 See Ch 12.

10 See Ch 13.

11 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).

12 *John Fairfax Publications Pty Ltd v Hitchcock* (2004) 61 NSWLR 344, [22], [23] (Spigelman CJ, Handley JA and M W Campbell A-JA agreeing).

13 The laws of evidence, for example, perhaps relate to the fairness of trials. Evidence law was the subject of substantial ALRC inquiries in 1985–87 and 2006: See Australian Law Reform Commission, *Interim Report, Evidence*, ALRC Report 26 (1985); Australian Law Reform Commission, *Evidence*, ALRC Report 38 (1987); Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006).

14 The Terms of Reference refer to laws that 'alter *criminal* law practices based on the principle of a fair trial' (emphasis added).

> recognise that it was not until the last years of the nineteenth century that an accused person became a competent witness at his or her trial.[15]

10.12 In his book, *Criminal Discovery: From Truth to Proof and Back Again*, Dr Cosmas Moisidis writes:

> The earliest forms of English criminal trials involved no conception of truth seeking which would be regarded as rational or scientific by modern standards. The conviction of the guilty and the acquittal of the innocent were to be achieved by means which appealed to God to work a miracle and thereby demonstrate the guilt or innocence of the accused. No consideration was given as to whether an accused should be a testimonial resource or be able to enjoy a right to silence and put the prosecution to its proof. Instead, guilt and innocence were considered to be discoverable by methods such as trial by compurgation, trial by battle and trial by ordeal.[16]

10.13 Even later, when the importance of trial by jury for serious crimes was recognised, trials remained in many ways unfair. In his *Introduction to English Legal History*, Professor Sir JH Baker wrote that, for some time, the accused remained 'at a considerable disadvantage compared with the prosecution':

> His right to call witnesses was doubted, and when it was allowed the witnesses were not sworn. The process for compelling the attendance of witnesses for the prosecution, by taking recognisances, was not available to the defendant. The defendant could not have the assistance of counsel in presenting his case, unless there was a point of law arising on the indictment; since the point of law had to be assigned before counsel was allowed, the unlearned defendant had little chance of professional help.[17]

10.14 There was 'little of the care and deliberation of a modern trial before the last century', Baker writes:

> The same jurors might have to try several cases, and keep their conclusions in their heads, before giving in their verdicts; and it was commonplace for a number of capital cases to be disposed of in a single sitting. Hearsay evidence was often admitted; indeed, there were few if any rules of evidence before the eighteenth century.[18]

10.15 Baker describes the 'unseemly hurry of Old Bailey trials in the early nineteenth century' and calls it 'disgraceful':

> the average length of a trial was a few minutes, and 'full two thirds of the prisoners, on their return from their trials, cannot tell of any thing which has passed in court, nor even, very frequently, whether they have been tried'. It is impossible to estimate how far these convictions led to wrong convictions, but the plight of the uneducated and unbefriended prisoner was a sad one.[19]

---

15 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [100].

16 Cosmas Moisidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology Press, 2008) 5.

17 JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 417. 'So the prosecutor could tell the jury why the defendant was guilty, but there was no advocate to say why he was not': Bingham, above n 3. 'Until the late 18th century, it was typical for defendants in criminal trial to respond in person to all accusations': Moisidis, above n 16, 10.

18 Baker, above n 17, 417.

19 Ibid.

10.16 The most important reforms, Baker writes, 'were put off until the nineteenth century'. A person on trial for a felony was given the right to have a lawyer represent him in court in 1836; to call his own witnesses in 1867; and to give his own sworn evidence in 1898.[20]

Attributes of a fair trial

10.17 Widely accepted general attributes of a fair trial—some traceable to the common law, others to important Parliamentary reforms—may now be found set out in international treaties, conventions, human rights statutes and bills of rights.[21] As found in art 14 of the *International Covenant on Civil and Political Rights* (ICCPR), these include the following:

- **independent court**: the court must be 'competent, independent and impartial';
- **public trial**: the trial should be held in public and judgment given in public;
- **presumption of innocence**: the defendant should be presumed innocent until proved guilty—the prosecution therefore bears the onus of proof and must prove guilt beyond reasonable doubt;[22]
- **defendant told of charge**: the defendant should be informed of the nature and cause of the charge against him—promptly, in detail, and in a language which he or she understands;
- **time and facilities to prepare**: the defendant must have adequate time and facilities to prepare a defence and to communicate with counsel of his own choosing;
- **trial without undue delay**: the defendant must be tried without undue delay—that is, undue delay between arrest and the trial, perhaps having regard to such things as the length of the delay, the reasons for the delay, and whether there was any prejudice to the accused;[23]
- **right to a lawyer**: the defendant must be 'tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it';

---

20 Ibid 418. These reforms were made by Acts of Parliament.

21 Eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 (discussed further below).

22 See Ch 11.

23 *R v Morin* (1992) 1 SCR 771.

- **right to examine witnesses**: the defendant must have the opportunity to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him';
- **right to an interpreter**: the defendant is entitled to the 'free assistance of an interpreter if he cannot understand or speak the language used in court';
- **right not to testify against oneself**: the defendant has a right 'not to be compelled to testify against himself or to confess guilt';
- **no double jeopardy**: no one shall be 'liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.[24]

10.18 The elements of a fair trial appear to be related to the defining or essential characteristics of a court, which have been said to include: the reality and appearance of the court's independence and its impartiality; the application of procedural fairness; adherence, as a general rule, to the open court principle; and that a court generally gives reasons for its decisions.[25]

Practical justice

10.19 The attributes of a fair trial cannot, however, be conclusively and exhaustively defined.[26] In *Jago v District Court (NSW)*, Deane J said:

> The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of

---

24 See Ch 12. This list is drawn from the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14. See also Bingham, above n 3, Ch 9.

25 *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (French CJ and Kiefel J) (citations omitted). Their honours went on to say: 'Historically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters'.

26 James Spigelman has written that it is 'not feasible to attempt to list exhaustively the attributes of a fair trial ... The issue has arisen in a seemingly infinite variety of actual situations in the course of determining whether something that was done or said either before or at the time of the trial deprived the trial of the quality of fairness to a degree where a miscarriage of justice has occurred': James Spigelman, 'The Common Law Bill of Rights' (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series* 25.

> essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.[27]

10.20 In *Dietrich v The Queen*, Mason CJ and McHugh J said:

> There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice.[28]

10.21 In this same case, Gaudron J said that what is fair 'very often depends on the circumstances of the particular case' and 'notions of fairness are inevitably bound up with prevailing social values':

> It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. And it is because of those same matters that, save where clear categories have emerged, the inquiry as to what is fair must be particular and individual.[29]

10.22 Testing a given law against an accepted attribute of a fair trial may therefore be contrasted with an approach that focuses on whether, in a particular case, justice was done in practice. In a case concerning administrative law, but in terms said to have more general application, Gleeson CJ said:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[30]

10.23 The plurality in *Assistant Commissioner Michael James Condon v Pompano*, which approved Gleeson CJ's statement, said that the 'rules of procedural fairness do not have immutably fixed content'.[31] Gageler J said:

> Suggestions that there are exceptions to procedural fairness in the common practices of courts in Australia are unfounded. The suggested exceptions are more apparent than real ... All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness.[32]

10.24 Evidently, considerable care must be taken in identifying laws that interfere with the right to a fair trial and, as discussed in Chapter 15, with procedural fairness in administrative decision making. Such laws must be understood in their broader context,

---

27 *Jago v The District Court of NSW* (1989) 168 CLR 23, [5].

28 *Dietrich v The Queen* (1992) 177 CLR 292, 300.

29 Ibid 364.

30 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [37]. Cited with approval, and said to have more general application, in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [156] (Hayne, Crennan, Kiefel and Bell JJ). Professors Dixon and Williams write that in this case, the Court endorsed 'a largely practical concept of procedural fairness, rather than one informed by abstract notions of human rights': Rosalind Dixon and George Williams, *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 294.

31 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [177] (Hayne, Crennan, Kiefel and Bell JJ).

32 Ibid [192] (Gageler J).

and with a view to their practical application. It is unlikely that such laws can be subject to simple tests which will effortlessly reveal whether the law is justified or not.

10.25 Much might therefore depend on whether the court retains its discretion to ensure the trial is run fairly. Judges play the central role in ensuring the fairness of trials, and have inherent powers to ensure a trial is run fairly. In *Dietrich v The Queen*, Gaudron J said that the 'requirement of fairness is not only independent, it is intrinsic and inherent':

> Every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial. Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court.[33]

10.26 In *X7 v Australian Crime Commission*, French CJ and Crennan J said:

> The courts have long had inherent powers to ensure that court processes are not abused. Such powers exist to enable courts to ensure that their processes are not used in a manner giving rise to injustice, thereby safeguarding the administration of justice. The power to prevent an abuse of process is an incident of the general power to ensure fairness. A court's equally ancient institutional power to punish for contempt, an attribute of judicial power provided for in Ch III of the Constitution, also enables it to control and supervise proceedings to prevent injustice, and includes a power to take appropriate action in respect of a contempt, or a threatened contempt, in relation to a fair trial.[34]

10.27 In his submission, Professor Jeremy Gans stressed the importance of the inherent jurisdiction of any superior court to stay a proceeding on the ground of abuse of process: 'in my view, a key criterion for determining whether a Commonwealth law limits the right to a fair trial is whether or not a court's power to prevent an abuse of process is effective'.[35]

10.28 For the purpose of this Inquiry, the ALRC has identified statutes that appear to depart from accepted attributes of a fair trial, even if such statutes—understood in their broader context and having regard to a court's power to prevent unfairness—often may not, in practice, cause unfairness.

Protections from statutory encroachment

Australian Constitution

10.29 The *Australian Constitution* does not expressly provide that criminal trials must be fair, nor does it set out the elements of a fair trial.

10.30 Trial by jury is commonly considered a feature of a fair trial, and s 80 of the *Constitution* provides a limited guarantee of a trial by jury: 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury'. However, the High Court has interpreted the words 'trial on indictment' to mean that Parliament may

---

33 *Dietrich v The Queen* (1992) 177 CLR 292, 363–4 (Gaudron J).

34 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).

35 J Gans, *Submission 2*.

determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies.[36] This has been said to mean that s 80 provides 'no meaningful guarantee or restriction on Commonwealth power'.[37]

10.31 The concept of Commonwealth judicial power provides some limited protection to the right to a fair trial. The text and structure of Ch III of the *Constitution* implies that Parliament cannot make a law which 'requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the *essential character of a court or with the nature of judicial power*'.[38] After quoting this passage, Gaudron J, in *Nicholas v The Queen*, said:

> In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.[39]

10.32 However, the regulation by Parliament of judicial processes (for example, the power to exclude evidence) is considered permissible, and is not an incursion on the judicial power of the Commonwealth.[40]

10.33 As noted in Chapter 1, the High Court may have moved towards—but stopped short of—entrenching procedural fairness as a constitutional right.[41] If procedural fairness were considered an essential characteristic of a court, this might have the potential, among other things, to constitutionalise:

> the presumption of innocence, the 'beyond reasonable doubt' standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts' jurisdiction to make an adverse finding on law or fact that has not been put to the

---

36 *R v Archdall and Roskruge; Ex pate Carrigan and Brown* (1928) 41 CLR 128, 139–40; *R v Bernasconi* (1915) 19 CLR 629, 637; *Kingswell v The Queen* (1985) 159 CLR 264, 276–7; *Zarb v Kennedy* (1968) 121 CLR 283.

37 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 355. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 58 CLR 556, 581–2 (Dixon and Evatt JJ).

38 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (emphasis added).

39 *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 (Gaudron J).

40 *Nicholas v The Queen* (1998) 193 CLR 173.

41 Williams and Hume, above n 37, 375.

> parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.[42]

10.34 In *Pompano*, Gaegler J said that Ch III of the *Constitution* 'mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia'. His Honour went on to say:

> Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made.[43]

10.35 It remains to be seen whether this will become settled doctrine in the Court.

Principle of legality

10.36 The principle of legality may provide some protection to fair trials.[44] When interpreting a statute, courts are likely to presume that Parliament did not intend to interfere with fundamental principles of a fair trial, unless this intention was made unambiguously clear.

10.37 Discussing the principle of legality in *Malika Holdings v Stretton*, McHugh J said it is a fundamental legal principle that 'a civil or criminal trial is to be a fair trial',[45] and that 'clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend' this and other fundamental principles.[46]

10.38 The application of the principle of legality to particular fair trial rights is also discussed further below and in other chapters of this report dealing with fair trial rights.[47]

International law

10.39 The right to a fair trial is recognised in international law. Article 14 of the ICCPR is a key provision and has been set out above. As discussed later in this chapter, fair trial is considered a 'strong right', but some limits on fair trial rights are also recognised in international law.

---

42 Ibid 376.

43 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [177].

44 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

45 Other cases identifying the right to a fair trial as a fundamental right: *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541–2; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575, 585.

46 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J, in a passage discussing why 'care needs to be taken in declaring a principle to be fundamental').

47 See Chs 9 and 11–14.

10.40 International instruments, such as the ICCPR, cannot be used to 'override clear and valid provisions of Australian national law'.[48] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[49]

Bills of rights

10.41 In other jurisdictions, bills of rights or human rights statutes provide some protection to fair trial rights. Bills of rights and human rights statutes protect the right to a fair trial in the United States,[50] the United Kingdom,[51] Canada[52] and New Zealand.[53] The Sixth Amendment to the United States *Constitution* provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

10.42 Principles of a fair trial are also set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[54]

Open justice

10.43 Open justice is one of the fundamental attributes of a fair trial.[55] That the administration of justice must take place in open court is a 'fundamental rule of the common law'.[56] The High Court has said that 'the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances'.[57]

10.44 In *Russell v Russell*, Gibbs J said that it is the 'ordinary rule' of courts of Australia that their proceedings shall be conducted 'publicly and in open view'; without public scrutiny, 'abuses may flourish undetected'. Gibbs J went on to say:

> Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their

---

48 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

49 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

50 *United States Constitution* amend VI.

51 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6.

52 *Canada Act 1982 c 11* ss 11, 14.

53 *New Zealand Bill of Rights Act 1990* (NZ) ss 24, 25.

54 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25; *Human Rights Act 2004* (ACT) ss 21–22.

55 Open justice is 'a fundamental aspect of the common law and the administration of justice and is seen as concomitant with the right to a fair trial': Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 674.

56 *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

57 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

> activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'. To require a court invariably to sit in closed court is to alter the nature of the court.[58]

10.45 The principle of open justice finds some protection in the principle of legality. French CJ has said that 'a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle'.[59]

10.46 Jason Bosland and Ashleigh Bagnall have written that this 'longstanding common law principle manifests itself in three substantive ways':

> [F]irst, proceedings are conducted in 'open court'; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of proceedings.[60]

10.47 That the media is entitled to report on court proceedings is 'a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings'.[61]

Common law limitations

10.48 The principle of open justice is not absolute, and limits on the open justice principle have long been recognised by the common law, particularly where it is 'necessary to secure the proper administration of justice' or where otherwise it is in the public interest.[62]

10.49 Open justice may be limited where proceedings are conducted *in camera* (the media and the public are not permitted in court); where the court orders that certain information be concealed from those present in court; where the court orders that a person be identified in court by a pseudonym; or where the court prohibits the publication of reports of the proceedings.[63]

---

58 *Russell v Russell* (1976) 134 CLR 495, 520. French CJ has said that this principle 'is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.': *Hogan v Hinch* (2011) 243 CLR 506, [20].

59 *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ).

60 Bosland and Bagnall, above n 55, 674.

61 *John Fairfax Publications v District Court of NSW* (2004) 61 NSWLR 344, [18]–[21] (citations omitted).

62 'It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers. This may be done where it is necessary to secure the proper administration of justice': *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ). 'A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule': *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

63 Bosland and Bagnall, above n 55, 674.

10.50 In *Russell v Russell*, Gibbs J said that there are 'established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament'.[64] His Honour went on to say that 'the need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court'.[65]

10.51 The common law has recognised a number of cases in which the principle of open justice may be limited in some circumstances, for example, to protect:

- secret technical processes;
- an anticipated breach of confidence;
- the name of a blackmailer's victim;
- the name of a police informant or the identity of an undercover police officer; and
- national security.[66]

10.52 French CJ said that the categories of case are not closed, but they 'will not lightly be extended'.[67]

10.53 In *John Fairfax Group v Local Court of New South Wales*, Kirby P discussed some of the justifications for common law limits on the principle of open justice:

> Exceptions have been allowed by the common law to protect police informers; blackmail cases; and cases involving national security. The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourages its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of a particular case.[68]

10.54 Similar exceptions are provided for in international law. Article 14(1) of the ICCPR provides, in part:

> The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would

64 *Russell v Russell* (1976) 134 CLR 495, 520.
65 Ibid 520 [8].
66 These examples are taken from *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ) (citations omitted). Concerning national security, French CJ said: 'Where "exceptional and compelling considerations going to national security" require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified': Ibid [21].
67 *Hogan v Hinch* (2011) 243 CLR 506, [21].
68 *John Fairfax Group v Local Court of NSW* (1991) 36 NSWLR 131, 141 (citations omitted).

> prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Statutes that limit open justice

10.55 Among other common law powers to limit open justice, courts may in some circumstances conduct proceedings *in camera* and make suppression orders.[69] Such powers are also provided for in Commonwealth statutes. There are a range of such laws, including those that concern:

- the general powers of the courts;
- national security; and
- witness protection.

General powers of courts

10.56 Federal courts have express statutory powers to make suppression orders and non-publication orders.[70] The *Federal Court of Australia Act* (Cth) s 37AE, for example, provides that 'in deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice'.[71]

10.57 Section 37AG sets out the grounds for making a suppression or non-publication order:

> (a) the order is necessary to prevent prejudice to the proper administration of justice;
>
> (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
>
> (c) the order is necessary to protect the safety of any person;

---

69 'It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers': *Hogan v Hinch* (2011) 243 CLR 506, [21] and cases cited there. 'The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute: *DJL v The Central Authority* (2000) 201 CLR 226, 240–1. The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court (*Central Equity Ltd v Chua* [1999] FCA 1067): Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth).

70 Eg, *Federal Court of Australia Act 1976* (Cth) ss 37AE–37AL. Model statutory provisions on suppression and non-publication orders were endorsed by Commonwealth, state and territory Attorneys-General in 2010. These were implemented in the High Court, Federal Court, Family Court of Australia and the Federal Magistrates Court and other courts exercising jurisdiction under the *Family Law Act 1975* (Cth) by amendments made by the *Access to Justice (Federal Jurisdiction) Amendment Act 2011* (Cth). NSW and Victoria have also implemented the model provisions.

71 Ibid s 37AE.

> (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).[72]

10.58 These grounds are reflected in other statutes, discussed below, that concern limits on open justice.

10.59 Under the *Federal Court of Australia Act* 1976 (Cth) s 17(4), the Federal Court may exclude members of the public where it is 'satisfied that the presence of the public ... would be contrary to the interests of justice'.

10.60 These provisions will have a relatively limited effect on criminal trials, given that criminal trials are rarely heard in federal courts, although in 2009 the Federal Court was given jurisdiction to deal with indictable cartel offences.[73]

National security

10.61 A number of provisions limit open justice for national security. For example, the *Criminal Code* provides that a court may exclude the public from a hearing or make a suppression order, if it is 'satisfied that it is in the interest of the security or defence of the Commonwealth'.[74]

10.62 Similar provisions appear in the *Crimes Act 1914* (Cth) s 85B and the *Defence (Special Undertakings) Act 1952* s 31(1), although the relevant proviso reads: if 'satisfied that such a course is *expedient* in the interest of the defence of the Commonwealth'.[75]

10.63 In making orders under these provisions, courts may consider the principles of open justice and the need to provide a fair trial.[76] In *R v Lodhi*, McClellan CJ said:

> Neither the *Crimes Act* or the *Criminal Code* expressly acknowledges the principle of open justice or a fair trial. However, by the use of the word 'may' the Court is given a discretion as to whether to make an order. Accordingly, the Court must determine whether the relevant interest of the security of the Commonwealth is present and, after considering the principle of open justice and the objective of providing the accused

---

72 Ibid s 37AG(1). The Explanatory Memorandum for the relevant Bill said the amendments were designed to 'ensure that suppression and non-publication orders are made only where necessary on the grounds set out in the Bill, taking into account the public interest in open justice, and in terms that clearly define their scope and timing': Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth).

73 See *Competition and Consumer Act 2010* (Cth) s 163.

74 *Criminal Code Act 1995* (Cth) sch 1 s 93.2(1) (*Criminal Code*). 'At any time before or during the hearing, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that it is in the interest of the security or defence of the Commonwealth: (a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or (b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or (c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.'

75 Emphasis added.

76 *Lodhi v R* (2006) 65 NSWLR 573; *R v Benbrika (Ruling No 1)* [2007] VSC 141 (21 March 2007).

> with a fair trial, determine whether, balancing all of these matters, protective orders should be made.[77]

10.64 Under the *Service and Execution of Process Act 1992* (Cth) s 127(4), a court may direct that a proceeding to which the section applies, which concerns matters of state, is to be held *in camera*. Suppression orders can be made under s 96.

10.65 The *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) s 40 concerns closing courts and making suppression orders and other orders when the court is satisfied that it would be expedient to prevent the disclosure of information related to nuclear weapons and other such material.

10.66 The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) aims to prevent the disclosure of information in federal criminal and civil proceedings where the disclosure is likely to prejudice national security.[78] Among other things, it provides that courts must, in some circumstances, consider closing the court to the public, where national security information may be disclosed.[79]

10.67 Decisions about whether certain sensitive information will be admitted as evidence may also be decided in a closed hearing—without the defendant and their lawyer, if the lawyer does not have an appropriate security clearance.[80]

10.68 In deciding to make certain orders, the courts must consider whether there would be a risk of prejudice to national security and whether the order would have 'a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence'. Section 31(8) provides that the court 'must give greatest weight' to the question of national security.[81] However, in *R v Lodhi*, Whealy J said that this:

> does no more than to give the Court guidance as to the comparative weight it is to give one factor when considering it alongside a number of others. Yet the discretion remains intact ... The legislation does not intrude upon the customary vigilance of the trial judge in a criminal trial. One of the court's tasks is to ensure that the accused is not dealt with unfairly. This has extended traditionally into the area of public interest immunity claims. I see no reason why the same degree of vigilance, perhaps even at a higher level, would not apply to the Court's scrutiny of the Attorney's certificate in a s 31 hearing.[82]

10.69 On appeal, in *Lodhi v R*, Spigelman CJ said:

> This tilting or 'thumb on the scales' approach to a balancing exercise does not involve the formulation of a rule which determines the outcome in the process. Although the

77 *Lodhi v R* (2006) 65 NSWLR 573, 584 [27] (McClellan CJ at CL).
78 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3.
79 Ibid s 31.
80 Ibid s 29(3).
81 Ibid s 31(7)(8). There are also related provisions for civil proceedings in Pt 3A of the Act.
82 *R v Lodhi* [2006] NSWSC 571, [108]. The reasoning of Whealy J in this case was upheld in the NSW Court of Criminal Appeal: see *Lodhi v R* (2006) 65 NSWLR 573, [36].

> provision of guidance, or an indication of weight, will affect the balancing exercise, it does not change the nature of the exercise.[83]

10.70 The Independent National Security Legislation Monitor (INSLM) discussed s 31(8) and its judicial interpretation and suggested it nevertheless be repealed.[84] While it has 'survived constitutional challenge, if its tilting or placing a thumb on the scales produces no perceptible benefit in the public interest, it would be better if it were omitted altogether'.[85]

10.71 The protection of national security information in criminal proceedings was the subject of the ALRC's 2004 report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*.[86]

Witness protection

10.72 The other major ground for limiting open justice is to protect certain witnesses, particularly children and other vulnerable witnesses.

10.73 In the Federal Court, all witnesses in 'indictable primary proceedings' may be protected (ie not limited to those in a criminal proceeding involving a sexual offence). Under the *Federal Court Act* s 23HC(1)(a), the Court may make such orders as it thinks appropriate in the circumstances to protect witnesses.[87] However, although the Federal Court has been given jurisdiction to hear indictable cartel offences,[88] criminal trials are otherwise rarely heard in federal courts.

10.74 Under the *Witness Protection Act 1994* (Cth) s 28, courts must hold certain parts of proceedings in private and make suppression orders when required to protect people in the National Witness Protection Program. However, it will not make such orders if 'it considers that it is not in the interests of justice'.[89]

10.75 Similarly, law enforcement operatives are given some protection under the *Crimes Act* s 15MK(1), which permits a court to make orders suppressing information if it 'considers it necessary or desirable to protect the identity of the operative for whom [a witness identity protection certificate] is given or to prevent disclosure of where the operative lives'.

10.76 The courts may exclude members of the public from a proceeding where a vulnerable witness is giving evidence under the *Crimes Act* s 15YP. Depending on the proceedings, this may include children (for sexual and child pornography offences) and all people for slavery, slavery-like and human trafficking offences.[90]

---

83 *Lodhi v R* (2006) 65 NSWLR 573, [45].
84 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 139.
85 Ibid.
86 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Final Report No 98 (2004).
87 This protection can also be made in relation to 'information, documents and other things admitted or proposed to be admitted': *Federal Court of Australia Act 1976* (Cth) s 23HC(1)(b).
88 See *Competition and Consumer Act 2010* (Cth) s 163.
89 *Witness Protection Act 1994* (Cth) s 28A(1).
90 *Crimes Act 1914* (Cth) s 15Y.

10.77 The court may also make such orders for a 'special witness'. The 'court may declare a person to be a special witness ... if satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner because of: (a) a disability; or (b) intimidation, distress or emotional trauma arising from: (i) the person's age, cultural background or relationship to a party to the proceeding; or (ii) the nature of the evidence; or (iii) some other relevant factor'.[91]

10.78 It is an offence under the *Crimes Act* s 15YR(1) to publish, without leave, information which identifies certain children and vulnerable adults or 'is likely to lead to the vulnerable person being identified'.

Other laws

10.79 Other Commonwealth statutes that may limit open justice, but not in the context of criminal trials, include:

- *Family Law Act 1975* (Cth) s 121—offence to publish an account of proceedings under the Act that identifies a party to the proceedings or a witness or certain others;
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)—court can order that proceedings occur *in camera* if it is in the interests of justice and the interests of 'Aboriginal tradition';[92]
- *Migration Act 1958* (Cth) s 91X—the names of applicants for protection visas not to be published by federal courts;
- *Child Support (Registration and Collection) Act 1988* (Cth) s 110X provides for an offence of publishing an account of proceedings, under certain parts of the Act, that identifies a party to the proceedings or a witness or certain others;
- *Administrative Appeals Tribunal Act 1975* (Cth) ss 35(2), 35AA;
- *Australian Crime Commission Act 2002* (Cth) ss 25A(9), 29B;
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 90, 92.

10.80 This chapter focuses on criminal trials, but laws that limit open justice and other fair trial rights in civil trials also warrant careful justification.

Right to confront witnesses and test evidence

10.81 The High Court has said that 'confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'.[93] The right to confront an adverse witness has been said to be 'basic to any civilised notion of a fair trial'.[94] In *R v Davis*, Lord Bingham said:

---

91 Ibid s 15YAB(1).
92 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 27.
93 *Lee v The Queen* (1998) 195 CLR 594, [32].
94 *R v Hughes* [1986] 2 NZLR 129, 149 (Richardson J).

> It is a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.[95]

10.82 This principle, Lord Bingham said, originated in ancient Rome, and was later recognised by such authorities as Sir Matthew Hale, Blackstone and Bentham.

> The latter regarded the cross-examination of adverse witnesses as 'the indefeasible right of each party, in all sorts of causes' and criticised inquisitorial procedures practised on the continent of Europe, where evidence was received under a 'veil of secrecy' and the door was left 'wide open to mendacity, falsehood, and partiality'.[96]

10.83 The Sixth Amendment to the *United States Constitution* provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

Statutory limitations

10.84 A number of laws may limit the right to confront witnesses and test evidence, including laws that:

- provide exceptions to the hearsay rule;
- protect vulnerable witnesses, such as children;
- protect privileged information, such as communications between client and lawyer and between a person and religious confessor;
- allow matters to be proved by provision of an evidential certificate; and
- permit the use of redacted evidence in court, for national security reasons.

Hearsay evidence

10.85 The importance of being able to cross-examine adverse witnesses is one of the rationales for the rule against hearsay evidence.[97] The hearsay rule, as set out in the Uniform Evidence Acts, is as follows:

> Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.[98]

---

95 *R v Davis* [2008] 1 AC 1128, [5].

96 Ibid.

97 'Legal historians are divided between those who ascribe the development of the rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness': JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [31015].

98 *Evidence Act 1995* (Cth) s 59(1). Another formulation is set out in Cross on Evidence: 'an assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of any fact asserted': Heydon, above n 97, [31010].

10.86 The High Court has said that one 'very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement'.[99]

> Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.[100]

10.87 However, Terese Henning and Professor Jill Hunter have written about the 'massive challenge in identifying an apparently elusive formula to satisfy the fair trial right to confront one's accusers in the face of key witnesses who have died, fled or refused to testify'.[101]

10.88 Exceptions to the hearsay rule have been recognised both at common law and in statutes. However, hearsay under the Uniform Evidence Acts extends the common law exceptions and has been said to be 'a significant departure from the common law'.[102] The exceptions are set out in ss 60–75 of the Uniform Evidence Acts.

> The Uniform Evidence Acts allow more out-of-court statements to be admitted and effectively abolishes the distinction between admitting statements for their truth or simply to prove that they were made. Also, implied, that is, unintended, assertions are not excluded, in contrast to the situation at common law where ... the situation remains unclear.[103]

10.89 Henning and Hunter write that, in recent years, 'many common law systems have introduced sweeping legislative reforms' in this area, and 'Australia's legislature and courts have followed the common law trend of shifting the traditional exclusionary rule in a markedly pro-admissibility direction'.[104]

Vulnerable witnesses

10.90 The vulnerable witness provisions under the *Crimes Act* pt IAD are intended to protect child witnesses and victims of sexual assault. For example, there are restrictions on the cross-examination of vulnerable persons by unrepresented defendants in pt IAD div 3.[105]

---

99 *Lee v The Queen* (1998) 195 CLR 594, [32].

100 Ibid.

101 Terese Henning and Jill Hunter, 'Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Bloomsbury Publishing, 2012) 347.

102 Westlaw AU, *The Laws of Australia* (at 20 July 2015) 16 Evidence, '16.4 Testimony' [16.4.1950].

103 Ibid.

104 Henning and Hunter, above n 101, 347.

105 Concerning the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 (Cth), the Human Rights Committee said: 'The committee appreciates that this is intended to protect vulnerable witnesses and does not limit the ability of the defendant's legal representative from testing evidence. However, the committee is concerned that if a person is not legally represented this provision may limit the defendant's ability to effectively examine the witnesses against them': Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Eighth Report of 2013* (June 2013) 5.

10.91 Such laws limit traditional rights of cross-examination, but were not criticised in submissions to this Inquiry. In fact, there have been calls for such laws to be extended. Women's Legal Services Australia has called for similar protections to be provided for in the *Family Law Act*, to

> protect victims of family and domestic violence in family law from being subject to cross-examination by the perpetrator who is self-representing and to provide assistance with the victim's cross-examination of the perpetrator (if the victim is also self-representing).[106]

10.92 Such laws are part of the trend towards considering the importance of treating fairly all participants in criminal proceedings, rather than the traditional focus on fairness only for the accused.[107] In the past, Professors Paul Roberts and Jill Hunter have written, complainants and witnesses have 'too often been treated in deplorable ways that betray the ideals of criminal adjudication'.

> Major procedural reforms have been implemented in many common law jurisdictions over the last several decades designed to assist complainants and witnesses to give their best evidence in a humane procedure which treats them with appropriate concern and respect.[108]

10.93 Although these may be seen as laws that limit traditional fair trial rights, Roberts and Hunter stress that rights for victims and witnesses need not be 'secured *at the expense of* traditional procedural safeguards, as though justice were a kind of commodity that must be taken from some ('criminals') so that others ('victims') can have more'.[109] This is said to be a common misconception. Victims 'do not truly get justice when offenders are convicted unfairly, still less if flawed procedures lead to the conviction of the innocent'.[110]

Privileges

10.94 Statutory privileges have the potential to prevent an accused person from obtaining or adducing evidence of their innocence, and may therefore deny a person a

106 Women's Legal Services Australia WLSA, *Submission 5*. The Productivity Commission and the ALRC and NSW Law Reform Commission have made recommendations about the cross-examination of complainants in sexual assault proceedings in previous inquiries: Productivity Commission, *Access to Justice Arrangements* (2014) rec 24.2; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report No 114, NSWLRC Report 128 (October 2010) Recs 18–3, 27–1, 27–2, 27–3. See further, Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539.

107 This is discussed more generally later in the chapter.

108 Paul Roberts and Jill Hunter, 'Introduction—The Human Rights Revolution in Criminal Evidence and Procedure' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Bloomsbury Publishing, 2012) 20.

109 Ibid.

110 Ibid.

fair trial.[111] A privilege is essentially a right to resist disclosing information that would otherwise be required to be disclosed.[112]

> Privileged communications may be highly probative and trustworthy, but they are excluded because their disclosure is inimical to a fundamental principle or relationship that society deems worthy of preserving and fostering even at the expense of truth ascertainment in litigation. There is a constant tension between the competing values which various privileges promote, and the need for all relevant evidence to be adduced in litigation.[113]

10.95 The recognition of certain privileges suggests that 'truth may sometimes cost too much'.[114] Unlike other rules of evidence, privileges are 'not aimed at ascertaining truth, but rather at upholding other interests'.[115]

10.96 Many statutory privileges provide for exceptions, usually with reference to the public interest, which may allow a court to permit a defendant to adduce otherwise privileged evidence of his or her innocence. Such exceptions exist for the privileges for journalists' sources, self-incrimination, public interest immunity and settlement negotiations.[116] However, they are arguably more limited or do not exist for client legal privilege and the privilege for religious confessions.[117] Professor Gans submitted that this needs careful review.[118]

10.97 Section 123 of the *Evidence Act 1995* (Cth) does provide for an exception for defendants seeking to adduce evidence in criminal proceedings, but Gans was critical of a confined interpretation given to the exception in a 2014 decision of the Victorian Court of Appeal.[119]

Evidentiary certificates

10.98 The use of evidentiary certificates has the potential to affect the fairness of a trial. An evidentiary certificate allows third parties to provide the court with evidence—without appearing in court and therefore without being challenged about that evidence. The Guide to Framing Commonwealth Offences states that evidentiary certificates should be used rarely:

---

111 J Gans, *Submission 2*.

112 Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) [14.1]. See also Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing Ltd, 2004) 91.

113 Jill B Hunter, Camille Cameron and Terese Henning, *Evidence and Criminal Process* (LexisNexis Butterworths, 2005) 276 [8.1]. In *McGuinness v Attorney-General* (Vic) Rich J said: 'Privilege from disclosure in courts of justice is exceptional and depends upon only the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country. It was found necessary to make exceptions in favour of state secrets, confidences between counsel and client, solicitor and client, doctor and patient, and priest and penitent, cases presenting the strongest possible reasons for silencing testimony': *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 87.

114 *R v Young* (1999) 46 NSWLR 681, 696–7 (Spigelman CJ).

115 J Gans, *Submission 2*.

116 *Evidence Act 1995* (Cth) ss 126H(2), 128(4), 129(5), 130(5), 131(2). See J Gans, *Submission 2*.

117 *Evidence Act 1995* (Cth) ss 118–120, 127.

118 J Gans, *Submission 2*.

119 *DPP (Cth) v Galloway (a pseudonym) & Ors* [2014] VSCA 272 (30 October 2014).

> Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute but that would be difficult to prove under the normal evidential rules, and should be subject to safeguards.[120]

10.99 The *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AA enables evidentiary certificates to be issued, setting out facts in relation to certain acts done by ASIO. The Law Council of Australia submitted that this may unjustifiably limit the right to a fair trial.

> This principle requires that mechanisms designed to prevent disclosure of certain evidence must be considered exceptional, and limited only to those circumstances that can be shown to be necessary. The right to a fair trial may not have been appropriately balanced against the public interest in non-disclosure.[121]

10.100 However, the certificates in s 34AA are only 'prima facie evidence of the matters stated in the certificate'.[122] More potentially problematic—though not necessarily unjustified—are provisions that provide that certain certificates are to be taken as *conclusive* evidence of the facts stated in the certificate. There are a number of such provisions in the Commonwealth statute book. Concerning such certificates, the Guide to Framing Commonwealth Offences states:

> In many cases it will be beyond the power of the Federal Parliament to enact provisions that specify that the certificate is conclusive proof of the matters stated in it. Requiring courts to exclude evidence to the contrary in this way can destroy any reasonable chance to place the complete facts before the court. However, conclusive certificates may be appropriate in limited circumstances where they cover technical matters that are sufficiently removed from the main facts at issue. An example of a provision permitting the use of conclusive certificates is subsection 18(2) of the *Telecommunications (Interception and Access) Act 1979*. These certificates only cover the technical steps taken to enable the transfer of telecommunications data to law enforcement agencies.[123]

Redacted evidence

10.101 There is a potential for redacted evidence to affect the fairness of a trial. Redacted evidence is documentary evidence that has been altered in some way, usually by being partially deleted to protect certain information from disclosure. As the INSLM explained, 'an accused simply should not be at peril of conviction of imprisonment (perhaps for life) if any material part of the case against him or her has not been fully exposed to accused and counsel and solicitors'.[124]

10.102 The NSI Act places certain limits on the disclosure of national security information, but also provides that a copy of a document that contained such information may be disclosed in federal criminal proceedings, if the relevant national

---

120 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 54.

121 Law Council of Australia, *Submission 75*. 'These provisions relate to the use of special powers by ASIO, such as search warrants, computer search warrants, and listening and tracking device warrants': Ibid.

122 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AA(4).

123 Attorney-General's Department, above n 120, 55.

124 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 142.

security information has been deleted.[125] In making such an order, a court must consider a number of factors, but must give 'greatest weight' to questions of national security.[126] The Law Council submitted that this 'may unduly restrict the court's discretion to determine how and when certain information may be disclosed in federal criminal proceedings' and have an impact on 'a defendant's opportunity to examine the prosecution's case and may not be a proportionate response to the risk identified, in view of the potential prejudice'.[127]

10.103 In making such an order, a court must also consider 'whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence'.[128] In the opinion of the INSLM, this suffices to protect against any potential unfairness.[129]

Secret evidence

10.104 Withholding secret evidence from one party to a criminal or civil procedure—particularly from a defendant in a criminal trial—is a more serious matter. Here, the court is asked to rely on evidence that the other party has no opportunity to see or challenge. There is a strong common law tradition against the use of secret evidence. In *Pompano*, French CJ said:

> At the heart of the common law tradition is 'a method of administering justice'. That method requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it. Antithetical to that tradition is the idea of a court, closed to the public, in which only one party, a government party, is present, and in which *the judge is required by law to hear evidence and argument which neither the other party nor its legal representatives is allowed to hear*.[130]

10.105 Article 14 of the ICCPR also provides that defendants must have the opportunity to examine witnesses against them.

10.106 The ALRC is not aware of any Commonwealth provisions that allow for so-called secret evidence in criminal trials. Although there have been criticisms of the NSI Act in relation to this, the INSLM has stated that the Act 'is not a legislative system to permit and regulate the use of secret evidence in a criminal trial—ie evidence adverse to an accused, that the accused is not allowed to know'.[131]

---

125 See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(2).
126 Ibid s 31(8).
127 Law Council of Australia, *Submission 75*.
128 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7)(b).
129 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 143. This matter is discussed extensively in this report.
130 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [1] (French CJ) (emphasis added).
131 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 140.

10.107 The use of secret evidence in tribunals, particularly in immigration cases, is discussed in the ALRC's report, *Keeping Secrets*.[132]

Right to a lawyer

10.108 It is important to distinguish between two senses in which a person may be said to have a right to a lawyer. The first (negative) sense essentially means that no one may prevent a person from using a lawyer. The second (positive) sense essentially suggests that governments have an obligation to provide a person with a lawyer, at the government's expense.

10.109 Both of these types of rights are reflected in art 14 of the ICCPR, which provides, in part, that a defendant to a criminal charge must be:

> tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

10.110 Although now well entrenched in the common law, even this first type of right does in fact not have a particularly long history. In England, people accused of a felony had no right to be represented by a lawyer at their trial until 1836.[133] However, the right to a lawyer is now widely recognised and subject to relatively few restrictions, as discussed below.

10.111 The second type of right—to be provided a lawyer at the state's expense—is less secure. In *Dietrich v The Queen*, Mason CJ and McHugh J said:

> Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial.[134]

10.112 The court held that the seriousness of the crime is an important consideration: 'the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only'.[135]

10.113 In this same case, Mason CJ and McHugh J said that, although 'the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense',

> the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which

---

132 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Final Report No 98 (2004) Ch 10.

133 *Dietrich v The Queen* (1992) 177 CLR 292, 317 (citations omitted).

134 Ibid 311.

135 Ibid.

> representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.[136]

Laws that limit legal representation

10.114 The ALRC is not aware of any Commonwealth laws that limit a court's power to stay proceedings in a serious criminal trial on the grounds that the accused is unrepresented and therefore will not have a fair trial.

10.115 Nevertheless, Commonwealth laws place limits on access to a lawyer. Under s 23G of the *Crimes Act*, an arrested person has a right to communicate with a lawyer and have the lawyer present during questioning, but this is subject to exceptions, set out in s 23L. There are exceptions where an accomplice of the person may try to avoid apprehension or where contacting the legal practitioner may lead to the concealment, fabrication or destruction of evidence or the intimidation of a witness. There is also an exception for when questioning is considered so urgent, having regard to the safety of other people, that it cannot be delayed.[137]

10.116 Although these exceptions may mean a person cannot in some circumstances see a lawyer of their own choosing, the person must nevertheless be offered the services of another lawyer.[138] The ALRC has not received submissions suggesting that these limits are unjustified.

10.117 The Law Council criticised the limited access to a lawyer for persons subject to a preventative detention order under the *Criminal Code* pt 5.3 div 105, which 'enables a person to be taken into custody and detained by the AFP in a State or Territory prison or remand centre for an initial period of up to 24 hours':

> Preventative detention orders restrict detainees' rights to legal representation by only allowing detainees access to legal representation for the limited purpose of obtaining advice or giving instructions regarding the issue of the order or treatment while in detention (Section 105.37 of the *Criminal Code*). Contact with a lawyer for any other purpose is not permitted.[139]

10.118 The *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34ZO limits a detained person's contact with a lawyer; s 34ZP allows a detained person to be questioned without a lawyer; and s 34ZQ(9) allows for the removal of legal advisers whose conduct 'the prescribed authority considers ... is unduly disrupting the questioning' of a detained person. However s 34ZQ(10) provides that in the event of the removal of a person's legal adviser, 'the prescribed authority must also direct … that the subject may contact someone else'.

---

136 Ibid [1].

137 *Crimes Act 1914* (Cth) s 23L(1)(b). See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2002* (October 2002) 416.

138 '[T]he investigating official must offer the services of another legal practitioner and, if the person accepts, make the necessary arrangements': *Crimes Act 1914* (Cth) s 23L(4).

139 Law Council of Australia, *Submission 75*. The Law Council also said that 'both the content and the meaning of communication between a lawyer and a detained person can be monitored. Such restrictions could create unfairness to the person under suspicion by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice': Ibid. Client legal privilege is discussed in Ch 13.

10.119 The right to have a lawyer of one's own choosing may be limited by provisions in the NSI Act that provide that parts of a proceeding may not be heard by, and certain information not given to, a lawyer for the defendant who does not have the appropriate level of security clearance.[140] The Act also provides that the court may recommend that the defendant engage a lawyer who has been given, or is prepared to apply for, a security clearance.[141]

10.120 This scheme was criticised by the Law Council, which submitted that it 'may unjustifiably encroach on the right to a fair trial in two ways':

> Firstly, it potentially restricts a person's right to a legal representative of his or her choosing, inconsistent with the rule of law, by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information. Secondly, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information.[142]

Legal aid and access to justice

10.121 The positive right to be provided with a lawyer at the state's expense is not a traditional common law right. Even if a court orders a stay of proceedings against an unrepresented defendant in a serious criminal trial, this power is of little assistance to others who seek access to justice. The focus of the fair trial rights in this chapter is on the rights of people accused of crimes, but this is not to discount the importance of access to justice more broadly.

10.122 The importance of funding for legal aid was raised by some stakeholders to this Inquiry. Women's Legal Services Australia submitted that many of their clients cannot afford legal representation and legal aid funding is insufficient for their needs. These clients must either continue their legal action unrepresented or not pursue legal action.[143] The Law Council said that 'the right to a fair trial and effective access to justice is undermined by a failure of successive governments to commit sufficient resources to support legal assistance services, as evidenced by increasingly stringent restrictions on eligibility for legal aid'.[144]

10.123 Access to justice has been the subject of many reports, in Australia and elsewhere, including recent reports by the Attorney-General's Department[145] and the Productivity Commission.[146]

---

140 See, eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29, 39, 46.
141 Ibid s 39(5).
142 Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) principle 4.
143 Women's Legal Services Australia WLSA, *Submission 5*.
144 Law Council of Australia, *Submission 75*.
145 Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (2009).
146 Productivity Commission, above n 106.

Appeal from acquittal

10.124 'It is a golden rule, of great antiquity, that a person who has been acquitted on a criminal charge should not be tried again on the same charge'.[147] To try a person twice is to place them in danger of conviction twice—to 'double their jeopardy'. The general principles underlying the double jeopardy rule include:

> the prevention of the State, with its considerable resources, from repeatedly attempting to convict an individual; the according of finality to defendants, witnesses and others involved in the original criminal proceedings; and the safeguarding of the integrity of jury verdicts.[148]

10.125 The principle applies where there has been a hearing on the merits—whether by a judge or a jury. It does not extend to appeals from the quashing or setting aside of a conviction,[149] or appeals from an acquittal by a court of appeal following conviction by a jury.[150]

10.126 The rule against double jeopardy can be traced to Greek, Roman and Canon law, and is considered a cardinal principle of English law.[151] By the 1660s it was considered a basic tenet of the common law.[152] Blackstone in his *Commentaries on the Laws of England* grounds the pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction for the same identical crime) on the 'universal maxim of the common law of England, that no man ought to be twice brought in danger of his life for one and the same crime'.[153]

---

147 *Davern v Messel* (1984) 155 CLR 21, 338 (Murphy J).

148 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals, Discussion Paper, Chapter 2' (2003). The Hon Michael Kirby AC CMG has identified and discussed ten separate grounds offered by the law for a rule against double jeopardy: (a) controlling state power; (b) upholding accusatorial trial; (c) accused's right to testify; (d) desirability of finality; (e) confidence in judicial outcomes; (f) substance not technicalities; (g) differential punishment; (h) upholding the privilege against self-incrimination; (i) increasing conviction chances; and (j) denial of basic rights: see Hon Justice Michael Kirby, '*Carroll*, Double Jeopardy and International Human Rights Law' (2003) 27(5) *Criminal Law Journal* 231. Justice Black of the US Supreme Court said in *Green v United States*: 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty ... It may be seen as a value which underpins and affects much of the criminal law': *Green v The United States* 355 US 184 (1957), 187–188, quoted in *Pearce v The Queen* (1998) 194 CLR 610, [10] (McHugh, Hayne and Callinan JJ).

149 *Davern v Messel* (1984) 155 CLR 21, 62 (Murphy J).

150 Ibid 39–40 (Gibbs CJ); *R v Benz* (1989) 168 CLR 110, 112 (Mason CJ).

151 See the judgment of Murphy J, which provides an account of the history of this principle: *Davern v Messel* (1984) 155 CLR 21, 62–63 (Murphy J).

152 Martin Friedland, *Double Jeopardy* (Clarendon Press, 1969) 5–6. At common law, the principle originated in the dispute between King Henry II and Archbishop Thomas Becket over the role of the King's courts in punishing clerks convicted in the ecclesiastical courts.

153 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press reprinted by Legal Classics Library, 1765) vol IV, bk IV, ch 26, 329–30.

10.127 In Australia, the principle of legality provides some protection for this principle.[154] When interpreting a statute, courts will presume that Parliament did not intend to permit an appeal from an acquittal, unless such an intention was made unambiguously clear.[155] For example, in *Thompson v Mastertouch TV Service*, the Federal Court found that the court's power to 'hear and determine appeals' under s 19 of the *Federal Court Act 1970* (Cth) should not be interpreted as being sufficient to override the presumption against appeals from an acquittal.[156] However, the principle of legality has not been applied to confine s 68(2) of the *Judiciary Act*, which can operate to 'pick up' state laws that allow an appeal against an acquittal and apply them in state courts hearing Commonwealth offences.[157]

10.128 The double jeopardy principle is enshrined in international law. Article 14(7) of the ICCPR states that no one shall be 'liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

10.129 Bills of rights and human rights statutes prohibit laws that permit an appeal from an acquittal in the United States,[158] Canada[159] and New Zealand.[160] The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[161]

Laws that allow an appeal from an acquittal

10.130 Section 73 of the *Constitution* provides the High Court with extensive jurisdiction, including, the High Court has held, jurisdiction to hear appeals from an acquittal made by a judge or jury at first instance.[162] However, while it is within the Court's power to hear an appeal from an acquittal, the Court will generally not grant special leave, unless issues of general importance arise.[163] In *R v Wilkes*, Dixon CJ said the Court should

---

154 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

155 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J); *R v Snow* (1915) 20 CLR 315, 322 (Griffith CJ); *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon J); *Macleod v Australian Securities and Investments Commission* 211 CLR 287, 289.

156 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J).

157 'The *Judiciary Act* is legislation of a quasi constitutional character. Its purpose includes the purpose of ensuring that accused persons in each State are, with defined exceptions, the subject of incidents of a criminal trial which are the same for Commonwealth offences as they are for State offences. This is a purpose of overriding significance and is sufficient to displace the application of principles of statutory interpretation which lead the Court to read down general words to conform with principles which Parliament is presumed to respect': *R v JS* [2007] NSWCCA 272 [115] (Spigelman CJ).

158 *United States Constitution* amend V.

159 *Canada Act 1982 c 11* s 11(h).

160 *New Zealand Bill of Rights Act 1990* (NZ) s 26(2).

161 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26; *Human Rights Act 2004* (ACT) s 24.

162 Deane J discusses the history of the consideration of s 73 of the *Constitution*, including the decision in *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [17]–[19] (Deane J).

163 Ibid [18] (Deane J).

> be careful always in exercising the power which we have, remembering that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court.[164]

10.131 The ALRC is not aware of any other Commonwealth law that allows an appeal from an acquittal.[165]

10.132 Some state laws permit an appeal from an acquittal,[166] and such laws will be picked up and applied by s 68 of the *Judiciary Act*.[167] The state laws largely follow the model developed by the Council of Australian Governments in 2007. Professor Gans has raised a number of concerns about the Victorian law,[168] including that it 'allows appeals against acquittal in some circumstances where there isn't fresh and compelling evidence' and includes a narrower safeguard than the one proposed by the Council of Australian Governments.[169]

10.133 However, as noted above, state laws are not reviewed in this report, and nor is s 68(2) of the *Judiciary Act*—the general policy of which is to 'place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice'.[170]

10.134 However, a few possible justifications for limiting this principle may be noted. Victims of crime and their families will sometimes believe a guilty person has been wrongly acquitted. For these people particularly, the application of the principle that a person should not be tried twice may be not only unjust, but deeply distressing. The principle will seem acceptable when the person acquitted is believed to be innocent, but not when they are believed to be guilty. A balance must be struck, it has been said, 'between the rights of the individual who has been lawfully acquitted and the interest held by society in ensuring that the guilty are convicted and face appropriate consequences'.[171]

---

164 *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon CJ). This suggests the High Court is unlikely to interfere with a verdict of not guilty entered by a jury: see *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [19].

165 'Apart from s 73 of the Constitution, which allows appeals to the High Court, the Law Council is unable to identify any Commonwealth laws which permit an appeal after acquittal': Law Council of Australia, *Submission 75*.

166 See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) pt 8; *Criminal Procedure Act 2004* (Vic), s 327H; *Criminal Code* (Qld) ch 68; *Criminal Appeals Act 2004* (WA) pt 5A; *Criminal Law Consolidation Act 1935* (SA) pt 10; *Criminal Code Act 1924* (Tas) ch XLIV.

167 See *R v JS* [2007] NSWCCA 272 [93]–[119] (Spigelman CJ).

168 J Gans, *Submission 2*.

169 Gans submitted that Victoria 'lacks the crucial COAG safeguard that the Court of Appeal rule that a retrial would be "in the interests of justice"', and instead, the Court 'need only find that the retrial would be fair, which is a narrow matter': Ibid.

170 *R v Williams* (1934) 50 CLR 551, 560 (Dixon J). Gleeson CJ said in *R v Gee* that this 'reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter': *R v Gee* (2003) 212 CLR 230, [7] (Gleeson CJ).

171 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 149.

10.135 Professor Gans suggested two general criteria that might be used to assess the question of justification. These are, first, 'does the law contain appropriate constraints to ensure that the prosecutor cannot take advantage of the process to simply make repeated attempts to try a defendant until he or she is fortuitously convicted?', and second, 'do defendants have at least the same ability to appeal against a final conviction?'[172]

10.136 Limits on the principle may only be justified when they are strictly necessary. The Law Commission of England and Wales considered the rule against double jeopardy and prosecution appeals following a reference in 2001. Its findings and recommendations have laid the foundation for laws limiting the rule in UK and in other jurisdictions, such as New South Wales. The Law Commission concluded that interference with the rule may be justified where the acquittal is 'manifestly illegitimate' and 'sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy'.[173] The scope of the interference must be clear-cut and notorious.[174]

10.137 The Law Commission recommended that additional incursions on the rule against double jeopardy be limited to acquittals for murder or genocide.[175] This built on existing rights of appeal from an acquittal where the accused has interfered with or intimidated a juror or witness.[176]

Other laws

10.138 In addition to the laws discussed above, stakeholders commented on other laws that may limit fair trial rights.

Trial by jury

10.139 The *Australian Constitution* provides that the 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'.[177] But as discussed above, this has been given a narrow interpretation: Parliament may determine which offences are indictable. Therefore any criminal law that is not indictable may, broadly speaking, be said to deny a jury trial to a person charged with that offence.

10.140 *Crimes Act* s 4G provides: 'Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.'

---

172 J Gans, *Submission 2*.

173 The Law Commission, 'Double Jeopardy and Prosecution Appeals: Report on Two References under Section 3(1)(e) of the *Law Commissions Act 1965*' [4.30].

174 Ibid [4.35].

175 Ibid [4.30]–[4.36].

176 In order for an appeal to lie, it must not be contrary to the interests of justice, and there must be a real possibility that the accused would not have been acquitted absent the interference or intimidation: *Criminal Procedure and Investigations Act 1996* (UK) ss 54–57.

177 *Australian Constitution* s 80.

10.141 *Crimes Act* s 4H provides: 'Offences against a law of the Commonwealth, being offences which: (a) are punishable by imprisonment for a period not exceeding 12 months; or (b) are not punishable by imprisonment; are summary offences, unless the contrary intention appears.'

10.142 Defendants may therefore be denied a jury trial where: (1) an offence is punishable by fine only or by imprisonment for *less* than 12 months; and (2) an offence is punishable by a period of *more* than 12 months, but the statute evinces an intention that the offence be tried summarily.

10.143 The second situation is perhaps of greater concern. An example is the *Customs Act 1901* (Cth) s 232A, which concerns rescuing seized goods and assaulting customs officers, and provides that whoever does this: 'shall be guilty of an offence and shall be liable, *upon summary conviction*, to a fine not exceeding 5 penalty units or to imprisonment for any period not exceeding 2 years'.

10.144 *Crimes Act* s 4J provides that certain indictable Commonwealth offences may be dealt with summarily, but usually only with the consent of both the prosecutor and the defendant. Section 4JA also provides that certain indictable offences punishable by fine only may be dealt with summarily.

Torture evidence from other countries

10.145 The use in a trial of evidence obtained by torture or duress would not be fair, whether the torture was conducted in Australia or in another country. This is not because torture is immoral and a breach of a fundamental human right, but because evidence obtained by torture is unreliable.[178]

10.146 In a 2005 case concerning 'third party torture evidence', Lord Bingham said 'the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention'.[179] The common law's rejection of torture was 'hailed as a distinguishing feature of the common law' and the subject of 'proud claims' by many English jurists:

> In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by *the inherent unreliability of confessions or evidence so procured* and by the belief that it degraded all those who lent themselves to the practice.[180]

---

178 In *Montgomery v H M Advocate*, Lord Hoffmann observed that 'an accused who is convicted on evidence obtained from him by torture has not had a fair trial', not because of the use of torture, which breaches another right, 'but in the reception of the evidence by the court for the purposes of determining the charge': *Montgomery v H M Advocate, Coulter v H M Advocate* [2003] 1 AC 641, 649.

179 *A v Secretary of State for the Home Department* [2005] 2 AC 68.

180 Ibid [11] (emphasis added). Lord Bingham later concluded: 'The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice': Ibid [52].

10.147 Australian Lawyers for Human Rights submitted that the exception to admissibility in the *Foreign Evidence Act 1994* (Cth) may make it 'harder for a court to exclude evidence obtained by torture or duress', because the definition of torture in s 27D(3) is too narrow—it should have been inclusive, rather than exclusive.[181]

10.148 The Law Council also submitted that s 27D 'permits evidence of foreign material and foreign government material obtained *indirectly* by torture or duress'.[182]

Civil penalty provisions that should be criminal

10.149 A person may be denied their criminal process rights where a regulatory provision is framed as a civil penalty, when it should—given the nature and severity of the penalty—instead have been framed as a criminal offence.

10.150 The Parliamentary Joint Committee on Human Rights has published an interim practice note on this topic[183] and has discussed whether civil penalty provisions should instead be characterised as criminal offences in the context of a range of bills.[184]

10.151 The Law Council has expressed concerns about the sometimes 'punitive' civil confiscation proceedings provided for in the *Bankruptcy Act 1966* (Cth),[185] and suggested that 'ordinary protections in respect of criminal matters should be applied':

> The involvement of the Commonwealth DPP in the process offers a valuable safeguard and the guarantees that the person who commences and conducts the proceedings is an Officer of the Court and the Crown, with all the duties that entails, and thus has a personal obligation to ensure that the Court's powers and processes are adhered to in accordance with the right to a fair trial.[186]

10.152 The Human Rights Committee has said that this topic is complex and 'should be the subject of continuing dialogue with government'.[187]

Justifications for limits on fair trial rights

10.153 Although it will never be justified to hold an unfair trial, particularly an unfair criminal trial, as this chapter has shown, many of the general principles that characterise a fair trial are not absolute.[188]

---

181 Australian Lawyers for Human Rights, *Submission 43*.

182 Law Council of Australia, *Submission 75* (emphasis added).

183 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Eighth Report of 2013* (June 2013) Appendix 2.

184 Eg, the Agricultural and Veterinary Chemicals Legislation Amendment Bill, the Biosecurity Bill 2012 (Cth), the Superannuation Legislation Amendment (Reducing Illegal Early Release and Other Measures) Bill 2012 (Cth) and the Australian Sports Anti-Doping Authority Amendment Bill 2013 (Cth).

185 *Bankruptcy Act 1966* (Cth) ss 154(6A), 231A(2A).

186 Law Council of Australia, *Submission 75*.

187 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Eighth Report of 2013* (June 2013) Appendix 2.

188 This is evidently the position in Europe: 'The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute': *Brown v Stott*

10.154 Given the importance of practical justice, discussed above, one general question that might be asked of a law that appears to limit a fair trial right is: does this law limit the ability of a court to prevent an abuse of its processes and ensure a fair trial? Professor Gans submitted that 'a key criterion for determining whether a Commonwealth law limits the right to a fair trial is whether or not a court's power to prevent an abuse of process is effective'.[189]

10.155 Another general question that might be asked is: does this law increase the risk of a wrongful conviction?[190]

10.156 The structured proportionality principle discussed in Chapter 1 may also be a useful tool. The Human Rights Committee has suggested that proportionality reasoning can be used to evaluate limits of fair trial rights.[191] Proportionality is also used in the fair trial context in international law.

10.157 In *Brown v Stott*, Lord Bingham said that limited qualification of the rights comprised within art 6 is acceptable, 'if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for'. He went on to say that the European Court of Human Rights has:

> recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.[192]

10.158 This reflects a proportionality analysis. Professor Ian Dennis writes that the European Court has not deployed the concept of proportionality with any consistency in the context of fair trial rights, but 'the English courts have been more consistent in using proportionality to evaluate restrictions of art 6 rights, although the practice has not been uniform'.[193] Dennis cites examples of proportionality reasoning in English courts in relation to the privilege against self-incrimination,[194] the presumption of innocence,[195] and legal professional privilege.[196]

(2003) 1 AC 681, 704 (Lord Bingham). Professor Ian Dennis has said that all the individual fair trial rights in art 6 of the European Convention 'are negotiable to some extent'. Although the right to a fair trial is a 'strong right', 'it is clear that the specific and express implied rights in art 6, which constitute guarantees of particular features of fair trial, can be subject to exceptions and qualifications': Ian Dennis, 'The Human Rights Act and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333, 345.

189 J Gans, *Submission 2*.

190 Ibid 2.

191 'Like most rights, many of the criminal process rights may be limited if it is reasonable and proportionate to do so': Parliamentary Joint Committee on Human Rights, 'Guide to Human Rights' (March 2014) 26 <http://www.aph.gov.au/joint_humanrights/>. As noted in Ch 1, many stakeholders in their submissions said that the proportionality principle should be used to test laws that limit important rights, although few discussed it specifically in the context of fair trial rights.

192 *Brown v Stott* (2003) 1 AC 681, 704 (Lord Bingham).

193 Dennis, above n 189, 346.

194 *Brown v Stott* (2003) 1 AC 681; *R v S and A* [2009] 1 All ER 716; *R v K* [2010] 2 WLR 905. See also Ch 12.

195 *R v Lambert* [2002] 2 AC 545; *Sheldrake v DPP* [2005] 1 AC 264.

196 *In Re McE* [2009] 2 Cr App R 1. See Ch 13 and Dennis, above n 189, 346.

10.159 Proportionality reasoning is referred to in discussions of these features of a fair trial earlier in this chapter and in other chapters of this report. It is a useful method of testing whether laws that limit fair trial rights are justified.

Conclusions

10.160 Criminal trials must always be fair and it will generally not be justified to depart from the accepted attributes of a fair trial. However, both the common law and statute feature some limits on fair trial rights. This chapter has identified a number of Commonwealth laws that limit fair trial rights, for example, to protect vulnerable witnesses and in the interests of national security. For example, although justice should usually be done in public, it may sometimes be justified to close a court to protect a child or to protect trade secrets.

10.161 There is a tension between national security and fair trial rights, as highlighted by submissions criticising laws that limit these rights for national security reasons. Some limits on fair trial rights for national security reasons are justified, but any such limit clearly warrants ongoing and careful scrutiny, given the importance of fair trial principles. Reviewing laws that limit fair trial rights falls within the role of the INSLM, who reviews the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis.

10.162 Laws that protect communications between client and lawyer and between people and their religious confessor may also warrant review, to ensure there are adequate exceptions for defendants seeking to adduce evidence in criminal proceedings. These privileges are themselves important traditional rights, but arguably should sometimes be limited to allow defendants to adduce evidence of their innocence.

10.163 Other chapters of this Interim Report highlight laws that limit other fair trial rights, including laws that reverse the legal burden of proof and laws that abrogate the privilege against self-incrimination.

10.164 The ALRC is interested in further comment on which laws that limit fair trial rights merit further review.

11. Burden of Proof

Contents

A common law principle

11.1 In criminal trials, the prosecution bears the burden of proof. This has been called 'the golden thread of English criminal law'[1] and, in Australia, 'a cardinal principle of our system of justice'.[2] The High Court of Australia observed in 2014 that

> [o]ur system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person.[3]

1 *Woolmington v DPP* [1935] AC 462, 481–2 (Viscount Sankey). This statement was affirmed in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J). See also JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [7085]; Glanville Williams, *The Proof of Guilt* (Stevens & Sons, 3rd ed, 1963) 184–5.

2 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, [44] (French CJ). See also Heydon, above n 1, [7085]; Williams, above n 1, 871; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 71.

3 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [46] (French CJ and Crennan J), [100]–[102] (Hayne and Bell JJ), [159] (Kiefel J); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

11.2 This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.[4]

11.3 This chapter discusses the source and rationale for the principle that the burden of proof is borne by the prosecution; how this principle is protected from statutory encroachment; and when laws that reverse the onus of proof in criminal trials may be justified.

11.4 This chapter is about the burden of proof in criminal, rather than civil, law. It considers examples of criminal laws that reverse the legal burden of proof. However, it also briefly discusses some laws that reverse the onus of proof in civil matters that were raised by submissions to this Inquiry.

11.5 The presumption of innocence has been recognised since 'at latest, the early 19th Century'.[5] In 1935 the UK House of Lords said the presumption of innocence principle was so ironclad that 'no attempt to whittle it down can be entertained'.[6] In 2005, the House of Lords said that the underlying rationale for the presumption of innocence was that to place the burden of proof on a defendant was 'repugnant to ordinary notions of fairness'.[7]

11.6 Professor Andrew Ashworth has expanded on the rationale for the presumption of innocence:

> [T]he presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.[8]

11.7 In the High Court of Australia, French CJ called the presumption of innocence 'an important incident of the liberty of the subject'.[9]

11.8 However, the principle that the accused does not bear a legal burden of proof has not been treated as unqualified. The legal burden of proving the defence of insanity rests on the party that raises it. Additionally, Parliament may reverse the onus of proof.[10] In 2014, the High Court noted that

---

4 In *Momcilovic v The Queen* (2011), French CJ said: 'The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt': *Momcilovic v The Queen* (2011) 245 CLR 1, [54].

5 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

6 *Woolmington v DPP* [1935] AC 462, [7].

7 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

8 Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

9 *Momcilovic v The Queen* (2011) 245 CLR 1, [44].

10 In *Woolmington v DPP*, Viscount Sankey noted that that the 'golden thread' of the burden of proof lying with the prosecution was subject to an exception for proof of insanity as well as 'any statutory exception': *Woolmington v DPP* [1935] AC 462, 481.

> [i]t has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof.[11]

11.9 In *Williamson v Ah On*, Isaacs J suggested that it may be justified in some circumstances to reverse the burden of proof:

> The broad primary principle guiding a Court in the administration of justice is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognized, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object. The usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law.[12]

Legal and evidential burdens

11.10 There is a distinction between a legal and an evidential burden of proof. These terms are defined in the *Criminal Code* (Cth):

> ***legal burden***, in relation to a matter, means the burden of proving the existence of the matter.[13]
>
> ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.[14]

11.11 Generally, the prosecution will bear both the legal and evidential burden of proof.[15] However, an offence may be drafted so that the accused bears either the evidential or legal burden, or both, on some issues.[16] Lord Hope in the House of Lords described what it means for the accused to bear either the legal or evidential burden of proof on an issue:

> A 'persuasive' [legal] burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An 'evidential' burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue,

---

11 *Kuczborski v Queensland* [2014] HCA 46 [240] (Crennan, Kiefel, Gageler and Keane JJ). The majority of the High Court was relying on the decision in *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12, 17–18. See also *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

12 *Williamson v Ah On* (1926) 39 CLR 95, 113.

13 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 13.1(3). The legal burden is sometimes called the persuasive burden. *Cross on Evidence* describes the legal burden as 'the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt, as the case may be': Heydon, above n 1, [7010].

14 *Criminal Code* (Cth) s 13.3(6). *Cross on Evidence* states that the evidential burden is 'the obligation to show, if called upon to do so, that there is sufficient evidence to raise the existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation': Heydon, above n 1, [7015].

15 Where the prosecution bears the legal burden the standard of proof is beyond reasonable doubt, unless another standard of proof is specified: *Criminal Code* (Cth) s 13.2.

16 Where the defendant bears the legal burden the standard of proof is the balance of probabilities: Ibid s 13.5.

> the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.[17]

11.12 The Guide to Framing Commonwealth Offences states that 'placing a legal burden of proof on a defendant should be kept to a minimum'.[18] This principle is also reflected in the *Criminal Code*, which provides that where the law imposes a burden of proof on the defendant, it is an evidential burden, unless the law expresses otherwise.[19]

11.13 This chapter is largely concerned with laws that reverse the legal burden of proof, rather than the evidential burden of proof. In other jurisdictions, an evidential burden of proof is not generally considered to offend the presumption of innocence.[20] For example, in *R v DPP; Ex parte Kebilene*, Lord Hope said:

> Statutory presumptions which place an 'evidential' burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence.[21]

11.14 It is beyond the practical scope of this Inquiry to consider whether particular reversals of the evidential burden of proof are justified.[22] However, Professor Jeremy Gans submitted that placing an evidential burden on an accused can be problematic, 'especially where the reversal applies to a key culpability element of a serious criminal offence'.[23]

11.15 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has stated that

> an offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.[24]

Essential elements of offence

11.16 It is possible to distinguish between the defining elements of an offence (its physical and mental—or 'fault'[25]—elements) and an exception, exemption, excuse,

17 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 378–79.
18 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 51.
19 *Criminal Code* (Cth) ss 13.3(1), 13.4. Section 13.4 provides that a defendant will only bear a legal burden if the law expressly specifies that the burden of proof is a legal burden; or requires the defendant to prove the matter; or creates a presumption that the matter exists unless the contrary is proved.
20 Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Criminal Law Review* 901, 904.
21 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 379. See also Dennis, above n 20, 904.
22 A search for the phrase 'evidential burden' across Commonwealth statutes returns 1367 results.
23 J Gans, *Submission 2*.
24 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) 37.
25 *Criminal Code* (Cth) pt 2.2 div 5.

qualification or justification to it (often referred to as defences).[26] Such defences include, for example, self-defence or duress.

11.17 Generally, the prosecution bears the legal burden of proving the defining elements of an offence, as well as the absence of any defence. However, the accused will generally bear an evidential burden of proof in relation to defences. This is reflected in s 13.3(3) of the *Criminal Code*, which provides:

> A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

11.18 Part 2.3 of the *Criminal Code* contains the generally available defences, and s 13.3(2) of the *Criminal Code* provides that the defendant bears the evidential burden of those defences.

Protections from statutory encroachment

Australian Constitution

11.19 The *Australian Constitution* does not expressly protect the principle that the burden of proof in a criminal trial should be borne by the prosecution. There is a long history of Commonwealth laws which reversed the traditional onus of proof but were held not to contravene Ch III of the *Constitution*.[27]

11.20 But in *Nicholas v The Queen*,[28] the High Court reserved its position regarding the validity of a law which deemed to exist and to have been proved to the satisfaction of the tribunal of fact, any ultimate fact which is an element of the offence charged. In particular, as French CJ explained in *International Finance Trust Company Ltd v New South Wales Crime Commission*,[29] the Parliament cannot direct courts exercising federal jurisdiction as to the outcome of the exercise of that jurisdiction. Further, in *International Finance*, this principle was applied by French CJ, Gummow, Heydon, and Bell JJ, as an aspect of the *Kable* doctrine,[30] to the exercise of non-federal jurisdiction.

---

26 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 464. Jeremy Gans has noted that '[t]he term defences, while ubiquitous in criminal law, is imprecise': Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 287. The distinction between defining elements and defences can be difficult to draw: see, eg, Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 256. This is considered further below when discussing justifications for reversing the burden of proof.

27 *Nicholas v The Queen* (1998) 193 CLR 173, [152]–[156].

28 *Nicholas v The Queen* (1998) 193 CLR 173.

29 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [49]–[55].

30 *Kable v DPP (NSW)* (1996) 189 CLR 51. In *Kable*, the High Court held that state parliaments may not confer functions on state courts incompatible with the exercise of federal judicial power under Ch III of the *Constitution*.

11.21 In *Carr v Western Australia*, Kirby J spoke about an 'important feature of the Australian criminal justice system':

> Trials of serious crimes, such as the present, are accusatorial in character. Valid legislation apart, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence. Ordinarily … the accused does not need to prove his or her innocence.[31]

11.22 Kirby J said that this feature of the criminal justice system is 'not always understood', yet 'it is deeply embedded in the procedures of criminal justice in Australia, inherited from England. It may even be implied in the assumption about fair trial in the federal *Constitution*'.[32] The right to a fair trial is considered in detail in Chapter 10.

Principle of legality

11.23 The principle of legality provides some protection for the principle that the prosecution should bear the burden of proof in criminal proceedings.[33] In *Momcilovic v The Queen*, French CJ held that:

> The principle of legality will afford … [the presumption of innocence] such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which could be construed as imposing either a legal burden or an evidential burden upon an accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden.[34]
>
> The principle of legality at common law would require that a statutory provision affecting the presumption of innocence be construed, so far as the language of the provision allows, to minimise or avoid the displacement of the presumption.

11.24 However, the principle cannot be used to override the clear and unequivocal language of a section. It does not 'constrain legislative power'.[35]

11.25 *Momcilovic* concerned the construction of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which deems a person to be in possession of a substance based upon occupancy of premises in which drugs are present, unless the person satisfies the court to the contrary. The question in *Momcilovic* was whether s 5 imposed a legal burden or an evidentiary burden on the defendant.

---

31 *Carr v Western Australia* (2007) 232 CLR 138, [103].

32 Ibid [104]. See further, Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 *University of Tasmania Law Review* 132; *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Gaudron J); Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 248.

33 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

34 *Momcilovic v The Queen* (2011) 245 CLR 1, [44] (French CJ).

35 Ibid [43] (French CJ).

11.26 In *Momcilovic*, the High Court confirmed that the section placed a legal burden on the accused.[36] French CJ remarked that '[o]n their face the words of the section defeat any attempt by applying common law principles of interpretation to read down the legal burden thus created'.[37]

International law

11.27 The *International Covenant on Civil and Political Rights* (ICCPR) protects the presumption of innocence:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[38]

11.28 The protection of the presumption of innocence is provided in the same terms in art 11(1) of the *Universal Declaration of Human Rights*,[39] and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*).[40]

11.29 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[41] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[42]

Bills of rights

11.30 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms.[43] The Fifth and 14th Amendments to the US Constitution guarantee a right not to be deprived of life, liberty or property without due process of law[44] and have been interpreted by the US Supreme Court as including a presumption of innocence.[45]

11.31 The *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proved guilty.[46] The *New Zealand Bill of Rights Act 1990* (NZ) contains a similar provision.[47]

---

36 Ibid [56] (French CJ), [466]–[468] (Heydon J), [512], [581] (Crennan and Kiefel JJ), [665]–[666], [670] (Bell J).

37 Ibid [56].

38 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

39 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

40 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(2).

41 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

42 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

43 The protection provided by bills of rights and human rights statutes is discussed more generally in Ch 1.

44 *United States Constitution* amend V, XIV.

45 *Re Winship* [1970] 397 US 358 (1970).

46 *Canada Act 1982 c 11* s 11(d).

47 *New Zealand Bill of Rights Act 1990* (NZ) s 25(c).

11.32 In Australia, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) both provide that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.[48]

11.33 The English common law has long stressed the 'duty of the prosecution to prove the prisoner's guilt'[49]—indeed, this has been described as the 'governing principle of English criminal law'.[50] Additionally, since its enactment, the *Human Rights Act 1998* (UK) requires that, so far as it is possible, legislation must be read and given effect in a way that is compatible with *European Convention* rights—including the presumption of innocence in art 6(2).[51] It has been noted that this has 'had a major impact on the law relating to the burden of proof'.[52]

Limits in bills of rights

11.34 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[53]

Laws that reverse the legal burden

11.35 A range of Commonwealth laws place a legal burden on the defendant in respect of particular issues.

Criminal Code

11.36 There are a number of provisions in the *Criminal Code* that place a legal burden on the defendant. These include terrorism offences, drug offences, child sex offences, and offence relating to unmarked plastic explosives.

Terrorism offences

11.37 Some terrorism offences impose a legal burden on the defendant. For the offence of membership of a terrorist organisation, it is a defence to prove that the defendant took reasonable steps to cease to be a member of a terrorist organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.[54]

11.38 Section 102.6 creates the offence of getting funds to, from, or for a terrorist organisation. A person will not commit an offence if he or she proves that the funds were received solely for the purpose of the provision of legal representation for a

---

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1); *Human Rights Act 2004* (ACT) s 22(1).

49 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC).

50 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [3] (Lord Bingham).

51 *Human Rights Act 1998* (UK) c 42, s 3(1).

52 Richard Glover and Peter Murphy, *Murphy on Evidence* (OUP Oxford, 2013) 11.

53 *Canada Act 1982 c 11* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

54 *Criminal Code* (Cth) s 102.3(2).

person in proceedings relating to terrorist organisation offences, or assisting the organisation to comply with Australian law.[55] The Law Council of Australia submitted that it was unclear why the defendant should bear the legal and not the evidential burden on this issue, observing that 'the justification for the departure is unclear in this case and may be unjustified'.[56]

11.39 A number of stakeholders to this Inquiry raised concerns with the evidential burden placed on the defendant in the offence of entering, or remaining in, a declared area.[57] Entering a 'declared area' is an offence unless the defendant can provide evidence that the area was entered solely for one or more legitimate purposes.[58]

11.40 The Gilbert and Tobin Centre for Public Law submitted that '[t]he offence does not technically reverse the onus of proof, and it is not an offence of strict or absolute liability. However, it has essentially the same effect, as criminal liability will be prima facie established wherever a person enters or remains in a declared area'.[59] Australian Lawyers for Human Rights submitted that the effect of the provision is 'clearly to place the burden of proving their innocence upon the defendant'.[60]

11.41 The Human Rights Committee noted that

> in addition to proving that they entered into or remained in the declared area solely for one of the prescribed legitimate purposes, they would also need to provide factual evidence that they did not enter into or remain in the declared area solely or in part for an illegitimate purpose.[61]

11.42 It concluded that the declared area offence was likely to be incompatible with the right to a fair trial and the presumption of innocence.[62]

Drug offences

11.43 The *Criminal Code* contains a series of deeming provisions in relation to the requisite intention for a number of drug offences. For example, when the defendant is found to be dealing with a threshold 'trafficable' quantity of a controlled drug, the person is deemed or presumed to have either: the intention to traffic;[63] the intention to

---

55 Ibid s 102.6(3).
56 Law Council of Australia, *Submission 75*. See also J Gans, *Submission 2*.
57 See, eg, Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.
58 *Criminal Code* (Cth) s 119.2.
59 Gilbert and Tobin Centre of Public Law, *Submission 22*.
60 Australian Lawyers for Human Rights, *Submission 43*.
61 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) 37–38.
62 Ibid 38.
63 *Criminal Code* (Cth) s 302.5.

cultivate for a commercial purpose;[64] or the intention to manufacture for a commercial purpose.[65]

11.44 The legal onus lies on the defendant to defeat these presumptions—that is, the defendant must prove, on the balance of probabilities, that he or she did not have the requisite intention for the offence.

11.45 The drug offences in the *Criminal Code* were introduced in 2005,[66] and were based on the Model Criminal Code, developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) after nationwide consultation.[67]

11.46 However, the MCCOC did not recommend that presumptions placing the legal burden on the defendant be included in the *Criminal Code*. The MCCOC instead recommended that the defendant bear only an evidential burden in relation to the requisite intention. In making its recommendation, the Committee considered that

> [t]he task of the prosecution is eased to the extent that guilt is presumed in the absence of evidence to the contrary. But testimony from the accused, other evidence or circumstances inconsistent with the inference of intent to traffic in the drug, will displace the presumption and require the prosecution to prove guilt beyond reasonable doubt.[68]

11.47 It considered that a presumption placing an evidential burden on the defendant was an appropriate compromise between the needs of effective law enforcement and the presumption of innocence. The MCCOC observed:

> Compromises which weaken or abandon the principle that individuals are innocent until proved guilty require compelling justification when the consequences of conviction are severely punitive, as they are in the trafficking offences … Though acceptance of the need for trafficable quantity presumptions involves a compromise, it is a compromise which preserves the principle that the prosecution must prove guilt whenever there is evidence which contradicts the presumption. There are compelling reasons against further dilution of the rule that individuals accused of crime are innocent until they are proved to be guilty.[69]

11.48 Commentators have noted that such presumptions are 'unique relative to most other drug trafficking threshold systems across the world, where deemed supply laws are explicitly avoided'.[70] Such provisions have been justified 'under goals of delivering

---

64 Ibid s 303.7.

65 Ibid s 305.6. A similar set of deeming provisions operates in relation to offences involving precursors: Ibid div 306.

66 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth).

67 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Model Criminal Code Chapter 6 Serious Drug Offences' (Report, 1998).

68 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 67, 81.

69 Ibid 82–85.

70 Caitlin Hughes et al, 'Australian Threshold Quantities for "Drug Trafficking": Are They Placing Drug Users at Risk of Unjustified Sanction?' (Trends and Issues in Crime and Criminal Justice 467, Australian Institute of Criminology, 2014) 2.

proportionality and effective responses to those who inflict widespread suffering—drug traffickers'.[71] However, the proportionality of this response has been questioned:

> the drug users who find themselves at the margins of the drug trafficking thresholds are most likely to be the more marginalised users (eg more unemployed and socially disadvantaged) … which reduces their capacity to successfully prevent an unjust sanction. … [I]t is known that an 'unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with the drug in question'.[72]

11.49 Heydon J in *Momcilovic* commented on the placement of the legal burden of proof on the defendant in relation to possession in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). He noted that, while 'unpalatable', such placement facilitates

> proof of possession much more than a simple placement of the evidential burden on the accused would. It increases the likelihood of the accused entering the witness box more than a reverse evidential burden would. That is because there is a radical difference between the two burdens. A legal burden of proof on the accused requires the accused to disprove possession on a preponderance of probabilities. An evidential burden of proof on the accused requires only a showing that there is sufficient evidence to raise an issue as to the non-existence of possession. The legal burden of proving something which the accused is best placed to prove like non-possession is much more likely to influence the accused to testify than an evidential burden, capable of being met by pointing to some piece of evidence tendered by other means and perhaps by the prosecution.[73]

Child sex offences outside Australia

11.50 The defendant bears a legal burden in relation to a number of defences to sexual offences against children outside Australia.[74] Section 272.9(5) imposes a legal burden on a defendant to prove that they did not intend to derive gratification from a child being present during sexual activity. The Law Council of Australia submitted in relation to this offence that

> [t]he gravity of the subject matter of the offence, coupled with the serious penalty it attracts, could have very serious consequences for a person charged with this offence. In such circumstances, it may not be appropriate that the only recourse available to a defendant is to discharge a legal burden.[75]

Plastic explosives

11.51 The *Criminal Code* creates a number of offences in relation to trafficking in,[76] importing or exporting,[77] manufacturing[78] or possessing[79] unmarked plastic explosives.

---

71 Ibid 6.
72 Ibid 5 (quoting Model Criminal Code Officers Committee of the Standing Committee of Attorneys–General, 'Model Criminal Code Chapter 6 Serious Drug Offences' (Report, 1998)).
73 *Momcilovic v The Queen* (2011) 245 CLR 1, [467].
74 *Criminal Code* (Cth) ss 272.9–10, 272.13, 272.16–272.17.
75 Law Council of Australia, *Submission 75*.
76 *Criminal Code* (Cth) s 72.12.
77 Ibid s 72.13.
78 Ibid s 72.14.
79 Ibid s 72.15.

If no detection agent (a marking requirement for plastic explosives)[80] is detected in a sample of an explosive when tested, a legal burden lies on the defendant to disprove that the plastic explosive breaches a marking requirement.[81]

11.52 A legal burden is also placed on the defendant to establish a defence to charges relating to unmarked plastic explosives, including that he or she had no reasonable grounds for suspecting that the plastic explosive breached that marking requirement.[82]

Taxation

11.53 The *Taxation Administration Act 1953* (Cth) contains a number of provisions that reverse the burden of proof. The legal burden lies on the defendant to establish defences to the charges of making false or misleading statements,[83] and incorrectly keeping records.[84]

11.54 Additionally, s 8Y provides that when a corporation commits a taxation offence, a person who is concerned in, or takes part in the management of a corporation shall be deemed to have committed the taxation offence. It is a defence to prove that the person did not aid, abet, counsel or procure the act or omission of the corporation concerned, and was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation. The legal burden lies on the defendant to establish this defence.[85]

11.55 The Australian Institute of Company Directors (AICD) expressed concern about this provision, arguing that the legal burden on the defendant should be removed and 'the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences' restored.[86]

11.56 In 2009, the Council of Australian Governments (COAG) agreed to a set of principles relating to personal liability for corporate fault and developed guidelines for their application.[87] The Principles provided that provisions that place an evidential or legal onus on a director to establish a defence that he or she is not liable for corporate fault (for example, a defence to show that reasonable steps were taken to avoid committing the contravention) 'must be supported by rigorous and transparent analysis and assessment, so as to clearly demonstrate why it is considered that such a provision is justified from a public policy perspective'.[88] Relevant considerations for justification include where:

- there is a serious risk of potential significant public harm resulting from the offence;

---

80 Ibid s 72.33(2).
81 Ibid s 72.35.
82 Ibid s 72.16(1).
83 *Taxation Administration Act 1953* (Cth) s 8K.
84 Ibid s 8L.
85 Ibid s 8Y(2).
86 Australian Institute of Company Directors, *Submission 42*.
87 Council of Australian Governments, 'Personal Liability for Corporate fault—Guidelines for Applying the COAG Principles' (2012).
88 Ibid.

- the size and nature of the penalties indicate a very serious offence; and
- the offence is a core element of the relevant regulatory regime.[89]

11.57 The onus of proof on defendants in s 8Y of the *Taxation Administration Act* was not amended in the legislative response to the COAG principles, the *Personal Liability for Corporate Fault Reform Act 2012* (Cth). Explanatory notes accompanying the Exposure Draft of the amending Bill elaborated on this decision:

> the Government has taken into account a range of factors outlined in the COAG guidelines, including the magnitude of harm that the offending conduct would likely cause, the effectiveness of corporate penalties in preventing this conduct and the availability of evidence to the prosecution and the director.
>
> Section 8Y provides a defence to directors who can show, on the balance of probabilities, that they were not involved in the company's offending. As such, section 8Y operates, in substance, as an accessorial liability provision. It would not be feasible to shift the burden and require the prosecution to prove a director's involvement in the company's offence, especially as such information could be peculiarly within the knowledge of the director.
>
> As a matter of practicality a director would be in a significantly better position to be able to adduce evidence that shows they were not involved in the company's offending rather than explicitly require the prosecution to establish their involvement.
>
> The ATO relies on section 8Y to prosecute those directors who repeatedly and seriously neglect their company's tax obligations. If the ATO is unable to prosecute these individuals, it could significantly undermine the public's confidence in the fairness of the tax system and the ATO's ability to enforce the law.[90]

11.58 The AICD submitted that the 'retention of this provision has not been sufficiently justified pursuant to the COAG approach. Further, and more importantly, no justification has been provided as to why it is appropriate to undermine the Rule of Law by deciding to retain this provision'.[91]

Copyright

11.59 The *Copyright Act 1968* (Cth) contains a number of criminal offences in relation to copyright infringement.[92]

11.60 The Act creates a presumption in relation to proof of subsistence and ownership of copyright, providing that statements contained on the labels, marks, certificates or chain of ownership documents are presumed to be as stated, unless the contrary is established.[93] It also includes presumptions relating to computer programs,[94] sound recordings[95] and films.[96]

---

89 Ibid.
90 Explanatory Document, Personal Liability for Corporate Fault Reform Bill 2012—Tranche 3 (2012) 3.
91 Australian Institute of Company Directors, *Submission 42*.
92 *Copyright Act 1968* (Cth) pt V div 5.
93 Ibid s 132A.
94 Ibid s 132AAA.
95 Ibid s 132B.
96 Ibid s 132C.

11.61 A presumption is a statement of facts that are taken to exist unless proven otherwise. A presumption that a matter exists unless the contrary is proved places a legal burden on the defendant.[97] A defendant must rebut such a presumption on the balance of probabilities.

11.62 The presumptions relating to criminal offences in the *Copyright Act* were introduced by the *Copyright Amendment Act 2006* (Cth). Provisions in the *Copyright Act* that provided that statements made on certificates and other documents were admissible in a prosecution as 'prima facie evidence' of the facts so stated were amended by the 2006 Act, and new presumptions relating to films and computer programs added.[98]

11.63 The Explanatory Memorandum stated that amendments were intended to 'strengthen' the presumptions in the Act, and to 'assist copyright owners and reduce costs in the litigation process'.[99] The Explanatory Memorandum also stated that the aim was to introduce consistency with other, civil, presumptions in the Act. The Australian Digital Alliance and the Australian Libraries Copyright Committee submitted that

> [p]resumptions in the context of criminal cases circumvent a key safeguard in our justice system: that the onus is on the prosecutor or plaintiff to prove the liability of the accused or defendant to the relevant standard of proof. This principle is a key protection against unjustified incursions on personal liberty. It is troubling that the reason given for the introduction of some of the presumptions was 'to assist copyright owners in the litigation process'. Provisions which make criminal liability for copyright infringement easier to prove act as deterrents to the use of copyright material, conceivably leading to self-censorship of what may very well be a legal use of material in given case. The result is a net loss of creative expression.[100]

11.64 Commenting on similarly worded presumptions relating to civil copyright infringement proceedings, Luke Pallaras observed that

> in some instances, a shift in the evidential burden may be sufficient to fulfil the policy goals of the presumption; but in other cases only a shift in the legal burden would suffice. For instance, where the purpose of a presumption is to prevent time and delay caused by establishing issues that are probabilistically likely to be the case (such as copyright subsisting in an alleged work, or the plaintiff's ownership of copyright), only a shift in the evidential burden appears justified.[101]

---

97 *Criminal Code* (Cth) s 13.4(c). In *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*, Perram J commented on the meaning of unless the contrary is 'established', stating that '[established] does not refer to an attempt at proof, or the presence of prima facie evidence; rather, it refers to a fact as having been proven "on the balance of probabilities"': *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142, [122].

98 Explanatory Memorandum, Copyright Amendment Bill 2006.

99 Ibid.

100 ADA and ALCC, *Submission 61*.

101 Luke Pallaras, 'Falling between Two Stools: Presumptions under the *Copyright Act 1968* (Cth)' (2010) 21 *Australian Intellectual Property Journal* 100, 104.

11.65 By contrast, the Commonwealth Director of Public Prosecutions supported a reversal of the legal burden, submitting in an Inquiry into the amending Bill that the 'presumption recognises that copyright is a highly technical area and marshalling the evidence necessary to prosecute matters is a difficult and lengthy process'.[102]

11.66 The Guide to Framing Commonwealth Offences states that 'presumptions have a similar effect to defences, and are only appropriate in certain circumstances'.[103] The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has stated that presumptions should be kept to a minimum and justification for them provided in the Explanatory Memorandum.[104]

Other laws

11.67 A number of other laws reverse the legal burden of proof. For example, the defendant bears a legal burden to establish defences to a number of offences in the *Migration Act 1958* (Cth). For the offence of arranging marriage between other persons to assist a person to obtain permanent residence, it is a defence if the defendant proves he or she believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.[105]

11.68 Under the *Great Barrier Reef Marine Park Act 1975* (Cth) the defendant bears the legal burden of proving that entry into a compulsory pilotage area was unavoidable.[106] For the offence of an unauthorised vessel entering an area to be avoided under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the defendant bears a legal burden to establish a defence of unforseen emergency.[107]

11.69 The *Work Health and Safety Act 2011* (Cth) prohibits a person from being subjected to discriminatory treatment for exercising a function or right under the legislation, such as serving as a health and safety representative or raising a concern about work health and safety.[108] The defendant bears the legal burden of proving that a prohibited reason was not the dominant reason for engaging in discriminatory conduct.[109] This reversal of the burden of proof has been justified on the basis that 'it will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason'.[110]

---

102 Commonwealth Director of Public Prosecutions, Submission No 53 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Copyright Amendment Bill 2006*, 2006.

103 Attorney-General's Department, above n 18, 53.

104 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 3 of 2010* (2010) 14.

105 *Migration Act 1958* (Cth) s 240(3). See also ss 219, 229(5)–(6), 232(2)–(3).

106 *Great Barrier Reef Marine Park Act 1975* (Cth) s 59H(1).

107 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 619(9). See also sch 2A, cl 18; *Torres Strait Fisheries Act 1984* (Cth) ss 49(2), 49A(3); *Offshore Minerals Act 1994* (Cth) s 404(4).

108 *Work Health and Safety Act 2011* (Cth) ss 104, 105. See also s 107 which prohibits requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct.

109 Ibid s 110.

110 Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth).

Bail

11.70 The presumption of innocence may be understood in both a broad and narrow sense.[111] In its broader sense the presumption of innocence encompasses the criminal process more generally, including the notion that 'pre-trial procedures should be conducted, so far as possible, *as if* the defendant were innocent'.[112] The narrower sense of the presumption of innocence refers to the principle that the prosecution should bear the burden of proof of guilt,[113] and is the focus of this chapter.

11.71 Procedures relating to bail engage the presumption of innocence in its wider sense. The NSW Law Reform Commission has distinguished the use of the language of 'presumption' in the bail context from other criminal law contexts. It notes that 'when the law speaks of a presumption, it is usually in relation to an issue of fact'. By contrast, presumptions relating to bail 'do not concern proof of facts, but decision-making and the burden of persuasion'.[114]

11.72 The Law Council of Australia submitted that Commonwealth laws that reverse the presumption in favour of bail 'may undermine the presumption of innocence, as a key component of a fair trial'.[115]

11.73 Examples of such laws include s 15(6) of the *Extradition Act 1988* (Cth) (*Extradition Act*) which requires that special circumstances must be established before a person remanded under the *Extradition Act* can be granted bail; and s 15AA of the *Crimes Act 1914* (Cth) (*Crimes Act*) which reverses for terrorism offences the presumption in favour of bail.

11.74 In explaining the necessity for a presumption against bail in the *Extradition Act*, the Attorney-General's Department stated:

> The current presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed by the person in extradition matters, and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. … The removal or substantial qualification of the existing presumption (which has been a feature of Australia's extradition regime since the mid-1980s) may impede Australia's ability to meet our extradition treaty obligation to return the person to the requesting country to face criminal charges or serve a sentence.[116]

---

111 Ashworth notes that the scope and meaning of the presumption of innocence are 'eminently contestable': Ashworth, above n 8, 243.

112 Ibid.

113 Ibid 244.

114 NSW Law Reform Commission, *Bail*, Report 133 (2012).

115 Law Council of Australia, *Submission 75*.

116 Attorney-General's Department, Submission No 7 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, 2011.

11.75 The Independent National Security Legislation Monitor has noted the 'extreme unlikelihood of a person charged with a terrorism offence being released on bail (in almost all cases the accused will be detained for the protection of the community).[117]

11.76 Reversing the presumption in favour of bail has been subject to criticism. In relation to the *Extradition Act*, the House of Representatives Standing Committee on Social Policy and Legal Affairs has observed:

> The Committee expresses its concern regarding the presumption against bail, and notes that the Explanatory Memorandum to the Bill and the evidence provided by the Attorney-General's Department fail to provide adequate justification on this point. The Committee does not doubt that bail is likely and rightly to be refused in the majority of extradition cases, and considers that this amendment will have little effect on the outcome of bail application in such cases. However, as a matter of principle, the Committee notes that it has not been convinced of the need for the Bill to prescribe a presumption either against or in favour of bail.[118]

11.77 The Australian Human Rights Commission identified the reversal of the presumption of bail for terrorism offences 'as a disproportionate interference with the right to liberty under art 9 of the ICCPR as well as the presumption of innocence under art 14(2) of the ICCPR'.[119]

Civil laws

11.78 The 'cardinal'[120] common law principle examined in this chapter is that the prosecution should bear the onus of proof in criminal proceedings. Accordingly, this chapter focuses on criminal laws that reverse the legal burden of proof.

11.79 In a civil claim, the burden of proof will generally lie on the plaintiff on all essential elements. As Walsh JA in *Currie v Dempsey* explained:

> The burden of proof in the sense of establishing a case, lies on a plaintiff if the fact alleged … is an essential element of his cause of action, eg, if its existence is a condition precedent to his right to maintain the action.[121]

11.80 The distinction between civil and criminal proceedings may not always be clear. The ALRC's 2003 report on civil and administrative penalties noted that

> [t]he traditional dichotomy between criminal and non-criminal procedures no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some

---

117 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 54.

118 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Advisory Report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (2011) 20.

119 Australian Human Rights Commission, Submission No 18 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

120 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

121 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

> procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable.[122]

11.81 The Institute of Public Affairs, in its submission, observed that '[g]overnments increasingly regulate behaviour through the civil law, rather than the criminal law'.[123] Professor Anthony Gray has noted the existence of 'a broader debate regarding the ongoing utility of such a distinction, whether there should be recognised a "third category" of proceedings that are properly neither civil nor criminal, and the essence of what is and should be considered to be a crime'.[124]

11.82 The Human Rights Committee has noted that civil penalty provisions

> may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.[125]

11.83 Matters to consider in assessing whether a civil penalty is 'criminal in nature' include the classification of the penalty; the nature of the penalty, including whether it is intended to be punitive or deterrent in nature, and whether the proceedings are instituted by a public authority with statutory powers of enforcement; and the severity of the penalty.[126]

11.84 The ALRC has not undertaken a comprehensive survey or review of provisions that shift the burden in civil proceedings. However, submissions to this Inquiry discussed the reversal of the burden of proof in a number of civil provisions.[127] These are discussed briefly below.

Proceeds of crime

11.85 The *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) establishes a scheme to confiscate the proceeds of crime.[128]

11.86 The Act provides for the making of an 'unexplained wealth order': an order requiring the person to pay an amount equal to so much of the person's total wealth as the person cannot satisfy the court is not derived from certain offences.[129] A court may

---

122 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2003) 84.

123 Institute of Public Affairs, *Submission 49*.

124 Anthony Gray, 'The Compatibility of Unexplained Wealth Provisions and Civil Forfeiture Regimes with *Kable*' (2012) 12 *QUT Law and Justice Journal* 18, 19.

125 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014).

126 Ibid.

127 See, eg, FamilyVoice Australia, *Submission 73*; Law Society of NSW Young Lawyers, *Submission 69*; National Farmers' Federation, *Submission 54*; Institute of Public Affairs, *Submission 49*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*; Australian Christian Lobby, *Submission 33*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

128 *Proceeds of Crime Act 2002* (Cth) s 6. See also Chs 7 and 9.

129 Ibid s 179A.

make an unexplained wealth order if a preliminary unexplained wealth order[130] has been made, and the court is not satisfied that the person's wealth was not derived from an offence.[131]

11.87 The burden of proving that the person's wealth is not derived from an offence lies on that person.[132] The person need not have been charged or convicted of any offence.

11.88 Gray has argued that civil forfeiture regimes are criminal in nature:[133]

> Such provisions typically allow forfeiture of the asset although the person who owns the asset has not been proven at the criminal standard to have committed a crime by which the asset was directly or indirectly obtained.[134]

11.89 Section 179E was added to the *Proceeds of Crime Act* in 2010,[135] with the rationale that,

> [w]hile the Act contains existing confiscation mechanisms, these are not always effective in relation to those who remain at arm's length from the commission of offences, as most of the other confiscation mechanisms require a link to the commission of an offence. Senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences.[136]

11.90 The reversal of the onus of proof in unexplained wealth orders has been said to be appropriate because '[d]etails of the source of a person's wealth will be peculiarly within his or her knowledge'.[137] However, the Scrutiny of Bills Committee was concerned about the 'potential impact of such an onerous provision on a person's civil liberties'.[138]

11.91 The operation of the unexplained wealth provisions is subject to the oversight of the Parliamentary Joint Committee on Law Enforcement.[139] That Committee may require law enforcement bodies to appear before it to give evidence.[140] Additionally, the Commissioner of the Australian Federal Police must report to the Committee each financial year.[141]

---

130 An order requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order: Ibid s 179B(1).

131 Ibid s 179E(1).

132 Ibid s 179E(3).

133 Gray, above n 124, 32.

134 Gray, above n 32, 135–36.

135 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth). Further amendments were made by the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) to 'strengthen the Commonwealth's unexplained wealth regime': Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014.

136 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.

137 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Tenth Report of 2009* (September 2009).

138 Ibid.

139 *Proceeds of Crime Act 2002* (Cth) s 179U(1).

140 Ibid s 179U(2).

141 Ibid s 179U(3).

11.92 An independent review of the *Proceeds of Crime Act* in 2006 found that, while there was consensus among international law enforcement bodies about the appropriateness of a reversal of the burden of proof in unexplained wealth provisions,

> it falls short of the wider consensus I believe is necessary to support the introduction of unexplained wealth provisions. Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community? … On balance I believe it would be inappropriate at this stage to recommend the introduction of these provisions.[142]

11.93 By contrast, in 2012, a Parliamentary Joint Committee on Law Enforcement inquiry into unexplained wealth legislation concluded that:

> in practice, it is difficult to conceive of scenarios by which an individual had significant amounts of unexplained wealth with no way of accounting for their legitimate accumulation, if that was in fact what had occurred … The committee is therefore of the view that, with appropriate safeguards, unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia.[143]

11.94 The Law Council of Australia submitted to this Inquiry that traditional criminal court processes should apply in civil confiscation proceedings, 'whereby the onus remains with the prosecution to establish that the property was unlawfully acquired'.[144]

Fair Work Act 2009 (Cth)

11.95 The General Protections in the *Fair Work Act 2009* (Cth) (*Fair Work Act*) prohibit an employer from taking adverse action[145] against an employee because an employee has exercised a workplace right;[146] has temporarily been absent from work due to illness or injury;[147] has participated or not participated in industrial activity;[148] or because of an employee's protected attribute.[149]

11.96 Under s 361, adverse action taken against an employee will be presumed to be action taken for a prohibited reason unless the employer responsible for taking the adverse action proves otherwise. This placement of the burden of proof on an employer is not novel: the first industrial relations statute, the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), placed the onus on an employer to show that an employee

---

142 Tom Sherman, 'Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)' (Attorney-General's Department, 2006) 37.

143 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) 10.

144 Law Council of Australia, *Submission 75*.

145 Adverse action includes dismissing the employee, or injuring the employee in his or her employment: *Fair Work Act 2009* (Cth) s 342(1).

146 Ibid s 340.

147 Ibid s 352.

148 Ibid s 346.

149 The protected attributes are a person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin: Ibid s 351.

was dismissed for some reason other than membership of a trade union or entitlement to the benefit of an industrial agreement or award.[150]

11.97 The National Farmers' Federation submitted that the reverse onus of proof in the *Fair Work Act* 'offends the common law presumption of innocence and undermines confidence in the judicial process'. It argued that the 'common law presumption of innocence should be restored'.[151] The Institute of Public Affairs also criticised this provision, arguing that it is 'unsatisfactory to expect the employer to rely on their own records to defend themselves from a claim, while the plaintiff carries little of the burden'.[152]

11.98 On the other hand, a number of stakeholders argued that the reversal of the burden of proof in the *Fair Work Act* was justified.[153] The Australian Council of Trade Unions (ACTU) argued that the reverse onus was essential 'because it is difficult for an applicant to prove the reason for the respondent's action'.[154] Jobwatch argued that employers have a monopoly on knowledge in these circumstances:

> Employee claims should not be open to defeat by a mere denial by the employer, as it is more difficult for employees to procure the necessary evidence. Section 361 helps to rectify this unequal access to evidence which stems largely from the power imbalance that exists between the parties.[155]

11.99 A number of judicial decisions have addressed the rationale for a reversal of the burden of proof, summarised by the ACTU's submission:

> In *Bowling v General Motors-Holden Pty Ltd*, Smithers and Evatt JJ noted that 'the real reason for a dismissal may well be locked up in the employer's breast and impossible, or nearly impossible, of demonstration through forensic purposes'. Northrop J of the Federal Court came to a similar conclusion in *Heidt Chrysler Australia Ltd.* He acknowledged that 'the circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly within the knowledge of the employer'. … In *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*, North J stated, 'A reverse onus on the issue of the reason for conduct makes good sense because the reason for the conduct is a matter peculiarly within the knowledge of the respondent'. This passage was quoted with approval by Ryan J in a 2008 case: *Police Federation of Australia v Nixon.*[156]

Discrimination laws

11.100 With the exception of the *Racial Discrimination Act 1975* (Cth), Commonwealth anti-discrimination laws contain a reverse legal burden of proof with

---

150 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) ss 9(1), (3). See further Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the *Fair Work Act*'s Union Victimisation and Freedom of Association Provisions' (2014) 37 *UNSW Law Journal* 471.

151 National Farmers' Federation, *Submission 54*.

152 Institute of Public Affairs, *Submission 49*.

153 Law Society of NSW Young Lawyers, *Submission 69*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*.

154 Australian Council of Trade Unions, *Submission 44*.

155 Jobwatch, *Submission 46*.

156 Australian Council of Trade Unions, *Submission 44* (citations omitted).

respect to 'indirect discrimination'—an 'unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute'.[157] If a defendant is shown to have imposed a condition, requirement or practice that has a disadvantaging effect on persons with a relevant attribute, they may avoid liability by establishing that the condition, requirement or practice is reasonable in all the circumstances.

11.101 A number of submissions considered the reversal of the burden of proof in anti-discrimination laws to be unjustified.[158] The Church and Nation Committee, Presbyterian Church of Australia submitted that there were a number of problems with this reversal:

> Firstly, the person accused of discrimination is called 'the discriminator' ie the title itself proceeds from an assumption of guilt rather than innocence. Secondly, the alleged discriminator must prove—in the first instance—that s/he did not discriminate. This is a reversal of the procedure in criminal law where the burden of proof rests on the prosecution to 'make a case' that the defendant committed the act. The alleged discriminator should not have to prove—in the first instance—that they did not commit the act. The burden of proof should rest on the person bringing the claim of discrimination. Otherwise … the process itself becomes the punishment and vexatious litigation ensues.[159]

11.102 The ACTU argued that the reversal of the burden of proof in anti-discrimination law was justified. It contended that such a reversal was supported by a clear policy rationale:

> *Power imbalance*—There is a significant imbalance in resources and expertise between complainants and respondents
>
> *Information asymmetry*—The respondent has access to information and evidence that the complainant does not e.g. statistics
>
> *Practicality*—The respondent is in the best position to explain the reason for the requirement. The complainant may not know the reason behind it
>
> *Reality*—Use of the reverse onus reflects the realities of the situation because in practice the burden usually falls on the respondent anyway
>
> *Access to justice*—It is 'notoriously difficult' for complainants to prove indirect discrimination has occurred.[160]

Justifications for reversing legal burden

11.103 The following section discusses some of the principles and criteria that may be applied to determine whether a criminal law that reverses the legal burden of proof may be justified.[161]

---

157 Australian Human Rights Commission, *Indirect Discrimination* <www.humanrights.gov.au/quick-guide/12049>. See *Sex Discrimination Act 1984 (Cth)* s 7C; *Disability Discrimination Act 1992* (Cth) ss 6(4), 30; *Age Discrimination Act 2004* (Cth) s 15.

158 FamilyVoice Australia, *Submission 73*; Australian Christian Lobby, *Submission 33*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

159 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

160 Australian Council of Trade Unions, *Submission 44* (citations omitted).

Proportionality

11.104 As discussed in Chapter 1, proportionality is, generally speaking, the accepted test for justifying most limitations on rights. The Human Rights Committee has noted that reverse burden offences are likely to be 'compatible with the presumption of innocence where they are … reasonable, necessary and proportionate in pursuit of a legitimate objective'.[162] Some stakeholders expressly endorsed proportionality as a means of assessing justifications for reversals of the burden of proof.[163]

11.105 In other jurisdictions, it is accepted that a reversal of the burden of proof may be justified in some circumstances. The approach of the European Court of Human Rights to reverse onus provisions is set out in *Salabiaku v France*:

> Presumptions of fact and law operate in every legal system. Clearly, the [*European Convention*] does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.
>
> … Article 6(2) [of the *European Convention*] does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[164]

11.106 In the UK House of Lords, Lord Bingham summarised the proportionality test as it can be applied to the reversals of the burden of proof:

> the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.[165]

11.107 Lord Bingham observed that such a test is context-specific, stating that '[t]he justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case'.[166]

11.108 A number of considerations may be relevant to evaluating whether a reversal of the burden of proof is reasonable, necessary and proportionate in pursuit of a legitimate objective.

---

161 Some submissions to the Inquiry considered there to be no circumstances under which a reversal of the burden of proof was justified: Pirate Party Australia, *Submission 53*; Australian Institute of Company Directors, *Submission 42*; ADJ Consultancy Services, *Submission 37*; J Mulokas, *Submission 10*.

162 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014) 2.

163 Law Council of Australia, *Submission 75*; UNSW Law Society, *Submission 19*.

164 *Salabiaku v France* [1988] ECHR 19 [28].

165 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [21].

166 Ibid.

Where not an essential element of the offence

11.109 It is commonly acknowledged that shifting a legal onus onto the accused with respect to an element of an offence that is essential to culpability is an encroachment on the presumption of innocence, and more difficult to justify.[167] Shifting the burden of proof on such an issue involves the possibility of unfair conviction. In the Canadian Supreme Court, Dickson CJC said that

> [i]f an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.[168]

11.110 Where a defendant bears the legal burden of proof on an issue essential to culpability, the result may be 'seriously unfair, since a conviction might rest on conduct which was not in any way blameworthy'.[169]

11.111 By contrast, it may be more readily justifiable to shift the burden of proof on issues that are 'optional exceptions to criminal responsibility'.[170]

11.112 Distinguishing between an issue that is central to culpability for an offence and optional exceptions to it can be difficult. Such distinctions are not always resolved by whether the issue is cast as a defining element of an offence or a defence to it. In the House of Lords, Lord Steyn noted that

> [t]he distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance.[171]

11.113 The Guide to Framing Commonwealth Offences recognises this difficulty. It states that placing the burden of proof on the defendant by creating a defence is more readily justified if the matter in question is not central to the question of culpability for the offence.[172]

11.114 Professor Jeremy Gans suggests that defences such as reasonable excuse or due diligence are examples of optional exceptions to an otherwise fully defined offence. In such cases, a shift in the burden of proof is 'clearly justifiable'.[173]

---

167 See, eg, David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *The Cambridge Law Journal* 142, 151–155; Kuan Chung Ong, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights' (2013) 32 *University of Tasmania Law Review* 248, 262–63; Dennis, above n 20, 919; Ashworth, above n 8, 258–59; J Gans, *Submission 2*.

168 *R v Whyte* (1988) 51 DLR 4th 481, 493.

169 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [26] (Lord Bingham).

170 J Gans, *Submission 2*.

171 *R v Lambert* [2002] 2 AC 545, [35].

172 Attorney-General's Department, above n 18, 50.

173 J Gans, *Submission 2*.

11.115 In *Lambert*, the imposition of a legal burden on the accused to prove that he did not know that a package in his possession contained controlled drugs was considered to shift the burden on an essential element of the offence—it was an issue 'directly bearing on the moral blameworthiness of the accused'.[174]

11.116 In that case, Lord Steyn observed:

> in a prosecution for possession of controlled drugs with intent to supply, although the prosecution must establish that prohibited drugs were in the possession of the defendant, and that he or she knew that the package contained something, the accused must prove on a balance of probabilities that he did not know that the package contained controlled drugs. If the jury is in doubt on this issue, they must convict him. This may occur when an accused adduces sufficient evidence to raise a doubt about his guilt but the jury is not convinced on a balance of probabilities that his account is true. *Indeed it obliges the court to convict if the version of the accused is as likely to be true as not*.[175]

11.117 Professor Ian Dennis suggests that an exception to a principle that the defendant should not bear the burden of proof on an issue going to culpability—or 'moral blameworthiness'—exists where the risk has been voluntarily assumed:

> individuals who voluntarily participate in a regulated activity from which they intend to derive benefit accept the associated burden. This burden is the risk that they may have to account for any apparent wrongdoing in the course of that activity, even where the liability involves an adverse moral evaluation of their conduct. … An analogy might be made with the duties to account that are frequently placed on office-holders in various legal contexts, such as the conduct of corporate enterprises.[176]

Seriousness

11.118 The seriousness of a crime, it is sometimes suggested, justifies placing a legal burden of proof on the accused. However, this argument has also been criticised. Calling this the 'ubiquity and ugliness argument', Sachs J of the South African Constitutional Court in *State v Coetzee* said:

> There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become … The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption … the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.[177]

11.119 In the UK, the seriousness of the problem addressed by the offence has been routinely considered as one factor in assessing whether a reversal of the burden of proof is a proportionate response. In *Lambert,* the imposition of a legal burden of proof

---

174 *R v Lambert* [2002] 2 AC 545, [35].
175 Ibid [38].
176 Dennis, above n 20, 920.
177 *State v Coetzee* [1997] 2 LRC 593 [220] at 677.

on the accused to prove that he did not know that a package in his possession contained controlled drugs was not considered a proportionate response to the 'notorious social evil' of drug trafficking.[178]

11.120 In *Sheldrake v DPP*, a legal burden on the accused to show that there was no likelihood of driving with an excess of alcohol was not considered disproportionate, given the legitimate objective of 'prevention of death, injury and damage caused by unfit drivers'.[179] However, in the conjoined appeal of *Attorney General's Reference No 4 of 2002*, despite the public interest in preventing terrorism, the House of Lords did not consider it justified to impose a legal burden on the accused to prove that an organisation was not a proscribed organisation on the date he became a member or began to profess being a member of that organisation, and that he had not taken part in the activities of the organisation at any time while it was proscribed.[180]

11.121 In *R v Williams (Orette)*, the legal burden of proof on the defendant in a firearms offence to show that he did not know and had no reason to suspect that an imitation firearm was convertible to a useable firearm was considered justified, with one of the reasons for this being the seriousness of firearm offences and the need to protect the public.[181]

11.122 Alternatively, where the offence is one where the penalty is not severe, it may be more readily justifiable to shift the burden of proof on an issue. Examples might include 'regulatory offences whose primary purpose is the efficient operation of matters within the public sphere, such as transport, traffic, manufacturing, environmental protection, control of domestic animals and consumer relations'.[182] Associate Professor David Hamer has argued that such regulations 'play a crucial role in safeguarding the public interest. While the breach of regulations often carries the potential for extensive and severe harm, the penalties are often fairly minor'.[183]

Difficulties of proof

11.123 Reversing the onus of proof is sometimes said to be justified where it is particularly difficult for a prosecution to meet a legal burden.[184]

11.124 However, as the Guide to Framing Commonwealth Offences notes,

> [t]he fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to

178 *R v Lambert* [2002] 2 AC 545, [17] (Lord Slynn), [41]–[42] (Lord Steyn), [84], [91], [94] (Lord Hope), [156]–[157] (Lord Clyde).
179 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [41] (Lord Bingham).
180 Ibid [51] (Lord Bingham).
181 *R v Williams (Orette)* [2013] 1 WLR 1200.
182 Chung Ong, above n 167, 256.
183 Hamer, above n 167, 166.
184 *Williamson v Ah On* (1926) 39 CLR 95, 113 (Isaacs J).

> produce the information needed to avoid conviction. This would generally be unjust.[185]

11.125 The Institute of Public Affairs submitted that difficulties associated with proof are not a sufficient justification for a reversal of the burden of proof, stating that '[t]he common law legal system is ideal not for the ease with which it allows for prosecutions, but for the protections it offers against an overbearing state'.[186]

11.126 Nonetheless, it may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. Such was the case in *R v Turner*, where the burden of proving that the defendant had the necessary qualification to kill game was considered to be peculiarly within the knowledge of the accused.[187] A number of submissions considered that a reversal of the burden of proof may be justified in circumstances where peculiar knowledge resides with the defendant.[188]

11.127 The Consumer Action Law Centre submitted that in corporate misconduct matters, the requisite knowledge and evidence 'invariably exists within the corporate entity, so therefore it is appropriate that any burden of proof be reversed to that party'.[189] Jobwatch submitted that it may be appropriate to reverse the burden of proof 'if it is particularly difficult to prove a case due to an imbalance of resources that favours the defendant'.[190]

11.128 Hamer has noted extraordinary proof imbalances are more likely to exist in the case of regulatory offences, and that reverse persuasive burdens 'provide a practical way for the regulator to manage the cost of prosecutions'.[191]

Conclusions

11.129 A number of Commonwealth criminal offences reverse the legal burden of proof and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law.

11.130 Offences that reverse the legal burden of proof on an issue essential to culpability arguably provide the greatest interference with the presumption of innocence, and their necessity requires the strongest justification.

11.131 This chapter has identified a range of such laws, including deeming provisions in relation to serious drug offences, and directors' liability for taxation offences.

---

185 Attorney-General's Department, above n 18, 50.
186 Institute of Public Affairs, *Submission 49*.
187 *R v Turner* (1816) 5 M & S 206.
188 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; The Tax Institute, *Submission 68*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*; Consumer Action Law Centre, *Submission 35*; UNSW Law Society, *Submission 19*.
189 Consumer Action Law Centre, *Submission 35*.
190 Jobwatch, *Submission 46*.
191 Hamer, above n 167, 166.

11.132 Further review of the reversals of the legal burden of proof in these laws may be warranted, including consideration of whether shifting the evidential burden only would be sufficient to balance the presumption of innocence with other legitimate objectives pursued by these laws.

11.133 This chapter has focused on reversals of the legal burden of proof in criminal laws, but notes that there can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny.

12. Privilege Against Self-incrimination

Contents

A common law right

12.1 The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.[1] It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.[2]

1 *Reid v Howard* (1995) 184 CLR 1, [8].
2 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [1] (French CJ).

12.2 In 1983 the High Court described the privilege as follows:

> A person may refuse to answer any question, or to produce any document or thing, if to do so 'may tend to bring him into the peril and possibility of being convicted as a criminal'.[3]

12.3 Similarly, in 2004 the Full Federal Court said:

> The privilege is that a person (not company) is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime.[4]

12.4 The common law privilege is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime,[5] to persons questioned in civil proceedings[6] and in non-curial contexts.[7]

12.5 The privilege is one aspect of the right to silence.[8] The right to silence protects the right not to be made to testify against oneself (whether or not that testimony is incriminating).[9] The privilege against self-incrimination is narrower, in that it protects the right not to be made to incriminate oneself. A statute might require a person to answer questions, thus breaching the right to silence, but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.[10]

12.6 This chapter is only concerned with the privilege against self-incrimination, which arose in the common law courts, rather than the privilege against exposure to a civil penalty or forfeiture, which arose in equity.[11] This is consistent with the Terms of Reference for this Inquiry which require the ALRC to consider laws that encroach on traditional, or common law, rights, freedoms and privileges.

Testimony and documents

12.7 The privilege is testimonial in nature, protecting individuals from convicting themselves out of their 'own mouths'.[12]

---

3 *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110 at 111.

4 *Griffin v Pantzer* (2004) 137 FCR 209, [37] (Allsop J).

5 *Petty & Maiden v R* (1991) 173 CLR 95.

6 *Reid v Howard* (1995) 184 CLR 1, [15].

7 *Griffin v Pantzer* (2004) 137 FCR 209, [44].

8 Queensland Law Reform Commission, 'The Abrogation of the Principle against Self-Incrimination' (Report No 59, 2004) 54; *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1. See also Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39 *Monash University Law Review* 156, 158. The right to silence is a negative right, a right not to be made to do something, namely, testify against yourself: Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 204.

9 Gans et al, above n 8, 204.

10 See, eg, *Broadcasting Services Act 1992* (Cth) s 202.

11 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [45]. See also Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25070]; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [24], [50].

12 *Hamilton v Oades* (1989) 166 CLR 486, 496.

12.8 The privilege does not prevent persons from being compelled to incriminate themselves through the provision of evidence that is non-testimonial in nature.[13] Non-testimonial evidence may include, for instance, fingerprints or DNA samples.[14] In *Sorby v Commonwealth*, Gibbs CJ explained that the privilege

> prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he was identified.[15]

12.9 While recent Australian decisions have indicated that the privilege extends to documents,[16] questions have been raised as to whether that continues to be the case. The Australian Securities and Investments Commission (ASIC) noted that in the United States and the United Kingdom, the privilege against self-incrimination no longer extends to the production of documents, but only protects testimonial communications.[17]

12.10 ASIC also noted that doubts have been expressed by Australian courts about the extension of the privilege to documents. In three judgments of the High Court, documents have been referred to as 'in the nature of real evidence which speak for themselves', in contrast to testimonial evidence, with the inference that the privilege may be unnecessary with regard to documents.[18] However in those cases it was not necessary for the Court to definitively confirm the existence—or otherwise—of the common law privilege regarding documents.

12.11 If the privilege continues to extend to documents, it only excuses the person from producing them. If the documents are, for example, seized under a warrant, they are not protected by the privilege.[19]

Corporations may not claim the privilege

12.12 The privilege against self-incrimination extends to natural persons, but not corporations.[20] In *Environment Protection Authority v Caltex*, the High Court reviewed

---

13 See, eg, ASIC's submission on this point: Australian Securities and Investment Commission, *Submission 74*.

14 Heydon, above n 11, [25095].

15 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

16 Ibid 288; *Griffin v Pantzer* (2004) 137 FCR 209, 37.

17 Australian Securities and Investment Commission, *Submission 74*; ASIC relied upon the following: *Attorney General's Reference (No 7 of 2000)* (2001) 2 Cr App R 19; *R v Kearns* (2001) 1 WLR 2815; *Fisher v United States* (1976) 425 US 391.

18 *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 326; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 502. In the context of discovery of documents by a corporation subject to contempt proceedings, see *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21 (17 June 2015) [38], [79].

19 Heydon, above n 11, [25090].

20 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would tend to make them personally liable: *Upperedge v Bailey* (1994) 13 ACSR 541. See also *Evidence Act 1995* (Cth) 1995 s 187 which abolished the privilege regarding bodies corporate.

the historical and modern rationales for the privilege and held that these did not support the extension of the privilege to corporations. In particular, the court noted that

> a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons ... Accordingly, in maintaining a 'fair' or 'correct' balance between state and corporation, the operation of the privilege should be confined to natural persons.[21]

The origins of the privilege

12.13 There is some debate among legal historians about the origins of the privilege.[22] Some have suggested it is of ancient origin, arising from the common law maxim *nemo tenetur prodere seipsum*, meaning that people should not be compelled to betray themselves.[23] Professor Richard Helmholz reports that the *ius commune* or common law of the 12th and 13th centuries, a combination of the Roman and canon laws, included an early privilege against self-incrimination that influenced the modern iteration of the privilege at common law.[24]

12.14 In his *Commentaries on the Laws of England*, William Blackstone explained that the maxim was enlivened where a defendant's 'fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.[25]

12.15 Others point to the development of the privilege in the 17th century as a response to the unpopularity of the Star Chamber in England whose practices included requiring suspects on trial for treason to answer questions without protection from self-incrimination.[26]

12.16 On the other hand, Professor John Langbein suggested the privilege did not arise until much later. He pointed to the development of the privilege as part of the rise of the adversarial criminal justice system, where the prosecution is charged with proving the guilt of a defendant beyond a reasonable doubt and subject to protections surrounding the manner of criminal discovery.[27]

12.17 In a vigorous dissent in *Azzopardi v R*, McHugh J endorsed Langbein's approach:

---

21 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [39].

22 For example, *Azzopardi v R* (2001) 205 CLR 50, 91 [120] (McHugh J). See also Cosmas Mosidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology Press, 2008); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100] (Hayne and Bell JJ).

23 Richard Helmholz, 'Introduction' in Richard Helmholz (ed), *The Privilege against Self-Incrimination: Its Origins and Development* (University of Chicago Press, 1997).

24 Ibid 7.

25 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 22, 293.

26 Leonard Levy, *Origins of the Fifth Amendment* (Macmillan, 1986); John Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1. See also *Sorby v Commonwealth* (1983) 152 CLR 281, 317; *Griffin v Pantzer* (2004) 137 FCR 209, [40]. For further background, see, David Dolinko, 'Is There a Rationale for the Privilege against Self-Incrimination?' (1986) 3 *UCLA Law Review* 1063, 1079.

27 John Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 *Michigan Law Review* 1047, 1047.

> … these lawyers and historians have convincingly demonstrated that the self-incrimination principle originated from the European inquisitorial procedure and that it did not become firmly established as a principle of the criminal law until the mid-19th century or later.[28]

The rationale for the privilege

12.18 A number of rationales have been offered for the privilege. First, and perhaps most importantly, the privilege is said to protect freedom and dignity. In *Pyneboard Pty Ltd v Trade Practices Commission*, Murphy J explained that the privilege is

> part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.[29]

12.19 Also in *Pyneboard*, the privilege was described as a 'fundamental bulwark of liberty'.[30]

12.20 Secondly, the privilege is said to be necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution. In *Cornwell v The Queen*, Kirby J said:

> Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.[31]

12.21 Thirdly, the privilege is thought to reduce the power imbalance between the prosecution and a defendant,[32] or as Gleeson CJ put it, to hold 'a proper balance between the powers of the State and the rights and interests of citizens'.[33]

12.22 In more utilitarian terms, the privilege may offer the following benefits.

- It may encourage witnesses to cooperate with investigators and prosecutors, as they are able to do so without giving answers to questions that may incriminate them.[34]

---

28 *Azzopardi v R* (2001) 205 CLR 50; see also Mosidis, above n 22; *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100].

29 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

30 Ibid 340 (Mason CJ, Wilson and Dawson JJ).

31 *Cornwell v R* (2007) 231 CLR 260, [176]; see also *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [55].

32 Mosidis, above n 22, 136.

33 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127. See also Australian Law Reform Commission, 'Evidence' (Interim Report 26) [857].

34 Australian Law Reform Commission, above n 33, [852], [861]; Heydon, above n 11, [25140].

- It may protect individuals from unlawful coercive methods used to obtain confessions.[35]
- It may reduce the incidence of false confessions. The stressful environment of police interviews may be 'conducive to false confessions on account of the authority of police, the isolation, uncertainty and anxiety of the suspect and the expectations of the interrogation officer'.[36] Being compelled to give a statement in this environment could exacerbate the problem.
- It may reduce the incidence of untruthful evidence, on the basis that a person who is compelled to give evidence is more likely to lie.[37]

Statutory protection

12.23 Some statutes protect the privilege against self-incrimination. For example, s 128(1) of the *Evidence Act 1995* (Cth) provides that where a witness objects to giving particular evidence that 'may tend to prove' that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty, a court may determine whether there are 'reasonable grounds' for an objection to providing that evidence.[38] If there are reasonable grounds, the court is to inform the witness that the witness need not give the evidence.[39]

12.24 In one respect, the *Evidence Act* offers superior protection than the common law. The *Evidence Act* requires a court, if it appears that a witness may have grounds to claim the privilege, to ensure that the witness is aware of the privilege.[40] At common law, there is no duty on the judge to warn a witness that there is no obligation to answer incriminating questions,[41] and many judges did not do so before the introduction of the statutory obligation.[42]

Protections from statutory encroachment

Australian Constitution

12.25 The privilege is not expressly protected by the *Australian Constitution*, nor has protection been implied by the courts. The High Court has on numerous occasions 'discarded any link between the privilege and the requirements of Ch III of the *Australian Constitution*'.[43] For instance, in *Sorby v Commonwealth*, a majority of the

35 Mosidis, above n 22, 133.
36 Ibid 129.
37 Australian Law Reform Commission, above n 33, [855].
38 *Evidence Act 1995* (Cth) 1995 s 128. See also cognate state and territory legislation.
39 Ibid s 128(3)(a).
40 Ibid s 132.
41 Heydon, above n 11, [25.105].
42 Australian Law Reform Commission, above n 33, [464].
43 See discussion in Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 *University of Tasmania Law Review* 132, 162.

High Court held that the privilege against self-incrimination is not an integral element in the exercise of judicial power reposed in the courts by Ch III of the *Constitution*.[44]

12.26 However, courts have an inherent power to prevent injustice and to ensure fair processes.[45] If a statutory abrogation of the privilege results in the prosecution obtaining an unfair forensic advantage, there is a question over the admissibility of that evidence:

> the trial judge has a discretion in relation to the admissibility of such [derivative] evidence, and the court has a power to control any use of derivative evidence which amounts to an abuse of process.[46]

Principle of legality

12.27 The principle of legality provides some protection to the privilege against self-incrimination.[47] When interpreting a statute, courts will presume that Parliament did not intend to interfere with the privilege, unless this intention was made unambiguously clear.[48]

12.28 In *Pyneboard Pty Ltd v Trade Practices Commission*, the High Court held that the right to claim the privilege against self-incrimination could be revoked where a statutory body, like the Trade Practices Commission, was authorised to compel individuals to produce information which may incriminate that individual. In that case, s 155(1) of the *Trade Practices Act 1974* (Cth) required a person to provide information or documents to the Commission. The High Court held that the privilege

> will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. That is so when the object of imposing the obligation is to ensure the full investigation on the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.[49]

International law

12.29 The right to claim the privilege against self-incrimination is enshrined in art 14(3)(g) of the *International Covenant on Civil and Political Rights*[50] (ICCPR) which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess guilt.

---

44 *Sorby v Commonwealth* (1983) 152 CLR 281, 308 (Mason, Wilson and Dawson JJ).

45 *Dietrich v R* (1992) 177 CLR 292, [4]. See further Ch 10.

46 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [58].

47 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

48 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Crafter v Kelly* [1941] SASR 237.

49 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 618 (Mason ACJ, Wilson and Dawson JJ).

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

12.30 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[51] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[52] The High Court has confirmed the 'influence' of art 14 of the ICCPR on the common law.[53]

Bills of rights

12.31 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Article 6 of the *European Convention on Human Rights* protects the right to a fair trial and the presumption of innocence.[54] While the privilege against self-incrimination is not specifically mentioned, the European Court has held that:

> the right to silence and the right not to incriminate oneself, are generally recognised international standards, which lie at the heart of the notion of a fair procedure under article 6.[55]

12.32 In the UK case of *R v Lambert*, Lord Hope explained that art 6(2)

> [i]s not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality.[56]

12.33 The privilege is enshrined in bills of rights and human rights statutes in the United States,[57] the United Kingdom,[58] Canada[59] and New Zealand.[60] For example, the *Canadian Charter of Rights and Freedoms* provides:

> Any person charged with an offence has the right …
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence.[61]

12.34 The right or privilege against self-incrimination is also protected in the Victorian *Charter of Human Rights and Responsibilities* and the ACT's *Human Rights Act*.[62]

---

51 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

53 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

54 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6. The European Court of Human Rights has upheld the centrality of the presumption of innocence as part of the inquisitorial systems of European nations' criminal justice systems: *Funke v France* [1993] 16 EHRR 297 (1993).

55 *Heaney and McGuinness v Ireland* (2001) 33 Eur Court HR 12, [40].

56 *R v Lambert* [2001] UKHL 37 [88].

57 *United States Constitution* amend V.

58 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6.

59 *Canada Act 1982 c 11* s 13.

60 *Bill of Rights Act 1990* (NZ) s 25(d).

61 *Canada Act 1982 c 11* s 11(c).

62 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(k); *Human Rights Act 2004* (ACT) s 22(2)(i).

Laws that exclude the right to claim the privilege

12.35 Many Commonwealth laws require a person to answer questions or produce documents, but provide that those answers or documents are not admissible against the person in criminal proceedings. It is possible to characterise these laws as preserving the privilege against self-incrimination, because of inadmissibility of the material.[63] However, for the purpose of this Inquiry, these laws will be characterised as excluding the privilege, because at common law there is a right *not to speak*, rather than a right not to have one's answers used against one.[64] If this broader approach to the right is taken, there are many provisions in Commonwealth laws that exclude the right to claim the privilege against self-incrimination.

12.36 Nearly all of these provisions provide statutory protections for witnesses, primarily by way of use or derivative use immunities that render incriminating evidence inadmissible against the relevant person in future criminal proceedings. Use immunity means that the statement given or record produced cannot be used in subsequent criminal or civil penalty proceedings against the person, except in proceedings in relation to the falsity of the evidence itself.[65] Derivative use immunity means that evidence obtained as a result of the person having made a statement, or provided a document, cannot be used in subsequent proceedings.[66]

12.37 Some stakeholders expressed concern at the exclusion of the privilege in Commonwealth laws.[67]

12.38 This chapter identifies provisions in Commonwealth laws that exclude the right to claim the privilege in the following areas:

- workplace relations laws;
- work health and safety laws;
- corporate and commercial regulation;
- national security laws;
- the powers of federal investigative and regulatory bodies; and
- migration law.

---

63 See, eg, J Gans, *Submission 02*.

64 The Institute of Public Affairs also took this approach: Institute of Public Affairs, *Submission 49*.

65 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).

66 Ibid [7.34]–[7.35].

67 Law Council of Australia, *Submission 75*; Australian Securities and Investment Commission, *Submission 74*; The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; Australian Council of Trade Unions, *Submission 44*; J Gans, *Submission 02*.

Workplace relations laws

12.39 The Terms of Reference for this Inquiry ask the ALRC to include particular consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation and workplace relations.

12.40 Several provisions in workplace relations legislation exclude the privilege against self-incrimination, primarily for the purpose of empowering Commonwealth officials to examine individuals in relation to workplace offences. The following provisions include use and derivative use immunities.

- *Fair Work Act 2009* (Cth) s 713 provides that a person is not excused from producing a record or document under ss 709(d) and 712 on the grounds that it may tend to incriminate them.
- *Fair Work (Registered Organisations) Act 2009* (Cth) ss 337 and 337A provide that a person may not refuse to give information, produce documents or answer questions on the ground that the information may incriminate that person.
- *Fair Work (Building Industry) Act 2012* (Cth) s 53 provides that a person may not refuse to give information, produce documents, or answer questions if required to do so by an examination notice relating to a building industry workplace investigation on the grounds that it may incriminate the person.

Work health and safety laws

12.41 Section 172 of the *Work Health and Safety Act 2011* (Cth) provides that a person is not excused from answering a question or providing information or a document on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty. Use and derivative use immunity is provided. The provision concerns investigations into unsafe or unlawful work practices.

12.42 The Australian Council of Trade Unions (ACTU) argued that there is a 'clear public interest' in ensuring workers are healthy and safe at work and employers comply with workplace laws, and therefore 'inspectors need to have strong unambiguous powers to obtain information'.[68]

12.43 The Explanatory Memorandum to the Work Health and Safety Bill 2011 (Cth) provides a justification for the abrogation of the privilege:

> These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

68 Australian Council of Trade Unions, *Submission 44*.

12.44 The ACTU argued that the provision is proportionate and necessary as inspectors need 'strong unambiguous powers to obtain information' in order to reduce the risk of workplace injury:

> The abrogation of the privilege against self-incrimination is justifiable and should be retained. There is a clear public interest in ensuring healthy and safe working conditions. Workers are entitled to healthy and safe conditions of work.[69]

Corporate and commercial regulation

12.45 As the Commonwealth regulator in the area of corporate and commercial regulation, ASIC has compulsory investigatory powers that exclude the privilege against self-incrimination.

12.46 ASIC is empowered to compel persons to:

- produce specified books relating to regulated entities or activities (production powers);[70] and
- attend examinations and answer relevant questions on oath (examination powers).[71]

12.47 The fact that producing documents or answering questions may incriminate the person is not a reasonable excuse for refusing to do so. Use immunity is available regarding statements and the signing of a record.[72]

12.48 Procedural safeguards are available in the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act), including:

- the provision of a notice setting out the general nature of the matter being investigated, and information about the examinee's rights and obligations;
- the right to have a lawyer present;
- an examinee is only required to answer questions that are relevant to a matter that ASIC is investigating;
- an examination must take place in private;
- an examinee is entitled to a copy of the record of the examination; and
- judicial review is available regarding examination decisions made by ASIC.[73]

---

69 Ibid.
70 *Australian Securities and Investments Commission Act 2001* (Cth) ss 30, 31, 33.
71 Ibid ss 19, 21.
72 Ibid s 68.
73 Ibid ss 19, 22, 23, 24; Australian Securities and Investment Commission, *Submission 74*.

National security laws

12.49 There are a number of Commonwealth laws that exclude the right to claim the privilege against self-incrimination in order to detect and prevent serious crime, particularly serious crimes such as terrorism. These laws include the following:

- *Crimes Act 1914* (Cth) s 3ZZGE(1)(c) provides that a person is not excused from giving information, answering a question, or giving access to a document to the Commonwealth Ombudsman, on the grounds that it may incriminate them. Use and derivative use immunities are available: s 3ZZGE(2).
- *Australian Security Intelligence Organisation Act* 1979 (Cth) (ASIO Act) s 34L(8) provides that a person cannot fail to provide information to ASIO officers even if that information may incriminate them.[74] Use immunity is available in s 34L(9).
- *Australian Federal Police Act 1979* (Cth) ss 40A, 40VG, 40VE and 40L exclude the right to claim the privilege against self-incrimination for Australian Federal Police (AFP) employees who are subject to investigations or questioning about professional standards and other internal matters. Use immunity is available.

12.50 The *Proceeds of Crime Act 2002* (Cth) is intended to enable the seizure of property used in, or derived from, terrorism offences, as well as to enable the confiscation of profits from drug trafficking, people smuggling, money laundering and large-scale fraud.[75] Several provisions exclude the privilege against self-incrimination. All contain use, but not derivative use, immunities.

- Section 39A excludes the use of the privilege as a reason to refuse to provide a sworn statement to the AFP under s 39(1)(d) where authorities harbour a suspicion that a person may have information about, or assets derived from, the suspected criminal activities of others. Use immunity is available.
- Section 206 is a similar provision that states that the privilege does not excuse a person from providing information with regard to a production order. Use immunity is available.
- Section 271 provides that a person is not excused from providing information to the Official Trustee if the information may tend to incriminate them. Derivative use immunity is available.

12.51 Some of these provisions—discussed below—have been subject to criticism by parliamentary and other reviews, for excluding the privilege without appropriate justification.

---

74 This provision was raised by several stakeholders: Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

75 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

Compulsory disclosure of information to the Commonwealth Ombudsman

12.52 In 2014, changes were made to the criminal laws regarding terrorism offences which had an impact on a range of rights and freedoms.[76] Safeguards were included in the legislation, including oversight by the Commonwealth Ombudsman. Officers of eligible agencies are required to provide information to the Ombudsman and are denied the privilege against self-incrimination, subject to use and derivative use immunities.[77] The Senate Standing Committee on the Scrutiny of Bills noted that this provision amounted to a 'possible undue trespass on individual rights and liberties',[78] and left the question of whether the provision was 'appropriate' to the Senate.[79]

12.53 The Explanatory Memorandum to the legislation that introduced the provision explained that the abrogation of the privilege against self-incrimination 'recognises the public interest in the effective monitoring of the use of delayed notification search warrants to ensure that civil liberties are not unduly breached'.[80]

Compulsory disclosure of information to ASIO

12.54 Several stakeholders raised concerns about s 34L(8) of the ASIO Act, which provides that a person cannot fail to provide information to ASIO officers, even if that information may incriminate them.[81] Direct use immunity is available.[82] According to the Explanatory Memorandum,

> The normal privilege against self-incrimination does not apply in relation to proposed new subsection 34G(8) to maximise the likelihood that information will be given or records or things produced that may assist to avert terrorism offences. The protection of the community from such violence is, in this special case, considered to be more important than the privilege against self-incrimination.[83]

12.55 Lisa Burton, Nicola McGarrity and George Williams considered that

> the problem with these justifications is that they are not reflected in the criteria for issuing a questioning warrant. That is, the legislation does not require any proof of imminent danger or that the intelligence sought is capable of preventing a terrorism offence before coercive questioning is permitted.[84]

---

76 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) item 35.

77 *Crimes Act 1914* (Cth) s 3ZZGE(3).

78 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014*, (October 2014) 789.

79 Ibid 790.

80 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

81 Law Council of Australia, *Submission 75*; Institute of Public Affairs, *Submission 49*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

82 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34(9).

83 Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

84 Lisa Burton, Nicola McGarrity and George Williams, 'The Extraodinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415, 446.

12.56 Statutory safeguards are contained within the legislation, including the requirement for a warrant, an explanation to the person about what the warrant authorises ASIO to do, provision for interpreters, permission from a judge if questioning continues for more than eight hours, and a requirement for humane treatment.[85]

12.57 The Law Council considered that this law may unjustifiably exclude the privilege, noting that a person

> may be required to give information regardless of whether doing so might tend to incriminate the person or make them liable to a penalty. The mandatory presence of a police officer throughout questioning, required by ASIO's Statement of Procedures, ensures law enforcement agencies have ready access to information and material provided to ASIO by the detained person, and thus may increase the likelihood of derivative use of information in a subsequent prosecution brought against the person who has been compelled to divulge it.[86]

12.58 When considering s 34L(8), the Independent National Security Legislation Monitor (INSLM) noted that it is 'not at all unusual for laws to abrogate the privilege against self‑incrimination albeit with protection against the use of such answers in criminal proceedings'. Given this, the INSLM concluded that,

> On balance and provisionally, the view of the INSLM is that there are so many such provisions given effect every day in Australia that the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege.[87]

12.59 The Australian Human Rights Commission also raised concerns about this provision, particularly the lack of protection against derivative use.[88]

Other coercive information-gathering agencies

12.60 A range of Commonwealth laws empower federal agencies to conduct coercive information-gathering investigations. For the purpose of performing their investigatory functions, these statutory agencies, such as the Australian Crime Commission and the Australian Taxation Office (ATO) have the ability to obtain information and documents in ways that deny the privilege against self-incrimination.

12.61 The justifications for these encroachments will necessarily vary depending on the particular area of law. Generally, they have been justified on public interest grounds to promote the investigation of and to prevent unlawful practices such as tax evasion, corruption and environmental pollution and degradation. Overwhelmingly, these provisions provide use or derivative use immunities to protect individuals from future criminal proceedings.

---

85 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 30E, 34J, 34M, 34N, 34R, 34T.

86 Law Council of Australia, *Submission 75*.

87 Independent National Security Legislation Monitor, *Annual Report* (16 December 2011) 28.

88 Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (2012).

12.62 The Terms of Reference for this Inquiry ask the ALRC to include consideration of Commonwealth laws that exclude the right to claim the privilege in commercial and corporate regulation, environmental regulation and workplace relations. The ALRC has identified provisions in these areas of law, as well as in other areas.[89] Unless otherwise stated, these provisions confer use immunity only. They include the following:

- *Australian Crime Commission Act 2002* (Cth) s 30;
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 189—derivative use immunity;
- *Competition and Consumer Act 2010* (Cth) ss 133E, 135C, 151BUF, 154R, 155(7), 155B, 159;
- *Corporations Act 2001* (Cth) s 597(12);
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 486J—derivative use immunity;
- *Great Barrier Reef Marine Park Act 1975* (Cth) s 39P(4)—derivative use immunity;
- *Income Tax Assessment Act 1936* (Cth) s 264—no use or derivative use immunity;
- *Law Enforcement Integrity Commissioner Act* 2006 (Cth) ss 80, 96;
- *Mutual Assistance in Business Regulation Act 1992* (Cth) s 14;
- *National Consumer Credit Protection Act 2009* (Cth) s 295;
- *Ombudsman Act 1976* (Cth) s 9;
- *Parliamentary Service Act 1999* (Cth) ss 65AC, 65AD;
- *Private Health Insurance Act 2007* (Cth) s 214.15;
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth) ss 44(4), 46S(4) —derivative use immunity;
- *Public Service Act 1999* (Cth) ss 72C, 72D;
- *Retirement Savings Accounts Act 1997* (Cth) s 120;
- *Superannuation Industry (Supervision) Act 1993* (Cth) ss 130B, 287, 290, 336;
- *Tobacco Plain Packaging* (Cth) s 83; and
- *Veterans' Entitlements Act 1986* (Cth) s 129.

89 Some of these provisions were highlighted by stakeholders: The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; J Gans, *Submission 02*.

Taxation law

12.63 The Tax Institute raised concerns about ss 263 and 264 of the *Income Tax Assessment Act 1936* (Cth), which provide the Australian Tax Commissioner with powers to obtain information relating to a person's income tax liability. When gathering information to establish whether an individual has returned the correct amount of taxable income, the ATO can issue a notice under s 264, and in doing so, abrogate the privilege against self-incrimination.

12.64 These access and information-gathering powers allow ATO officers to enter taxpayers' premises in order to access and make copies of books, documents and other papers, as well as requiring taxpayers to produce documents, provide information in writing and attend interviews.

12.65 The Tax Institute conceded that, on occasion, the Tax Commissioner 'must sometimes act quickly' as 'powers of compulsion, for example to overcome banker-customer confidentiality, are necessary'. However, it went on to argue that these powers 'are not balanced by statutory limitations on derivative use of the information in criminal proceedings'.[90]

12.66 This provision was considered in *Deputy Commissioner of Taxation v De Vonk*, where the court said:

> If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.[91]

Migration law

12.67 There are numerous provisions in migration law that exclude the privilege against self-incrimination where officials from the Migration Agents Registration Authority (MARA) or Immigration Department officials are investigating criminal offences and civil penalty provisions concerning visa fraud. Generally speaking, the provisions empower MARA to compel information from registered or former migration agents that may be relevant to their investigations.

12.68 These provisions are in the *Migration Act 1958* (Cth) (*Migration Act*) and include derivate use immunities. They include the following.

- Section 24: a person is not excused from giving information or providing documents when that evidence concerns unlawful work practices or the violation of visa work conditions by non-citizens.

---

90 The Tax Institute, *Submission 68*.
91 *Commissioner of Taxation v de Vonk* (1995) 61 FCR 564, 583.

- Section 140XG: a person is not excused from giving information or providing documents to an inspector when that inspector is on their work premises and acting under s 140XC(d).
- Section 268BK: a person is not excused from giving information or providing documents concerning the investigation of student visas.
- Section 305C(6): a person is not excused from giving information or providing documents concerning where an individual has information relevant to a decision by MARA to refuse a registration application from a registered migration agent or make a decision to cancel or suspend such an agent's registration or to caution such an agent.
- Section 306J: an individual is not excused from producing a document under ss 306D, 306E or 306F on the ground that the production of the document may tend to incriminate the individual or expose the individual to a penalty.[92]
- Section 308(3): empowers MARA to compel information from registered migration agents, even if the information would tend to incriminate the agent.
- Section 311EA(6): empowers MARA to compel information from former migration agents, even if the information would tend to incriminate the agent.
- Section 487C(1): provides that a person is not excused from giving evidence or producing a document relating to a work-related offence under s 487B, even if the disclosure incriminates that person.

Other laws

12.69 There are many other Commonwealth laws that exclude the right to claim the privilege against self-incrimination,[93] including the following provisions. Unless otherwise stated, these provisions confer derivative use immunities.

12.70 The laws include the following:

- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 54—use immunity only;
- *Australian Border Force Act 2015* (Cth) ss 26—use immunity only;
- *Australian Sports Anti-Doping Authority Act 2006* (Cth) s13D;
- *Aviation Transport Security Act* 2004 (Cth) s 112;
- *Banking Act 1959* (Cth) s 52F—use immunity only;

92 Those sections relate to the power to compel the production of documents from inactive migration agents and the representatives of deceased migration agents.

93 The Institute of Public Affairs identified '108 current federal laws that restrict the privilege against self-incrimination': Institute of Public Affairs, *Submission 49*.

- *Bankruptcy Act 1966* (Cth) s 81(11AA). There is no express provision for immunity, but the abrogation of the privilege is 'subject to any contrary direction by the Court, the Registrar or the magistrate';
- *Defence Trade Controls Act 2012* (Cth) ss 44, 57;
- *Dental Benefits Act 2008* (Cth) s 32E;
- *Quarantine Act 1908* (Cth) s 79A; and
- *Therapeutic Goods Act 1989* (Cth) ss 31F, 32JD, 32JK, 41JC, 41JJ.

Justifications for excluding the privilege against self-incrimination

12.71 The right to claim the privilege against self-incrimination is not absolute and may be removed or diminished by statute.[94] In *Hamilton v Oades*, the High Court held that

> it is well established that Parliament is able to interfere with established common law protections, including the right to refuse to answer questions, the answers to which may tend to incriminate the person asked.[95]

12.72 The High Court has observed that legislatures may choose to exclude the privilege 'based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained'.[96]

12.73 Removing the right to claim the privilege, while providing immunities regarding the use of the information, may serve the public interest in having information revealed to agencies responsible for investigating crime or misconduct. Gathering information for the purpose of investigating serious crime or maintaining regulatory schemes is an important function of the executive branch of government.

12.74 Again, the High Court said in X7 v Australian Crime Commission:

> legislatures have, in different settings, abrogated or modified the privilege when public interest considerations have been elevated over, or balanced against, the interests of the individual so as to enable true facts to be ascertained. Longstanding examples such as the compulsory public examination of a bankrupt, or of a company officer (when fraud is suspected), serve a public interest in disclosure of the facts on behalf of creditors and shareholders which overcome some of the common law's traditional consideration for the individual.[97]

12.75 The High Court, in the passages above, described the public interest being balanced against the individual's interest in avoiding self-incrimination. A slightly

---

94 See, for example, *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J).

95 *Hamilton v Oades* (1989) 166 CLR 486, 494.

96 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J). See also *Sorby v Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ); *Rees v Kratzman* (1965) 116 CLR 63, 80 (Windeyer J).

97 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [28].

different approach was taken by the Queensland Law Reform Commission in its 2004 report, *The Abrogation of the Privilege Against Self-incrimination,* where two public interests were described:

> In relation to the privilege against self-incrimination there is, on the one hand, the public interest in upholding the policies that underlie what has come to be judicially recognised as an important individual human right. On the other hand, there is a public interest in ensuring that relevant authorities have adequate powers to inquire into and monitor activities that give rise to issues of significant public concern.[98]

12.76 Stakeholders and commentators have proposed a range of factors that should be considered in the balancing exercise.

Public benefit and avoiding serious risks

12.77 The Law Council said that to justify abrogating the privilege, there should be an 'assessment that the public benefit which will derive from negation of the privilege must decisively outweigh the resultant harm to the maintenance of civil rights'.[99] The Council suggested that an investigation into 'major criminal activity, organised crime or official corruption' might justify an abrogation of the privilege, as would risks such as 'danger to human life, serious personal injury or damage to human health, serious damage to property or the environment or significant economic detriment'.[100]

12.78 The ACTU offered a similar list of risks that might justify restricting the privilege, including 'serious damage to property or the environment, danger to human life or significant economic detriment'.[101] This submission approved of the abrogation of the privilege in the *Model Work Health and Safety Act*, noting that nearly 200 workers were killed in 2013, and arguing that the clear public interest in healthy and safe workplaces justified the abrogation. The ACTU contrasted work safety laws with the regulation of industrial action, and said:

> No satisfactory explanation has been offered as to the abrogation of the privilege in the industrial arena. The enforcement of industrial law … simply does not go to these issues of vital public importance.[102]

12.79 In 2000, the Senate Standing Committee for the Scrutiny of Bills expressed concern at the loss of the privilege, and (citing its own 1993 report) commented that:

> it was 'reluctant to see the use of provisions abrogating the privilege—even with a use/derivative use indemnity—being used as a matter of course.' The Committee preferred to see the use of such provisions 'limited to "serious" offences and to situations where they are absolutely necessary'.[103]

---

98 Queensland Law Reform Commission, above n 8, [6.3].
99 Law Council of Australia, *Submission 75*.
100 Ibid.
101 Australian Council of Trade Unions, *Submission 44*.
102 Ibid.
103 Senate Standing Committee on the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 4 of 2000* (2000) 12, 20.

12.80 ASIC also considered that 'the importance of the public interest sought to be advanced by the exclusion' is relevant to the assessment of whether a law that excludes the privilege against self-incrimination is appropriately justified.[104]

Proportionality

12.81 Justifications that refer to public benefit and the investigation of serious offences implicitly incorporate a proportionality approach, in that these justifications compare the seriousness of the infringement of the privilege with the importance of the objective sought to be achieved by the infringement.[105] Such an approach was explicitly proposed by two stakeholders. The Law Council said:

> Other considerations include whether the information could not reasonably be obtained by any other lawful means; whether the abrogation is no more than is necessary to achieve the identified purpose; and the consequences of abrogation.[106]

12.82 Professor Gans et al also endorsed a proportionality approach when explaining the balancing exercise which must be conducted in any coercive information-gathering exercise:

> These processes may limit the privacy of citizens, but, assuming that the material gathered is sufficiently narrow and the government's purposes are proportionate to the infringement, they will be compatible with the right.[107]

12.83 The Parliamentary Joint Committee on Human Rights has noted that, while art 14(3)(g) of the ICCPR protects the right to be free from self-incrimination, the right is 'subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective'.[108]

12.84 Under the *European Convention on Human Rights*, the right to a fair trial is absolute, but the implied right against self-incrimination may be restricted to achieve a legitimate aim, if there is 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[109] In *Procurator Fiscal v Brown* the Privy Council considered whether road traffic legislation—which required a person to identify the driver of a car—was compatible with the implied right against self-incrimination. It was relevant to the proportionality test that the legislation in question was road traffic legislation, with the important and legitimate aim of protecting public safety. The court noted that there were 37,770 fatal and serious accidents in 1998 in Great Britain, and that it can be difficult for the police to identify drivers of vehicles. The restriction on the privilege was held to be compatible with the Convention.[110]

---

104 Australian Securities and Investment Commission, *Submission 74*.
105 See further Ch 1 regarding proportionality.
106 Law Council of Australia, *Submission 75*.
107 Gans et al, above n 8, 235.
108 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifth Report of 2012* (October 2012) [1.58].
109 *Procurator Fiscal v Brown (Scotland)* (Unreported, UKPC D3, 5 December 2000), Lord Hope.
110 Ibid.

Voluntary participation in regulatory scheme

12.85 Infringements on the privilege may be justified when the person required to provide information is a voluntary participant in a regulatory scheme.[111] Professor Gans suggested that in such a case, 'there is a good argument that the decision to participate renders any subsequent self-incrimination voluntary, rather than compelled' and gave the example of a regulatory scheme requiring company officers to supply information about a company.[112]

12.86 The Queensland Law Reform Commission has also suggested that 'society is entitled to insist on the provision of certain information from those who voluntarily submit themselves to such a regulatory scheme'.[113] ASIC cited this suggestion with approval, and argued that:

> Persons operating in the corporate, markets, financial services or consumer credit sectors generally enjoy significant privileges as a consequence of being licensed, authorised or registered with ASIC and submitting to the relevant regulatory regime.[114]

12.87 ASIC considered that because those persons occupy positions of trust, and have extensive opportunities to commit wrongdoing and cause immense harm, the need to regulate them justifies excluding the privilege.[115] On the other hand, the Institute of Public Affairs raised concerns about the number of statutes that remove the privilege in relation to companies and their directors and agents, and proposed that 'provisions which remove legal rights of company directors' should be repealed.[116]

12.88 The Guide to Framing Commonwealth Offences provides that 'it may be appropriate to override the privilege when its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence'.[117]

Immunities

12.89 As outlined at the start of this chapter, laws that exclude the privilege will generally be accompanied by use or derivative use immunity.[118] The Guide to Framing Commonwealth Offences indicates that where a law excludes the privilege, it is 'usual to include a use immunity or a derivative use immunity provision'. The Guide explains that the rationale for this protection is that 'removing the privilege against self-

111 J Gans, *Submission 02*; Australian Securities and Investment Commission, *Submission 74*.
112 J Gans, *Submission 02*.
113 Queensland Law Reform Commission, above n 8, [6.54].
114 Australian Securities and Investment Commission, *Submission 74*.
115 Ibid.
116 Institute of Public Affairs, *Submission 49*.
117 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 95.
118 Australian Securities and Investment Commission, *Submission 74*. Generally, courts are more inclined to uphold the validity of use immunity rather than derivative use immunity, see for example, Mason CJ's judgment in *Hamilton v Oades* (1989) 166 CLR 486, 496.

incrimination represents a significant loss of personal liberty for an individual who is forced to give evidence that would tend to incriminate him or herself'.[119]

12.90 Legislators must make a judgment as to whether use immunity sufficiently balances the loss of the privilege, or whether derivative use immunity is necessary. There are different views on this issue.

12.91 The Human Rights Committee noted that an abrogation of the privilege is more likely to be considered permissible if it is accompanied by both a use and derivative use immunity.[120]

12.92 The Supreme Court of Victoria was asked to consider whether a statute that provided use immunity only was consistent with the *Charter of Human Rights and Responsibilities*, which protects the right to a fair hearing and the privilege against self-incrimination. Warren CJ held that the removal of the derivative use immunity in the statute in question went too far:

> In the context of organised crime, such a limitation means that investigators are not required to give careful consideration to which persons will be charged and interrogated … thereby raising the possibility of innocent or deliberate breaches of the right against self-incrimination … In my view, the purpose of the limitation may still be achieved whilst retaining a form of derivative use immunity.[121]

12.93 The Law Council considered that a law that excludes the privilege and provides use, but not derivative use, immunity may, for that reason, be unjustifiable.[122]

12.94 On the other hand, derivative use immunities have been criticised on the basis that they have the potential to quarantine large amounts of material and render a witness immune from prosecution altogether. A thorough review conducted by the Queensland Law Reform Commission in 2004 concluded that the default position should be use immunity, rather than derivative use, because

> the potential effect of a derivative use immunity is wider than the scope of the protection that would have been available if the privilege had not been abrogated. The Commission therefore considers that a derivative use immunity, because of its capacity to effectively quarantine from use additional material that proves the guilt of an individual who has provided self-incriminating information, should not be granted unless there are exceptional circumstances to justify the extent of its impact.[123]

---

119 Attorney-General's Department, above n 117, 96.

120 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifth Report of 2012* (October 2012) [1.58].

121 *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 198 Crim R 305, [155]–[156].

122 Law Council of Australia, *Submission 75*.

123 Queensland Law Reform Commission, above n 8, [9.89].

12.95 It has even been suggested that a witness might deliberately disclose information in order to claim immunity against disclosure of information that may have been obtained by other means during the investigation.[124]

12.96 The question has been particularly prominent in relation to the regulation of corporations, and has been the subject of several reviews over the last 20 years. In 1989, derivative use immunity became available in the Corporations Law. In 1991, the Joint Statutory Committee on Corporations and Securities—now the Parliamentary Joint Committee on Corporations and Financial Services—conducted an inquiry into use immunity provisions in the Corporations Law. It reported on the concerns raised by the Australian Securities Commission (now ASIC) that 'the danger of imperilling future criminal prosecutions has led the Commission to decide not to formally interview witnesses', meaning that the power of compulsory examination was not used.[125] One outcome was that 'investigations which could be discharged within a period of months are taking periods of years'.[126] The Director of Public Prosecutions raised concerns that a prosecutor might have to prove that each piece of evidence tendered was not acquired as a result of information disclosed pursuant to an immunity.[127] Other stakeholders challenged these claims.[128]

12.97 The Committee recommended removal of the derivative use immunity provisions and they were in fact removed in 1992. A 1997 review of that legislative change by John Kluver found that the amendments 'greatly assisted the ASC in its enforcement of the national scheme laws, primarily by increasing the Commission's ability to more fully and expeditiously utilise its power to conduct compulsory oral examinations' but had not led to examinees being unjustifiably prejudiced.[129]

12.98 In submissions to this ALRC Inquiry, Professor Gans argued that the concerns about derivative use immunity have been overstated,[130] while ASIC restated its concerns about such an immunity impeding the regulation of corporations and the prosecution of criminal activities.[131] The disagreement may, in part, be due to different understandings of the scope of derivative use immunity. The usual form of words for Australian statutes that provide derivative use immunity is that evidence obtained 'as a direct or indirect consequence' of the person having given evidence cannot be used against the person.[132]

---

124 Australian Administrative Review Council, 'The Coercive Information-Gathering Powers of Government Agencies' (Report 48, 2008) 50.

125 Joint Statutory Committee on Corporations and Securities, 'Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law' (1991) [3.1.5].

126 Ibid [3.2.1].

127 Ibid [3.5.1].

128 Ibid [3.5.3]–[3.10.3].

129 John Kluver, 'Review of the Derivative Use Immunity Reforms' (1997).

130 J Gans, *Submission 02*.

131 Australian Securities and Investment Commission, *Submission 74*.

132 *Evidence Act 1995* (Cth) 1995 s 128; *Migration Act 1958* (Cth) s 24; *Proceeds of Crime Act 2002* (Cth) s 271; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 486J.

12.99 The Canadian Supreme Court considered a range of possible approaches to derivative use immunity and concluded that Charter protection is only given to derivative evidence which 'could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness'.[133] This approach was adopted by the Victorian Supreme Court in the Charter case mentioned above.[134] However ASIO has expressed concern that derivative use immunity could render inadmissible material that 'would or could have been discovered without the particular information disclosed by the person'.[135]

Other statutory safeguards

12.100 Statutes that abrogate the privilege may be more justifiable if they include safeguards such as a requirement for reasonable suspicion of wrongdoing before a person can be subject to compulsory questioning, as is the case in s 39A of the *Proceeds of Crime Act*. Examples of other statutory safeguards in relation to the powers of ASIC and ASIO are noted above.[136]

12.101 Abrogation of the privilege may be more justifiable where the examination is to be conducted with judicial supervision. In this case, an officer of the court can 'control the course of questioning and to make suppression or non-publication orders limiting the timing and scope of any use or dissemination by the Commission of answers given or documents produced'.[137]

Conclusions

12.102 The privilege against self-incrimination is a common law right that protects a person from being compelled to answer a question or produce a document. It is said to protect the privacy, dignity and personal freedom of the individual, to preserve the presumption of innocence, and to maintain the proper balance between the citizen and the state. It is also thought to protect individuals from improper pressure to confess, and to reduce the incidence of unreliable testimony.

12.103 The privilege places barriers in the way of investigations and prosecutions. Parliament has, at times, considered that the public interest in facilitating fact-finding, whether for regulation, investigation or prosecution, outweighs the important interests protected by the privilege. The privilege has been abrogated in a wide range of legislation, including laws addressing workplace relations, work health and safety, corporate and commercial regulation, taxation, national security and migration.

12.104 In nearly all cases identified by this Inquiry to date, the abrogation of the privilege has been accompanied by a use or derivative use immunity, as recommended by the Guide to Framing Commonwealth Offences. Use immunities prohibit the use of

---

133 *R v S (RJ)* [1995] 1 SCR 451, 561.

134 *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 198 Crim R 305, [159].

135 Australian Securities and Investment Commission, *Submission 74*.

136 See further the safeguards recommended in Australian Administrative Review Council, above n 124, Principle 17.

137 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [340]; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [50].

the information revealed in subsequent proceedings against the person. Derivative use immunities render inadmissible information obtained as a result of the person having revealed information.

12.105 There have been several reviews of the privilege against self-incrimination and the availability of use immunities to protect witnesses who are compelled to produce evidence or attend examinations. These reviews largely concluded that use and derivative use immunities are an appropriate safeguard of individual rights and may, therefore, appropriately justify laws that exclude the privilege against self-incrimination.

12.106 Concerns have been raised regarding statutes that provide use immunity only, and not derivative use immunity. The ALRC is interested in comment as to whether further review of the use and derivative use immunities is necessary.

13. Client Legal Privilege

Contents

The common law

13.1 Client legal privilege is an 'important common law immunity'[1] and a 'fundamental and general principle of the common law'.[2] It 'exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'.[3]

1 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
2 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).
3 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

13.2 This chapter is about client legal privilege—also known as legal professional privilege—as defined by the common law.[4] The chapter discusses the source and rationale for client legal privilege; how the privilege is protected from statutory encroachment; and when laws that abrogate the privilege may be justified.

The doctrine

13.3 The settled doctrine on client legal privilege in Australia is set out in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*:

> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[5]

13.4 The High Court went on to state:

> It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. It may here be noted that the 'dominant purpose' test for legal professional privilege was recently adopted by this Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the 'sole purpose' test which had been applied in *Grant v Downs*.
>
> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings.[6]

13.5 The privilege applies to a range of legal proceedings and can be claimed at 'interlocutory stages of a civil proceeding, during the course of a civil or criminal trial and in non-judicial proceedings (such as administrative and investigative proceedings or in derogation of a search warrant)'.[7] The onus is on the party asserting the privilege to present the facts that give rise to the claim.

---

4 This shift in language reflects 'the nature of the privilege as one belonging to the client, rather than the lawyer': Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [1.16].

5 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

6 Ibid [9]–[10] (footnotes omitted). See also *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217. To successfully claim the privilege, a relationship between a lawyer and their client must be in existence or at the very least, contemplated: *Minter v Priest* [1930] AC 558, 568. There are exceptions to this rule, for instance, a person may claim client legal privilege where they do not have a direct relationship with a lawyer but they have an interest in common with the client, such as in a joint tenancy, see eg, Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 76.

7 McNicol, above n 6, 52.

13.6 Litigation and advice privilege are the two main types of client legal privilege, although the distinction between them is sometimes blurred.[8] The test of whether communications or evidence were brought into existence for the dominant purpose of providing legal advice or for use in litigation, is a question of fact.[9] Third party communications may also be protected by client legal privilege where a communication passes between a third party and a lawyer or their client and that communication was made in contemplation of anticipated litigation.[10]

13.7 A claim for client legal privilege will only be successful if the privilege attaches to certain communications between a lawyer and their client. There are a range of communications such as costs agreements that are not protected by client legal privilege:[11]

> [O]nly those documents which are brought into existence for the dominant purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production.[12]

13.8 Communications may be oral or written as long as the communication is necessary for the purpose of carrying on the proceeding for which the legal practitioner is employed.[13] Further, privilege will only attach to communications made by a lawyer while acting in their professional capacity.[14] Client legal privilege must first be claimed before it has any effect and, given that the privilege is a personal right, must be claimed by the person entitled to it.[15] The privilege covers civil and criminal matters or proceedings.

13.9 There are various rules or exceptions to claims for client legal privilege at common law. For instance, a claim for client legal privilege will fail if the communication that is the subject of the claim was made in furtherance of the following:

- the commission of a crime;[16]

---

8 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.28]. The *Evidence Act 1995* (Cth) also distinguishes between the two types of privilege: *Evidence Act 1995* (Cth) ss 118–119.

9 *Grant v Downs* (1976) 135 CLR 674. See also JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25240].

10 Heydon, above n 9, [25235].

11 Ibid [25225].

12 Ibid [25220].

13 *Gillard v Bates* (1840) 6 M & W 547 548.

14 *Trade Practices Commission v Sterling* (2004) 36 FLR 357, 245 (Lockhart J).

15 Ronald Desiatnik, *Legal Professional Privilege in Australia* (Lexis Nexis Butterworths, 2nd ed, 2005) 74. See also Heydon, above n 9, [25240]. Section 132 of the *Evidence Act 1995* (Cth) requires courts to satisfy themselves that a witness is aware of their right under s 118 to object to the adducing of evidence that may disclose the content of a confidential communication which is otherwise the subject of client legal privilege.

16 *R v Cox & Railton* (1884) 14 QBD 153. See also that 'if a client applies to a lawyer for advice intended to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which the advice is wanted, the communication between the two is not privileged': Heydon, above n 9, [25290].

- the abuse of a statutory power;[17] or
- if the claim frustrates a legal process.[18]

Rationales

13.10 In the ALRC's 2008 *Privilege in Perspective* report, a number of rationales were identified for the privilege, including instrumental rationales, so as encouraging full and frank disclosure of evidence and information, encouraging compliance with regulatory bodies, discouraging litigation or encouraging settlement, and promoting the efficient operation of the adversarial system.[19] The ALRC also discussed the importance of safeguarding client legal privilege in order to protect access to justice, facilitating other rights or protections.[20]

13.11 Protecting the confidentiality of communications between lawyers and clients facilitates a relationship of trust and confidence.[21] A confidential relationship encourages clients to communicate in a frank and honest way with their legal representative. Without that confidence, a person may decide—often to their detriment—not to engage a lawyer. The privilege therefore 'assists and enhances the administration of justice'.[22]

13.12 In *Greenough v Gaskell*, Lord Brougham explained that the privilege was fashioned 'out of regard to the interests of justice',

> which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in the matters affecting rights and obligations which form the subject of all judicial proceedings. If a privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half of his case.[23]

13.13 In order for lawyers to provide rigorous and targeted legal advice they need to be made aware of all the facts of their client's case—facts which a client may only feel comfortable disclosing under the protection of confidentiality.[24]

---

17 *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500.

18 For instance, in *R v Bell; Ex Parte Lees*, the High Court upheld the rejection of a claim for client legal privilege on the grounds that the claim would have defied a Family Court order: *R v Bell; Ex Parte Lees* (1980) 146 CLR 141.

19 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.9].

20 Ibid [2.43].

21 The Hon Justice John Gilmour, 'Legal Professional Privilege: Current Issues and Latest Developments' (Paper presented at the Law Society of Western Australia, Perth, 13 March 2012) 3. There are a range of rationales for client legal privilege, including instrumental rationales and rights-based rationales. See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.5]–[2.61].

22 *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ). See also Sue McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege-the Demise of Implied Statutory Abrogation' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 1.

23 *Greenough v Gaskell* (1833) ER 39 621.

24 *Due Barre v Livette* (1791) Peake 109, 110.

> [It is] necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client, this privilege is granted to ensure that the client can consult his lawyer with freedom and candor; it being thought that if the privilege did not exist a man would not venture to consult any skilled person.[25]

13.14 In *Esso Australia Resources v Commissioner of Taxation*, Kirby J spoke about the fundamental purpose of the privilege:

> It arises out of 'a substantive general principle of the common law and not a mere rule of evidence'. Its objective is 'of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law'. It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as 'a bulwark against tyranny and oppression' which is 'not to be sacrificed even to promote the search for justice or truth in the individual case'.[26]

History

13.15 Client legal privilege has a long history, having existed for over 400 years in English law.[27] Indeed American legal historian, Professor John Wigmore, described the privilege as 'the oldest of the privileges for confidential communications'.[28]

13.16 The privilege dates from Elizabethan times[29] when it was developed by the courts as a mechanism to underscore the 'professional obligation of the barrister or attorney to preserve the secrecy of the client's confidences'.[30] Dr Jonathan Auburn described the privilege as one of the 'many rules in the large mass of law relating to testimonial compulsion' that developed in the 16th century.[31]

13.17 Professor John Wigmore explained that the privilege, along with other similar protections in civil and criminal law, developed as a way to invest a sense of sportsmanship into the adversarial justice system:

> The right to use a rule of procedure or evidence as one plays a trump card, or draws to three aces, or holds back a good horse til the home stretch is a distinctive result of the common law moral attitude towards parties in litigation.[32]

13.18 The privilege developed significantly in the 18th and 19th centuries in the Chancery courts when it was considered to be only an evidentiary rule.[33] As common law procedures were reformed in the late 19th century, client legal privilege came to be

---

25 *Baker v Campbell* (1983) 153 CLR 52, 66 (Gibbs CJ).

26 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 92 [111] (Kirby J in obiter). Kirby J is quoting Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490.

27 *Baker v Campbell* (1983) 153 CLR 52, 84 (Murphy J).

28 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940) [2290].

29 Heydon, above n 6 [25215]. See also Max Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1928) 16 *California Law Review* 487.

30 *Baker v Campbell* (1983) 153 CLR 52, 66 (Deane J).

31 Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 7.

32 Wigmore, above n 28, 374–75.

33 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 581 (Kirby J).

understood as a substantive right. The scope of the common law privilege expanded significantly in the 20th century to take account of new government agencies empowered with coercive information-gathering powers.[34] Indeed the Administrative Review Council noted in 2008 that client legal privilege continues to be an 'evolving and often contentious area of the law'.[35]

A right?

13.19 The language of 'rights' has arisen during the course of the evolution of the privilege at common law.[36] For instance, in *Baker v Campbell*, Murphy and Deane JJ adopted the terminology of rights when discussing the privilege.[37] This view was endorsed by a majority of the High Court in *AFP v Propend Finance*.[38]

13.20 Client legal privilege has also been described as a human right, derived from the right to privacy[39] and the right to protection from the state.[40] In *Baker v Campbell*, Deane J said that it 'represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state'.[41]

13.21 Client legal privilege quite clearly interacts with other rights and privileges at common law, including the right to a fair trial[42] and the right to privacy. Murphy J in *Baker v Campbell* emphasised the protection of a client's privacy from the intrusion of the state:

> The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy. [43]

13.22 In the same case, Wilson J commented that the 'adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society'.[44]

---

34 Auburn, above n 31, 13.

35 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 51.

36 There is a discussion of the 'rights' rationale for client legal privilege in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.52]–[2.61].

37 *Baker v Campbell* (1983) 153 CLR 52, 85, 116–117.

38 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 65 (McHugh, Gaudron, Gummow and Kirby JJ).

39 See also Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.36]–[2.39].

40 For an explanation on the rights-based rationales for client legal privilege, see, eg, Ibid [2.35]–[2.61].

41 *Baker v Campbell* (1983) 153 CLR 52, 120.

42 The right to a fair trial is discussed in Ch 10.

43 *Baker v Campbell* (1983) 153 CLR 52, 89.

44 Ibid 95.

Protections from statutory encroachment

Australian Constitution

13.23 While the *Australian Constitution* contains no express provision in respect of client legal privilege, the High Court has yet to consider whether it is protected with respect to the exercise of judicial power by any implication arising from Ch III of the *Constitution.*

Principle of legality

13.24 The principle of legality provides some protection to client legal privilege.[45] When interpreting a statute, courts will presume that Parliament did not intend to interfere with client legal privilege, unless this intention was made unambiguously clear.[46] In *Baker v Campbell*, Deane J said:

> It is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.[47]

International law

13.25 Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) protects the right to a fair and public trial but also a limited right to privacy in relation to proceedings.[48] This suggests communications between clients and lawyers should be treated as confidential.

13.26 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[49] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[50]

Bills of rights

13.27 In some jurisdictions, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The Victorian *Charter of Human Rights and Responsibilities* provides that a person has the 'right not to have his or her privacy or correspondence unlawfully or arbitrarily interfered with'[51] and the right to a fair

---

45 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

46 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [106] (Kirby J); *Valantine v Technical and Further Education Commission* (2007) 97 ALD 447, [37] (Gzell J; Beazley J and Tobias JJA agreeing). Legislative intention to displace the privilege may be clearer where the privilege against self-incrimination is also abrogated: *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.

47 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

48 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

49 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

50 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

51 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13a.

hearing and to communicate with his or her lawyer in criminal proceedings.[52] The ACT's *Human Rights Act* provides protection for a fair hearing.[53]

Laws that abrogate client legal privilege

13.28 There are some provisions in Commonwealth laws that abrogate client legal privilege.

13.29 Few stakeholders to this Inquiry identified Commonwealth laws that abrogate client legal privilege.[54] For the most part, stakeholders identified two areas of law that affect client legal privilege: mandatory data retention laws; and statutory access to communications between lawyers and individuals suspected of terrorism-related offences. As explained later in this chapter, these laws do not indicate an express and unambiguous legislative intention to abrogate the privilege, as required by the principle of legality.

13.30 Most of the laws identified in this chapter include statutory protections for witnesses: use or derivative use immunities render evidence or testimony that was the subject of a claim for client legal privilege inadmissible in some future proceedings.

13.31 A use immunity usually limits the use of information that would ordinarily be subject to a claim of client legal privilege in any subsequent criminal or civil penalty proceedings against the person who provided the information, except in proceedings in relation to the falsity of the evidence itself.[55]

13.32 A derivative use immunity is wider than a use immunity, in that it also renders inadmissible in subsequent proceedings any evidence obtained as a result of the person having disclosed or provided a privileged communication. Therefore, any documents obtained or witnesses identified as a result of the information having been provided are not admissible against the person compelled to answer.[56]

13.33 Commonwealth laws that abrogate client legal privilege generally arise in the following contexts:

- ad hoc legal investigations;
- laws aimed at open government and transparency; and
- the coercive information-gathering powers of federal investigatory bodies.

---

52 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25.

53 *Human Rights Act 2004* (ACT) s 21.

54 Law Council of Australia, *Submission 75*; Australian Securities and Investments Commission, *Submission 74*; National Association of Community Legal Centres, *Submission 66*; Australian Council of Trade Unions, *Submission 44*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; D Black, *Submission 6*; J Gans, *Submission 2*.

55 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [7.34]–[7.35].

56 Ibid.

Ad hoc investigations

13.34 Some Commonwealth laws abrogate client legal privilege in the context of ad hoc bodies or investigations.

13.35 For instance, in the *Royal Commissions Act 1902* (Cth), ss 6AA(1) and 6AB(5) provide that it is not a reasonable excuse for a person to refuse or fail to provide a document, evidence or information to the Commission in relation to ss 3(2B) and (5), subject to exemptions.

13.36 Section 4 of the *James Hardie (Investigations and Procedures) Act 2004* (Cth) provides that legal professional privilege may be abrogated in relation to a James Hardie investigation or proceeding, or James Hardie 'material', as defined in that Act. Section 6 provides that this does not create a general abrogation of legal professional privilege.

13.37 It may be appropriate for client legal privilege to be abrogated in the context of specific investigations,[57] given they are designed to investigate specific matters that are in the public interest and are conducted for a fixed or limited period of time. This may be particularly important in the case of ad hoc investigative bodies, like royal commissions or special investigations, where time and resources are finite.[58] The Explanatory Memorandum of the James Hardie (Investigations and Procedures) Bill 2004 outlined the policy justification for the abrogation of client legal privilege in that bill:

> The community must have confidence in the regulation of corporate conduct, financial markets and services. This confidence would be undermined if ASIC was unduly inhibited in its ability to obtain and use material necessary to conduct investigations … In relation to matters concerning, or arising out of, the James Hardie Special Commission of Inquiry, the Government considers that it is clearly in the public interest that any investigation and subsequent action by ASIC and the DPP be unfettered by claims of legal professional privilege.[59]

13.38 The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) drew attention to s 4 of the Bill, noting that it

> would abrogate legal professional privilege in relation to a wide range of records and books connected with the Special Commission of Inquiry conducted in New South Wales into the conduct of the James Hardie Group of companies. In his second reading speech the Treasurer acknowledges that 'legal professional privilege is … an important common law right' that ought to be abrogated only in special circumstances, but goes on to assert that such abrogation is justified 'in order to serve higher public policy interests' such as the 'effective enforcement of corporate regulation'.[60]

---

57 Ibid Rec 6–1.
58 Ibid Rec 6–2.
59 Explanatory Memorandum, James Hardie (Investigations and Procedures) Bill 2004 (Cth).
60 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2005* (August 2005) 151.

13.39 The Law Council of Australia raised concerns about the process by which client legal privilege may be abrogated by the *Royal Commissions Act 1902* (Cth) and the process for appeal. The Law Council argued that

> While parties retain the right to appeal to the Federal Court against a finding by a Royal Commissioner that a document is not privileged, there remains a concern that the proceedings may be tainted by the knowledge of privileged—and potentially prejudicial matters—notwithstanding the provision that the Commissioner is to disregard matters subject to privilege. Further, while there is an argument that Royal Commissions deal with matters of significant public interest, over-riding the private interest in protection of privilege, the reasonableness of such a claim in respect of *all* Royal Commissions is belied by the fact that the question of amending the *Royal Commissions Act* in this way had not previously been raised—presumably because it was not considered necessary. Accordingly, a more targeted approach may have been appropriate in the circumstances.[61]

13.40 In its *Royal Commissions and Official Inquiries* report, the ALRC made specific recommendations about the operation of client legal privilege in specific, ad hoc inquiries, including royal commissions.[62]

Open government and accountability in decision-making

13.41 There are some Commonwealth laws that abrogate client legal privilege by compelling individuals to produce evidence or information to government oversight bodies such as the Commonwealth Ombudsman. The purpose of these laws is to promote transparency in government decision-making. Unless otherwise stated, the following provisions confer immunities. The laws include the following provisions:

- *Crimes Act 1914* (Cth) s 3ZZGE(1)(d)(ii), which provides that client legal privilege is not an excuse for not disclosing information to the Commonwealth Ombudsman regarding the inspection of a prescribed Commonwealth agency's records, although any evidence protected by legal professional privilege cannot later be used to prosecute the individual for specific offences in pt 7 of the *Criminal Code* (Cth).
- *Crimes Act* s 15HV, which provides that the Commonwealth Ombudsman should be given access to documents and information relating to controlled operations, despite any claims for client legal privilege.
- *Judiciary Act 1903* (Cth) s 55ZH, which provides that where a Legal Services Direction is made by the Attorney-General that requires a person to provide documents or information in relation to the Australian Government Solicitor, a person may not refuse to comply on the basis of client legal privilege. While there is no immunity attached to this provision, privilege will not be waived in respect of the entire communication.

---

61 Law Council of Australia, *Submission 75*.

62 See, for example, Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Final Report No 111 (2009) Ch 17; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

- *Ombudsman Act 1976* (Cth) s 9(4)(ab)(ii) which provides that where the Ombudsman has reason to believe that a person is capable of furnishing information or producing documents or other records relevant to an investigation, client legal privilege cannot be used as an excuse to avoid producing those documents. There are similar provisions in ss 7A(1B) and 8(2B). Any evidence disclosed is inadmissible in later criminal proceedings.

Coercive information-gathering powers of regulatory agencies

13.42 Many Commonwealth agencies have statutory coercive information-gathering powers, enabling them to investigate complaints and initiate inquiries into illegal activities such as corruption. The coercive powers of these agencies vary significantly depending on their functions across a broad area of laws including, for example, criminal law, migration law and corporate regulation. As part of those powers, statutory officers are often empowered to compel witnesses to provide documents, information or evidence. Unless otherwise stated, these provisions include use or derivative use immunities. Examples of such provisions include the following:

- *Fair Work (Building Industry) Act 2012* (Cth) s 53, which provides that a person is not excused from providing evidence or information under an examination notice to a special, independent assessor appointed under the Act to enforce the Building Code.
- *Inspector-General of Taxation Act 2003* (Cth) s 16, which abrogates client legal privilege where the Inspector General requires the production of information or documents from tax officials at the Australian Taxation Office under s 15.
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5), which provides that where a person is summoned to give evidence at a hearing before the Commissioner, they are not excused from answering a question or producing a document or information on public interest grounds that it would disclose a communication between an officer of a Commonwealth body and another person that is protected by client legal privilege.
- *Seafarers Rehabilitation and Compensation Act 1992* (Cth) ss 70 and 85, which provide that client legal privilege does not apply to medical reports supplied in relation to an injury that is the subject of a compensation claim. There are no immunities available in these provisions.

13.43 There appear to be few Commonwealth corporate and commercial laws that abrogate client legal privilege. For instance, the Australian Securities and Investments Commission (ASIC) stated that there are 'no current Commonwealth laws that abrogate client legal privilege specifically for ASIC's activities'.[63]

13.44 The access and information-gathering powers of the Australian Taxation Office (ATO) are subject to client legal privilege, so that privileged documents or

63 Australian Securities and Investments Commission, *Submission 74*.

communications need not be disclosed or produced to the ATO, whether in response to those powers or to an informal request.[64]

National security legislation

13.45 There may be an argument that laws that allow or require telecommunications companies or Commonwealth agencies, like the Australian Federal Police (AFP) or the Australian Security and Intelligence Organisation (ASIO), to access or retain data that may reveal an individual's communications with their lawyer, results in an abrogation of client legal privilege.

13.46 While client legal privilege is understood as a 'right to resist disclosing information that would otherwise be required to be disclosed',[65] access and surveillance laws may create a chilling effect[66] on the communications between a lawyer and their client.[67] These provisions include the following:

- *Australian Security and Intelligence Organisation Act 1979* (Cth) (the *ASIO Act*) s 34ZQ(2), which is part of the special powers regime that empowers ASIO to issue questioning and detention warrants in relation to persons suspected of terrorism offences. This provision requires that all contact between a person subject to one of these warrants and their lawyer is able to be monitored by an ASIO official.
- *Criminal Code* s 105.38(1), which requires any contact between a lawyer and a person being detained under a preventative detention order be capable of being 'effectively monitored by a police officer'.[68]
- The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) requires service providers such as telecommunications companies to retain customer's metadata for two years. This data may be accessed by prescribed Commonwealth agencies.

Monitoring contact under preventative detention orders

13.47 Section 105.38(1) of the *Criminal Code* requires that any contact between a lawyer and a person being detained under a preventative detention order be capable of being 'effectively monitored by a police officer'.

---

64 In the exercise of its statutory powers, the ATO must ensure that there is a reasonable opportunity provided to claim client legal privilege: *Commissioner of Taxation v Citibank* (1989) 85 ALR 588. In relation to client legal privilege, the Federal Court considered whether s 263 of the *Income Tax Assessment Act 1936* (Cth) overrode client legal privilege.

65 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.1]. There is common law authority for the proposition that client legal privilege does not extend to the disclosure of a client's identity, see, *Bursill v Tanner* (1885) 16 QBD 1; McNicol, above n 6, 98.

66 Auburn, above n 31, 66.

67 Generally speaking, the fact that an individual engaged the services of a lawyer, is not protected by client legal privilege: *Minter v Priest* [1930] AC 558.

68 This provision relates to contact with a lawyer under ss 105.35 and 105.37. These provisions were raised by the Law Council of Australia, *Submission 75*.

13.48 The Gilbert and Tobin Centre for Public Law argued that this provision

> infringes client legal privilege as any communication between the person and a lawyer must be monitored. The infringement of these rights is unjustified on both principled and practical grounds. The [Independent National Security Legislation Monitor] INSLM described the powers as being 'at odds with our normal approach to even the most reprehensible crimes'. The COAG Review remarked that such powers 'might be thought to be unacceptable in a liberal democracy'. Both recommended that the power be repealed.[69]

13.49 Similarly, the Law Council of Australia wrote that 'such restrictions could create unfairness to the person under suspicion by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice'.[70]

Telecommunications data retention

13.50 The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) amended the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) to introduce a mandatory data retention scheme. The scheme requires service providers to retain types of telephone and web data under the TIA Act for two years.

13.51 The Parliamentary Joint Committee on Human Rights (the Human Rights Committee) expressed some concern about the implications of this regime as potentially abrogating client legal privilege:

> There are also currently no exceptions for the retention and accessing of data on persons whose communications are subject to obligations of professional secrecy, such as lawyers. Under the proposed scheme, it would be possible for the data from a legal practitioner to be accessed, which raises questions as to whether this could impact on legal professional privilege. If it were to impact on legal professional privilege this would raise concerns as to whether this is proportionate with the right to privacy. The committee is concerned that the communications data of persons subject to an obligation of professional secrecy may be accessed and that accessing this data could impact on legal professional privilege.[71]

13.52 The Human Rights Committee requested the advice of the Attorney-General as to whether such data could, in any circumstances, impact on legal professional privilege, and if so, how this is proportionate with the right to privacy. No response is, however, evident in the Committee's report.[72]

---

69 Gilbert and Tobin Centre of Public Law, *Submission 22*.

70 Law Council of Australia, *Submission 75*.

71 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifteenth Report of the 44th Parliament* (November 2014) [1.52]–[1.54].

72 Ibid.

13.53 There are a number of safeguard measures built into the Act, including the following:

- that mandatory data retention only applies to telecommunications meta data (not content)—the type of information that is to be retained is outlined in sch 1 of the amending Act;[73]
- mandatory data retention is to be reviewed by the Parliamentary Joint Committee on Intelligence and Security three years after the commencement of the Act; and
- the Commonwealth Ombudsman has oversight of the mandatory data retention scheme and, more broadly, the exercise by law enforcement agencies of powers under chs 3 and 4 of the TIA Act.

13.54 The statement of compatibility with human rights that accompanied the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 acknowledged that the bill engages and limits the right to privacy but not the right to client legal privilege. The statement identifies the object of the legislation as being 'the protection of national security, public safety, addressing crime, and protecting the rights and freedoms'.[74]

13.55 Several stakeholders raised concerns about whether the abrogation of client privilege could be implied into the legislation.[75] The National Association of Community Legal Centres, for example, argued that the bill did not appear to protect communications between client and lawyer and therefore appears to be an unjustifiable encroachment on client legal privilege.[76] Australian Lawyers for Human Rights proposed that the bill include exemptions for lawyer/client communications.[77]

13.56 In evidence and submissions to the Parliamentary Joint Committee on Intelligence and Security's Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, several stakeholders raised concerns about the potential abrogation of client legal privilege under that bill. For instance, the Law Institute of Victoria provided evidence to the Committee that

> telecommunications data is capable of revealing substantial information, and this could include information about communications between a lawyer and their client. For example, information exchanged by email or calls about potential witnesses between the lawyer and associates of the client, experts or other relevant parties, could

---

73 This schedule commences on 13 October 2015.

74 Explanatory Memorandum, Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014 (Cth).

75 Law Council of Australia, *Submission 75*; Australian Privacy Foundation, *Submission 71*; National Association of Community Legal Centres, *Submission 66*; Free TV Australia, *Submission 48*; Australian Lawyers for Human Rights, *Submission 43*; C Shah, *Submission 16*. A court may construe legislation to infer that the legislature intended to abrogate client legal privilege where the legislative intention is clear.

76 National Association of Community Legal Centres, *Submission 66*.

77 Australian Lawyers for Human Rights, *Submission 43*.

> disclose a defence case. A litigation strategy or case theory could be identified based on witnesses or experts contacted by the lawyer.[78]

13.57 Similarly, the Law Council of Australia submitted to the Committee that, although telecommunications data alone may not reveal the content or substance of lawyer/client communications, it would, at the very least, be able to provide an indication of whether:

> a lawyer has been contacted;
>
> the identity and location of the lawyer;
>
> the identity and location of witnesses;
>
> the number of communications and type of communications between a lawyer and a client, witnesses and the duration of these communications.[79]

13.58 In response to such concerns, the Attorney-General's Department noted that, at common law, legal professional privilege attaches to the 'content of privileged communications, not to the fact of the existence of a communication between a client and their lawyer'.[80] The Parliamentary Joint Committee on Intelligence and Security relied on this Departmental response when concluding that there is no need for 'additional legislative protection in respect of accessing telecommunications data that may relate to a lawyer'.[81]

13.59 The Government supported all of the Committee's recommendations, however none of those recommendations addressed concerns relating to the confidentiality of lawyer/client communications.[82]

13.60 The ALRC observes that without a clear and unambiguous legislative intention to abrogate client legal privilege, it is not clear that the telecommunications data retention law is capable of doing so.

---

78 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) [6.194].

79 Law Council of Australia, Submission No 126 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014).

80 Attorney-General's Department, Submission No 27 to the Joint Parliamentary Committee on Intelligence and Security, Parliament of Australia, *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014).

81 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) [6.210]–[6.213]. The Senate Standing Committee on the Scrutiny of Bills also raised concerns about the bill in relation to the right to privacy: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 16 of 2014, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014) 213.

82 Attorney-General and Minister for Communications, 'Government Response to the Inquiry of the Parliamentary Joint Committee on Intelligence and Security into the Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014' (Joint Media Release, 3 March 2015).

ASIO's questioning and detention warrant regime

13.61 ASIO may issue a questioning or a detention warrant under pt III div 3 of the *ASIO Act*. This is referred to as the special powers regime of the *ASIO Act*. A questioning warrant compels the subject to appear for questioning by ASIO at a prescribed time.[83] A detention warrant empowers a police officer to take the subject into custody if there are

> reasonable grounds for believing that if a person is not immediately taken into custody, the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear before a law enforcement or security authority, or may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[84]

13.62 Under s 34ZQ(2) of the *ASIO Act*, contact between the subject of a questioning or detention warrant and their lawyer 'must be made in a way that can be monitored'.

13.63 The Gilbert and Tobin Centre for Public Law argued that the requirement that all conversations between lawyers and their clients be monitored under ASIO's special powers regime risks abrogating client legal privilege.[85]

13.64 The Explanatory Memorandum to the ASIO Legislation Amendment (Terrorism) Bill 2002 that introduced s 34ZQ(2) did not provide specific justifications for the abrogation of client legal privilege, other than a general statement that the bill will 'assist in the investigation of terrorism offences'.[86]

13.65 The Explanatory Memorandum stated that the effect of the proposed section is to require that

> contact between the detained person and the legal adviser be made in a way that can be monitored by a person exercising authority under the warrant (an ASIO officer or other appropriate officer) (proposed subsection 34U(2)).[87]

13.66 The policy justification for the introduction of the special powers regime, including the requirement in s 34ZQ(2) that all communication between the subject of a warrant and their lawyer be monitored, was informed by debates about approaches to counter-terrorism in the post 9/11 period. The central issue in this ongoing debate is the balance between national security and individual rights.

13.67 The Law Council of Australia's submission to the INSLM's Inquiry into questioning and detention warrants commented on the operation of s 34ZQ(2). It expressed concern that persons detained be entitled to a lawyer without that communication being monitored or otherwise restricted. The Law Council stated that, 'unless detainees can freely access legal advice and communicate confidentially with

---

83 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E(2).
84 Ibid s 34F(4)(d)(i)–(iii). This provision was also discussed in Ch 6 on Freedom of Movement.
85 Gilbert and Tobin Centre of Public Law, *Submission 22*.
86 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.
87 Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

their lawyer, there are no practical means to challenge any ill-treatment'.[88] The Law Council highlighted related legal rights that may be affected if client legal privilege is abrogated, such as a suspect's ability or willingness to report allegations of misconduct or mistreatment while in custody.

13.68 Ultimately, the ALRC considers that without a clear and unambiguous intention to abrogate client legal privilege, this law arguably does not abrogate legal privilege. The law does not require disclosure of information despite a claim for privilege. Rather, it allows law enforcement to access and monitor communications between a lawyer and their client, with the knowledge of the client and their lawyer.

Other laws

13.69 There are other laws that may be seen to abrogate client legal privilege in criminal proceedings:

- *Crimes Act 1914* (Cth) s 3ZQR, which provides that a person cannot rely on client legal privilege to avoid adducing a document, information or other evidence related to a serious terrorism offence. This evidence is inadmissible in future criminal proceedings against the person.
- *Criminal Code* s 390.3(6)(d), which provides a defence for criminal association offences where the association is for the sole purpose of providing legal advice or representation. A lawyer bears the evidential burden to prove this defence, and the Law Council of Australia argued that this burden may result in the need to disclose information that may otherwise be subject to client legal privilege.[89] It is not clear whether this provision abrogates client legal privilege.
- *Evidence Act 1995* (Cth) s 123, which allows a defendant to adduce evidence of privileged proceedings unless the defendant is an associated defendant.

Justifications for abrogating client legal privilege

13.70 The common law recognises a need to confine or place limits on client legal privilege.[90] The High Court has stated that the privilege should be 'confined within strict limits'.[91] The High Court has enunciated various balancing tests to weigh competing interests in claims for client legal privilege.

13.71 In *Waterford v Commonwealth*, the High Court explained that:

> Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception, the public interest in the 'perfect administration of justice' is accorded

88 Law Council of Australia, Submission to Independent National Security Legislation Monitor, *Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention Orders*, 2012 [141]–[143].

89 Law Council of Australia, *Submission 75*.

90 See, for example, the discussion in Auburn, above n 31, 99.

91 *Grant v Downs* (1976) 135 CLR 674, 685.

> paramountcy over the public interest that requires, in the interests of a fair trial, the admission, in evidence of all relevant documentary evidence.[92]

13.72 In *Esso Australia Resources v Commissioner of Taxation,* the High Court noted the 'obvious tension' between the policy behind client legal privilege and 'the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case':

> Where the privilege applies, it inhibits or prevents access to potentially relevant information. The party denied access might be an opposing litigant, a prosecutor, an accused in a criminal trial, or an investigating authority. For the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.[93]

13.73 In *Carter v Northmore Hale Davy & Leake,* Deane J explained that once client legal privilege attaches, there is 'no question of balancing … The question itself represents the outcome of such a balancing process'.[94]

13.74 There is limited guidance in parliamentary committee reports on appropriate justifications for abrogating client legal privilege. In the context of right of entry provisions in workplace laws, the Scrutiny of Bills Committee recommended to legislatures that

> Legislation conferring a power of entry and search should specify the powers exercisable by the officials carrying out the action. It should preserve the right of occupiers not to incriminate themselves and, where applicable, their right to the protection of legal professional privilege.[95]

13.75 The conferral of statutory immunities and the use of information and evidence to assist federal investigations are two justifications for the abrogation of client legal privilege.

Statutory protections

13.76 As noted earlier in this chapter, most provisions which abrogate client legal privilege contain use or derivative use immunities to protect witnesses from future criminal proceedings.[96] The protection afforded by the conferral of such immunities may counterbalance the abrogation of client legal privilege.

13.77 The Law Council suggested that where client legal privilege is abrogated, use and derivative immunity should ordinarily apply to documents or communications revealing the content of legal advice, in order 'to minimise harm to the administration of justice and individual rights'.[97]

---

92 *Waterford v Commonwealth* (1987) 163 CLR 54, [8] (Mason and Wilson JJ).

93 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

94 *Carter v The Managing Partner, Nothmore Hale Davy and Leake* (1995) 183 CLR 121, 133.

95 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (15 May 2002) [1.30].

96 There is a lengthy discussion of the use of these statutory protections in Ch 12 on the privilege against self-incrimination.

97 Law Council of Australia, *Submission 75*.

13.78 In its 2008 *Privileges in Perspective* report, the ALRC made a recommendation concerning safeguards for individuals who are required to disclose information or evidence that may be subject to client legal privilege in the course of federal investigations.[98] Recommendation 7–2 stated that:

> Federal client legal privilege legislation should provide that, in the absence of any express statutory statement concerning the use to which otherwise privileged information can be put (for example, provisions conferring use immunity or derivative use immunity or authorising unrestricted use of otherwise privileged information), where federal legislation abrogates the application of client legal privilege to the exercise of a federal coercive information-gathering power the following default provision should apply:
>
> (a) a federal body that seeks to rely on otherwise privileged information as evidence in any court proceedings must apply to the court for permission to do so;
>
> (b) there should be a presumption against use of the evidence which is able to be displaced in the court's discretion, having regard to the following factors:
>
> (i) the public interest in limiting the effects of the abrogation of an important common law right;
>
> (ii) whether the otherwise privileged information was obtained pursuant to the exercise of a covert investigatory power; and
>
> (iii) the probative value of the otherwise privileged evidence, including whether it reveals matters tending to constitute serious misconduct or conduct which has a serious adverse impact on the community in general or on a section of the community; and
>
> (c) a federal body is precluded from using otherwise privileged information against the holder of client legal privilege in any administrative penalty proceedings.

Assisting investigations

13.79 Abrogation of client legal privilege may sometimes be justified where the law is aimed at assisting regulatory or criminal investigative processes. ASIC wrote that 'such public interests include that all relevant information should be available to a court and to government agencies conducting investigations'.[99]

13.80 As outlined earlier in this chapter, there are some Commonwealth agencies that possess coercive information-gathering powers to investigate complaints or instigate inquiries. These agencies are, on occasion, able to compel witnesses to provide evidence, information or documents, and often expressly abrogate client legal privilege. The privilege may be abrogated in circumstances where reliance on the privilege may interfere with the administration of justice caused by delays in investigations or proceedings.[100]

---

98 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 322.

99 Australian Securities and Investments Commission, *Submission 74*.

100 Ibid.

13.81 The cost of litigating claims of client legal privilege may also frustrate proceedings and the resources of federal agencies.[101]

13.82 In its *Privilege in Perspective* report, the ALRC recommended that

> in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, where the Australian Parliament believes that exceptional circumstances exist to warrant a departure from the standard position, it can legislate to abrogate client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.[102]

13.83 This recommendation was qualified by consideration of the following factors:

> (a) the subject of the investigation, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community, or is a covert investigation;
>
> (b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially,
>
> (c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation.[103]

13.84 The recommendations in that report serve as a useful guide for legislatures when abrogating client legal privilege. The Administrative Review Council's 2008 report into the *Coercive Information-Gathering Powers of Government Agencies* supported the ALRC's recommendations. The Council wrote that abrogation of the privilege should occur

> only rarely, in circumstances that are clearly defined, compelling and limited in scope—for example, for limited purposes associated with the conduct of a royal commission.[104]

13.85 In the Council's view, coercive information-gathering agencies should keep written records of the situations where the privilege applies and, in particular, where the privilege is waived. This requirement should be part of agency guidelines on coercive information-gathering powers.[105]

13.86 There may also be specific types of information that may, justifiably, need to be disclosed in the public or national interest. Legal advice to government is one example where legislatures may be justified in limiting or abrogating the privilege in the public interest of transparency and open government. Abrogating client legal privilege for

---

101 Ibid. This issue was canvassed in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [8.244].

102 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

103 Ibid.

104 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 57.

105 Ibid.

communications between lawyers and government representatives involved in proceedings relating to public misfeasance, for instance, may be in the interests of open and representative government. Several states in the United States have abolished client legal privilege for state governments.[106]

13.87 ASIC also pointed to the fact that litigating client legal privilege claims can be a costly and time-intensive task for regulatory agencies.[107]

Legitimate objectives

13.88 As outlined throughout this chapter, both the common law and international human rights law recognise that client legal privilege can be restricted in order to pursue legitimate objectives—such as national security and public safety. Client legal privilege may be seen as a corollary of other important rights such as the right to privacy and the right to a fair trial.

13.89 In analysing legislation, the Human Rights Committee asks whether a limitation on a privilege—like client legal privilege—is aimed at achieving a 'legitimate objective of promoting or protecting the rights of others'[108]—a quite open category of limitation. The Centre for Comparative Constitutional Studies agreed that the 'concept of a legitimate end should encompass a wide range of laws and that only exceptionally would a law be considered not to pursue a legitimate end'.[109]

13.90 When considering whether Commonwealth laws that abrogate client legal privilege are appropriately justified, it is useful to consider the limitations and derogations outlined in the ICCPR. Article 14(1) of the ICCPR protects the right to a fair trial and a limited right to privacy in relation to proceedings.[110] This may suggest some protection for confidential communications between a lawyer and their client.

13.91 The United Nations Human Rights Committee warned against 'severe restrictions or denial'[111] of this right for individuals to communicate confidentially with their lawyers:

> Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[112]

13.92 The Administrative Review Council's 2008 report into the *Coercive Information-Gathering Powers of Government Agencies* included suggestions about

106 Liam Brown, 'The Justification of Legal Professional Privilege When the Client Is the State' (2010) 84 *Alternative Law Journal* 624, 638.
107 Australian Securities and Investments Commission, *Submission 74*.
108 See eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].
109 Centre for Comparative Constitutional Studies, *Submission 58*.
110 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.
111 United Nations Human Rights Committee, General Comment No 32 on Article 14 (Administration of Justice) of the ICCPR (CCPR/C/GC/32) [23]32.
112 Ibid [34].

the circumstances or justifications for when client legal privilege and the privilege against self-incrimination could be abrogated. The Council considered that

> there is a link between any abrogation of client legal privilege and the threshold specified for the exercise of a particular coercive information-gathering power and suggests that consideration will need to be given to the threshold if privilege is to be abrogated.[113]

13.93 There was some discussion of client legal privilege in the Productivity Commission's 2014 Access to Justice Report. The Commission noted that legal complaint bodies—such as law societies or practitioners' boards—whose role is to investigate improper practise by lawyers, may need to override the privilege in the public interest.[114] The Commission made a recommendation that state and territory legal complaint bodies should be empowered to compel lawyers to produce information or documents, despite a claim for client legal privilege. However, the Commission noted that any information subject to the privilege should only be used for the purposes of investigating a lawyer's conduct and pursuing disciplinary action.[115]

Proportionality and client legal privilege

13.94 Unlike other rights, freedoms and privileges discussed in this Inquiry, stakeholders and commentators have not advanced the use of a proportionality test to assess the justification of Commonwealth laws that abrogate client legal privilege.

Conclusions

13.95 There are some provisions in Commonwealth laws that abrogate client legal privilege.

13.96 The ALRC's 2008 *Privilege in Perspective* report identified provisions in the empowering statutes of some Commonwealth coercive information-gathering bodies that abrogate client legal privilege. That report made recommendations—many of which have not yet been adopted—concerning the circumstances in which client legal privilege may be abrogated. Some of the laws identified in that report and in this chapter may warrant further review by an appropriate body, to ensure they do not unjustifiably abrogate client legal privilege. These provisions arise in many different areas of law.

13.97 There is some guidance—from departmental and other material such as the Guide to Framing Commonwealth Offences—on the circumstances when client legal privilege may be abrogated. The Administrative Review Council offers one such guide. In its 2008 report into the *Coercive Information-Gathering Powers of Government Agencies*, the Council stated:

> Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be

---

113 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 57.

114 'Access to Justice Arrangements' (Inquiry Report 72, Productivity Commission, 2014) 225.

115 Ibid rec 6.7.

> upheld through legislation … Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.[116]

13.98 Many of the provisions identified in this chapter include statutory protections by way of use and derivative use immunities to protect witnesses and individuals who are compelled to disclose information that may be subject to claims of client legal privilege. As discussed, the conferral of statutory protections may—in some circumstances—justify the abrogation of client legal privilege.

13.99 Stakeholders to this Inquiry raised surveillance and access provisions in telecommunications data retention laws and in some criminal laws, arguing that such laws may be characterised as abrogating client legal privilege. However, in the absence of a clear and unambiguous legislative intention to abrogate client legal privilege, these laws arguably do not abrogate the privilege.

116 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) Principle 17.

14. Strict and Absolute Liability

Contents

A common law presumption

14.1 There is a common law presumption that '*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence'.[1] The general requirement of *mens rea* is said to be 'one of the most fundamental protections in criminal law',[2] and it reflects the idea that

> it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).[3]

1 *Sherras v De Rutzo* [1895] 1 QB 918, 921.
2 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011).
3 Ibid.

14.2 Professors Andrew Ashworth and Jeremy Horder write:

> The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences.[4]

14.3 In *He Kaw Teh v R*, Brennan J explained the operation of *mens rea* as an element in criminal offences:

> It is implied as an element of the offence that, at the time when the person who commits the *actus reus* does the physical act involved, he either—
>
> (a) knows the circumstances which make the doing of that act an offence; or
>
> (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.[5]

14.4 Historically, criminal liability at common law necessarily involved proof of *mens rea*.[6] In *Williamson v Norris*, Lord Russell CJ said:

> The general rule of the English law is that no crime can be committed unless there is *mens rea*.[7]

14.5 In his *Commentaries on the Laws of England* (1765), William Blackstone wrote that, to 'constitute a crime against human laws, there must be first a vitious will, and secondly, an unlawful act consequent upon such vitious will'.[8]

14.6 Some criminal offences, however, do not require proof of fault—these are described as strict and absolute liability offences. Criminal offences are generally characterised in one of three ways:

- *mens rea* offences—the prosecution must prove a physical element (*actus reus*) and a mental element (*mens rea*);
- strict liability offences—the prosecution is not required to prove fault, but there is a defence of reasonable mistake available;[9] and
- absolute liability offences—proof of fault is not required and the defence of reasonable mistake is not available.[10]

---

4 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 155.

5 *He Kaw Teh v R* (1985) 157 CLR 523, 582.

6 Sir William Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1937) vol 8, 432.

7 *Williamson v Norris* 1899 1 QB 14 (Lord Russell CJ).

8 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 2, 21.

9 Generally, an honest and reasonable mistake in a set of facts, which, if they had existed, would make the defendant's act innocent, affords an excuse for doing what would otherwise be an offence: *Proudman v Dayman* (1941) 67 CLR 536, 541 (Dixon J).

10 *Wampfler v R* (1987) 67 CLR 531. See further, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2003) [4.4].

14.7 In the mid to late 19th century, strict and absolute liability offences were increasingly developed, particularly so-called 'regulatory offences'.[11] Regulatory offences were designed to protect individuals from the risks that came with greater industrialisation and mass consumerism. This trend has continued, with a recognition that the imposition of strict liability 'may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment or financial or corporate regulation'.[12] Similarly, there is a recognition that while absolute liability offences should be rare, it may be appropriate for jurisdictional or similar elements, or 'where an element is essentially a precondition of an offence, and the state of mind of the offender is not relevant'.[13]

14.8 In Australia, the common law presumption of fault-based liability is reflected in statute. Chapter 2 of sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) codifies the general principles of criminal responsibility which apply to all Commonwealth offences. Section 5.6 of the *Criminal Code* states that where an offence does not specify a fault element, the prosecution must prove fault: intention in relation to conduct, recklessness in relation to a circumstance or result. As a result, unless a Commonwealth statute states that an offence is one of strict or absolute liability, a fault element is read into the offence.

14.9 The Terms of Reference for this Inquiry ask the ALRC to consider laws that apply strict or absolute liability to *all* physical elements of a criminal offence. However, the ALRC considers that it is useful to consider laws that apply strict or absolute liability to *any* physical elements of a criminal offence.

14.10 Where a provision is silent on the question of fault, s 5.6 of the *Criminal Code* operates to impose a requirement for the prosecution to prove fault for all elements of the offence, including technical and jurisdictional elements. The effect of this is that, unless expressly stated in the provision, strict or absolute liability does not apply to physical elements of an offence. Most commonly, such express statements are made in relation to jurisdictional elements. However, problems arise when strict or absolute liability applies to physical elements that would normally require fault to render them culpable.[14]

14.11 Professor Jeremy Gans, in his submission to this ALRC Inquiry noted:

> Some physical elements of a criminal offence almost never lack subjective intent in practice (eg most conduct) and many others in Commonwealth legislation are technical/jurisdictional elements with no relevance to responsibility. The relevant

---

11 Before this time, convictions for criminal offences without proof of intent were found 'only occasionally, chiefly among the nuisance cases': Francis Bowes Sayre, 'Public welfare offenses' (1933) 33 *Columbia Law Review* 56. Whereas at common law, it was generally true to say that to convict D, P had to prove *actus reus* and *mens rea*, in modern times a doctrine has grown up that in certain classes of statutory offences, which may be called for convenience 'regulatory offences', D can be convicted on proof of P by *actus reus* only: Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963) 1.

12 Senate Standing Committee for the Scrutiny of Bills, 'Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation' (26 June 2002), 284.

13 Ibid 285.

14 See, eg, *Corporations Act 2001* (Cth) ss 952E, 952J, 1021E, 1021FA–FB, 1021H, 1021NA–NC; *Fisheries Management Act 1991* (Cth) s 100B; *Criminal Code* (Cth) s 102.5(2)(b).

> question is whether or not absolute/strict liability applies to any element of a Commonwealth offence that may plausibly be committed without subjective intent or knowledge and that is relevant to criminal responsibility.[15]

14.12 As a result, this chapter relates to offences where strict or absolute liability is imposed on *any* element of the offence. It discusses the source and rationale of the common law presumption; how it is protected from statutory encroachment; and when Commonwealth laws that impose strict or absolute liability may be justified.

Protections from statutory encroachment

Australian Constitution

14.13 The *Australian Constitution* does not expressly require that criminal offences include the element of *mens rea*, nor has it been implied into the *Constitution* by the High Court.

Principle of legality

14.14 The principle of legality provides some protection to the principle of *mens rea*.[16] When interpreting a statute, courts will presume that Parliament did not intend to create a strict liability offence, unless this intention was made unambiguously clear.[17]

14.15 In *CTM v The Queen*, the High Court considered whether the common law defence of honest and reasonable mistake of fact applies to s 66C(3) of the *Crimes Act 1900* (NSW), which makes it an offence for a person to have sexual intercourse with another person between the ages of 10 and 16. The majority of the High Court stated:

> While the strength of the consideration may vary according to the subject matter of the legislation, when an offence created by Parliament carries serious penal consequences, the courts look to Parliament to spell out in clear terms any intention to make a person criminally responsible for conduct which is based on an honest and reasonable mistake.[18]

14.16 As demonstrated by the majority decision in *CTM v The Queen*, this represents a high bar. Amendments to the *Crimes Act 1900* (NSW) in 2003 removed the express statutory defence under s 77(2)(c) that the person 'had reasonable cause to believe, and did in fact believe, that the child was of or above the age of 16 years'.[19]

14.17 These amendments were designed 'to provide equal treatment of sexual offences against males and females'.[20] A majority of the High Court held that the offence in s 66C is not an absolute liability offence (ie, an offence of honest and reasonable mistake is available), despite the repeal of s 77(2), because it does not preclude the ongoing

---

15 J Gans, *Submission 2*.

16 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

17 *He Kaw Teh v R* (1985) 157 CLR 523, 528 (Gibbs CJ); *Sherras v De Rutzen* [1895] 1 QB 918.

18 *CTM v The Queen* (2008) 236 CLR 440, [7] (Gleeson CJ, Gummow, Crennan and Kiefel JJ). This finding was supported by the other judges: Ibid [57], [61] (Kirby J), [139] (Hayne J), [201]–[202].

19 New South Wales, Legislative Assembly, *Parliamentary Debates* (7 May 2003), 376.

20 New South Wales, Legislative Assembly, *Parliamentary Debates* (21 May 2003), 900.

operation of the common law principle that an honest and reasonable mistake generally precludes criminal liability. The Court stated:

> The New South Wales Parliament regarded the 'express defence' in s 77(2) as no longer appropriate. It was a defence that, in its terms, differentiated between homosexual and heterosexual activity, so it at least had be to be changed if there were to be the desired equalisation. It could not have been left as it was. Yet the problem to which that provision was addressed did not disappear; and the long-standing and well-understood principle which provided an alternative response to the same problem remained potentially applicable in the absence of 'the clearest and most indisputable evidence [concerning] the meaning of the Act'.[21]

International law

14.18 Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR), which relates to the presumption of innocence, provides protection to the principle of *mens rea.* However, international instruments cannot be used to 'override clear and valid provisions of Australian national law'.[22] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[23]

Relevant statutory provisions

14.19 There are a range of Commonwealth laws that could be said to impose strict or absolute liability. The Terms of Reference for this Inquiry asked the ALRC to include consideration of Commonwealth laws in commercial and corporate regulation, environmental regulation and workplace relations law that impose strict liability. This chapter will examine these areas, as well as some laws that arise in the following areas:

- customs and border protection legislation
- national security legislation; and
- copyright legislation.

14.20 The imposition of absolute liability is relatively rare, and is largely confined to technical or jurisdictional elements.[24] Some notable exceptions arise in relation to customs and border protection and national security.

---

21 *CTM v The Queen* (2008) 236 CLR 440, [30] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

22 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

24 For example, absolute liability is imposed on elements relating to the value of the property and cash (in the proceeds of crime context), the time period in which the conduct occurred, or whether the conduct contravenes particular legislation: *Criminal Code* (Cth) ss 360.2, 360.3, 400.3(4)–400.7(4). Another example relates to extradition. A nominal offence is created to facilitate prosecution in lieu of extradition. It applies where a person is remanded by a magistrate under s 15 of the *Extradition Act 1988* (Cth), and the person engaged in conduct outside Australia which would have constituted an offence if it had occurred in Australia: *Extradition Act 1988* (Cth) s 45. Absolute liability applies to these two elements, on the basis that the prosecution would have to prove all elements of the underlying offence beyond reasonable doubt. These elements are technical elements, and if the prosecution, for instance, could prove

Corporate and prudential regulation

14.21 Strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation.[25] Examples include the composition of corporate entities and licensing,[26] the provision of information, both to the general public and the regulator,[27] compliance with regulator and court/tribunal directions,[28] directors' duties and remuneration,[29] corporate governance including audit requirements,[30] and the holding of monies on behalf of others.[31]

Insolvent trading

14.22 The Australian Institute of Company Directors (AICD) submitted that many provisions imposing criminal liability on company directors do so on a strict or absolute liability basis. The AICD was of the view that criminal liability on any basis other than because the director 'knowingly authorised or recklessly permitted a contravention fosters an approach to business which is overly risk averse and which stifles economic growth and innovation'.[32]

14.23 In particular, the AICD identified s 588G of the *Corporations Act 2001* (Cth) (*Corporations Act*) as the 'most notable example' of the imposition of strict liability on directors' duties. It said that 'where directors must make complex judgments or where the penalties applied as a result of a breach are significant,' strict or absolute liability should not be imposed.

14.24 Section 588G makes it an offence for a director to incur a debt if the company is insolvent at the time of incurring the debt, or if incurring the debt would result in the company becoming insolvent. Strict liability is imposed in relation to whether the person is a director, and the company is insolvent at the time the debt is incurred, or would become insolvent as a result of incurring the debt. Section 588G(3)(c) and (d) require that the director must reasonably suspect that the company is or would become insolvent at the time of incurring the debt, and that the failure to prevent the company incurring the debt is dishonest.

---

all the fault elements relating to the offence of murder, it should not also be required to prove that the defendant knew or was reckless to the fact that murder constitutes an offence under Australian law.

25 The report states that 'strict liability may be appropriate to ensure the integrity of [a financial or corporate regulatory regime]': Senate Standing Committee for the Scrutiny of Bills, above n 12, 284.

26 See eg, *Corporations Act 2001* (Cth) ss 113, 115, 624, 630, 633, 640, 664D, 672B, 723–5, 734, 736, 791A, 820A.

27 See, eg, Ibid ss 123, 136, 139, 142–4, 146, 148, 153, 157, 162, 178A, 178C, 205B, 235, 246B, 246D, 246F–G, 249Z, 250BB, 250P, 250S, 250W, 314, 316, 316A, 317, 348D, 349A, 428, 601CW, 601DD, 601DE, 601DH, 643–4, 648G, 650B, 650E–F, 651A, 652C, 661B, 662A, 665A, 666A–B, 667A, 670C, 912F, 952C, 952E, 952G, 985J, 1020AI, 1021C, 1021E, 1021FA–FB, 1021H, 1021M, 1021NA–NC, 1041E, 1274, 1299G, 1300, 1308. See also *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GN, 66, 72, 73, 91, 200, 220.

28 See, eg, *Corporations Act 2001* (Cth) ss 158, 294, 601BJ, 601JA, 657F, 1232. See also *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GN, 66, 72, 73, 91, 200, 220.

29 See, eg, *Corporations Act 2001* (Cth) ss 191, 195, 199B, 200B, 201D, 202B, 203D, 205G, 206J–K, 206M, 585G.

30 See, eg, Ibid ss 249K, 250PA, 307A–C, 308–9, 312, 324B, 601HG, 989CA.

31 See, eg, Ibid ss 666B, 722, 993B–D, 1021O.

32 Australian Institute of Company Directors, *Submission 42*.

14.25 On the question of the imposition of strict liability, the ALRC, in its 2003 report, 'Principled Regulation: Federal Civil and Administrative Penalties', stated that dispensing the need to prove fault would risk unfairness to those who are subject to deemed liability provisions. It considered that 'the potential for unfairness of deeming provisions necessitates the inclusion of the protection of a fault element in provisions that deem an individual liable for a civil penalty'.[33] The ALRC recommended that

> in the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.[34]

Prudential regulation

14.26 Strict liability offences relating to prudential regulation are primarily found in the *Superannuation Industry (Supervision) Act 1993* (Cth), *Insurance Act 1973* (Cth), and *Life Insurance Act* 1995 (Cth).[35] Strict liability in prudential regulation is targeted at ensuring the fidelity of the regulatory framework. As a regulatory agency, the Australian Prudential Regulatory Authority (APRA) relies strongly on the deterrence effect of regulatory mechanisms, and incentives to enter into administrative arrangements to prevent contravening conduct. Where prosecutions prove difficult, or provisions are virtually unenforceable, the overall efficacy of the regulatory regime is jeopardised. APRA has contended that, where it becomes known that the regulatory regime is difficult to enforce, it could encourage disreputable practices in the industry, putting the pool of superannuation savings in Australia at risk.[36]

14.27 Based on this reasoning, non-compliance provisions relating to APRA directions,[37] superannuation payments and related commissions and brokerages,[38] false, misleading or defective statements and representations are designated strict liability offences. Additionally, as APRA relies on information from industry participants in fulfilling its regulatory responsibilities, a failure to provide APRA with information, documents or assistance is also designated a strict liability offence.

---

33 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2003), 329.

34 Ibid Rec 8–1.

35 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 11B–C, 18, 29JA, 29JB, 29JCA, 29W–WB, 34M–Q, 34Z, 35A–D, 63, 64, 71EA, 103–5, 107–8A, 122–4, 126K, 129–30, 130C, 131AA, 131B–C, 135, 140, 141A, 154, 159–60, 201, 242P, 252A, 254, 260, 262, 265, 299C, 299F–K, 299M, 299Y, 303, 331; *Insurance Act 1973* (Cth) ss 7A, 9, 10, 14, 17, 20, 24, 27, 43A, 49, 49A, 49F, 49L, 62ZD, 62ZQ, 108.

36 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 247.

37 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29JB, 34P, 34Q, 63, 131AA, 159–60; *Life Insurance Act 1995* (Cth) ss 88B, 98B, 125A, 230F; *Insurance Act 1973* (Cth) ss 7A, 17, 27, 49, 49F, 62ZD, 108.

38 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29WA, 29WB, 34M, 34N.

14.28 While this general approach to prudential regulation has been accepted,[39] the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) drew attention to amendments inserted by the *General Insurance Reform Act 2001* (Cth). This inserted the following new strict liability offences:

- breaching a condition of an APRA determination that certain requirements do not apply (authorisation to carry on an insurance business, audit and actuarial investigations, compliance with prudential standards, keeping of accounting records, requirements relating to presence and service in Australia)—s 7A
- carrying on an insurance business in Australia, unless otherwise authorised—ss 9, 10
- breaching an authorisation condition—s 14
- breaching an authorisation condition given to a non-operating holding company—s 20.

14.29 While the Scrutiny of Bills Committee accepted that strict liability sought to 'ensure the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan', it noted that the provisions were modelled on ss 7 and 8 of the *Banking Act 1959* (Cth), which are fault-based provisions. The committee left the question for the Senate as a whole to consider.[40]

Environmental protection

14.30 Strict liability is a key feature of a variety of environmental regulatory frameworks, including the general framework relating to environmental protection and biodiversity, standards and measures targeted at improving water efficiency, prohibitions on the manufacture and use of ozone depleting substances, fisheries and marine reserves, and areas of particular significance, such as the Great Barrier Reef.

14.31 The Environmental and Planning Law Committee in its submission to this ALRC inquiry, stated:

> On balance, removing strict liability for offences under Commonwealth environmental legislation would, in the EPLC's view, significantly reduce the efficacy of the EPBC Act and other Commonwealth environmental legislation in deterring environmental crime.[41]

---

39 See, eg, Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 245–7; Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2002* (June 2002), 304–5; Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2002* (December 2002), 509–11; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (March 2008), 11–12; Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2008* (March 2008), 61–4.

40 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2001* (29 August 2001), 483. Note, by the time the SBC had published its report, the Bill had already been passed, and there was no whole of Senate consideration of the issue.

41 Law Society of NSW Young Lawyers, *Submission 69*.

14.32 The ALRC did not receive any other submissions raising concerns about the imposition of strict liability for environmental offences.

14.33 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the central plank of environmental regulation at the Commonwealth level.[42] It contains a number of strict liability offences. The effect of the majority of these provisions is that the prosecution does not need to prove fault in relation to a particular property or species being protected. [43] In justifying a number of these provisions to the Scrutiny of Bills Committee in 2006, the Minister stated:

> The relevant offence provisions of the EPBC Act form part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to elements of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act.[44]

14.34 Additionally, the Minister noted that strict liability is appropriate

> where it has proved difficult to prosecute fault provisions ... The experience of the [Department], as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove a mental element (for example that a person knew or was reckless as to the fact that a species is a listed threatened species) is a substantial impediment to proving these offences.[45]

14.35 Strict liability has also been justified on the grounds that it overcomes a knowledge of law problem.[46]

14.36 By contrast, the Scrutiny of Bills Committee did not accept such justifications for similar provisions in the *Fisheries Management Act 1991* (Cth). The relevant provisions impose strict liability to the element that a foreign fishing boat is located in the Australian Fishing Zone.[47]

14.37 In its consideration of the insertion of ss 100B and 101AA of the *Fisheries Management Act 1991* (Cth), the Scrutiny of Bills Committee, in 2007, expressed an initial view that these provisions did not appear to comply with the principles set out in its report on the application of strict and absolute liability (Strict and Absolute Liability Report).[48]

14.38 The Strict and Absolute Liability Report states that where strict liability is imposed because proving fault is undermining the deterrent effect of the offence, there must be 'legitimate grounds for penalising persons lacking 'fault' in respect of that element'.[49] The Scrutiny of Bills Committee

---

42 See also Ch 8.

43 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15A, 15B, 15C, 16, 17B, 18, 18A, 20, 20A, 21, 22A, 23, 24A, 24D, 24E, 354A, 355A.

44 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2006* (29 November 2006), 214.

45 Ibid.

46 See eg, Ibid.

47 See, eg, *Fisheries Management Act 1991* (Cth) ss 95, 99–100, 100B, 101–104, 105AA.

48 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2007* (20 June 2007), 233.

49 Ibid.

> [was] concerned about the fairness of applying strict liability to the element of the location of a foreign fishing boat in the territorial sea of Australia when 'the territorial sea is not generally depicted on Australian charts or charts issued under other jurisdictions', thus making it virtually impossible for a foreign fishing boat to know whether or not it has entered the territorial sea.[50]

14.39 The ALRC has identified a number of provisions in the *Great Barrier Reef Marine Park Act 1975* (Cth), which are potentially analogous. These provisions impose strict liability in relation to whether certain conduct was engaged within specified zones in the Great Barrier Reef Marine Park, [51] and do not appear to have raised concerns with stakeholders or parliamentary scrutiny committees.

Workplace relations

14.40 Strict liability offences are largely focused on workplace health and safety concerns.[52] Stakeholders did not raise any concerns about the imposition of strict or absolute liability in this context, and based on its research, the ALRC has not identified any statutory provisions subject to controversy in this field of operation.

Customs and border protection

Strict liability offences

14.41 The customs and border protection regulatory framework hinges upon a risk assessment approach. These risk assessments rely on information provided to Customs officials.[53] Inaccurate, false or misleading information can result in inaccurate risk assessments, and may result in the entry of prohibited imports (e.g. narcotics or weapons) into the community.[54] As a result, the *Customs Act 1901* (Cth) (*Customs Act*) includes a number of strict liability offences relating to the failure to keep records or provide information, and the provision of false or misleading information.[55]

14.42 The Law Council of Australia submitted that

> the failure to report the entry of cargo on time or in an untimely or incorrect fashion (s 64AB(10) of the *Customs Act*) may be an unjustified use of strict liability where the provision of that information has been made in an untimely or incorrect fashion by a contracting party overseas. In that case the imposition of a penalty may be unfair on the Australian party who becomes liable for the offence.[56]

---

50 Ibid 235.

51 See, eg, *Great Barrier Reef Marine Park Act 1975* (Cth) ss 38AA, 38BA(2), (3A), 38BC(2), 38BD(2), 38CA(2), 38DA, 38DD(3), 38GA(4)c), 38GA(11).

52 The key piece of legislation regulating workplace health and safety imposes strict liability to all physical elements of offences under it, unless stated otherwise: *Work Health and Safety Act 2011* (Cth) s 12F(2). See, also, *Industrial Chemicals (Notification and Assessment) Act 1989*; *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth); *Seafarers Rehabilitation and Compensation Act 1992*.

53 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (15 May 2002), 149.

54 Ibid.

55 See, eg, *Customs Act 1901* (Cth) ss 64–64ABA, 64ACD, 64AE, 64A, 65, 67EI, 71AAAQ, 71G, 74, 90, 101, 102, 102A, 102DG, 105C, 113, 114F, 116, 117AA, 117A, 118, 119, 123, 124, 213A, 214AI, 240, 243SA–SB, 243T–V.

56 Law Council of Australia, *Submission 75*.

14.43 The Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) stated that the imposition of strict and absolute liability was justified in such circumstances during its 1999 inquiry into the *Customs Legislation Amendments and Repeal (international Trade Modernisation) Bill 2000*, *Customs Depot Licensing Charges Amendment Bill 2000 and Import Processing Charges Bill 2000* (the ITM inquiry).

14.44 The strict liability regime was introduced to 'preserve appropriate border control'[57] and reflects the view that isolated non-compliance, when viewed in its entirety 'can have significant consequences for the community as a whole',[58] as '[i]ncorrect information renders ineffective Customs [sic] capacity to detect offences using risk management techniques'.[59]

14.45 However, bodies such as the Australian Federation of International Forwarders (AFIF) and Customs Brokers and Forwarders Council of Australia Inc (CBFCA) raised concerns about the application of strict liability, particularly in relation to false or misleading statements and late reporting.

14.46 AFIF noted that, in some cases, data is simply on-forwarded directly, and shipping companies are reliant on overseas exporters for the accuracy and timeliness of the reporting.[60] CBFCA noted that late reporting is caused by user error, inadequate systems or operating hours and lack of data from overseas sources. It submitted that the first of these could be remedied with training, and contended that it 'is unreasonable that infringement notices and penalties should apply for late reports caused by the overseas source not supplying data in the time stipulated by the Australian regulatory authorities'.[61] In relation to false or misleading statements, the Legal and Constitutional Affairs Committee noted that a person is not liable if they make a statement that the person is uncertain about the information provided.[62]

14.47 By contrast, in 2002, the Scrutiny of Bills Committee expressed the view that the imposition of strict liability for a failure to provide information in the customs context may trespass on personal rights and liberties. The Scrutiny of Bills Committee said that these provisions did not comply with the principles relating to 'the protection of people affected by strict liability provisions and for the administration of such provisions'.[63] By way of example, one of the principles for the protection of people affected by strict liability provisions states:

> Strict liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who

---

57 Senate Legal and Constitutional Legislation Committee, 'Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000' (Parliament of the Commonwealth of Australia), [1.27].

58 Ibid.

59 Ibid.

60 Ibid [1.46].

61 Ibid [1.47].

62 Ibid [1.50].

63 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 374.

> must by necessity rely on information from third parties in Australia or overseas; offences which do not apply this principle have the potential to operate unfairly.[64]

Absolute liability offences

14.48 In the customs and border protection context, some provisions impose absolute liability on elements other than technical or jurisdictional elements. One such example is ss 233BABAB and 233BABAC of the *Customs Act*, which impose absolute liability in relation to whether importation was prohibited. In response to concerns raised by the Scrutiny of Bills Committee about the application of absolute liability for offences that are more traditionally subject to strict liability, the Minister stated that this departure from general policy is justified to 'ensure consistency across similar offences'.[65]

National security

Strict liability offences

14.49 A number of submissions to this inquiry have identified strict liability offences relating to counter-terrorism and national security as examples of an unjustified imposition of strict or absolute liability.[66]

Associating with a terrorist organisation

14.50 The Law Council of Australia raised concerns about ss 102.5(2) and 102.8 of the *Criminal Code*, which impose strict liability for training with or associating with a terrorist organisation. These provisions are discussed in greater detail in Chapter [x], dealing with freedom of association. The Law Council of Australia and the UNSW Law Society criticised the provisions for expanding the reach of criminal liability to conduct which does not indicate culpability.

14.51 The Attorney-General's Department argued that the default elements

> need to be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.[67]

14.52 The Security Legislation Review Committee, chaired by Simon Sheller QC OA, considered this submission, and stated in its report (the Sheller Report) that, it 'does not regard it as according with justice and proportionate to apply strict liability to offences under either ss 102.5 or 102.8'.[68] Further, it concluded that offences that carry penalties of 25 years (s 102.5) and three years (s 102.8) should not be subject to strict liability.[69]

---

64 Senate Standing Committee for the Scrutiny of Bills, above n 12, 286.
65 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2007* (8 August 2007), 297.
66 Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.
67 Attorney-General's Department, *Submission No 14(a) to the Security Legislation Review Committee*, 2006.
68 Sheller Committee, *Report of the Security Legislation Review Committee*, June 2006 [10.36].
69 Ibid.

14.53 The Sheller Report also concluded that:

> Even if strict liability applies only to make it unnecessary for the prosecution to prove that the organisation is a terrorist organisation as a result of proscription, the defendant is denied by the process of proscription any opportunity to resist the factual conclusion that it is a terrorist organisation, at any time, either by resisting the process of proscription, which results in the executive act of proscription, or at the trial for the offence.[70]

14.54 The Council of Australian Governments, in its 2013 review of counter-terrorism legislation, adopted the Sheller report's comments relating to s 102.5,[71] and recommended the repeal of s 102.8.[72]

Financial transactions

14.55 Under ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth), strict liability applies such that a person does not need to know that any use of, dealing with, or making available of an asset is not in accordance with a notice under the Act. The Attorney-General, in response to the Scrutiny of Bills Committee's initial concerns stated that the imposition of strict liability

> is necessary to ensure that the offences can be effectively prosecuted ... if the prosecution was required to prove not only that the defendant was aware that the asset was a freezable asset but also that he or she was aware that a particular dealing with the asset was not in accordance with a notice under section 22, defendants would be able to avoid liability by demonstrating that they did not turn their minds to the question of whether there was a notice permitting the dealing ... A person who acts in the mistaken but reasonable belief that a dealing is in accordance with a notice would be able to rely on the defence of mistake of fact under section 9.2 of the Criminal Code.[73]

14.56 Notwithstanding the Attorney-General's justification, the Scrutiny of Bills Committee was concerned these provisions may trespass upon personal rights and liberties, and left the question for resolution by the Senate as a whole.

Disclosure of information

14.57 Section 34ZS of the *Australian Security Intelligence Organisation Act 1979* (Cth) imposes strict liability in relation to the disclosure of operational information concerning a warrant issued under s 34D by the subject of the warrant or a legal representative. Chapter 3 discusses this provision in greater detail, including the ALRC's recommendations in relation to such secrecy provisions.

---

70 'Review of Counter-Terrorism Legislation' (Council of Australian Governments, 2013), [104]. The cited extract is from: Sheller Committee, *Report of the Security Legislation Review Committee*, June 2006, [10.32].

71 'Review of Counter-Terrorism Legislation', above n 70, [104] – [105].

72 Ibid rec 23.

73 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (15 May 2002), 180.

Declared area offences

14.58 The UNSW Law Society, Gilbert and Tobin Centre for Public Law and Australian Lawyers for Human Rights identified s 119.2 of the *Criminal Code*, as inserted by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth). The discussion below focuses on concerns relating to the imposition of strict liability. The extent to which this provision encroaches on freedom of movement is discussed in Chapter 6.

14.59 Section 119.2 criminalises the entry or presence in an area in a foreign country, which is a declared area, unless it is for the purpose of a limited list of approved purposes.

14.60 Under s 119.2, and applying the default fault elements set out in s 5.6 of the *Criminal Code*, the prosecution is required to prove the following fault elements:

- the person intentionally enters, or remains in, an area in a foreign country, knowing that it is an area in a foreign country; and
- the person is reckless as to whether the area is an area declared by the Foreign Affairs Minister under s 119.3.

14.61 A number of stakeholders and parliamentary committees raised concerns about this provision. While these criticisms do not relate to the imposition of strict liability, it highlights that s 119.2 of the *Criminal Code* potentially imposes criminal liability in the absence of culpable or problematic conduct.

14.62 The Gilbert and Tobin Centre for Public Law submitted that, while not expressed as an offence of strict liability, s 119.2 operates such that, in effect, it is an offence of strict liability. Criminal liability is established, *prima facie*, when a person enters or remains in a declared area. The Gilbert and Tobin Centre for Public Law noted that 'the prosecution need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism'.[74] It contends that the provision is problematic because it is the malicious purpose of engaging in terrorism, rather than the mere fact of travel, 'which should render the conduct an appropriate subject for criminalisation'.[75] Australian Lawyers for Human Rights echoed the concerns raised by the Gilbert and Tobin Centre for Public Law.[76]

14.63 The Scrutiny of Bills Committee raised concerns about the breadth of this provision, noting that 'it appears that the offence is made out simply for being in a declared area'.[77] Following consideration of the legitimate purposes set out in s 119.2(3) of the *Criminal Code*, the Scrutiny of Bills Committee stated:

> The potential difficulty with this provision, however, is that the legitimate purposes are listed and it is not clear that the listed purposes cover the field of purposes which

74 Gilbert and Tobin Centre of Public Law, *Submission 22*.
75 Ibid.
76 Australian Lawyers for Human Rights, *Submission 43*.
77 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014), 58.

> would demonstrate that there was no intent to support terrorist groups or engage in terrorist activities overseas.[78]

14.64 The Attorney-General in his response to the committee, noted the following passage from the Parliamentary Joint Committee on Intelligence and Security:

> The areas targeted by the 'declared area' provisions are extremely dangerous locations in which terrorist organisations are actively engaging in hostile activities. The Committee notes the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas. The Committee considers it is a legitimate policy intent for the Government to do this and to require persons who choose to travel to such places despite the warnings to provide evidence of a legitimate purpose for their travel. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with terrorist organisations present to the community.[79]

14.65 The Human Rights Committee also noted that a person could commit the offence without intending to engage in or support terrorist activity.[80]

14.66 The UNSW Law Society conducted a proportionality analysis of the provision, and noted that a provision which includes an intent to engage in hostile or terrorist activity as an element of the offence would be a less rights-encroaching alternative.[81]

Other laws

Copyright

14.67 The Australian Digital Alliance identified a number of strict liability offences in the *Copyright Act 1968* (Cth) (*Copyright Act*), and submitted that 'to date there has been no evidence that these provisions have led to a reduction in commercial scale copyright infringement ... [and] by removing the *mens rea* element from the offences, strict liability provisions could easily see people innocently committing an offence'.[82] The Australian Digital Alliance also raised concerns about the broad discretion given to prosecutors and police arising from a strict liability regime coupled with an infringement notice scheme.[83]

14.68 In its consideration of the provisions of the *Copyright Amendment Act 2006*, the Legal and Constitutional Affairs Committee noted that a number of submissions found the imposition of strict liability for copyright infringement 'unprecedented and troubling, to the extent that [the provisions imposing such liability] should not be passed in its current form'.[84]

---

78 Ibid.
79 Ibid 59.
80 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.170].
81 UNSW Law Society, *Submission 19*.
82 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.
83 Ibid.
84 Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006 [Provisions]* (November 2006), [3.16].

14.69 Associate Professor Kimberlee Weatherall stated:

> The key to understanding the regulatory potential of [the strict liability] provisions lies in appreciating their breadth. Historically, there is no quantitative threshold for criminal liability for copyright infringement: almost all offences under the *Copyright Act 1968* (Cth) apply to the making of, or dealing with, a single infringing article, provided it is made for the purposes of trade or commercial advantage. As a result, behaviour extending all the way from the obviously 'pirate' through to quite commonplace commercial acts falls within the scope of the criminal offences ... The provisions confer considerable discretion on the executive branch, in the form of enforcement agencies and prosecution agencies, without parliamentary oversight.[85]

14.70 Other jurisdictions such as the United Kingdom, Canada and the United States have not imposed strict liability for copyright infringements.[86] Similar offences do not exist in the regulatory framework for patents and trademarks.[87]

14.71 A number of submissions stated that strict liability for copyright infringement 'should be rejected as a matter of principle'.[88] Additionally, concerns were raised that the provisions were overly broad, and most problematically, could be applied to non-commercial acts, acts undertaken by the public in general, and conduct undertaken in the course of ordinary, legitimate business.[89]

14.72 The Legal and Constitutional Affairs Committee agreed that 'there is merit in attempting to limit the scope of these provisions to the actual activities that the committee understands they are intended to target'.[90] It was of the view that 'strict liability provisions could be narrowed in a way that would significantly reduce the risk of their application to ordinary Australians and legitimate businesses',[91] and recommended that

> the Federal Government re-examine with a view to amending the strict liability provisions in Schedule 1 of the Bill to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.[92]

14.73 Following this recommendation, the government removed 11 proposed strict liability offences and amended one to address the perception of possible overreach.[93]

14.74 However, the Australian Digital Alliance, in its submission to this ALRC Inquiry, noted that the remaining strict liability offences could still 'easily see people innocently committing an offence'. It cited s 132AO(5) of the *Copyright Act* as an example. The relevant provision states:

> (5) A person commits an offence if:

---

85 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.
86 Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006 [Provisions]* (November 2006), [3.16], [3.36].
87 Ibid rec 2.
88 Ibid [3.17].
89 Ibid [3.18].
90 Ibid [3.128].
91 Ibid.
92 Ibid rec 2.
93 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2007* (February 2007), 12.

(a) the person causes:

(ii) images from a cinematograph film to be seen; or

(iii) sound from a cinematograph film to be heard; and

(b) the hearing or seeing occurs in public at a place of public entertainment; and

(c) causing the hearing or seeing infringes copyright in the recording or film.

14.75 The phrase 'in public' is not defined in the *Copyright Act*. A place of public entertainment is also not exhaustively defined.[94] Divisions 3 and 4 of pt III outline relevant acts which do not constitute infringements of copyright.

14.76 In *Australasian Performing Right Association Ltd v Commonwealth Bank*, Gummow J held that in determining whether the relevant conduct is in public, the question is whether

> in coming together to form the audience ... were the persons concerned bound together by a domestic or private tie or by an aspect of their public life? [95]

14.77 The Australian Digital Alliance submitted to this ALRC Inquiry that

> [t]he absence of any *mens rea* or necessity to have caused financial harm means that any person who plays a short burst of footage from their phone or laptop in a public place faces potential criminal liability.[96]

14.78 Based on the reasoning in *Australasian Performing Right Association Ltd v Commonwealth Bank*,[97] it appears that this scenario may constitute conduct breaching s 132AO. For instance, if the person plays a short burst of footage in Martin Place during lunch time, the persons gathered at Martin Place are not bound together by a domestic tie. Martin Place likely falls within the definition of a place of public entertainment, and the conduct described by the Australian Digital Alliance does not appear to fall within the categories of conduct in divs 3 and 4 of pt III of the *Copyright Act*.

Family law

14.79 The Law Council of Australia stated that a number of provisions in the *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth) may unjustifiably impose strict liability. These provisions relate to providing the Registrar with information about payments, changes in circumstances, or other information sought by written notice.

14.80 It submitted that

> [p]roceedings under the family law legislation govern the property of litigants and their family relationships. The imposition of penalties in that context is serious.

---

94 Under s 132AA of the *Copyright Act 1968* (Cth), a place of public entertainment includes 'premises that are occupied principally for purposes other than public entertainment but are from time to time made available for hire for purposes of public entertainment'.

95 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 111 ALR 157, [55].

96 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

97 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 111 ALR 157.

> Further, an offence in a family law context usually will occur whilst other litigation is pending and can impact upon it.[98]

14.81 The ALRC notes that the specific instances of strict liability identified by the Law Council of Australia reflect a broader trend in statutes across the body of Commonwealth laws to impose strict liability in relation to the provision of information to regulatory or governing bodies. The Scrutiny of Bills Committee has accepted difficulties in proving intent as a possible rationale for imposing strict liability.[99] For example, in considering the Financial Sector Legislation Amendment Bill (No. 1) 2000 (Cth), the relevant Minister argued

> it would be difficult to successfully prosecute alleged breaches of regulatory offences which involve an act of omission [such as a failure to advise of a significant event] ... as evidence of mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence ... the [Director of Public Prosecutions] has advised that for regulatory offences relating to the lodgement of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.[100]

Justifications for imposing strict and absolute liability

14.82 The imposition of strict or absolute liability is a departure from a fundamental protection of the criminal law. The Strict and Absolute Liability Report concluded that the imposition of strict liability may be justified:

- where it is difficult to prosecute fault provisions;
- to overcome 'knowledge of law' issues, where a physical element incorporates a reference to a legislative provision;
- where it is necessary to protect the general revenue; or
- to ensure the integrity of a regulatory regime (eg, public health, the environment, financial or corporate regulation).[101]

14.83 Additionally, the following general principles apply in relation to the imposition of strict liability. The Strict and Absolute Liability Report stated that the following factors should be considered in imposing strict liability:

- It should only be imposed after careful consideration of all available options, and where there is general public support and acceptance of the measure and the penalty.

---

98 Law Council of Australia, *Submission 75*.
99 Senate Standing Committee for the Scrutiny of Bills, above n 12, 285.
100 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 246.
101 Senate Standing Committee for the Scrutiny of Bills, above n 12, 284.

- It should not be imposed for mere administrative convenience, or based on a rigid formula. It is insufficient to rely on broad uncertain criteria (such as general public good or community interest), or solely on reduced resource requirements. Strict liability should only be imposed based on specific criteria/rationales.
- It should not be imposed, where schemes are so complex and detailed that breaches are virtually guaranteed, or where parties must by necessity rely on information from third parties.
- It should not be imposed, where it is accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning.
- It should only apply for offences where the penalty does not include imprisonment, and where there is a cap of 60 penalty units for monetary penalties.
- It should be accompanied by program specific defences which account for reasonable contraventions. These should be in addition to the defences in the *Criminal Code*.[102]

14.84 On the question of absolute liability, the Strict and Absolute Liability Report states that the imposition of absolute liability should be 'rare and limited to jurisdictional or similar elements of offences'.[103] Additionally, it stated that it 'may be acceptable [to impose absolute liability] where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant'.[104]

14.85 The Human Rights Committee considers strict and absolute liability offences through the lens of the ICCPR. Strict and absolute liability is considered in the context of concerns which may arise about the presumption of innocence under art 14(2) of the ICCPR.

14.86 The Human Rights Committee noted that the imposition of strict or absolute liability will not violate art 14(2) where it pursues a legitimate aim, and is reasonable and proportionate to that aim.[105] Strict liability offences drafted in accordance with the principles set out in the Strict and Absolute Liability Report and the Guide to Framing Commonwealth Offences[106] are likely to satisfy the proportionality test set out above.[107] In relation to absolute liability, the Human Rights Committee has stated that

---

102 Ibid 283–6.
103 Ibid 285.
104 Ibid.
105 See, eg, Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills Introduced 18–29 June 2012, First Report of 2012* (August 2012), 13.
106 Attorney-General's Department, above n 2.
107 See, eg, Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills Introduced 18–29 June 2012, First Report of 2012* (August 2012), 13.

imposing absolute liability on jurisdictional elements is unlikely to raise human rights concerns.[108]

Conclusions

14.87 A wide range of Commonwealth laws across a number of different contexts may be seen as encroaching upon the presumption that evil intent or recklessness must be proved in imposing criminal liability. A significant number of these may be justified.

14.88 It is accepted that strict liability may generally be imposed to protect public health, safety and the environment. It may also be accepted for regulatory offences. The general principle is that strict liability may be imposed where a person is placed on notice to guard against the possibility of inadvertent contravention.

14.89 Absolute liability may generally be accepted when applied to technical or jurisdictional elements of an offence. It may be accepted where there are legitimate grounds for penalising a person who has made a reasonable mistake of fact.

14.90 Extensive guidance is available to policymakers in considering whether the application of strict or absolute liability is justified. The Guide to Framing Commonwealth Offences[109] and Drafting Directions[110] both provide specific guidance on the imposition of strict and absolute liability, which reflects comments made by the Scrutiny of Bills Committee both in the Strict and Absolute Liability Report, and as part of its ongoing review of bills. Additionally, policymakers are encouraged to seek assistance from relevant sections of the Attorney-General's Department in drafting strict or absolute liability offences.

14.91 However, some areas of particular concern have been identified, as evidenced by parliamentary committee materials, submissions and other commentary. These aspects of Commonwealth law might be reviewed to ensure that these laws do not unjustifiably encroach upon the presumption that intent or knowledge must be proved in imposing criminal liability:

- counter-terrorism and national security legislation dealing with:
    - financial transactions related to freezable assets—ss 20 and 21 of the Charter of the United Nations Act 1945 (Cth));
    - associating with a terrorist organisation—ss 102.5 and 102.8 of the Criminal Code);

108 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2012* (October 2012), [1.24].

109 Attorney-General's Department, above n 2.

110 Office of Parliamentary Counsel, *Drafting Directions*.

- the disclosure of operational information concerning a warrant issued under s 35D of the Australian Security Intelligence Organisation Act 1979 (Cth)—s 34ZS; and
- a person's presence in a declared area—s 119.2 of the *Criminal Code*

- directors duties relating to insolvent trading in the *Corporations Act*;
- reporting requirements under the *Customs Act*; and
- commercial scale infringement in the *Copyright Act*.

14.92 The Strict and Absolute Liability Report also recommended that '[t]he Attorney-General's Department should coordinate a new project to ensure that existing strict and absolute liability provisions are amended where appropriate to provide a consistent and uniform standard of safeguards'.[111]

14.93 The government did not accept this recommendation for a number of reasons, including that the *Criminal Code* harmonisation project has achieved a significant degree of certainty and consistency in the application of strict and absolute liability.[112]

14.94 However, the trend in legislation brought before the Parliament to harmonise provisions with the *Criminal Code* is that it does not consider the policy merits of imposing strict or absolute liability. These amendments simply seek to ensure that existing strict or absolute liability offences continue to operate as such, despite the introduction of the *Criminal Code* by expressly stating that the relevant offences are strict or absolute liability offences.[113]

---

111 Senate Standing Committee for the Scrutiny of Bills, above n 12, 289.

112 Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2002—Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (June 2004), 6.

113 See, eg, *Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2000* (Cth); *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001* (Cth); *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001* (Cth); *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3) 2001* (Cth); *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2000* (Cth); *Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Act 2001* (Cth).

15. Procedural fairness

Contents

The common law

15.1 The common law recognises a duty to accord a person procedural fairness—a term often used interchangeably with natural justice—when a decision is made that affects a person's rights, interests or legitimate expectations.[1] Courts may construe a statutory provision as implying that a power be exercised with regard to procedural

1 *Kioa v West* (1985) 159 CLR 550. See also David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) [12.34]. The common law doctrine has a 'wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers': Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285.

fairness where a party's interests might be adversely affected by the exercise of that power.[2]

15.2 This chapter considers the duty to afford procedural fairness in administrative decision-making.[3] This chapter discusses the source and rationale for procedural fairness; how it is protected from statutory encroachment; and when laws that deny procedural fairness may be justified.

15.3 In *Plaintiff M61/2010 v Commonwealth*, the full bench of the High Court explained the scope of the common law duty to afford procedural fairness to persons affected by the exercise of public power:

> It was said in *Annetts v McCann*, that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power. In *Kioa v West*, different views were expressed about whether the requirements of procedural fairness arise from the common law or instead depend upon drawing an implication from the legislation which confers authority to decide. It is unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result. It is well established, as held in *Annetts*, that the principles of procedural fairness may be excluded only by 'plain words of necessary intendment'.[4]

15.4 In *Kioa v West*, Mason J said:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[5]

15.5 Further, in *S10/2011 v Minister for Immigration*, the High Court held that the principle and presumptions of statutory construction reflect the interactions of the three branches of government, and while not constitutionally entrenched, are part of the common law of Australia:

> [O]ne may state that the 'common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a

---

2 *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. There is also an exclusionary aspect to this concept of implication so that clear and unambiguous statutory language can exclude the common law duty to afford procedural fairness.

3 The common law duty to afford procedural fairness is also raised by Ch III courts in the context of due process and open justice considerations in criminal law. See, for example, the High Court case of *Pompano* where the High Court ruled on the validity of closed hearing provisions of the *Criminal Organisation Act 2009* (Cth): *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38. This is discussed in more detail in Ch 10 on the right to a Fair Trial.

4 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74]. (References omitted).

5 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). Justice Mason's approach to natural justice in *Kioa* is at odds with that of Brennan J in *Kioa* who reasoned that 'there is no free-standing common law right to be accorded natural justice by the repository of a statutory power': 610.

> debate whether procedural fairness is to be identified as a common law duty or as an implication from state proceeds upon a false dichotomy and is unproductive.[6]

15.6 Procedural fairness relates to the manner in which a decision is made, rather than the reasoning behind the decision. Issues of procedural fairness arise in the context of administrative decision-making, that is, decisions made by government departments and officials and tribunals.[7] Such decisions may affect people in a range of contexts, including where:

- decisions may curtail a person's liberty;
- affect their freedom of movement;
- damage their reputation; or
- have a significant effect on their economic well-being.

15.7 The Law Council of Australia explained that procedural fairness will

> promote better decision-making in government because the decision-maker will have before him or her all the relevant information required. The procedural rigour required in a hearing and the injunction to behave impartially is likely to make a decision-maker more conscientious and objective in reaching his or her conclusions.[8]

15.8 One of the key features of procedural fairness is that 'in origin it is a common law doctrine or obligation … the requirements of natural justice are fashioned by courts, and are read into or attached to statutory powers so as to ensure procedural fairness in the administration of statutes'.[9] While procedural fairness is protected at common law, statute also provides some protection for individuals. For instance, a breach of the rules of natural justice is a ground for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[10] This Act does not impose a duty to afford procedural fairness.

Doctrine

15.9 Procedural fairness usually involves two requirements: the fair hearing rule and the rule against bias.[11]

15.10 The hearing rule requires a decision-maker to inform a person of the case against them, provide them with an opportunity to be heard, and prior notice of a decision that adversely affects their interests. In *Commissioner of Police v Tanos*, Dixon CJ and Webb J stated that

---

6 *Plaintiff S10/2011* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).
7 Procedural fairness overlaps with some principles associated with the right to fair trial and judicial review, discussed in Chs 10 and 18.
8 Law Council of Australia, *Submission 75*.
9 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.5].
10 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 1(a).
11 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

> it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by a judicial or quasi-judicial proceeding he must be afforded an adequate opportunity to be heard.[12]

15.11 The content of the hearing rule in relation to procedural fairness varies across the spectrum of administrative decision-making, depending on the circumstances of a particular case.[13]

15.12 Taking into account this caveat, the minimum required for a fair hearing in administrative law involves the following;

- notice that a decision adversely affecting a person's interests will be made;
- disclosure of evidence relied on when determining the adverse decision;[14]
- a substantive hearing—oral or written—with a reasonable opportunity to present a case in response to an adverse decision;[15] and
- in some circumstances, access to legal representation.[16]

15.13 On the last point, any right to access legal representation will depend on whether an oral or written hearing is provided. At common law, a person is entitled to be represented by an agent, or lawyer, in an oral hearing before a statutory body.[17] Whether legal representation must be provided to a person whose rights, interests or legitimate expectations are adversely affected in administrative decision-making will depend on the empowering Act of the appropriate statutory body. In some cases legal representation may not be required and may even be contrary to the informal or inquisitorial setting of a tribunal.

15.14 The bias rule of procedural fairness requires that a decision-maker must not be biased or be seen by an informed observer to be biased in any way—apprehended or ostensible bias.

15.15 When a court considers whether a decision-maker had a duty to afford procedural fairness, it will, generally speaking, consider the following questions.

---

12 *Commissioner of Police v Tanos* (1985) 98 CLR 383, 395. 'The fundamental rule is that a statutory authority having power to effect the rights of a person is bound to hear him before exercising the power': *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ) quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

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

14 The rules of evidence will differ depending on the procedures of the relevant tribunal or body.

15 There is no right to an oral hearing, unless specified in the empowering Act of the relevant statutory body. For instance, in *Chen v Minister for Immigration and Ethnic Affairs*, it was held that there is no requirement of an oral hearing in a person's refugee assessment: *Chen v Minister for Immigration and Ethnic Affairs* (1993) 45 FCR 591.

16 Margaret Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) [6.60].

17 *R v Board of Appeal; Ex parte Kay* (1916) 22 CLR 183. It is, however, important to note that a person affected by the administrative decision of a statutory body does not have a right to legal representation at government expense: *New South Wales v Canellis* (1994) 181 CLR 309, 328–9.

15.16 First, the implication question: is there an implied duty to accord procedural fairness? In the absence of a clear legislative intention to exclude procedural fairness, courts may imply procedural fairness to ensure that 'the justice of the common law will supply the omission of the legislature'.[18]

15.17 In *Kioa v West*, Deane J explained that where an individual has been denied procedural fairness, they can

> demand the observance of the ordinary restraints which control the exercise of administrative power including, unless they be excluded by reason of statutory provision, or the special nature of the case, the standards of procedural fairness which are recognised as fundamental by the common law.[19]

15.18 The exclusion question is also considered at this stage: has the legislature shown an intention to exclude the obligation to observe the requirements of procedural fairness? Procedural fairness cannot be implied where a law expressly excludes it.[20] Related to this question is the principle of duality in decision-making. That is, where a decision-making process involves different steps or stages before a final decision is made, the requirements of procedural fairness are satisfied if the decision-making process, viewed in its entirety, entails procedural fairness.[21] Displacement of procedural fairness may occur where provision has been made for a certain type of hearing or procedure to take place, for example, where legislation provides for a hearing at one stage of a decision-making process but not at another.[22]

15.19 Second, the content question: what kind of hearing is the decision-maker required to provide to the applicant?[23] The content rule will vary depending on the circumstances of a particular case and the statutory context in which it arises.[24]

History

15.20 The rule against bias and the hearing rule in their contemporary form are drawn from natural law. Natural law developed through the work of the medieval philosopher and theologian, Thomas Aquinas.[25] French CJ explained:

> As a normative marker for decision-making it [the rule against bias] predates by millennia the common law of England and its voyage to Australian colonies.[26]

---

18 *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414 Court of Common Pleas (1863) 180 (Byles J).

19 *Kioa v West* (1985) 159 CLR 550, 631.

20 *Plaintiff S10/2011* (2012) 246 CLR 636, [97].

21 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [29] (Mason CJ, Dawson and Toohey JJ). See also *South Australia v O'Shea* (1987) 163 CLR 378. Procedural fairness may not necessarily be implied in relation to decisions made under delegated legislation; for more, see: Groves, above n 1, 314.

22 Allars, above n 16, [6.23].

23 Creyke, McMillan and Smyth, above n 9, [10.1.12].

24 *Ridge v Baldwin* [1964] AC 40 65, 72 (Lord Reid); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J). The 'particular requirements of compliance with the rules of natural justice will depend on the circumstances': *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [48].

25 Chief Justice Robert S French, 'Procedural Fairness - Indispensable to Justice?' (2010). The hearing rule appeared in cases in the medieval Year Books: HH Marshall, *Natural Justice* (Sweet & Maxwell, 1959) 18–19.

26 French, above n 25.

15.21 Procedural fairness may not necessarily be implied in relation to decisions made under delegated legislation, or when the decision was one characterised by general policy decision-making.

15.22 Procedural fairness developed through the common law in the early 17th century.[27] Historically, procedural fairness only applied to decisions by courts or bodies that had a duty to act judicially. The scope of procedural fairness was extended in the mid-19th century to all 'quasi-judicial' decisions in *Cooper v Board of Works for the Wandsworth District*.[28]

15.23 In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (*Lam*), Callinan J explained that 'natural justice by giving a right to be heard has long been the law of many civilised societies':

> That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.[29]

15.24 Over the course of the 20th century, the concept of procedural fairness developed significantly, eventually applying to a diverse range of government decisions affecting property, employment, reputation, immigration and financial and commercial interests.[30] In *Annetts v McCann*, a case involving the right of two parents to make submissions at a coronial inquiry into the deaths of their two sons, Mason CJ, Deane and McHugh JJ explained the recent evolution of the concept of procedural fairness. The judges noted that

> many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine's protection.[31]

15.25 Stakeholders to this Inquiry highlighted the importance of procedural fairness in promoting accountability and transparency in government decision-making processes.[32] For instance, the UNSW Law Society submitted that

> The broad purpose of administrative law is to safeguard the rights and interests of people in their dealings with the government and its agencies. It confers a right to challenge a government decision by which a person feels aggrieved through

---

27 Creyke, McMillan and Smyth, above n 9, [10.1.9]; French, above n 25, 3.

28 *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414 Court of Common Pleas (1863). The court in this case extended natural justice to decisions interfering with property rights.

29 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [140]. Callinan J was quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–79.

30 Creyke, McMillan and Smyth, above n 9, [10.1.9].

31 *Annetts v McCann* (1990) 170 CLR 596, 599.

32 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Australian Lawyers for Human Rights, *Submission 43*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

> independent adjudication to contribute to a greater measure of justice in administrative decision-making. This ensures that the Executive does not act arbitrarily, while promoting the observance of public law values of accountability, legality and transparency.[33]

Rationale

15.26 In extra-curial commentary, Chief Justice Robert French AC has said that procedural fairness is 'indispensable to justice', and highlighted five inter-related rationales for the duty to afford procedural fairness:

- that it is instrumental, that is to say, an aid to good decision-making;
- that it supports the rule of law by promoting public confidence in official decision-making;
- that it has a rhetorical or libertarian justification as a first principle of justice, a principle of constitutionalism;
- that it gives due respect to the dignity of individuals; and
- by way of participatory or republican rationale—it is democracy's guarantee of the opportunity for all to play their part in the political process.[34]

15.27 There are several principles which are said to guide administrative decision-making including rationality in decision-making, reasonableness[35] and practical justice. In relation to the last of these principles, Gleeson CJ in *Lam* emphasised that 'fairness is not an abstract concept' and that the 'concern of the law is to avoid practical injustice'.[36]

15.28 The ALRC has taken these, and other, common law principles into account when identifying Commonwealth laws that may deny procedural fairness.

Protections from statutory encroachment

Australian Constitution

15.29 The *Australian Constitution* does not provide express protection for procedural fairness. However, procedural fairness in relation to decisions made by officers of the Commonwealth may attract a remedy under the *Constitution*.[37] In *Re Refugee Tribunal; Ex parte Aala*, a majority of the High Court held that the denial of procedural

---

33 UNSW Law Society, *Submission 19*.

34 Chief Justice Robert S French, 'Procedural Fairness—Indispensable to Justice?' (2010).

35 See for example, Deane J's discussion in *Australian Broadcasting Tribunal v Bond*, where he explains the connection between these principles and natural justice. Deane J stated that 'If a statutory tribunal is required to act judicially, it must act rationally and reasonably': *Australian Broadcasting Tribunal v Bond* (1990) 176 CLR 321, 367.

36 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [38]. The concept of 'practical injustice' also arises in criminal law. For a more detailed discussion of 'practical justice', see Ch 10.

37 Under s 75(v) of the *Australian Constitution*, a writ of mandamus or prohibition or an injunction may be sought against an officer of the Commonwealth.

fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction and thus attract the issue of prohibition under s 75(v) of the *Australian*.[38]

15.30 There is some suggestion that s 71 of the *Constitution* may provide some protection for procedural rights, though this relates more to due process considerations by Ch III courts. Section 71 provides:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

15.31 In *Re Tracey; Ex parte Ryan*, Deane J stated that s 71 is the 'Constitution's only general guarantee of due process'.[39] Similarly in *Leeth v Commonwealth*, a majority of the High Court stated:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.[40]

Principle of legality

15.32 The principle of legality provides some protection for procedural fairness.[41] When interpreting a statute, courts will presume that Parliament did not intend to limit procedural fairness, unless this intention was made unambiguously clear.[42] In *Miah*, McHugh J held that the 'the common law rules of natural justice … are taken to apply to the exercise of public power unless clearly excluded'.[43]

15.33 In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ said:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[44]

International law

15.34 Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that all persons should be 'equal before the courts and tribunals' and that, 'in the determination of any criminal charge against him, or of his rights and obligations in

---

38 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

39 *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 580. The current state of High Court authority on the due process as derived from the separation of judicial power under the *Australian Constitution* is discussed in Leslie Zines, *The High Court and the Constitution* (Federation Press, 6th ed, 2015) 300–07.

40 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

41 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

42 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

43 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 93.

44 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). Quoted with approval in *Saaed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

Bills of rights

15.35 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The right to procedural fairness for persons affected by the exercise of public power is expressed differently in other jurisdictions. In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.[45] In New Zealand, the human rights legislation requires observance of procedural fairness.[46]

15.36 In Canada, any deprivation of life, liberty and security of the person must be informed by principles of fundamental justice according to the Canadian *Charter of Rights and Freedoms*.[47]

Laws that deny procedural fairness

15.37 A wide range of Commonwealth laws may be seen to deny the duty to afford procedural fairness, broadly conceived, to persons affected by the exercise of public power.[48] Some of these laws impose limits on procedural fairness that have long been recognised by the common law, for example, imposing an obligation on courts to 'act judicially'.[49] While the concept of procedural fairness has developed significantly, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

15.38 The Terms of Reference for this Inquiry asked the ALRC to include consideration of Commonwealth laws in commercial and corporate regulation, environmental regulation and workplace relations law that deny procedural fairness to persons affected by the exercise of public power. This chapter will examine some of these laws that arise in the following areas:

- corporate and commercial regulation;
- migration law; and
- national security legislation.

---

45 *United States Constitution* amend V.

46 *New Zealand Bill of Rights Act 1990* (NZ) s 27(1).

47 *Canada Act 1982 c 11* s 7.

48 A range of stakeholders raised concerns about laws that deny procedural fairness to persons affected by the exercise of public power: Law Council of Australia, *Submission 75*; Australian Securities and Investments Commission, *Submission 74*; Law Society of NSW Young Lawyers, *Submission 69*; The Tax Institute, *Submission 68*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Refugee Council of Australia, *Submission 41*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

49 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

Corporate and commercial regulation

15.39 The Australian Securities and Investments Commission (ASIC) highlighted provisions in corporate and commercial regulation that may be characterised as denying procedural fairness, noting that these provisions are 'the exception rather than the rule'.[50]

15.40 ASIC submitted that 'there are limitations to procedural fairness in provisions of the *Corporations Act 2001* (Cth)' which are designed to prevent financial loss caused by fraud or improper financial management. The provisions highlighted by ASIC in the *Corporations Act 2001* (Cth) included the following:

- Section 739 empowers ASIC to issue interim stop orders for offers of security made under a disclosure agreement where ASIC believes that an agreement contains: a misleading or deceptive statement; an omission of information required under legislation; or some new circumstance has arisen since the lodgement of the disclosure document. Stop orders are administrative mechanisms which can be issued by a regulatory agency without recourse to a court. Under an interim stop order issued in accordance with s 739, a company cannot offer, issue, sell or transfer shares. While this may be seen as denying procedural fairness, an interim order only operates for 21 days, after which time ASIC must hold a hearing to determine if the order should be ongoing.
- Section 915B enables ASIC to suspend or cancel an Australian Financial Services (AFS) licence without first providing procedural fairness by way of a hearing where, among other things, the licensee becomes insolvent, is convicted of serious fraud, loses their legal/mental capacity; or in the case of responsible entities of managed investment schemes—where the scheme members have or are likely to suffer loss because of a breach of the *Corporations Act*. However, ASIC is required under s 915B to give written notice to the person or licence-holder. Further, under s 915C, ASIC may offer a licensee an opportunity to appear or be represented at a hearing.

15.41 The content of the hearing rule required by the duty to afford procedural fairness may be reduced in such a statutory context. Also, given the operation of safeguards in both of these provisions which provide some opportunity for a hearing, it is not clear that these provisions could be characterised as denying procedural fairness. The ALRC welcomes submissions on this question.

15.42 ASIC's regulatory guide on licensing and administrative action explains that, where appropriate in all the circumstances, an AFS licence may be suspended without first offering a hearing or providing the party with an opportunity to make submissions. Under s 915C, ASIC has the discretion to offer the party a private hearing.[51] ASIC's

---

50 Australian Securities and Investments Commission, *Submission 74*.

51 The principles and procedures ASIC adopts for such hearings are set out in a Regulatory Guide: Australian Securities and Investments Commission, *Licensing: Administrative Action against Financial Service Providers* Regulatory Guide 98 (July 2013). There is further information available about the

regulatory guide also outlines the factors ASIC will take when considering—on a case-by-case basis—the suspension or cancellation of an AFS licence including the following;

- whether ASIC has jurisdiction in the matter;
- the strategic significance of taking action;
- the benefits of pursuing misconduct;
- issues specific to the case; and
- alternatives to formal investigation.[52]

Migration law

15.43 The ALRC received a number of submissions from stakeholders regarding provisions in migration law that may be characterised as denying procedural fairness to persons affected by the exercise of public power.[53]

Migration Act

15.44 Some provisions of the *Migration Act 1958* (Cth) may be characterised as excluding procedural fairness. The provisions highlighted below explicitly exclude the rules of natural justice, while others vest significant discretionary and non-reviewable power in the Minister for Immigration and Border Security, effectively precluding access to a hearing, or to the reasons for a decision, regarding a decision by the Minister to revoke or cancel a visa.

15.45 The following provisions of the *Migration Act* may be characterised as denying procedural fairness:

- Under s 109, the Minister may cancel a visa if information provided to the Department of Immigration for the purpose of obtaining that visa was incorrect. Section 133A(4) provides that natural justice does not apply to a decision made under s 109.
- Section 133C(3) excludes natural justice from the Minister's decision to refuse or cancel a visa under s 116 and if the Minister is convinced that it would be in the public interest to do so. Section 116 provides the Minister with a power to cancel visas for a range of reasons.
- Section 134A states that the rules of natural justice do not apply to the emergency cancellation of visas on security grounds when the Minister is

process for conducting hearings under s 915C of the *Corporations Act 2001* (Cth) on the Australian Securities and Investments Commission website, see: <www.asic.gov.au/hearingsmanual>.

52 Ibid 14.

53 Law Council of Australia, *Submission 75*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Australian Lawyers for Human Rights, *Submission 43*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

advised by Australian Security Intelligence Organisation (ASIO) under s 134B that the visa-holder poses a security risk.

- Sections 500A(11) and 501A(3) exclude the rules of natural justice from decisions made by the Minister to refuse to grant to a person a temporary safe haven visa, or to cancel a person's temporary safe haven visa.
- Section 501(3) excludes natural justice from the Minister's discretionary power to cancel or revoke a non-citizen's visa if the Minister reasonably suspects that a person does not satisfy the 'character test' and the decision is in the national interest.
- Section 501(5) provides that decisions under ss 501(3) and 501(3A) are not subject to the rules of natural justice. Section 501(3) allows the Minister to refuse to grant a visa or to cancel a visa if the Minister 'reasonably suspects' the person does not pass the character test. Section 501(3A) compels the Minister to revoke or cancel a non-citizen's visa if the Minister reasonably suspects that a person does not satisfy the 'character test' where the person has a substantial criminal record; has committed a sexually-based offence against a child; or the person is serving a custodial sentence at the time of cancellation or revocation.

15.46 Other provisions in the *Migration Act* may be characterised as excluding procedural fairness in the processing of unauthorised maritime arrivals (UMAs):

- Section 198AE provides that natural justice rules do not apply to a decision by the Minister that an UMA be taken to a regional processing centre under s 198AD.
- Section 473DA confines the Immigration Assessment Authority (IAA) to observe the rules of natural justice by way of an exhaustive statement of natural justice requirements. Under pt 7AA, the Minister may refer to the IAA all applications for protection visas made by UMAs who arrived in Australia on or after 13 August 2012 that have been subject to a so-called 'fast track application process'. The IAA will conduct a limited merits review and either affirm the fast track reviewable decision, or remit the decision for reconsideration in accordance with prescribed directions or recommendations.

15.47 There are several provisions in the *Maritime Powers Act 2013* (Cth) which suspend the rules of natural justice as they relate to the powers of the maritime authority:

- Section 22B provides that the rules of natural justice do not apply to authorisations made under the *Maritime Powers Act.*
- Section 75B excludes the rules of natural justice from ss 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G and 75H. These provisions largely relate to the maritime authority's coercive powers to intercept and detain vessels within and outside of Australian maritime waters, as well as to detain and move individuals aboard those vessels.

15.48 Other migration laws that exclude the requirements of procedural fairness include, for example:

- Section 48A of the *Australian Passports Act 2005* (Cth), which provides that there are multiple circumstances in which the Minister is not required to notify a person when the Minister receives a notice of refusal or cancellation of a non-citizen's visa or other travel document.
- Section 36 of the *Australian Securities and Intelligence Organisation Act 1979* (Cth) (*ASIO Act*), which provides that any adverse security assessment made in respect of a non-citizen is not subject to the hearing requirements under pt IV of that Act.[54] Notice of an adverse security assessment, and the reasons for that assessment, are therefore not disclosed to affected parties or their legal representatives, contrary to the principle of procedural fairness.

15.49 There are four areas of migration and related laws that have been the subject of debate in parliamentary inquiries—outlined in the following sections. These laws have also been highlighted as being of concern by stakeholders who made submissions to this Inquiry on the basis of excluding procedural fairness. These provisions, which are discussed in more detail below, concern:

- mandatory cancellation of visas;
- fast track assessment process for UMAs;
- changes to the *Maritime Powers Act*; and
- ASIO security assessments for non-citizens.

Mandatory cancellation of visas

15.50 Several stakeholders noted concerns with two parts of the *Migration Act* that require the Minister to cancel or revoke a visa on character or other grounds.[55] By removing any discretion from the Minister's decision-making process, visa applicants and visa-holders are unable to contest the reasons for the decision.

15.51 The first is s 501(3A) of the *Migration Act*, introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth). This provision compels the Minister to revoke or cancel a non-citizen's visa if the Minister reasonably suspects that a person does not satisfy the 'character test' where the person has a substantial criminal record; has committed a sexually-based offence against a child; or the person is serving a custodial sentence at the time of cancellation or revocation. Section 501(5) provides that a decision is not subject to the rules of natural justice.

---

54 To be eligible for a protection visa, non-citizens cannot have received an adverse security risk assessment from ASIO: *Migration Act 1958* (Cth) s 36(1B).

55 ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*.

15.52 Several stakeholders expressed concerns about this provision, with some arguing that the seriousness of a decision to refuse or cancel a visa necessitated the application of procedural fairness to the decision-making process.[56] The Refugee and Advice Casework Service (RACS) argued that the cancellation of visas should be subject to procedural fairness requirements given the seriousness of an adverse decision for certain visa applicants and visa holders—for example, asylum seekers or stateless persons—for whom a refusal or cancellation decision 'may result in indefinite detention'.[57]

15.53 The ANU Migration Law Program similarly commented that

> Visa cancellation has serious consequences for the individuals concerned, and for this reason, visa cancellation decisions should be subject to strict procedural fairness obligations.[58]

15.54 Kingsford Legal Centre noted that the formulation of the provision prior to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) specified a range of factors a decision-maker could consider when exercising discretion to refuse or cancel a visa. The Centre wrote that, 'in removing the Minister's discretion to consider these factors, the person whose visa is to be cancelled is denied due process'.[59]

15.55 The Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 did not provide specific justifications for the removal of discretion. However, it did underscore the importance that the provision places on ministerial decision-making:

> The community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted in merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.[60]

15.56 Section 134A provides that the rules of natural justice do not apply to the Minister's decision to cancel or revoke a visa on security grounds under ss 109 and 134B. These provisions were introduced into the *Migration Act* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

15.57 The Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 explained that the obligation to cancel a visa under s 134A will arise if ASIO suspects that a person might be a risk to national security and recommends cancellation of the person's visa. The power could be used in circumstances where ASIO suspects that a person, who applies for a visa from outside Australia, may pose a risk to national security but ASIO either has insufficient

---

56 ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*.

57 Refugee Advice and Casework Service, *Submission 30*.

58 ANU Migration Law Program, *Submission 59*.

59 Kingsford Legal Centre, *Submission 21*.

60 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

information or a lack of time to furnish a security assessment in advance of the person's anticipated arrival in Australia.[61]

15.58 These provisions mean that the Minister cannot exercise discretion to consider individual circumstances on a case-by-case basis. The Kingsford Legal Centre was concerned by this, arguing that

> Previously, the Minister's discretion afforded procedural fairness to the visa holder by ensuring that the decision was made in light of the relevant factors. The process is now automatic and applies to all regardless of the circumstances of their particular situation … The provision precludes the circumstances of the individual from being taken into account.[62]

15.59 In examining the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) found that

> A significant feature of the scheme is that the rules of natural justice are expressly excluded by proposed section 134A in relation to decisions made under proposed subdivision FB.[63]

15.60 Despite this finding, the Scrutiny of Bills Committee's conclusion was to refer any future consideration of the impact of this legislation on an individual's access to procedural fairness to the Senate:

> the committee leaves the general question of the appropriateness of the overall scheme, including the exclusion of the rules of natural justice which would require a fair hearing prior to the exercise powers which directly affect rights or interests, to the Senate as a whole.[64]

Fast track assessment process for Unauthorised Maritime Arrivals

15.61 The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 amended the *Migration Act* to create a new fast track assessment process for UMAs who entered Australia after a prescribed time. Several stakeholders argued that this new process arbitrarily and unfairly excludes procedural fairness from protection visa application processes for UMAs.[65]

15.62 Under pt 7AA of the *Migration Act*, the Minister may refer fast track reviewable decisions made by immigration officials to a new body, the IAA, within the Refugee Review Tribunal (RRT), which will conduct a limited merits review. The fast track process radically confines any obligation for the IAA to observe the rules of natural

---

61 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

62 Kingsford Legal Centre, *Submission 21*. The Refugee Council of Australia also raised concerns about the failure to conduct 'individualised assessments': Refugee Council of Australia, *Submission 41*.

63 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 73.

64 Ibid.

65 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*.

justice by way of an exhaustive statement of natural justice requirements in s 473DA. This provision excludes any obligation to provide a visa applicant with a hearing.

15.63 RACS wrote that the practical effect of s 473DA is that the IAA will, generally:

- not hold hearings;
- not allow a fast track review applicant to respond or comment on adverse information raised at the primary stage, or the reasons for the decision to refuse the application;
- not seek new information from a fast track review applicant; and
- not be permitted to consider new information provided by the fast track review applicant, other than in what it identifies as exceptional circumstances.[66]

15.64 The IAA is empowered to make a decision based on the paperwork alone. Further, the IAA

- will not offer a review applicant an interview or the opportunity to comment on an application, except in 'exceptional circumstances';[67]
- is prohibited from considering new information or new evidence except in exceptional circumstances;[68] and
- is under no obligation to provide an applicant with any documents relied upon in the initial decision by a delegate.[69]

15.65 The ANU College of Law's Migration Law Program distinguished between s 425 of the *Migration Act*, which requires the RRT to hold a hearing for protection visa applicants who arrived in Australia before 13 August 2012, and s 473DA which applies to UMAs who arrived after this date. The ANU Migration Law Program explained that the later section has been interpreted to mean that the IAA need not conduct a hearing with, or otherwise interview the applicant, except in exceptional circumstances.[70]

15.66 The ANU Migration Law Program argued that pt 7AA is 'unnecessary' as there is an existing and established merits review system for migration matters with procedural fairness obligations.[71]

15.67 The statement of compatibility with human rights for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 explained the policy rationale behind the creation of the IAA:

> [t]he establishment of the IAA as a separate office within the RRT, will allow it to make findings independent of the Department and therefore the primary assessment

66 Refugee Advice and Casework Service, *Submission 30*.
67 Ibid.
68 ANU Migration Law Program, *Submission 59*.
69 Ibid.
70 Ibid.
71 Ibid.

> process … The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.[72]

15.68 The Scrutiny of Bills Committee noted that the aim of the Bill was to introduce a more rapid processing and streamlined model for the processing of protection claims. However, the Committee asked the Immigration Minister for advice

> as to whether the fast track assessment process is compatible with the obligation to consider the best interests of the child and the right to a fair trial, and particularly: whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.[73]

15.69 In the second reading speech to the Bill, the Minister for Immigration explained that this new approach to review will 'discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims'.[74]

15.70 In the Senate debate over the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), Government Senator Michaelia Cash explained that the government

> must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The government must also have the legislative basis to refuse a protection visa, or to cancel a protection visa, for those noncitizens who are a security risk. We must prevent and deter any threats posed by those who are a risk to the security of our nation and must implement legislative amendments such as those proposed in this bill to ensure the security and safety of the Australian community.[75]

15.71 On the other hand, some have argued that the provisions unjustifiably deny procedural fairness by limiting access to a review process, thus denying a fair hearing. The Refugee Council of Australia (RCA) argued that the new fast track system administered by the IAA fails to provide 'an adequate framework for ensuring accuracy and procedural fairness in decision-making'.[76] The RCA distinguished between the IAA and RRT, stating that, unlike the RRT,

---

72 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

73 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.401].

74 Commonwealth, *Parliamentary Debates* House of Representatives, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 Second Reading Speech, 25 September (Scott Morrison).

75 Commonwealth, *Parliamentary Debates* Senate, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 Second Reading Speech, 4 December (Michaelia Cash).

76 Refugee Council of Australia, *Submission 41*.

> asylum seekers cannot apply to the IAA in their own right: cases must be referred to the IAA by the Minister. In most circumstances, the IAA will make assessments based solely on the information provided to it by the Secretary of the Department of Immigration … The applicant will not be permitted to participate in the process and cannot provide new information to support their claims other than in exceptional circumstances and within certain restrictions.[77]

15.72 Submissions to the Senate's Legal and Constitutional Affairs Committee's Inquiry into the Bill by the Law Council of Australia[78] and the Refugee and Immigration Legal Centre[79] noted that the IAA's process excludes important procedural fairness guarantees, such as the right to be heard, to present and challenge evidence. The Law Council observed that the Bill 'appears to infringe upon traditional rights and freedoms outlined in the Terms of Reference to the ALRC's Inquiry', including procedural fairness.[80]

Maritime Powers Act

15.73 Several stakeholders raised concerns about the exclusion of natural justice from the *Maritime Powers Act* under changes in 2014 that increased the powers of maritime officials to turn around vessels on the high seas without providing accountability for such decisions.[81]

15.74 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) amended the *Maritime Powers Act* to exclude the requirements of natural justice in relation to the exercise of maritime powers under div 2, pt 2 of that Act. The Explanatory Memorandum to the Bill explained that the amendments provide

> both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment. Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the 'unique circumstances … in a maritime environment' render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is

---

77 Ibid.

78 Law Council of Australia, Submission No 129 to Senate Legal and Constitutional Affairs Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

79 Refugee and Immigration Legal Centre, Submission No 165 to Senate Legal and Constitutional Affairs Committee, *Migration and Maritime Powers Legislation (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

80 Law Council of Australia, Submission No 129 to Senate Legal and Constitutional Affairs Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

81 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; UNSW Law Society, *Submission 19*.

> appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.[82]

15.75 The Senate Committee found that proposed s 22B amounted to a possible undue trespass on personal rights and liberties.[83] The Committee went on to underscore the importance of procedural fairness in migration law:

> The rules of natural justice are considered to be fundamental principles of the common law. The *Maritime Powers Act* contains a number of significant and coercive 'maritime powers' and the explanatory memorandum does not provide sufficient justification for the exclusion of natural justice for all of the powers in the *Maritime Powers Act.* Not all the powers are the same or require the same considerations in relation to their exercise. For example, different considerations may arise in relation to powers which enable a person or vessel to be detained than in relation to powers which enable a person or vessel to be transported to a destination (which may be outside of Australia). Without further details and analysis, the claim that application of the rules of natural justice is not consistent with the 'unique circumstances … in a maritime environment' does not enable the committee to properly consider the appropriateness of the proposed exclusion of natural justice.[84]

15.76 In light of these concerns, the Committee sought the Minister's advice as to why the exclusion of natural justice was considered reasonable.[85] While the Minister provided a detailed reply that explained the effect of each new provision, the Committee reiterated its concerns about the exclusion of the rules of procedural fairness and referred the provisions to the Senate for further consideration.[86]

15.77 The Law Council argued that the exclusion of the rules of procedural fairness cannot be justified in light of the seriousness of the consequences for persons removed from Australian waters—for example, 'the relocation of affected individuals to a place where they face a real risk of persecution'.[87]

15.78 The Human Rights Law Centre argued that the government should repeal the provisions in the *Maritime Powers Act* that exclude natural justice. The Centre contested the justification that 'fairness at sea can be "impracticable"', arguing that

> 'impracticability' does not justify completely excluding the duty to act fairly. It is a factor relevant to what fairness practically requires in the particular circumstances. More fundamentally, to the extent that acting fairly at sea could carry practical challenges, administrative inconvenience is a necessary and reasonable price to pay to ensure important decisions affecting people's rights and liberties are properly made.[88]

---

82 Explanatory Memorandum, Migration Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).
83 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 909.
84 Ibid 909–10.
85 Ibid 910.
86 Ibid 914.
87 Law Council of Australia, *Submission 75*.
88 Human Rights Law Centre, *Submission 39*.

ASIO security assessments for non-citizens

15.79 Several stakeholders raised concerns about the exclusion of the fair hearing rule from ASIO's adverse security assessment process in s 36 of the *ASIO Act* as it applies to non-citizens.[89] Under s 36, notice of an adverse security assessment, and the reasons for that assessment, are not disclosed to affected parties or their legal representatives.[90]

15.80 To be eligible for a protection visa, non-citizens must not have received an adverse security risk assessment from ASIO.[91] According to the RCA, at the time of their submission to this Inquiry, there were 'at least 32 people who have been found to be owed refugee protection but remain in indefinite immigration detention because they have received adverse security assessments'.[92]

15.81 In February 2014, the Senate Legal and Constitutional Affairs Committee conducted an Inquiry into the Migration Amendment Bill 2013. The Legislation Committee's report noted that the Bill aimed to 'clarify administrative certainty'.[93] However, some submissions to that Inquiry expressed concern over the means adopted to achieve this end.[94] Notably, the United Nations High Commissioner for Refugees (UNHCR) noted

> its concern that a refugee who has received an adverse assessment has very limited legal avenues to contest a negative assessment and is not afforded procedural fairness or natural justice.[95]

15.82 There has been criticism from Australian commentators and international bodies about the lack of transparency in this process. For instance, the UN's Human Rights Committee received communications from two Royhingan asylum seekers in 2011 and 2012 who had received adverse ASIO security assessments. The Committee wrote that

> The secret basis of the security assessment renders it impossible to evaluate the justification for detention.[96]

15.83 In 2013, the Australian Human Rights Commission noted its concern about

> the lack of transparency of the ASIO security assessment process. Under the new Independent Reviewer process refugees are provided with an unclassified written summary of reasons for the decision to issue an adverse security assessment. However, there is limited information available about the content of the summaries of

---

89 Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

90 For Australian citizens subject to an adverse ASIO security assessment, s 27AA of the *Australian Administrative Appeals Tribunal Act 1975* (Cth) provides that an individual may not be informed of the reasons for ASIO's decision, including any evidence obtained against the individual.

91 *Migration Act 1958* (Cth) s 36(1B).

92 Refugee Council of Australia, *Submission 41*.

93 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Migration Amendment Bill 2013* (2014) [1.10].

94 UNHCR, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment Bill 2013*, 2014; Amnesty International, Submission No 1 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment Bill 2013*, 2014.

95 UNHCR, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment Bill 2013*, 2014.

96 Human Rights Committee, Communication No 2094/2011 (28 August 2011) and No 2136/2011 (21 March 2012) [3.5].

> reasons. In particular, it is unclear whether they will set out any details about the information that ASIO relied upon to make the adverse assessment.[97]

15.84 Professor Ben Saul was critical of the lack of notice and reasoning provided to asylum seekers and their legal representatives:

> An affected person is only able to adequately respond to the case against them if they know the essential substance of that case. Currently, at the decision-making stage, ASIO need not disclose anything that they reasonably believe would prejudice national security.[98]

15.85 In the ALRC's 2004 report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, there was a lengthy discussion of the use of secrecy provisions in migration law, including an earlier and similar iteration of s 36 of the *ASIO Act*. In that Inquiry, the ALRC considered that

> the real issue is the availability of meaningful review which allows the aggrieved party a proper opportunity to consider and seek to challenge or contradict all the evidence available to the decision maker. Thus, the ALRC considers that there is a legitimate concern in relation to the use of secret evidence in immigration and similar matters.[99]

15.86 Several stakeholders raised concerns about the justifications for this process, given the seriousness of the likely consequence of an adverse security assessment—indefinite detention or deportation. For instance, the Human Rights Law Centre submitted that:

> Given the seriousness of the consequences flowing from an adverse ASIO security assessments, it is crucial that they be made through a process that is fair, transparent and reviewable.[100]

15.87 The Victorian Foundation for Survivors of Torture stated that it has had more than 20 clients who have been in prolonged, indefinite detention because of receiving adverse security assessments.[101]

15.88 Some stakeholders argued that the balance between individual rights to procedural fairness and the advancement of national security rests too far towards the latter. The Law Council argued that

> Restricting a person's freedom of movement may be for the legitimate purpose of preventing individuals from taking part in hostilities, engaging in terrorist activities or crime. However, questions arise as to whether certain counter-terrorism legislative measures are proportionate to achieving this objective and justified.[102]

---

97 Australian Human Rights Commission, *Factsheet: Refugees with an Adverse Security Assessment by ASIO* (16 May 2014).

98 Ben Saul, '"Fair Shake of the Sauce Bottle"' [2012] *Alternative Law Journal* 221, 222.

99 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Final Report No 98 (2004) [10.82].

100 Human Rights Law Centre, *Submission 39*.

101 Victorian Foundation for the Survivors of Torture, *Submission 56*.

102 Law Council of Australia, *Submission 75*. The UNSW Law Society similarly argued that 'while a level of secrecy in national security affairs is necessary, the powers granted to ASIO in this area represent a serious infringement of common law procedural fairness': UNSW Law Society, *Submission 19*.

15.89 Finally, the Gilbert and Tobin Centre for Public Law and the UNSW Law Society pointed to the use of a special advocate regime in the UK, Canada and New Zealand where lawyers, having passed security clearance processes, are given access to the charges and evidence laid against their clients. They proposed this as an alternative model to the current regime under s 36 of the *ASIO Act*.[103]

15.90 In 2012, the Australian Government established the Independent Reviewer of Adverse Security Assessments, tasked with reviewing non-citizens' adverse ASIO security assessments. The Reviewer's role is to examine material relied upon by ASIO when making an adverse security assessment, with a view to deciding whether the assessment was appropriate.[104] The applicant may also submit material to the Reviewer.

National security legislation

15.91 Some provisions in criminal and national security laws deny concerned parties the right to a hearing or to access evidence against them. These provisions include the following:

- *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3)(c), 31, 38L and 38I(3) set out the closed hearing requirements—including closed hearing certificates—that apply to certain federal criminal proceedings and civil proceedings respectively, whereby a court may exclude a defendant's legal representative on the grounds that a disclosure of information may lead to a national security risk.
- *ASIO Act* s 35 empowers ASIO to issue an adverse security assessment against an Australian citizen in order to recommend administrative action be taken against an individual's interest, such as cancelling their passport. An adverse assessment of a citizen may be challenged in the Administrative Appeals Tribunal under s 54, but the Attorney-General may issue public interest certificates under s 38(2) that require any sensitive national security information to be withheld from the applicant.[105]
- *ASIO Act* s 34ZQ(4)(b) provides that the lawyer of a person subject to a questioning or detention warrant under ASIO's special powers regime is only entitled to view the warrant conditions and is not therefore able to view any of the supporting evidence.

---

103 Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

104 The role of the Independent Reviewer is outlined on the Attorney-General's Department's website, see: <http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx>.

105 Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

ASIO's powers under questioning and detention warrants

15.92 Several stakeholders raised concerns about the operation of s 34ZQ(4)(b) of the ASIO Act on the grounds that it limits an individual's rights to hear the evidence supplied in a warrant for their questioning or detention.[106]

15.93 The Human Rights Law Centre submitted that, in practice, this provision means that the person who is the subject of a warrant is not informed of the reasons put forward for the issue of the warrant. The Centre went on to argue that the denial of procedural fairness posed by this provision goes 'far beyond what is necessary'.[107]

15.94 The Law Council raised general objections to pt III div 3 of the ASIO Act, arguing that

> the secrecy surrounding detention under an ASIO warrant makes it very difficult for a detained person to both know and challenge the lawfulness of detention.[108]

15.95 In assessing the effects of this regime on individual rights and freedoms, the Gilbert and Tobin Centre for Public Law argued that

> The infringement of these rights and privileges is unjustified not only on principled grounds, but also because the provisions appear to have little practical benefit in preventing terrorism. After repeatedly questioning government agencies as to why ASIO's warrant powers are necessary, the Independent National Security Legislation Monitor (INSLM) was presented with '[n]o scenario, hypothetical or real … that would require the use of a QDW [questioning and detention warrant] where no other alternatives existed to achieve the same purpose'. He recommended that ASIO's questioning power be retained, but its detention power be repealed.[109]

15.96 The Independent National Security Monitor (INSLM) has recommended the repeal of questioning and detention warrants. The INSLM found that they are an unjustifiable intrusion on personal liberty and either violate, or are dangerously close to violating, the right to freedom from arbitrary detention under art 9(1) of the ICCPR.[110]

Other laws

15.97 There are provisions in the empowering Acts of some statutory bodies that limit access to legal representation. There may be circumstances where a person whose interests are adversely affected by an administrative decision, is entitled to legal representation. Section 596(1) of the *Fair Work Act 2009* (Cth) is an example of a provision that may deny procedural fairness by limiting or qualifying the circumstances when a party may access legal representation. The section provides that a person may be represented by an agent or a lawyer at the Fair Work Commission (FWC) only with

---

106 Law Council of Australia, *Submission 75*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

107 Human Rights Law Centre, *Submission 39*.

108 Law Council of Australia, *Submission 75*.

109 Gilbert and Tobin Centre of Public Law, *Submission 22*. See also Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 105.

110 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 106.

the permission of the FWC, subject to exceptions in s 596(4). Section 596(2) outlines the factors the FWC will consider when assessing an application for representation by a lawyer or an agent.[111]

15.98 The *Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) would contains a number of clauses[112] that would deny procedural fairness to persons affected by the exercise of ministerial discretion to cancel their Australian citizenship in light of their allegiance to, or activity with, foreign fighting and terrorist organisations.[113] Several clauses in the Bill exclude the rules of natural justice and exclude s 47 of the *Australian Citizenship Act 2007* (Cth) which requires the Minister to provide notice of decisions to persons whose citizenship is revoked.

Justifications for laws that deny procedural fairness

15.99 As with other rights, freedoms and privileges, laws that limit or deny procedural fairness may be justified on policy grounds, typically in the interests of quick and efficient decision-making, or when a matter is sufficiently clear or serious such as in national security matters.

15.100 Academic writing and extra-judicial commentary provide useful criteria or principles from which to assess when it is appropriately justified to exclude procedural fairness.

15.101 Professor Saul has suggested a list of principles to be considered in any decision to exclude procedural fairness. These are:

- the public interest in national security;
- fairness to affected individuals;
- the accountability of administrative decision-making; and
- public confidence in open justice.[114]

15.102 Professor Matthew Groves has observed that 'the evolution of the principles governing the implication of the duty to observe the rules of procedural fairness has been matched by a similar evolution in their exclusion'.[115] Groves goes on to explain that

---

111 The FWC issues Practice Notes that guide employees and employers in the FWC's rules and procedures. These are published on the FWC's website at <www.fwc.gov.au>. See for instance, Australian Fair Work Commission, *Practice Note 2/2013: Fair Hearings* (March 2015).

112 Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) ss 33AA, 35 and 35A.

113 At the time of writing, the Bill had been referred to the Parliamentary Joint Committee on Intelligence and Security. The Committee was asked to report to Parliament by 21 August 2015.

114 Ben Saul, 'Security and Fairness in Australian Public Law' (2013) No. 13/22 *Sydney Law School Legal Studies Research Paper* 1.

115 Groves, above n 1, 302.

> The cases which have accepted that natural justice has been excluded or greatly limited by implication do not yield a clear general principle because they depend heavily on the purpose and content of the statute under consideration.[116]

15.103 Other factors have been highlighted to provide guidance as to when it is appropriate to limit or exclude procedural fairness. These are:

- the statutory framework;
- the circumstances concerning the individual decision to be made;
- the subject matter of the decision;
- the nature of the inquiry; and
- the rules of a tribunal (for example, the procedures that it has normally adopted or which are statutorily required).[117]

15.104 Bodies such as the Administrative Review Council and guides such as the Attorney-General's Department's *Administrative Law Policy Guide 2011* explain the scope and meaning of the duty to afford procedural fairness. They do not, however, provide justifications for when it may be appropriate to deny procedural fairness and this is perhaps not their role.

15.105 The Administrative Review Council's report, *The Scope of Judicial Review*, provides that procedural fairness should be an element in government decision-making in all contexts, and accepts that what is considered to be fair will vary with the circumstances.[118]

15.106 The Attorney-General's Department's *Administrative Law Policy Guide 2011* provides that

> Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern to the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances.[119]

Legitimate objectives

15.107 When considering how limitations on procedural fairness may be appropriately justified, one useful starting point is the ICCPR.[120] Article 14 of the ICCPR protects the proper administration of justice, equality before courts and tribunals and the right to a fair and public hearing by a competent, independent and

---

116 Ibid.
117 Creyke, McMillan and Smyth, above n 9, [10.4.4].
118 Administrative Review Council, 'The Scope of Judicial Review' (Report 47, Australian Government, 2006) 52.
119 Administrative Review Council, *Australian Administrative Law Policy Guide* (2011).
120 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

impartial tribunal established by law. This right extends to all individuals including non-citizens such as refugees.[121]

15.108 Article 14(1) acknowledges that courts have the power to exclude all or part of the public from hearings for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public.

15.109 Article 4 of the ICCPR is a derogation clause that provides States Parties may derogate from their obligations in times of 'public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.

15.110 The UN Human Rights Committee, commenting on arts 4 and 14, stressed that even in such emergencies, the derogations must be proportionate in the circumstances:

> While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.[122]

15.111 Broadly speaking, legislatures have justified the limitation or exclusion of procedural fairness rules in the interests of urgency in certain decision-making, and to prevent a more serious harm.

Reduce delay

15.112 The need for quick action on a pressing matter and the desire to reduce delay by streamlining administrative processes is often raised as a justification for excluding procedural fairness.[123]

15.113 In some circumstances, urgent action to prevent an imminent harm may necessitate justifiable limits on procedural fairness. In *Marine Hull and Liability Insurance Co Ltd v Hurford*, Wilcox J explained that the requirements of procedural fairness may be appropriately limited where 'powers which, by their very nature, are inconsistent with an obligation to accord an opportunity to be heard'.[124]

15.114 However, some argued that the aim of quick decision-making should not justify laws that deny procedural fairness. ANU's Migration Law Program argued that,

---

121 United Nations Human Rights Committee, General Comment No 32 on Article 14 (Administration of Justice) of the ICCPR (CCPR/C/GC/32).

122 Ibid [6].

123 For discussion on when courts may construe a legislative intention to exclude procedural fairness in the interests of urgency, see, Allars, above n 16, [6.38].

124 *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241.

in the context of migration law, 'the erosion of procedural fairness obligations should not be justified on the basis of efficiency or expediency in decision-making'.[125]

15.115 Similarly, RACS argued that while consideration may be given to questions of urgency, 'given the imperative for administrative decisions to be wise, just and fair, any limits on procedural fairness should be a last resort, and avoided to the greatest extent possible'.[126]

15.116 Some laws, particularly statutes empowering tribunals and other quasi-judicial bodies with legal and regulatory powers, explicitly require such bodies to make 'speedy' decisions while still balancing this imperative with the rules of procedural fairness.[127]

Prevent serious harm

15.117 There may also be circumstances where it is appropriate to exclude procedural fairness in order to prevent a more pressing or serious harm. ASIC supported this justificatory principle, noting that it may be appropriate to limit procedural fairness to 'prevent financial loss or to protect the integrity of financial markets'.[128]

15.118 This justification may fall within the permissible limitations on procedural rights to ensure 'public order', as stipulated in art 14(1) of the ICCPR.

Proportionality and procedural fairness

15.119 Some stakeholders favoured the adoption of a proportionality test to determine if a law that excludes procedural fairness is justified.[129] For instance, the UNSW Law Society argued that a

> test of proportionality, while a flexible test, ought to be considered through a different tone depending on what right is being infringed upon. The weight or importance of the particular right is formally recognised as part of the test as a factor considered in the determination of the 'overall social detriment' in the appropriateness stage. It is clear that the more essential a right is perceived to be, the law infringing upon it must either provide great benefits and/or be as least intrusive as possible. The elements of suitability and necessity, while normally low thresholds, will be elevated in importance in cases of fundamental rights. Procedural fairness is such a right.[130]

15.120 As the UNSW Law Society outlined, applying a proportionality test to laws that deny procedural fairness would involve assessing whether the laws are

(1) practically suitable for achieving a legitimate policy objective;

---

125 ANU Migration Law Program, *Submission 59*.
126 Refugee Advice and Casework Service, *Submission 30*.
127 Examples of these, many of which are state statutes, are outlined in a speech given by the Hon Justice Alan Wilson, 'Procedural Fairness v Modern Tribunals: Can the Twain Meet?' (speech delivered at the Queensland Law School, Brisbane, 31 May 2013).
128 Australian Securities and Investments Commission, *Submission 74*.
129 Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*.
130 UNSW Law Society, *Submission 19*.

(2) necessary, in the sense that there are no alternative means of pursuing that objective that are less inimical to procedural fairness, yet are equally practicable and as likely to succeed; and

(3) appropriate, in that the detriment caused by infringing on procedural fairness must not exceed the social benefit of the legislation. Legislation is particularly likely to be inappropriate when it detrimentally affects the essential content of the right.[131]

15.121 The Law Council submitted that the process for determining whether a limit is 'reasonable' and 'demonstrably justified' involves answering two instructive questions:

(a) Is the purpose of the limit justified?

(b) Are the means which the limit operates reasonable?

In responding to the first question, the purpose must be, on the balance of probabilities:

(a) lawful or 'prescribed by law'—that is, not ultra vires, as well as clear and accessible to the public; and

(b) directed toward a 'pressing and substantial' public interest.132

Conclusions

15.122 A wide range of Commonwealth laws may be seen as affecting the common law duty to afford procedural fairness to persons affected by the exercise of public power. These laws exclude the rules of procedural fairness in many different contexts by limiting or excluding access to hearings, to the reasons for a decision, to the evidence relied upon to reach a decision, to legal representation, and often deny an individual the right to respond to reasons and evidence.

15.123 There are departmental and other materials that provide guidance on the scope of the duty to afford procedural fairness in decision-making. Bodies such as the Administrative Review Council and the Attorney-General's Department's *Administrative Law Policy Guide 2011* have produced such material, however they do not—and perhaps nor is it their role to—provide justifications for when it may be appropriate to deny procedural fairness.

15.124 The areas of Commonwealth law that may provide particular concern, as evidenced by parliamentary committee materials, submissions and other commentary are provisions in migration law and national security legislation related to the following areas of law;

- the mandatory cancellation of visas in the *Migration Act*;
- the fast track assessment process for UMAs in the *Migration Act*;

131 Ibid.
132 Law Council of Australia, *Submission 75*.

- the exclusion of natural justice from decisions under the *Maritime Powers Act*; and
- the process for ASIO security assessments for non-citizens in the ASIO Act.

15.125 These aspects of Commonwealth law might be reviewed to ensure that these laws do not unjustifiably deny procedural fairness. Any review of the process for ASIO security assessments of non-citizens falls within the remit of the INSLM.

16. Delegating Legislative Power

Contents

The separation of powers

16.1 Under the constitutional doctrine of the separation of powers, parliaments make laws, the executive administers or enforces laws, and the judiciary adjudicates disputes about the law. The doctrine is reflected in the structure of the *Australian Constitution*: Chapter I is entitled 'The Parliament'; Chapter II, 'The Executive Government; and Chapter III, 'The Judicature'. But these powers are not as separate and the distinctions not as clear as some might imagine. For one thing, in Australia, members of the executive (the Cabinet and other government ministers) are also members of the legislature.

16.2 Nevertheless, from the separation of powers doctrine may be derived the principle that legislative power should not be inappropriately delegated to the executive. Although it is common for Parliament to delegate the power to make laws to the executive—not only to government ministers, but also government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission—this chapter is about when this would not be appropriate.

16.3 This chapter is concerned with laws that delegate *legislative* power, rather than with laws that give ministers and government agencies *executive* power. There may be no bright line between legislative and executive power, but the distinction is 'essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases'.[1] Creating new rules of law of general application is traditionally the role of Parliament.

1 *Minister of Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331.

Delegating legislative power—a common practice

16.4 Delegating legislative power to the executive is now commonplace and is said to be essential for an efficient and effective government. The Public Interest Advocacy Centre submitted that, given 'the breadth and depth of areas now regulated by government, the ability to flesh out primary legislation in subordinate legislation is a necessary and expedient tool of government'.[2]

16.5 In fact, parliaments have been delegating powers to the executive for some time—in England, possibly for as long as 650 years.[3] A famous example from 1539 is the *Statute of Proclamations*, which included the following provision:

> The King for the Time being, with the advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.[4]

16.6 In Australia, delegated legislation has been a major part of the law since colonisation.[5] Indeed, 'the very first legal step taken by the English to establish a colony—Governor Phillip's Proclamation at Sydney Cove—could be viewed as a subordinate legislative action'.[6] Today far more laws are made under delegation than directly by parliaments.

16.7 Not only does the modern state depend on delegated legislation, but it might be argued that parliamentary sovereignty would be limited to some degree if parliament could not choose to delegate part of its legislative power.

Criticisms

16.8 Despite the fact that parliaments commonly delegate legislative power to the executive, and have done so for some time, some laws are more properly made by Parliament. Professor Denise Meyerson has written that although some delegated legislation is clearly necessary in practice, there is a danger:

> if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.[7]

---

2 Public Interest Advocacy Centre, *Submission 55*.

3 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 5; VCRAC Crabbe, *Legislative Drafting* (Routledge, 2012) 213.

4 The King at the time was Henry VIII. As discussed below, a provision in an Act that allows for delegated laws to amend an Act of Parliament is now known as a 'Henry VIII clause'. The *Statute of Proclamations* is also known as the *Proclamation by the Crown Act 1539*, 31 HVIII c 8.

5 Pearce and Argument, above n 3, 5.

6 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) 259.

7 Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 52.

16.9 Furthermore, the executive has been said to 'lack the democratic credentials of Parliament'.[8] The framers of the *Constitution* vested the legislative power in the Australian Parliament 'because they thought the people's elected representatives particularly well-suited to the exercise of the "open-ended discretion to choose ends" which is the essence of the legislative task'.[9]

16.10 The fact that the 'executive process lacks the transparency and publicity of the parliamentary process' has been said to be an important concern about delegating legislative power.[10] Delegation 'reduces the accountability of the exercise of legislative power'.[11]

16.11 Although it is not clearly a right, freedom or privilege, the principle that legislative power should not be inappropriately delegated to the executive may be an important way of protecting other rights, freedoms and privileges. MJC Vile said the separation of powers doctrine—which clearly supports the principle discussed in this chapter—was 'essential for the establishment and maintenance of political liberty'.[12]

16.12 Sometimes, criticism of delegated legislation concerns its quality and quantity,[13] rather than whether the law belongs in primary legislation. David Hamer, for example, has said that delegated legislation is a 'fertile field for government despotism and bossy interference by bureaucrats'.[14] The thrust of the debate about the burden of government regulation, Robin Creyke and John McMillan write, is that

> some government regulation has become overly prescriptive, badly designed, poorly administered, inconsistent and duplicative, unduly burdensome, unnecessarily costly to industry, and a barrier to national business competition.[15]

16.13 However, this chapter is not about the quality or quantity of delegated legislation, or whether particular delegated laws should have been made at all, but rather about whether particular types of delegated law should more properly have been made directly by parliament.

Safeguards

16.14 Delegated legislation receives less public and parliamentary scrutiny than primary legislation. However, some concerns about delegated legislation may be addressed by the procedures that must be followed in making the legislation,

---

8 Ibid 53.
9 Ibid.
10 Judith Bannister et al, *Government Accountability* (Cambridge University Press, 2014) 112.
11 Ibid.
12 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 14. Pearce and Argument summarise the primary arguments directed against the use of delegated legislation as: 'First, that if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the *Constitution* altered. Second, if laws are made affecting the subjects, it can be argued that they must be submitted to the elected representatives of the people for consideration and approval': Pearce and Argument, above n 3, 11.
13 The 'proliferation' of delegated legislation is discussed in Pearce and Argument, above n 3, 16.
14 David Hamer, 'Can Responsible Government Survive in Australia?' (Department of the Senate, 2001) 148 <http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/hamer>.
15 Creyke, McMillan and Smyth, above n 6, 368.

particularly since the enactment of the *Legislative Instruments Act 2003* (Cth). These safeguards are designed to allow Parliament to oversee the making of delegated legislation, to scrutinise it through committees, and to repeal laws that Parliament considers should not have been made.[16]

16.15 The practical effect of the *Legislative Instruments Act* was explained in part by the Australian Securities and Investments Commission (ASIC), one of the government agencies that makes delegated legislation. If it makes a legislative instrument, ASIC said, it must not only register the instrument when it is made, but first:

> engage in appropriate consultation, ... explain in an Explanatory Statement the justification for making the instrument, the instrument is subject to disallowance (repeal) by either House of Parliament during a disallowance period and the instrument will expire by operation of law after 10 years (unless earlier repealed or earlier ceasing to have effect according to its terms).[17]

16.16 The requirement that legislative instruments be published on a public register was a major development made by the *Legislative Instruments Act*, and helps provide for an open and accountable delegated legislation process.[18]

16.17 There are also limits on incorporating other instruments or writings in delegated legislation, although this is subject to a contrary intention in the enabling Act.[19]

16.18 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) both consider whether an Act of Parliament inappropriately delegates legislative power to the executive.[20] The Regulations and Ordinances Committee in particular scrutinises delegated legislation to ensure 'that it does not contain matter more appropriate for parliamentary enactment'.[21]

16.19 The tabling, disallowance, and committee scrutiny of delegated legislation are important safeguards and practical way for parliament to control executive lawmaking.

16.20 Common law principles may also provide additional safeguards. For example, although a statute may provide for the sub-delegation of legislative power,[22] if it does not, a delegate generally cannot sub-delegate the power.[23]

---

16 This is in addition to the judicial review of delegated legislation, which essentially considers whether the legislation was validly made, often whether it is within power.

17 Australian Securities and Investments Commission, *Submission 74*. See *Legislative Instruments Act 2003* (Cth).

18 *Legislative Instruments Act 2003* (Cth) pt 4.

19 Ibid s 14.

20 Parliamentary committees are discussed in Ch 2.

21 Senate Standing Order 23(3)(d).

22 'I have found no reason for concluding that Parliament may not, in authorizing subordinate legislation, confer power to authorize the making of regulations or by-laws not inconsistent with the legislation which Parliament has directly authorized': *Esmonds Motors v Commonwealth* (1970) 120 CLR 463, 477 (Menzies J). See also Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) [23.4].

23 'The broad principle that a person cannot, without authority, delegate legislative power that has been delegated has been accepted with only one or two minor expressions of doubt': Ibid [23.5]. Pearce and Argument discuss the question of sub-delegation of delegated legislative power in Ibid ch 23.

Constitutional limits

16.21 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, but nor is it expressly prohibited. The High Court's decisions in *Baxter v Ah Way*[24] and *Roche v Kronheimer*[25] have been held as authority for Parliament's power to delegate certain legislative powers to the Executive. Dixon J said that *Roche v Kronheimer* decided that

> a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.[26]

16.22 In *Victorian Stevedoring and General Contracting Company v Dignan*, Dixon J noted the 'logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation'.[27]

16.23 Dixon J suggested when a delegation of legislative power may not be valid:

> This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.[28]

16.24 Whether constitutionally valid or not, a 'wide' and 'uncertain' delegation of legislative power may not be appropriate.

Examples of laws that delegate legislative power

16.25 It is quite common for Commonwealth legislation to delegate to the executive the power to make certain laws. There are thousands of legislative instruments currently in force in Australia, covering a wide range of subject matter, including laws about food standards, fisheries, civil aviation, corporations, superannuation, taxation and migration, to name only a few subjects.

---

24 *Baxter v Ah Way* (1910) 8 CLR 626, 637–8.

25 *Roche v Kronheimer* (1921) 29 CLR 329.

26 *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.

27 It is 'one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation': Ibid 91.

28 Ibid 101.

16.26 Acts that delegate legislative power to the executive often do so in terms similar to this provision, from the *Atomic Energy Act 1953* (Cth):

> The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.[29]

16.27 Some provisions like this will set out more fully the types of regulations that may be made. For example, there is considerable detail about what the regulations may do in s 63 of the *Therapeutic Goods Act 1989* (Cth).

16.28 Sometimes a provision in an Act delegating legislative power is expressed broadly and there is little substantive law in the primary legislation. This is sometimes called 'skeleton' legislation—the bare bones are in the primary legislation, but most of the law is in the delegated legislation.[30] This arrangement has often been criticised.[31] Pearce and Argument cite the *Carbon Credits (Carbon Framing Initiative) Act 2011* (Cth) and related Acts as an example, although there are many other such Acts.[32] The Scrutiny of Bills Committee said in 2012 that 'framework' bills were becoming increasingly prevalent[33] and that 'important information' should be included in the primary legislation, 'unless there is a principled reason for including it in delegated legislation'.[34]

16.29 Offence provisions are considered particularly important, and generally belong in primary legislation, particularly where the penalties for infringement are high. For example, s 30B of the *National Credit Code* allows for the making of certain regulations concerning credit card contracts, including for offences and civil penalties against the regulations.[35] Although there are limits in the Act on the offences and penalties, the Scrutiny of Bills Committee said the 'penalties which may be imposed by regulation are significant and it is unclear why the offences and requirements cannot adequately be specified in the legislation which will be considered in detail by Parliament'.[36]

16.30 'Henry VIII clauses' are another type of delegation of legislative power that is considered inappropriate.[37] These allow delegated legislation to amend the primary

---

29 *Atomic Energy Act 1953* (Cth) s 65.

30 This is also called 'coat-hanger' or 'framework' legislation.

31 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) ch 5; Pearce and Argument, above n 3, 121–123.

32 Pearce and Argument, above n 3, 122.

33 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) 35.

34 Ibid 34.

35 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 30B(2).

36 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 4 of 2011* (2000) 47.

37 The first such clause is quoted earlier in the chapter.

legislation. The Scrutiny of Bills Committee often comments on such provisions. In 2009, for example, the Committee noted the large number of Henry VIII clauses in the National Consumer Credit Protection Bill 2009—so many in fact that it was 'not possible to provide commentary in relation to all of them'.[38] The relevant Minister defended the arrangement, telling the Committee that the Government needed to ensure that there was 'adequate flexibility in the new arrangements to ensure the smooth transition to a national credit regime'.[39] Section 35A of the *Fair Work Act 2009* (Cth), which relates to the geographical application of the Act, is another example of a Henry VIII clause.[40]

16.31 Government agencies and regulators will sometimes be given the power to make delegated legislation. The Commissioner of Taxation and ASIC, for example, both have statutory powers to make certain rules and regulations. For example, under the *Income Tax Assessment Act 1936* (Cth), the Commissioner of Taxation may determine by legislative instrument which taxpayers are required to lodge an income tax return.[41] Under *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the Commissioner of Taxation may make certain determinations in relation to how much GST is payable on taxable importations.[42] There are many other such examples.

16.32 Only a few submissions to this Inquiry commented on inappropriate delegations of legislative power. The Public Interest Advocacy Centre (PIAC) expressed some concern about the practice, particularly in light of what it saw as 'minimal parliamentary scrutiny' in practice.[43] Parliamentary committees often highlight potentially problematic delegations, but PIAC submitted that much depends on the 'individual will of parliamentarians to make themselves aware of the potential impact of tabled delegated legislation'.[44]

16.33 Measures to limit inappropriate delegations of legislative power were also suggested by PIAC. For example, it recommended that legislative instruments be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It also suggested that the *Legislative Instruments Act* be amended to include a non-exhaustive list of powers and matters which should not be delegated, unless there is a public interest in doing so.[45]

Justifications for delegating legislative power

16.34 Practical necessity is perhaps the overriding justification for delegated legislation. The 'modern state depends on reams of delegated legislation'[46] and

38 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Tenth Report of 2009* (September 2009) 370.
39 Ibid 371.
40 Bannister et al, above n 10, 116.
41 *Income Tax Assessment Act 1936* (Cth) s 161.
42 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 13–20(3).
43 Public Interest Advocacy Centre, *Submission 55*.
44 Ibid.
45 For PIAC's other recommendations, see Ibid.
46 George Winterton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Company, 2013) [3.500].

therefore the ability of a legislature to empower others to make legislation has been described as 'an essential adjunct to the practice of government'.[47]

16.35 Pearce and Argument write that the delegation of legislative power is 'generally considered to be both legitimate and desirable' in three situations:

- to save pressure on parliamentary time;
- when the legislation would be too technical or detailed; and
- where the legislation must deal with rapidly changing or uncertain situations.[48]

16.36 ASIC highlighted the need for delegated legislation in the regulation of corporations and financial services. The nature of the laws that it administers, ASIC submitted, is such that 'it would be impossible for primary legislation dealing with that subject matter to satisfactorily accommodate every circumstance currently known and that may arise in the future'.[49] ASIC continued:

> These sectors of the Australian economy are complex and subject to constant innovation. Without delegated legislative power, primary legislation would be unable to anticipate and respond in a timely way to the challenges and issues raised by these sectors.[50]

16.37 Pearce and Argument write that 'one of the fundamental justifications for putting something into delegated legislation is that it is something that parliament need not be too concerned about but, rather, is something that the parliament can be relatively comfortable merely keeping a watchful eye over'.[51] In other words,

> 'important' things—including the intrinsically 'political' things—are to be kept to the primary legislation. The delegated legislation is for the detail, for the machinery.[52]

16.38 Further guidance on what are appropriate matters for primary and delegated legislation may be found in the *Legislation Handbook*.[53] It states that 'while it is not possible or desirable to provide a prescriptive list', the following kinds of matters should be included in primary legislation:

(a) appropriations of money;

(b) significant questions of policy including significant new policy or fundamental changes to existing policy;

(c) rules which have a significant impact on individual rights and liberties;

---

47 Pearce and Argument, above n 3, 170.

48 Pearce and Argument, above n 9, [1.9]. Similar and other reasons justifying delegated legislation were set out in the 'Report of the Committee on Ministers' Powers (Donoughmore Committee)' (United Kingdom, 1936). See Caroline Morris and Ryan Malone, 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7, 9.

49 Australian Securities and Investments Commission, *Submission 74*.

50 Ibid.

51 Pearce and Argument, above n 3, 118.

52 Ibid 119.

53 Department of Prime Minister and Cabinet Canberra, *Legislation Handbook* (1999). This is a guide to making legislation for government departments.

(d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);

(e) provisions conferring enforceable rights on citizens or organisations;

(f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);

(g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);

(h) provisions imposing taxes or levies;

(i) provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);

(j) provisions authorising the borrowing of funds;

(k) procedural matters that go to the essence of the legislative scheme;

(l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

(m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).[54]

16.39 The proportionality principle, which is useful to test limits on many rights, may be less helpful in determining whether a delegation of legislative power is appropriate. For one thing, applied here, the proportionality principle would suggest that delegations of legislative power should be rare and only made when strictly necessary. However, delegating legislative power to the executive is very common and is a widely accepted method of law making, particularly if subject to parliamentary control.

Conclusions

16.40 This chapter has highlighted some important concerns about laws in delegated legislation that might more properly belong in primary legislation. However, this was not a subject that attracted much comment in submissions to this ALRC Inquiry.

16.41 There are many processes in place to remind law makers about when laws should be in primary rather than delegated legislation. There is guidance in the *Legislation Handbook* and scrutiny by parliamentary committees. There are also procedures that enable either House of Parliament to 'disallow' (repeal) delegated legislation soon after it has passed.

54 Ibid 3.

16.42 These mechanisms may be used to consider whether particular laws should be provided for in primary or delegated legislation. Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the process of making delegated legislation—may be the most suitable way to limit inappropriate delegations of legislative power. However, the ALRC invites comment on any particular laws in delegated legislation that would more appropriately belong in primary legislation.

17. Immunity from Civil Liability

Contents

A common law principle

17.1 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. They may operate to allow some interference—usually by government agencies—with a person's liberty, freedom of movement, bodily security, property, and other rights, and deny civil redress. Although sometimes necessary, laws that give immunity from civil liability and authorise what might otherwise be a tort operate to limit individual rights and arguably should only be enacted when necessary.

17.2 It is a fundamental tenet of the rule of law that no one is above the law. This principle applies not only to ordinary citizens, but to the government, its officers and instrumentalities: their conduct should be ruled by the law. AV Dicey wrote that the rule of law encompasses

> equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes

> the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[1]

17.3 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.

17.4 This chapter concerns two of the items listed in the Terms of Reference: the one that refers to laws that 'give executive immunities a wide application' and another that refers to laws that 'authorise the commission of a tort'.[2] These types of law are closely related. Notably, an executive immunity may essentially authorise the executive or part of the executive to commit what would otherwise be a tort.[3] Statutes that authorise tortious conduct or provide for immunities from civil liability may sometimes apply to non-government actors, for example to those engaging in industrial action, but it is more common for them to apply only to the executive.

17.5 Executive immunities from civil liability are the main focus of this chapter. This chapter discusses the source and rationale of the principle that executive immunities from legal liability should be limited; how this principle is protected from statutory encroachment; and when laws that give the executive a wide immunity may be justified.

17.6 This topic is closely related to some of the other rights, freedoms and privileges listed in the Terms of Reference. Laws that give executive immunities a wide application and that authorise torts are problematic largely because they limit other individual rights. An immunity from the tort of trespass to land affects a person's property rights.[4] A statute that authorises arrest and detention affects a person's liberty and freedom of movement.[5]

17.7 Immunity from statute is a related but distinct type of executive immunity, but it is not the subject of this chapter. There is a general presumption of statutory interpretation that statutes are not intended to bind the Crown,[6] in the absence of clear words or necessary implication.[7] In 1990, the High Court in *Bropho v Western*

---

1 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889) 190.

2 The fact that conduct is authorised by statute or other lawful authority will usually prevent the conduct amounting to a tort at all: the essence of the tort may lie in the unlawfulness of the conduct. For example, the tort of false imprisonment is only committed if there is no lawful authority; if there is statutory or other lawful authority to imprison or restrain a person, the imprisonment is not 'false'. It is therefore more appropriate to refer to statutes that authorise conduct that would *otherwise* amount to a tort.

3 'In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action': *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, [34] (McHugh J).

4 See Chs 7, 8.

5 See Ch 6.

6 'Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect': *R v Cook* (1790) 3 TR 519, 521 (Lord Kenyon). See also: *Attorney-General v Donaldson* (1842) 10 M & W 117, 124 (Alderson B); *Ex Parte Post Master General; In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).

7 *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *The Commonwealth v Rhind* (1966) 119 CLR 584. See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [5.171]–[5.172].

Australia held that this presumption only provides limited protection to the government, and gives way to an express or implied intention that legislation binds the executive.[8] However, the Terms of Reference suggest that laws that give executive immunities a wide application encroach on a traditional principle. Laws that provide for an immunity from statute would be consistent with a traditional Crown immunity, rather than an encroachment upon it, and such laws are therefore not considered in this chapter.

17.8 Further, the traditional principle that executive immunities should not be given a wide application does not extend to immunity from criminal laws. In fact, there is a strong common law presumption that the executive is not criminally liable.[9] This is reflected in the Guide to Framing Commonwealth Offences, which states that the Crown 'cannot be held criminally responsible unless legislation provides to the contrary' and that it is 'generally not appropriate to make a contrary provision'.[10] Executive immunity from criminal prosecution is therefore also outside the scope of this chapter.[11]

Executive immunities from civil liability

17.9 Historically, the executive had the benefit of the broad common law immunity of 'the Crown'.[12] This extended not only to the sovereign, but to the executive government. In *Commonwealth v Mewett*, which includes a discussion of the history and rationale of Crown immunity, Dawson J said:

---

8 *Bropho v Western Australia* (1990) 171 CLR 1, 15, 18–19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 28 (Brennan J). Where this rebuttable presumption applies and legislation is interpreted as not binding government, it may be said to give the executive a form of 'immunity' from laws which apply to ordinary citizens. In modern times, with the increased outsourcing of governmental functions, the principle could provide protection to parties contracting with the Crown, but only where the application of statutory liability would impair the Crown's legal interests, or prevent the divestment of proprietary, contractual or other legal rights and interests of the Crown: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 36–37 [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

9 In *Cain v Doyle*, Dixon J said: 'There is, I think, the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them. But we should at least look for quite certain indications that the legislature had adverted to the matter and had advisedly resolved upon so important and serious a course': *Cain v Doyle* (1946) 72 CLR 409, 424.

10 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011).

11 This is not to suggest that criminal liability for parts of the executive is never appropriate. For example, criminal liability for government business enterprises may sometimes be justified.

12 The term 'the Crown' refers to 'the government and its myriad components': Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (LBC Information Services, 1982) 2. This arises in the discussion of the history of Crown immunity and its abrogation. In contrast to the government, separate public authorities did not come within crown immunity: Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 215. Whether or not a government instrumentality is to be regarded as 'the Crown' may be significant on a purely procedural level of deciding whom to sue: Aronson and Whitmore, 30.

> The immunities which the Crown enjoys from suit in contract and tort rest, however imperfectly and in different ways, upon the propositions that the sovereign cannot be sued in its own courts and that the sovereign can do no wrong.[13]

17.10 Historically, Australia has shown a 'healthy concern for the rule of law'[14] by limiting this type of immunity by statute—in South Australia as early as 1853.[15] Dr Nick Seddon has written:

> The distance of the tyranny of English ways of thinking together with the need, in a frontier society, for new systems and roles of government combined to make Australia the pioneer of Crown proceedings legislation. ... In addition, as has been pointed out by Gummow and Kirby JJ in *Commonwealth v Mewett*, the Constitution itself, with its recognition of the role of the High Court as the guardian of the Constitution, placed substantial limitations on the maxim that the sovereign could do no wrong.[16]

17.11 The Law Council of Australia submitted that, in general, 'the whole course of the development of Australian law ... points to removal of executive immunity'.[17]

17.12 The general immunity is now abrogated by statute in all Australian states and territories and in the Commonwealth.[18] For the federal government, Crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth),[19] and arguably under s 75(iii) of the *Australian Constitution*,[20] suggesting Australia's constitutional arrangements work against special immunities from suit for governments. Under ss 56 and 64 of the *Judiciary Act* the executive is, so far as possible, subject to the same legal liabilities as citizens.[21]

17.13 Nevertheless, this position could be clarified. In its 2001 report, *The Judicial Power of the Commonwealth*, the ALRC recommended that the *Judiciary Act* be 'amended to state expressly that the Commonwealth is subject to the same substantive obligations at common law and in equity to persons of full age and capacity, except as specifically provided by a Commonwealth Act'.[22] In its submission, the Law Council supported this and other related recommendations in the ALRC's 2001 report.[23]

---

13 *Commonwealth v Mewett* (1997) 191 CLR 471, 497. Others have suggested that, at least in theory, the Crown (and thus the executive) has always been regarded in law as able to commit a tort, but there have been *procedural* rules that prevent civil action: see, eg, *Commonwealth v Mewett* (1997) 191 CLR 471; *Bell v Western Australia* (2004) 28 WAR 555, 563–4. However, for the purposes of this chapter, it does not matter greatly whether the historical position of the executive government is characterised as a substantive principle of immunity or a procedural one.

14 Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 257.

15 See *Claimants' Relief Act 1853* (SA).

16 Seddon, above n 14, 257.

17 Law Council of Australia, *Submission 75*.

18 See further Aronson and Whitmore, above n 12, ch 1.

19 *Judiciary Act 1903* (Cth) ss 56, 64.

20 Cf *Commonwealth v Mewett* (1997) 191 CLR 471.

21 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 176.

22 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) Rec 25–3.

23 Law Council of Australia, *Submission 75*.

17.14 Thus the Commonwealth of Australia now has no general Crown immunity from liability in tort or other civil actions and is subject to the same procedural and substantive laws as those which govern claims by one individual against another.[24] The Crown is also now subject to vicarious liability for the torts of its servants and agents, and may also have a non-delegable duty, to the same extent as an individual.[25]

17.15 The 'Ipp Report'[26] reviewed many aspects of public liability and made recommendations that have greatly reshaped the liability of public authorities in many jurisdictions. One recommendation was for the enactment of a 'policy defence' to a claim in negligence:

> [A] policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.[27]

17.16 This 'policy defence' does not strictly create an immunity, but instead alters (and lowers) the applicable standard of care—which is another way of protecting someone from civil liability. Western Australia was the only jurisdiction to adopt a version of this recommendation.[28]

What is a tort?

17.17 Immunity from liability in tort is perhaps the most concerning type of executive immunity from civil liability, given its effect on people's fundamental rights. A tort is a legal wrong which one person or entity (the tortfeasor) commits against another person or entity and for which the usual remedy is an award of damages. Many torts protect fundamental liberties, such as personal liberty, and fundamental rights, such as property rights, and provide protection from interferences by other people or entities and by the Crown. In short, torts protect people from wrongful conduct by others and give claimants a right to sue for compensation or possibly an injunction to restrain the conduct. Like criminal laws, laws creating torts also have a normative or regulatory effect on conduct in society:

> When the legislature or courts make conduct a tort they mean, by stamping it as wrongful, to forbid or discourage it or, at a minimum, to warn those who indulge in it of the liability they may incur.[29]

17.18 A statute authorising conduct that would otherwise be a tort may therefore reduce the legal protection of people from interferences with their rights and freedoms.

---

24 *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 12, 7.

25 The Crown was not, at common law, vicariously liable for the torts of its servants or officers and also had no direct liability to its citizens: Sappideen and Vines, above n 12, 215. But the laws abrogating Crown immunity reverse that position. For example, the Commonwealth was held to have a non-delegable duty in negligence as a school authority to its pupils: *Commonwealth v Introvigne* (1982) 150 CLR 258.

26 Commonwealth of Australia, 'Review of the Law of Negligence: Final Report ('Ipp Report')' (2002).

27 Ibid 185, rec 39.

28 *Civil Liability Act 2002* (WA) ss 5U, 5X.

29 Tony Honoré, 'The Morality of Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 75.

17.19 Torts are generally created by the common law,[30] although there are statutory wrongs which are analogous to torts.[31] In addition, many statutes extend[32] or limit[33] tort remedies, while statutory duties and powers may form the basis of duties or liability in tort, either in the common law tort of breach of statutory duty[34] or the common law tort of negligence.[35] Many common law torts have a long history, some dating as far back as the 13th century,[36] although others were created more recently.[37]

17.20 Although a tort may also amount to a crime, claims in tort are civil claims generally brought by people seeking compensation from the tortfeasor for injury or loss. Torts may be committed by individuals, corporate entities or public authorities, including government departments or agencies. Tort liability includes both personal liability and vicarious liability (for torts committed by employees or agents).

17.21 Torts include assault, battery, false imprisonment, trespass to land or goods, conversion of goods, private and public nuisance, intimidation, deceit, and the very expansive tort of negligence. Negligence occurs in many different social contexts, including on the roads, in the workplace, or through negligent medical care or professional services. The common law tort of defamation has long protected personal reputation from untruthful attacks.[38]

17.22 While not all consequences of tortious conduct result in an award of damages, generally people have a right to legal redress if they can prove, on the balance of probabilities, that they have been the victim of a tort. In some cases, the affected

---

30 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) bk III; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1899) vol II, ch VIII.

31 For example, the statutory liability for misleading or deceptive conduct in trade or commerce: see fair trading Acts and the *Australian Consumer Law* (Cth) s 18.

32 Eg, *Compensation to Relatives Act 1987* (NSW). See also equivalent acts in other states and territories that extend tort liability to fatal accidents.

33 Eg, *Civil Liability Act 2002* (NSW). See also how workers' compensation legislation limits common law claims and how state and territory *Uniform Defamation Acts* regulate defamation claims.

34 Carolyn Sappideen and Prue Vines, 'The Tort of Breach of Statutory Duty' , *Fleming's Law of Torts* (Thomson Reuters (Professional) Australia, 10th ed, 2011).

35 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 583; Sappideen and Vines, above n 12, 149–150; 215–222.

36 SFC Milsom, *Historical Foundations of the Common Law* (Lexis Nexis Butterworths, 2nd ed, 1981) 283; Pollock and Maitland, above n 30; JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 82–5. Despite their common law origins, most tort actions are subject to some statutory variation of the common law principles by state and territory legislation. Numerous statutes limit actions or defences, provide limitation periods, cap or exclude awards of damages, and provide for survival of actions. The *Uniform Defamation Acts 2005* in all states and territories modify the common law action of defamation.

37 Professor Creighton and Others, *Submission 24*. 'In a series of decisions between 1880 and 1901 the English courts identified a range of tort liabilities, which cumulatively had the effect of fixing any worker who engaged in industrial action, or any union official who organised such action, with responsibility for any losses that the action inflicted upon another party (most obviously, the employer)': Ibid.

38 A person's reputation is regarded as integral to his or her dignity, standing in the community and, in many cases, ability to earn income. According to William Blackstone, the 'security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right': Blackstone, above n 30, bks 1–2. See also, Pollock and Maitland, above n 30, 536–8; Sappideen and Vines, above n 12, ch 25. The recognised defences to defamation at common law and in statutes provide important but not complete protection of freedom of speech.

person may seek an injunction from the courts to prevent the tort happening or continuing.[39]

Protections from statutory encroachment

Australian Constitution

17.23 As noted above, s 75(iii) of the *Australian Constitution* may be taken to impliedly extinguish common law Crown immunity. It provides that in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, the High Court shall have original jurisdiction.

17.24 Further, Crown immunity is removed by s 64 of the *Judiciary Act*:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.[40]

17.25 However, s 64 of the *Judiciary Act* may be superseded or overridden by legislation providing for a specific immunity to a person or entity.

17.26 The *Constitution* does not create rights in tort nor does it expressly authorise any conduct that would otherwise constitute a tort. However, the implied constitutional freedom of political communication, recognised in a series of decisions of the High Court of Australia, has been held to preclude the unqualified application of the common law tort of defamation:

> The common law of libel and slander could not be developed inconsistently with the *Constitution*, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the *Constitution*.[41]

17.27 The implied constitutional freedom, recognised by the High Court as a restriction on the ability of people to sue for defamation, is not absolute. In *Lange v Australian Broadcasting Corporation*, the High Court formulated the constitutional defence as one of 'qualified privilege' to speak freely on government and political matters, drawing in concepts of reasonableness and subject to an absence of malice on the part of the speaker.[42]

Principle of legality

17.28 The principle of legality provides some protection for the principle that executive immunities should be only as wide as necessary to achieve the legislative

---

39 For example, to prevent a trespass or a nuisance: Sappideen and Vines, above n 12, 58; 522–3. The courts are however especially cautious of granting injunctions in defamation cases, because of the risk of undue restriction on freedom of speech: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

40 See also, *Judiciary Act 1903* (Cth) s 56; *Australian Constitution* s 78.

41 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566. The *Constitution* also impliedly restricts the curtailment of the protected freedom by the exercise of legislative or executive power: Ibid 560, 566.

42 Ibid, 574.

purpose, and should not unduly derogate from individual rights.[43] When interpreting a statute, courts will presume that Parliament did not intend to grant the executive a wide immunity from liability or authorise what would otherwise be a tort, unless this intention was made unambiguously clear.[44] In the absence of clear language, courts will narrowly construe any legislative provision to this effect.

17.29 The application of the principle of legality to particular rights and freedoms is discussed throughout this report. A few cases that apply the principle in interpreting immunity and authorisation provisions are noted below.

17.30 The High Court case *Board of Fire Commissioners v Ardouin*[45] concerned a claim in negligence—an infant riding his bike in the street was hit by a fire truck that was racing towards the scene of a fire. The Court considered a section of the *Fire Brigades Act 1909* (NSW) that gave immunity from liability to the Board of Fire Commissioners where damage was caused by a bona fide exercise of statutory authority under that Act. Kitto J expressed the principle of interpretation which arose:

> Section 46 operates to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow.[46]

17.31 In the same case, Dixon J pointed out that the immunity in that case was confined to aspects of the executive's operations that justified special protection from liability:

> It was not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority.[47]

17.32 Further High Court authority may be found in *Puntoriero v Water Administration Ministerial Corporation.*[48] Mr and Mrs Puntoriero had irrigated their potato crop using water supplied by a statutory corporation, and the water was contaminated. Could the corporation defend a claim of negligence by relying on a statutory provision that provided, in part, that 'an action does not lie against' the corporation 'with respect to loss or damage suffered as a consequence of the exercise of a function' of the corporation? The High Court held that it could not. Kirby J, although dissenting, commented:

> It has been stated in a series of decisions in this Court that immunity provisions, such as the one in question here, will be construed jealously or strictly so as to confine the

---

43 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

44 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105, 116; *Coco v The Queen* (1994) 179 CLR 427; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

45 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

46 Ibid.

47 Ibid 110.

48 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

> scope of the immunity conferred. [The reason for this] ... is to ascertain the true purpose of the provision upon an hypothesis, attributed by the courts to Parliament, that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language.[49]

17.33 Courts are similarly reluctant to hold that a statute authorises the commission of what would otherwise be a tort. In *Puntoriero*, McHugh J said:

> In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action. The reasons which require provisions of the latter kind to be read narrowly apply to provisions of the former kind. For that reason, provisions taking away a right of action for damages of the citizen are construed 'strictly', even jealously.[50]

17.34 In *Coco v The Queen*,[51] the High Court considered whether a statute that conferred authority on a judge to authorise a police officer to install a listening device extended to authorising the police officer to enter onto private premises to install the device. The Court held that the statute did not authorise this trespass. The majority said that statutory authority to 'engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language'.

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law.[52]

International law

17.35 While international covenants typically do not refer to prohibitions on excessively wide executive immunities as such, art 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.[53]

17.36 Article 17 may represent some limit on excessively wide executive immunities for arbitrary or otherwise unlawful interferences with a person's privacy, home, honour or reputation.

---

49 Ibid [59].
50 Ibid [34] (McHugh J).
51 *Coco v The Queen* (1994) 179 CLR 427.
52 Ibid [8] (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).
53 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

17.37 International covenants also typically do not refer to the right of an individual not to be subject to tortious conduct in such terms, although many of their articles set out fundamental freedoms and rights which might be infringed by a person committing a tort.

17.38 Torture, for example, would constitute the torts of assault or battery and breach art 7 of the ICCPR. Imprisoning a person without lawful authority would constitute the tort of false imprisonment and breach art 9. Defaming a person would constitute the tort of defamation and breach art 17. While there is no settled tort of invasion of privacy in Australian common law, the equitable action of breach of confidence protects correspondence from some interferences in breach of art 17.[54]

17.39 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[55] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[56]

Laws that give immunity from civil liability

17.40 A statute may restrict a person's right to sue in tort in several ways, for example, by: authorising certain conduct that *would* otherwise be a tort; providing a defence of statutory authority to conduct or activities that *may*, particularly if reasonable care is not taken, constitute a tort;[57] and giving a person an exemption or immunity from civil liability in tort.

17.41 Many examples of such laws are discussed in other chapters of this report, in the context of the individual right the law interferes with. For example, laws that authorise or provide an immunity from:

- the tort of defamation are discussed in the freedom of speech chapter;[58]
- the torts of trespass to person and false imprisonment are discussed in the freedom of movement chapter;[59] and
- the tort of trespass to property are discussed in the chapters about property rights.[60]

17.42 Some of these laws are also noted briefly below, although most are examples of more general statutory immunities from civil liability.

---

54 See, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) Ch 13.

55 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

56 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

57 For example, a nuisance. See, eg, *Allen v Gulf Oil Refinery Ltd* [1980] AC 1001; *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660, [16]; *Benning v Wong* (1969) 122 CLR 249, 324–337 (Owen J); Barker et al, above n 35, [4.1.6.3]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 [121]–[123].

58 Ch 3.

59 Ch 6.

60 Chs 7 and 8.

Authorising torts—police, customs and tax office powers

17.43 There are many examples in Commonwealth law of a statute giving authority to a Commonwealth officer or agency to do what would otherwise be a tort. For example, statutes give authority to federal police officers and customs officers to arrest or detain a person, to search a person, to enter and search property, or to seize or retain seized property. As long as the officer acts within the lawful authority given by the statute or common law, such conduct will not constitute a tort. Without such lawful authority, these types of conduct would amount to trespass to the person, trespass to land, or trespass or conversion of goods.

17.44 For example, powers of arrest without warrant are found in the *Australian Federal Police Act 1979* (Cth) s 14A and the *Crimes Act 1914* (Cth) ss 3W, 3WA, 3X, 3Y and 3Z. Powers of arrest without a warrant are also provided at common law, and provided a justification in an action in tort.[61]

17.45 The *Customs Act 1901* (Cth) s 210(1) authorises an officer of customs or the police to arrest a person, in some circumstances, without a warrant, if the officer believes on reasonable grounds that the person has committed certain offences. This provision authorises what would otherwise be a tort.

17.46 Statutes may also authorise an arresting officer to search a person to find hidden weapons or prevent the loss of evidence[62] and to use some limited level of force when arresting a person.[63] Without such authority—whether at common law or in statute—such physical interference might amount to the tort of trespass to the person.

17.47 The Australian Taxation Office has statutory access and information gathering powers. For example, the access power in the *Taxation Administration Act 1953* (Cth) provides that a tax official, for the purposes of a taxation law, 'may at all reasonable times enter and remain on any land, premises or place' and 'is entitled to full and free access at all reasonable times to any documents, goods or other property'.[64] This authorises what would otherwise be the tort of trespass to property.[65]

Other public authorities

17.48 Section 246 of the *Australian Securities and Investments Commission Act 2001* (Cth) is typical of the immunity from civil suit (eg, for the torts of negligence or breach of statutory duty) that is given to various public authorities. It provides that the Minister, ASIC, a member of ASIC, and a number of other persons listed in the provision, are not

> liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in performance or purported performance of any function, or in

---

61 See, eg, *Holgate-Mohammed v Duke* (1984) AC 437.

62 Eg, *Australian Federal Police Act 1979* (Cth) s 14D.

63 Eg, Ibid s 14B.

64 *Taxation Administration Act 1953* (Cth) sch 1, s 353–15.

65 This provision 'makes lawful that which otherwise would be unlawful, eg entry upon premises, the examination of a document': *Federal Commissioner of Taxation v Smorgon* (1979) 143 CLR 499, 535 [14] (Mason J).

> exercise or purported exercise of any power, conferred or expressed to be conferred by or under the corporations legislation, or a prescribed law of the Commonwealth, a State or a Territory.[66]

17.49 Similar provisions may be found in the following Commonwealth Acts, among others:

- *Age Discrimination Act 2004* (Cth) s 58;
- *Australian Information Commissioner Act 2010* (Cth) s 35;
- *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 78;
- *Australian Sports Commission Act 1989* (Cth) s 57;
- *Imported Food Control Act 1992* (Cth) s 38;
- *Inspector-General of Intelligence and Security Act 1986* (Cth) s 33;
- *National Health Act 1953* (Cth) s 99ZR;
- *Navigation Act 2012* (Cth) s 324;
- *Ombudsman Act 1976* (Cth) s 33; and
- *Product Stewardship (Oil) Act 2000* (Cth) s 31.

17.50 Many of these provisions contain an explicit 'good faith' proviso, but others do not. For example, s 34(1) of the *Australian Postal Corporation Act 1989* (Cth) provides:

> An action or proceeding does not lie against Australia Post or any other person in relation to any loss or damage suffered, or that may be suffered, by a person because of any act or omission (whether negligent or otherwise) by or on behalf of Australia Post in relation to the carriage of a letter or other article by means of the letter service.

17.51 In *Little v Commonwealth*,[67] the High Court considered an immunity provision that was silent on the notion of 'good faith'. Dixon J held that the provision removed liability from the arresting police for all actions except those not done in good faith. His Honour's reasoning perhaps implies that public officers may be assumed to act in good faith and should have protection for such actions, but they should not be protected if they have acted in bad faith.[68]

17.52 The above provision from the *Australian Postal Corporation Act* also highlights that executive immunities are sometimes extended to government business enterprises, such as Australia Post.[69]

---

66 *Australian Securities and Investments Commission Act 2001* (Cth) s 246(1).

67 *Little v Commonwealth* (1947) 75 CLR 94.

68 More recently, the High Court has suggested that remedies would always be available where officials acted in bad faith or according to other corrupt motives: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

69 Other government business enterprises include: Defence Housing Australia; ASC Pty Limited (formally known as Australian Submarine Corporation); Australian Rail Track Corporation Limited, Moorebank Intermodal Company Limited; and NBN Co Limited: *Public Governance, Performance and Accountability Rule 2014* r 5.

17.53 Some statutes expressly give an immunity not only from civil proceedings, but from criminal proceedings, although there is a strong common law presumption that the executive is not criminally liable.[70] For example, the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides:

> Criminal or civil proceedings do not lie against [certain prescribed people] in relation to anything done, or omitted to be done, in good faith by the person in connection with the performance or purported performance of functions or duties, or the exercise or purported exercise of powers, conferred by this Act.[71]

17.54 Other provisions giving an immunity from both civil and criminal proceedings include:

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 75P, 235;
- *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K;
- *Broadcasting Services Act 1992* (Cth) s 203; and
- *Trade Marks Act 1995* (Cth) s 226B.

17.55 Some statutes set out limitations on the immunity more fully. For example, the immunity for those participating in a special intelligence operation, in s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth), does not extend to conduct that causes death or serious injury, constitutes torture, or causes significant loss of, or serious damage to, property. Nevertheless, the Law Council submitted that the immunities in the ASIO Act for special intelligence operations 'may not contain adequate safeguards' and compared the provision to those related to the Australian Federal Police's controlled operations scheme in the *Crimes Act*.[72]

17.56 Other immunity provisions apply not just to a particular government agency, but to the executive government more broadly. For example, s 2A(3) of the *Competition and Consumer Act 2010* (Cth) provides:

> Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

17.57 Sections 494AA and 494AB of the *Migration Act* (Cth) also bar certain legal proceedings against the Commonwealth, including 'proceedings relating to an unauthorised entry by an unauthorised maritime arrival' and proceedings related to the exercise of powers to bring a 'transitory person' to Australia from a country or place outside Australia. The latter type of power is said to include restraining a person on a vessel and using such force as is necessary,[73] the exercise of which, without authority, may amount to a tort.

---

70 *Cain v Doyle* (1946) 72 CLR 409.
71 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 86.
72 *Crimes Act 1914* (Cth) pt 1AB. See Law Council of Australia, *Submission 75*.
73 *Migration Act 1958* (Cth) s 198B.

17.58 While it is by no means certain or likely that a public authority would be held liable in tort for negligence in the performance of its powers, due to the difficulty of establishing either a duty of care in negligence arising out of the creation of a statutory power,[74] or a civil right of action for breach of statutory duty, there are cases where a public authority has been held liable for negligent misstatement[75] or negligent conduct in operational matters.[76]

Giving evidence and making complaints

17.59 Some statutes provide an immunity to people who make complaints or give evidence to certain government agencies, particularly regulators. For example, s 37 of the *Ombudsman Act 1976* (Cth) provides that civil proceedings 'do not lie against a person in respect of loss, damage or injury of any kind suffered by another person' because they made a complaint or a statement or gave a document or information to the Ombudsman or a member of the Ombudsman's staff, for the purposes of the Act.[77]

17.60 Examples of similar provisions include:

- *Enhancing Online Safety for Children Act 2015* (Cth) s 89;
- *Freedom of Information Act 1982* (Cth) ss 55Z, 84;
- *Interactive Gambling Act 2001* (Cth) s 23; and
- *Telecommunications Act 1989* (Cth) s 156.

Public interest disclosures

17.61 The *Public Interest Disclosure Act 2013* (Cth) features a more detailed immunity scheme for public officials who make a 'public interest disclosure' in relation to certain types of conduct, such as illegal conduct, or conduct that perverts the course of justice, or constitutes maladministration, or is an abuse of public trust.[78]

Consular and diplomatic immunities

17.62 It is less common for a statute to provide immunity to a non-government person or entity. An example is the immunity given to members of a foreign consular or diplomatic service by the *Consular Privileges and Immunities Act 1972* (Cth) and the *Diplomatic Privileges and Immunities Act 1967* (Cth).[79]

---

74 See, eg, *Graham Barclays Oysters v Ryan* (2002) 211 CLR 540; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

75 *Shaddock & Associates v Parramatta City Council (No 1)* (1981) 150 CLR 225.

76 *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

77 The Commonwealth Ombudsman plays an important role in dealing with complaints about the misuse of government power—a role that may be all the more important where limits are placed on the availability of remedies in the courts.

78 For the immunity provisions, see in particular *Public Interest Disclosure Act 2013* (Cth) pt 2 div 1.

79 Giving legislative operation to the *Vienna Convention on Diplomatic Relations 1961* and the *Vienna Convention on Diplomatic Relations 1963*.

Industrial action

17.63 Statutes protect industrial action that might otherwise amount to a tort. The limited immunity provided to 'protected industrial action' is unusual in that it applies to individuals or non-government groups such as employee or employer associations.

17.64 So far as the common law is concerned, Professors Breen Creighton and Andrew Stewart write, 'virtually all industrial action would be unlawful as a tort, a breach of contract and, frequently, a crime'.[80] Relevant torts might include trespass, private nuisance, conspiracy and intentional interference with a contract.

17.65 Creighton and Stewart note that, unlike the United Kingdom, Australia has 'little history of legislative protection against common law liability for industrial action'.[81] However, there is now some protection. The immunity provision for protected industrial action—subject to prescribed limitations—is in the *Fair Work Act 2009* (Cth) s 415. It is not a 'blanket' immunity and it applies to those taking or organising industrial action in relation to a new single-enterprise agreement.[82] Section 415 provides:

> (1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:
>
> (a) personal injury; or
>
> (b) wilful or reckless destruction of, or damage to, property; or
>
> (c) the unlawful taking, keeping or use of property.
>
> (2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

17.66 The immunity in Australia originally had the object of encouraging parties to bring their disputes within the new industrial relations and dispute resolution framework of 1993. This new framework represented a 'shift away from conciliation and arbitration in favour of formalised enterprise bargaining',[83] an essential element of which is said to be 'the capacity of the participants in the process to elect to take industrial action in order to exert pressure upon the other parties'.[84] This in turn calls for legislative protection against common law liability.[85] The overall object of the scheme is that disputes proceed in an orderly, safe and fair way, without duress; that

---

80 Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 2010) [22.08].

81 Ibid [23.01]. Rather, 'both State and federal parliaments have adopted a quite extraordinary range of legislative provisions against industrial action, the operation of which is additional to that of the common law. The end result is that for all practical purposes it was impossible, at least before 1993, for any group of Australian workers lawfully to take industrial action to protect or promote their occupational interests': Ibid [22.08].

82 Professor Creighton and Others, *Submission 24*.

83 Ibid.

84 Ibid.

85 Ibid. See also Australian Council of Trade Unions, *Submission 44*.

parties are properly and efficiently represented; and that undue risks to those caught up in the dispute are minimised.[86]

17.67 The appropriate scope of the immunity is the subject of considerable debate. The statutory limitations on this immunity affect other rights, particularly freedom of association.[87]

Justifications for encroachments

17.68 The executive performs unique functions, and may need special powers and privileges to discharge those functions, particularly when pursuing a broader public good. Exposure to some types of liability might make a government agency's task very difficult, or prohibitively costly, to perform.[88] It is therefore generally accepted that executive immunities from civil liability will at least sometimes be justified.

17.69 Perfect equality before the law between government and citizen is not possible, Gleeson CJ suggested in *Graham Barclay Oysters Pty Ltd v Ryan.* The formula that, in proceedings against the government, rights should be *as nearly as possible* the same as in an ordinary case between subject and subject

> reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.[89]

17.70 However, as Professor Mark Aronson has written, discussing government liability in negligence, the 'trouble is that while most people have a sense that governments occasionally warrant different treatment, the commentators have difficulty agreeing on a set of principles to determine when that is the case'.[90] Moreover, at least in regard to negligence, the common law may provide only limited assistance if, as Aronson states, the 'common law on the liability of government authorities in negligence is remarkably confused'.[91]

---

86 See, for example, *Industrial Relations Reform Act 1993* (Cth) s 4.

87 See Ch 5.

88 An example is the immunity given under the *Archives Act 1983* (Cth) s 57 to the Commonwealth against liability for defamation where access is given to records required to be made available for public purposes.

89 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [12]. Although Gleeson CJ was here discussing a NSW provision, the words are similar to those in the *Judiciary Act 1903* (Cth) s 64, quoted above.

90 Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 2009, 46.

91 Ibid. This problem is not limited to Australia. See, eg, Bruce Feldhusen, 'Public Immunity from Negligence: Uncertain, Unnecessary and Unjustified' (2013) 92 *Canadian Bar Review* 211. The UK Supreme Court recently considered the liability of police officers in negligence in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

17.71 Nevertheless, where immunities from civil liabilities affect people's rights—including their liberty, property and freedom of speech—such immunities are presumably only justified when strictly necessary. This may often be assessed by applying a structured proportionality analysis, of the sort widely used in international law, countries with bills of rights and human rights Acts, and by the Australian Parliamentary Joint Committee on Human Rights.[92]

17.72 The executive performs unique functions, but it also carries unique responsibilities. Governments may seek to enact laws that authorise their own agencies and officials to act in a way that would normally create legal liability, and to exclude or limit that liability. This may also suggest the need for some caution in giving executive immunities.

17.73 It may be less difficult to justify immunities given to people who make complaints or provide evidence to government regulators, and immunities given to public officials who disclose illegal, corrupt or other such conduct.

17.74 The justification of immunities for protected industrial action should be considered in the broader context of industrial relations law and in light of other important rights, including freedom of association.

Conclusions

17.75 Some laws that provide for executive immunities from civil liability or that authorise what would otherwise be a tort are no doubt justified. For example, the police need some powers of arrest and detention to enforce the law. This is also recognised in the common law.

17.76 Statutes give powers not only to the federal police, but to other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. These include powers to arrest or detain persons, to seize or retain property, and to carry out intrusive investigations—conduct that might otherwise amount to a tort. These powers are commonly justified on the grounds that they are necessary to prevent crime and terrorism and to otherwise protect national security. They may also be necessary to properly enforce laws, including customs, quarantine and immigration laws.

17.77 However, many executive immunities from civil liability warrant particular and thorough justification. They limit people's legal rights and have the potential to undermine the rule of law. Greater intrusions into people's rights warrant stronger justification. Where a statute provides an immunity to a claim in negligence, the statute may amount to a 'permission to be careless'.[93] Concerning government liability in negligence, Professor Aronson concludes:

---

92 Proportionality is discussed in Ch 1. Parliamentary committee scrutiny is discussed in Ch 2.

93 Aronson writes that it is 'difficult to understand what possessed the Parliaments to grant government entities generic permissions to be careless, or careless to a degree not permissible to their private sector analogues': Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 2009, 82.

> it is never a good reason to deny a duty of care simply because the defendant is the government, or because it is a statutory authority, or because it has statutory powers or statutory duties. Each of those reasons is both far too general and far too narrow. They are too general because not all government entities are the same, and nor are their functions. They are too narrow because they imply that the private sector has no analogues equally deserving of special consideration. The search for categorical exemptions from government liability has proved elusive.[94]

17.78 The same caution may be applied to government immunities more broadly, for example with respect to other torts.

17.79 Other chapters of this report discuss some of the statutory provisions giving authority to Commonwealth agencies or officers to arrest or detain a person, to seize or detain property, or to enter property.

17.80 Where government immunities from civil liability are necessary, consideration should nevertheless be given to their appropriate scope—to the limitations and conditions attaching to the immunities. For example, where unclear, an immunity provision might make clear that it does not protect a government agency from oversight by the Ombudsman, if this is intended.

17.81 Many of the issues discussed in this chapter were reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. That report included a number of recommendations, including for legislation abolishing the Commonwealth's procedural immunities from being sued[95] and for amendments to the *Judiciary Act* to state expressly that the Commonwealth is subject to the same substantive obligations at common law and in equity as apply to persons of full age and capacity, except as specifically provided by a Commonwealth Act.[96]

17.82 The 2001 report also called for further reviews, including a review of:

- the law relating to claims for compensation for loss arising from wrongful federal administrative action;[97] and
- the circumstances in which a statutory exception (to the principle that the Commonwealth should be subject to the same substantive obligations at common law and in equity as others) is considered necessary or desirable.[98]

---

94 Ibid 81.

95 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) Rec 23–1.

96 Ibid Rec 25–3.

97 Ibid Rec 25–2.

98 Ibid Rec 25–3.

18. Judicial Review

Contents

A common law principle

18.1 Judicial review is about setting the boundaries of government power.[1] It is about ensuring government officials obey the law and act within their prescribed powers.[2] Access to the courts for the purpose of judicial review is an important common law right. Sir William Wade stated that 'to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power'.[3]

18.2 In his *Introduction to Australian Public Law*, David Clark gives a brief history of judicial review of administrative action:

> Judicial review in the administrative law sense originated in the 17th century when various prerogative writs, so called because they issued in the name of the Crown, began to be issued against administrative bodies. These writs, such as certiorari, prohibition and mandamus originated in the 13th century, but were originally confined to review of the decisions of inferior courts... By the late 17th century the

1 'The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised and upon that the whole system was constructed': *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

2 'The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

3 Sir William Wade, *Constitutional Fundamentals*, Hamlyn Lectures, 32nd Series, 1980 <http://socialsciences.exeter.ac.uk/law/hamlyn/lectures/>.

> writs began to be used against administrative agencies such as the Commissioners of Sewers, and the Commissioners for Bridges and Highways. With the dramatic expansion of State functions in the 19th century and the emergence of innumerable statutory bodies, committees, commissions, and other administrative agencies, the way was open for the expansion of judicial review in this sense.
>
> The power to judicially review what were once called inferior jurisdictions (lower courts and administrative agencies) arrived in Australia with the opening of the first Supreme Courts in Van Diemen's Land and New South Wales in 1824... The power to review by certiorari, prohibition and mandamus was, in origin, a common law power and was, therefore, a power of jurisdiction created by the courts through their judicial decisions.[4]

18.3 In *Church of Scientology v Woodward*, Brennan J said:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[5]

18.4 In Australia, an 'entrenched minimum provision of judicial review'[6] by the High Court is conferred under s 75 of the *Constitution* (discussed below) and s 39B of the *Judiciary Act 1903* (Cth), which extends the constitutional jurisdiction to the Federal Court. The framework for judicial review also spans a number of legislative schemes. The primary statutory source of judicial review is the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), which contains broader grounds for review, and is more accessible than constitutional review. Additionally, some judicial review schemes are contained in specific statutes, and regulate review of decisions made under those statutes—for example, in the areas of migration and taxation.

18.5 However, as noted further below, statutes sometimes provide that certain administrative or judicial decisions may not be reviewed by courts. A privative clause—also known as an ouster clause—is a statutory provision that attempts to restrict access to the courts for judicial review of administrative decisions. They are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[7] Additionally, judicial review of some decisions may be excluded from the operation of statutory schemes such as the *ADJR Act*.

18.6 This chapter discusses how access to the courts is protected from statutory encroachment; laws which restrict access to the courts; and when laws that restrict access to the courts may be justified. It is about judicial review, rather than merits review.[8]

---

4 David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) 247.

5 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

7 Simon Young, 'Privative Clauses: Politics, Legality and the Constitutional Dimension' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014), 277.

8 Merits review is concerned with a person or body—other than the primary decision maker—considering the facts, law and policy underlying the original decision, and substituting a fresh decision where the new

Protections from statutory encroachment

Principle of legality

18.7 The principle of legality provides protection to judicial review.[9] When interpreting a statute, courts will presume that Parliament did not intend to restrict access to the courts, unless this intention was made unambiguously clear.[10] For example, in *Magrath v Goldsborough Mort & Co Ltd*, Dixon J said:

> The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably.[11]

18.8 In *Public Service Association (SA) v Federated Clerks' Union*, Dawson and Gaudron JJ said:

> Privative clauses... are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.[12]

18.9 Dawson and Gaudron JJ went on to say:

> Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction.[13]

18.10 *Hockey v Yelland* also concerned a privative clause—specifically, a Queensland statute that provided that determinations by a medical board 'shall be final and conclusive' and the claimant 'shall have no right to have any of those matters heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever'.[14] Gibbs CJ said that this provision did not 'oust the jurisdiction of the Supreme Court to issue writs of certiorari':

> It is a well recognized principle that the subject's right of recourse to the courts is not to be taken away except by clear words... The provision that the board's determination shall be final and conclusive is not enough to exclude certiorari... The words of the further provision... are in my opinion quite inapt to take away from the Court its power to issue certiorari for error of law on the face of the record.[15]

---

decision is correct or preferable. By contrast, judicial review is concerned with the lawfulness of a decision, whether by reference to whether the decision maker had the power to make the decision, a legal error has occurred in making the decision, or where necessary, whether the rules of procedural fairness were complied with.

9 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

10 *Momcilovic v The Queen* (2011) 245 CLR 1, [43]–[44] (French CJ).

11 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

12 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ). Quoted with approval in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30]–[32] (Gleeson CJ).

13 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, [18] (Dawson and Gaudron JJ).

14 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

15 Ibid.

Australian Constitution

18.11 Where a statute purports to make it 'unambiguously clear' that Parliament intends to restrict access to the courts, the *Constitution* provides further protection. It provides for an 'entrenched minimum provision of judicial review',[16] which cannot be removed by statute. Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.[17] Gleeson CJ said that this provision 'secures a basic element of the rule of law':

> The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.[18]

18.12 In light of this constitutional jurisdiction, courts may construe privative clauses much more narrowly than the text of the provision suggests. So much more narrowly in fact, that such clauses may sometimes be largely or even entirely deprived of effect.[19] The courts have justified such interpretive approaches by reference to the assumption that legislation should, as far as reasonably possible, be interpreted in a way that favours constitutional validity.[20]

Laws that restrict access to the courts

18.13 Restrictions on access to the courts arise in many forms. A common method of restricting access to the courts is to exclude a decision from review under the *ADJR Act*,[21] or restrict judicial review according to procedures under a particular legislative framework.[22] The most controversial method of restricting access to the courts is the

---

16 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].

17 *Australian Constitution* s 75(v).

18 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [5] (Gleeson CJ).

19 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Section 474 of the *Migration Act 1958* (Cth) purports to exclude challenging, appealing, reviewing, quashing or any calling into question a 'privative clause decision'. It also purports to exclude prohibition, mandamus, injunction, declaration or certiorari as a remedy in any court. In *Plaintiff S157/2002* the High Court unanimously rejected the literal interpretation, and held that the writs of mandamus and prohibition were available for decisions involving jurisdictional error.

20 The long history of authority to this effect was noted in Ibid [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). While this approach may lead the courts to interpret privative clauses in a manner that gives them very limited scope, alternative approaches may be more likely to require courts to find that a privative clause was invalid on constitutional grounds. Once this possibility is recognised, the value of interpretive approaches that enable some effect to be given to privative clauses can be understood.

21 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1.

22 See, eg, *Migration Act 1958* (Cth) pt 8; *Taxation Administration Act 1953* (Cth) pt IVC.

inclusion of a privative or ouster clause which purports to significantly restrict or exclude judicial review.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

18.14 The Law Council of Australia submitted that decisions excluded from review under sch 1 of the *ADJR Act* should be examined, and the justification for their exclusion critically considered.[23] The Institute of Public Affairs noted that a large number of acts are excluded from review under the *ADJR Act*.[24]

18.15 It can be argued that the removal of statutory avenues of review is not a restriction in the true sense, because it simply removes an avenue of review that exists only because the federal Parliament created it. However, the *ADJR Act* was part of a broader scheme to increase the rights of citizens to obtain information, lodge complaints and commence legal proceedings against government decisions.[25] The *ADJR Act* served the valuable function of providing a simpler alternative to the technical form of judicial review entrenched in the *Constitution.* While removing *ADJR Act* review may not exclude judicial review, it excludes a simpler and more accessible form of review.

18.16 Such restrictions on access to the courts arise in Commonwealth laws relating to a wide range of areas, including commercial and corporate regulation, workplace relations regulation, migration law, and counter-terrorism and national security legislation. Some examples are considered below.[26] The discussion is organised by subject matter. In 2012 the Administrative Review Council (ARC) 2012 into federal judicial review. The discussion in this chapter is informed by the ARC's report.

Foreign ownership

18.17 Decisions under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (*FATA*) and div 1 of pt 7.4 of the *Corporations Act 2001* (Cth) (*Corporations Act*) relating to foreign ownership are excluded from review under the *ADJR Act*.[27]

18.18 Excluding decisions under *FATA* from judicial review under the *ADJR Act* was sought to be justified on the basis that determining whether an acquisition is in the national interest is exclusively the domain of government policy.[28] An additional

---

23 Law Council of Australia, *Submission 75*.

24 Institute of Public Affairs, *Submission 49*.

25 Other elements of the wider scheme of which the *ADJR Act* was one part include: *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Freedom of Information Act 1982* (Cth).

26 A number of decisions excluded from review under the *ADJR Act* are justified on the basis that adequate alternative review mechanisms are available, either under a separate statutory scheme, or under s 39B of the *Judiciary Act 1903* (Cth). The examples discussed in this chapter are focused on whether other policy rationales for excluding judicial review under the *ADJR Act* are justified.

27 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (h).

28 Administrative Review Council, 'Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act' (Report No 32, 1989), [281].

justification provided was that proceedings for judicial review might result in public disclosure of classified and commercially confidential material.[29]

18.19 The ARC concluded that, while the national interest is not sufficient grounds to justify restricting access to the courts, the potential disclosure of classified and commercially confidential information justifies such a restriction, on the basis that:

> The most compelling reason for an exemption, in the Council's view, is the potential broad impacts on the national economy if applicants become less willing to share information due to a perceived likelihood of information being disclosed in ADJR Act proceedings.[30]

18.20 By contrast, the ARC recommended that decisions relating to limits on share ownership under div 1 of pt 7.4 of the *Corporations Act* be subject to review under the *ADJR Act*. It stated that excluding review on the basis that these decisions consider the national interest cannot be supported, as a number of other categories of decisions which take into account the national interest are currently subject to review under the *ADJR Act*.[31]

18.21 Similarly, the ARC recommended that review should be available under the *ADJR Act* for decisions giving effect to the government's foreign investment policy under the *Banking (Foreign Exchange) Regulations 1959* (Cth). Some examples of such decisions relate to foreign currency exchanges, transfer of money outside Australia and proceeds of exports. The ARC concluded that restricting access to courts in relation to these decisions was not justified because a review under the *ADJR Act* would consider the legality of the decision, rather than the underlying policy.[32]

Financial regulation

18.22 The Securities Exchange Guarantee Corporation (SEGC) is a company limited by guarantee, whose sole member is ASX Limited. It is the trustee of the National Guarantee Fund (NGF). Part 7.5 of the *Corporations Act* authorises the SEGC to make decisions about the NGF, including in relation to the imposition of levies on market operators and participants, and making operating rules about the NGF.[33]

18.23 These decisions cannot be reviewed under the *ADJR Act*.[34] Claimants dissatisfied by decisions of the SEGC may seek a review under s 888H of the *Corporations Act*. The review mechanism under this provision is broader than that

---

29 Administrative Review Council, 'Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act', above n 28, [278].

30 Administrative Review Council, 'Federal Judicial Review in Australia' (Report 50, September 2012) [B.60]. This contrasts with the ARC's position during its 1989 review of the ambit of judicial review, when the Council concluded that questions around the disclosure of confidential and classified material could be addressed by public interest immunity, and that the exclusion of decisions under *FATA* should be removed: Administrative Review Council, 'Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act', above n 28, [274].

31 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [B.62].

32 Ibid [B.76].

33 Ibid [B.64].

34 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (hb).

available under the *ADJR Act*, allowing the court to consider the merits of the decision.[35]

18.24 The Treasurer advanced a number of justifications for restricting judicial review, including the commercial nature of the decisions, the availability of ministerial disallowance and scrutiny and the existence of review mechanisms under the *Corporations Act*.

18.25 The ARC stated that the commercial nature of a decision is not a rationale for restricting access to the courts, and ministerial disallowance and scrutiny are not a substitute for judicial review.[36] However, it concluded that s 888H of the *Corporations Act* provides for an efficient and effective review mechanism, and thus, the exclusion in sch 1 does not unjustifiably restrict access to the courts.[37]

Workplace relations

18.26 Decisions under key pieces of workplace relations legislation[38] are exempt from review under the *ADJR Act*.[39] These exemptions have been in place, in various guises, since the *ADJR Act* came into force.

18.27 The ARC, in its 2012 review, concluded that excluding decisions by Fair Work Australia from judicial review under the *ADJR Act* is justified on the basis that these decisions affect the national economy, and are effectively legislative in character. They determine future rights and conduct, and are of general application.[40] The *ADJR Act*, it must be recalled, applies to 'administrative' decisions. While the courts have not devised a single or simple definition of that term, it has long been accepted that administrative decisions typically—though not always—affect one person to a much greater degree than other people. By contrast, legislative decisions or actions normally have general or very wide application. The restriction of review under the *ADJR Act* to administrative decisions reflects the focus of that Act on improving the rights of individuals to question decisions which affect them. The exclusion of decisions by Fair Work Australia from the *ADJR Act* reflects this longstanding focus of the *ADJR Act*.

18.28 By contrast, the ARC recommended that decisions of the Fair Work Ombudsman and the Fair Work Building Industry Inspectorate should be subject to review under the *ADJR Act*. The powers of both bodies are similar to the powers of many regulatory bodies whose decisions are subject to review under the *ADJR Act*. The ARC did not accept that the exclusion was justified on the basis that review under the *ADJR Act* would fragment enforcement proceedings. It noted that no other enforcement agencies are exempt from review on this basis, and further, the functions and powers of both bodies are regulatory and administrative in nature.[41] This conclusion may be

---

35 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [B.65].
36 Ibid [B.67].
37 Ibid [B.68].
38 In particular, *Fair Work Act 2009* (Cth); *Fair Work (Registered Organisations) Act 2009* (Cth); *Fair Work (Building Industry) Act 2012* (Cth).
39 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (a).
40 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [B.11].
41 Ibid [B.12]–[B.21].

justified by the fact that such decisions are typically ones that affect individuals. It follows that making such decisions amenable to review under the *ADJR Act* aligns with its purpose, which is to increase the ability of citizens to challenge decisions which affect them.

Counter-terrorism and national security legislation

18.29 Several stakeholders raised concerns about restrictions on access to the courts in counter-terrorism and national security legislation. Australian Lawyers for Human Rights submitted that restrictions on judicial review arising from the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) are not justified.[42] The Law Council of Australia submitted that judicial review under the *ADJR Act* of the validity of a preventative detention order should not be excluded.[43]

18.30 Decisions under the following legislation are excluded from review under the *ADJR Act*:

- *Intelligence Services Act 2001* (Cth);
- *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*);
- *Inspector-General of Intelligence and Security Act 1986* (Cth) (*IGIS Act*);
- *Telecommunications (Interception and Access) Act 1979* (Cth);
- *Telecommunications Act 1997* (Cth)—ss 58A, 581(3), and cl 57A and 72A of sch 3A;
- *Criminal Code*[44]—s 104.2 and div 105;
- *Australian Passports Act 2005* (Cth)—ss 22A and 24A; and
- *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth)—ss 15 and 16A.[45]

18.31 The ARC recommended that a number of security exemptions under the *ADJR Act* should be reviewed or removed. In particular, it recommended reviewing the blanket exemption for all ASIO decisions, and removing exemptions under the *IGIS Act*, and div 105 of the *Criminal Code*.[46] These, and other restrictions on access to the courts arising in counter-terrorism and national security legislation are discussed below.

Criminal Code

18.32 In making its recommendation that div 105 of the *Criminal Code* should be subject to review under the *ADJR Act*, the ARC noted that, unlike interim control orders (which it recommended should not be excluded from review under the *ADJR*

---

42 Australian Lawyers for Human Rights, *Submission 43*.
43 Law Council of Australia, *Submission 75*.
44 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*).
45 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 paras (d)–(dac), (db)–(dd).
46 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, Appendix B.

Act), there is no court involvement in the making of a preventative detention order. Further, 'as a general principle, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review'.[47]

18.33 Additionally, the Council of Australian Governments (COAG) and the Independent National Security Legislation Monitor (INSLM) both recommended that div 105 of the *Criminal Code* be repealed.[48]

18.34 COAG adopted the ARC's recommendation that s 104.2 of the *Criminal Code* be excluded from review under the *ADJR Act*.[49] It noted that the final decision to impose an interim control order is made by a court, relying on a chain of decisions which require each decision maker to consider the decisions of previous decision makers.[50] The INSLM, on the other hand, recommended that div 104 as a whole be repealed, stating that interim control orders are not necessary.[51]

ASIO decisions

18.35 Generally, the ARC considered that the need to protect sensitive security information was an appropriate justification for excluding review under the *ADJR Act*.[52] However, it stated that while the need to protect sensitive security information justifies exempting *some* decisions under the *ASIO Act*, the current exemption should be reviewed, as it excludes *all* decisions under the *ASIO Act*.[53]

Foreign fighters

18.36 Amendments to sch 1 of the *ADJR Act* under the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) exclude from review under the *ADJR Act*, decisions to suspend or require the surrender of a passport for 14 days where the Director-General of Security suspects, on reasonable grounds, that a person 'may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country'.[54] The Explanatory Memorandum noted that the exclusion is necessary 'as judicial review under the [ADJR] Act may compromise the operations of

---

47 Ibid [B.47].

48 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) rec III/4; 'Review of Counter-Terrorism Legislation' (Council of Australian Governments, 2013), [276].

49 Section 104.2 provides that the Australian Federal Policy must not request an interim control order without the Attorney-General's written consent. It also outlines the circumstances in which the Australian Federal Police may seek the Attorney-General's written consent.

50 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [B.41]; 'Review of Counter-Terrorism Legislation', above n 48, [279].

51 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 43.

52 See, eg, Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [B.38], [B.25].

53 Ibid rec B6, [B.28].

54 *Australian Passports Act 2005* (Cth) s 22A(2); *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) s 15A(1).

security agencies and defeat the national security purpose of the new mechanisms'.[55] Suspension is limited to a 14 day period, and further, the exclusion from review implements recommendations made by the INSLM.[56]

18.37 The Inspector-General of Intelligence and Security submitted to the Intelligence Committee's review of this Bill that

> limited access to review rights is not unreasonable where the suspension is for 14 days and there is opportunity for merits review of any subsequent cancellation decision.[57]

18.38 The Parliamentary Joint Committee on Human Rights (Human Rights Committee), in concluding initially that the statement of compatibility did not demonstrate that the cancellation powers were proportionate, noted that the exclusion from review under the *ADJR Act* 'could potentially compound the limitation on the right to freedom of movement'.[58]

18.39 This may be an issue on which reasonable minds differ. While some level of oversight and review may be desirable for all decisions, most would accept that limits can be justified in some cases. A notable aspect of the 14 day period under this legislation is that it is of limited duration and it is coupled with a right of merits review. The availability of merits review provides a reason for courts to refuse relief in judicial review on discretionary grounds.[59]

Migration law

18.40 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (*Resolving the Asylum Legacy Caseload Act*) introduced pt 8A into the *Maritime Powers Act 2013* (Cth (*Maritime Powers Act*), which among other things, empowers the Minister to

- give a direction requiring that an officer exercise a power in a specified manner, or in specific circumstances or classes of circumstances;[60]
- make a determination that a vessel or class of vessels may be used to place, restrain, remove or detain a person to take them to the destination;[61] and

---

55 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

56 Ibid.

57 Inspector-General of Intelligence and Security, Submission No 1 to Parliamentary Joint Committee on Intelligence and Security *Inquiry into Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (1 October 2014).

58 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.245]. While the Human Rights Committee finally determined that the suspension powers were proportionate, it did not address the issue of review rights in coming to this conclusion: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Nineteenth Report of the 44th Parliament*' (March 2015), [1.347]–[1.348].

59 The ground is that another, simpler right of review is available.

60 *Maritime Powers Act 2013* (Cth) s 75F.

61 Ibid s 75H.

- make a determination authorising the exercise of powers in relation to a foreign vessel outside territorial waters, relating to detaining, or taking a vessel to a destination, or the treatment of persons while doing so.[62]

18.41 These decisions are excluded from review under sch 1 of the *ADJR Act*.[63] The Explanatory Memorandum states that the Bill seeks to deter 'the making of unmeritorious claims as a means to delay an applicant's departure from Australia, [and support] a more timely removal from Australia of those who do not engage Australia's protection obligations'.[64]

18.42 The Explanatory Memorandum further stated that the exclusion seeks to 'ensure that decisions relating to operational matters cannot be inappropriately subject to the provisions of the ... *Judiciary Act 1903* (Cth), or the *ADJR Act*'.[65]

18.43 The statement of compatibility stated:

> The exclusion of judicial review under the ADJR Act is limited to circumstances in which, in the Government's view, review by lower courts and on broader grounds would be inappropriate in respect of complex and highly sensitive operational matters. People who are affected by these measures will still have a judicial pathway through the constitutional writs and as such will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4) [of the ICCPR].[66]

18.44 The Refugee Advice and Casework Service has stated that there should be

> extreme caution in relation to legislation that proposes to allow the prolonged detention of any person in the absence of Parliamentary or judicial oversight.[67]

18.45 The Department of Immigration and Border Protection submitted that

> limited new powers are provided to the Minister personally to ensure that the executive has appropriate oversight of matters significant to Australia's sovereignty, national security and overarching national interests.[68]

---

62 Ibid s 75D.

63 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (pa). This was inserted by: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) s 31.

64 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

65 Ibid.

66 Ibid.

67 Refugee Advice and Casework Service, Submission No 134 to Senate Standing Committee on Legal and Constitutional Affairs , *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014. These concerns were echoed by the Law Council of Australia; the Institute of International Law and Humanities; and the Andrew and Renata Kaldor Centre for International Refugee Law.

68 Department of Immigration and Border Protection, Submission No 171 to the Senate Standing Committee on Legal and Constitutional Affairs, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

18.46 The Legal and Constitutional Affairs Committee recommended that the Bill be passed, including the restrictions on judicial review. The Committee stated:

> The government believes that legislative change is required to clear that backlog and the committee agrees. It is for that reason that the committee recommends that the Bill be passed.[69]

18.47 By contrast, both the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee)[70] and the Human Rights Committee[71] had serious reservations about restrictions on judicial review introduced by the *Resolving the Asylum Legacy Caseload Act*.

18.48 The Minister for Immigration and Border Protection, in his response to questions from the Scrutiny of Bills Committee, stated that given that the ministerial directions are made in the national interest, and are likely to involve complex and sensitive operational matters, 'it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the [*ADJR Act*]'.[72]

18.49 It is unclear why such decisions should be amenable to one form of judicial review, rather than another. In the absence of a rationale for this view, the Scrutiny of Bills Committee stated that it was 'concerned that the leading and more accessible *ADJR Act* regime is not being utilised, which also has the effect of fragmenting the Commonwealth approach to judicial review'.[73]

18.50 The Human Rights Committee stated that it is

> concerned that the proposed statutory framework would limit judicial review, and, in particular, the ability of individuals to seek judicial review of executive decisions that may be inconsistent with [the] stated intention to comply with Australia's non-refoulement obligations.[74]

Separate statutory schemes

18.51 Part IVC of the *Taxation Administration Act 1953* (Cth) established a comprehensive system of internal and external merits review, as well as rights of appeal of taxation decisions in the Federal Court. This was adopted to facilitate 'a quick and efficient mechanism for review of numerous decisions'.[75] Additionally, the separate regime allows an affected person to seek review of a decision, while

---

69 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999) [3.71].

70 Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2015* (March 2015) 234.

71 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.373].

72 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014* (2014), 923.

73 Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2015* (March 2015), 234.

74 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.373].

75 Australian Taxation Office Submission No 13 to Administrative Review Council *Inquiry into Federal Judicial Review in Australia*, 1 July 2011.

preserving the Commissioner of Taxation's ability to seek recovery of debts relating to the decision.[76]

18.52 Migration decisions, strictly speaking, do not fall under a separate statutory scheme. Instead, pt 8 of the *Migration Act 1958* (Cth) (*Migration Act*) incorporates constitutional review by conferring jurisdiction on the Federal Circuit Court, and the Federal Court.

18.53 In 2001, s 494AA was inserted into the *Migration Act*, excluding judicial review (except under the *Constitution*) of matters relating to the entry, processing and detention of asylum seekers arriving by boat, who landed at an 'excised offshore place'. The Explanatory Memorandum noted that this bar on proceedings sought to 'limit the potential for future abuse of legal proceedings'.[77] The Scrutiny of Bills Committee did not accept this justification, stating that 'such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights'.[78]

18.54 In 2013, the bar on legal proceedings under s 494AA was extended to any asylum seeker who arrived by boat at any place on or after 1 June 2013. This was a response to the *Report of the Expert Panel on Asylum Seekers*,[79] and sought to ensure that 'all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive'.[80]

18.55 Similar restrictions apply in relation to transitory persons.[81] Additionally, such a person cannot challenge, other than under the *Constitution*, any actions taken to bring them to Australia,[82] including for example the safety of vessels used for such transportation, or the use of reasonable and necessary force.[83]

18.56 Both statutory schemes include privative clauses. These are discussed in the next section.

Privative clauses

18.57 The classic example of restrictions on access to the courts arises where statutes restrict access to the courts by providing that certain administrative or judicial decisions may not be reviewed by courts. A privative clause—also known as an ouster clause—is a statutory provision that attempts to restrict access to the courts for judicial

76 Ibid.
77 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.
78 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2002* (February 2002), 46.
79 Air Chief Marshal Angus Houston AC, AFC (Ret'd), Paris Aristotle AM, Professor Michael L'Estrange AO, 'Report of the Expert Panel on Asylum Seekers' (August 2012).
80 Revised Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.
81 *Migration Act 1958* (Cth) s 494AB.
82 Ibid.
83 Ibid s 198B(2).

review of administrative decisions. They are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[84]

18.58 Some examples of privative clauses include those which make orders, awards or other determinations final, clauses forbidding courts from granting remedies traditionally used in judicial review, no invalidity or conclusive evidence provisions, self-executing decisions—that is, a decision where the 'decision' follow automatically—and clauses prescribing time limits.[85]

18.59 Generally, clauses which prescribe time limits for bringing an action, or stipulate an alternative procedure to judicial review to challenge decisions have generally been accepted by courts, as they still provide for judicial oversight.[86] Privative clauses which attempt to 'restrict or exclude judicial review entirely will not be successful'.[87]

18.60 The key argument against such privative clauses arises from the foundation of a free and democratic society protected by the rule of law. The right of judicial review entrenched in the *Constitution* embodies a broader notion that review of government decisions by independent courts is a valuable protection to citizens and an important form of oversight of administrative decision making. It promotes the rule of law by ensuring government power cannot operate without restriction, and improves the quality of government by enabling courts to better explain legislation (through their interpretive role) and decision makers (by findings that can explain when decision makers have fallen into legal error). To remove or significantly restrict judicial oversight allows governmental power without restriction, and is at odds with Australia's constitutional and Westminster traditions.

General corporate regulation

18.61 The Australian Securities and Investments Commission (ASIC) submitted that ss 1274(7A) and 659B of the *Corporations Act* are examples of provisions which restrict access to the courts.[88]

18.62 Section 1274(7A) provides that a certificate of registration is conclusive evidence that the company is duly registered on the specified date, without recourse to judicial review which might invalidate the registration. ASIC submitted that this restriction was justified because the potential harm from setting aside the decision as a result of a review outweighs the public interest in the proper exercise of the power.[89]

---

84 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Matthew Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014), 277.

85 Administrative Review Council, 'The Scope of Judicial Review' (Report 47, Australian Government, 2006), Appendix 2.

86 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012), [15.3.6].

87 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [6.15].

88 Australian Securities and Investments Commission, *Submission 74*.

89 Ibid.

18.63 Section 659B precludes persons other than ASIC or certain officers or government agencies from seeking judicial review, other than under s 75(v) of the *Constitution*, in relation to a takeover bid until the bid is complete. However, the Takeovers Panel may decide whether there has been unacceptable conduct and conduct merits review of ASIC decisions while the bid is ongoing. ASIC submitted that the potential harm from delays arising from a review process outweigh the public interest in the proper exercise of a power.[90]

Taxation

18.64 The Tax Institute submitted that ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth) (*ITAA*)—as conclusive evidence provisions—restrict access to the courts.[91] Under s 175, the validity of an assessment by the Commissioner of Taxation is not affected by non-compliance with provisions with the ITAA. Under s 177, the production of a notice of assessment is conclusive evidence of the due making of the assessment, and reviews of the assessment are only available under pt IVC of the *Taxation Administration Act 1953* (Cth). The High Court in *Commissioner of Taxation v Futuris Corporation Limited* held that the effect of s 175 of the *ITAA* is that relief under s 75(v) of the *Constitution* is available only if the assessment did not amount to a true assessment, because it is provisional, or not in good faith.[92]

18.65 The ARC considered that the 'no invalidity' clause was justified, noting that '[t]he use of "no invalidity" clauses has ensured that, where appropriate, applicants are directed through the comprehensive merits review and appeal avenues in the taxation legislation'.[93] These avenues can lead affected people to the courts, though in the guise of statutory appeal, rather than judicial review. Once the full nature of these alternate rights is understood, the underlying point of the ARC may be that the de facto limitations imposed by 'no invalidity clauses' in the *ITAA* are ones of form rather than substance.

Migration Act 1958 (Cth)

18.66 Restrictions on access to the courts under the *Migration Act* began in 1992, with limits imposed on grounds for review and stricter time limits to bring an application for review.[94] A mandatory requirement to seek merits review before accessing judicial review was also introduced.[95]

18.67 In 2001, s 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), seeking to oust the jurisdiction of the courts. It states that a privative clause decision

90 Ibid.
91 The Tax Institute, *Submission 68*.
92 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 [25].
93 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [6.8].
94 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.11].
95 Ibid.

> must not be challenged, appealed against, reviewed, quashed or called in question in any court, and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.[96]

18.68 The High Court, in *Plaintiff S157 v Commonwealth* read down this provision, stating that it does not apply to any decision involving jurisdictional error.[97] In *Re Refugee Tribunal, ex parte Aala*, the High Court held that a jurisdictional error arises when a decision maker 'makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do'.[98] The High Court gave an expansive interpretation to the notion of jurisdictional error in this and later decisions, which means that the scope of decisions that may be infected with jurisdictional error—and thus not protected by a privative clause—is now very wide; so wide that it may be that a privative clause offers no real protection against any legal error.

18.69 One of the key rationales advanced for seeking to restrict access to the courts is that the volume and cost of litigation in the migration context is too high, and litigants seek to abuse the system to delay their removal from Australia.[99]

18.70 The large volume of litigation may also be due to the limited availability of lawyers to assist applicants and the complexity of migration litigation.[100]

18.71 The Minister for Immigration and Multicultural Affairs, in supporting the claim that much migration litigation represented an attempt to prolong an applicant's stay in Australia, stated that

> it is hard not to conclude that there is a substantial number of applicants who are using the legal process primarily in order to extend their stay in Australia, especially given that just less than half of all applicants withdraw from legal proceedings before hearing.[101]

18.72 The ALRC stated that high rates of withdrawal are the norm in all areas of litigation.[102] It stated that 'mischief is not indicated by leaving at the door of the court'.[103]

18.73 Further, based on evidence given by the Federal Court, that 72.3% of migration cases were disposed of within nine months,[104] the Legal and Constitutional Affairs

---

96 *Migration Act 1958* (Cth) s 474(1).

97 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

98 *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82, [163].

99 Commonwealth, *Parliamentary Debates* House of Representatives Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Minister Ruddock).

100 For a summary of these submissions, see: Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.52]–[1.56].

101 Commonwealth, *Parliamentary Debates* House of Representatives Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Minister Ruddock).

102 Australian Law Reform Commission, Submission No 14 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

103 Australian Law Reform Commission, Transcript of Evidence to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

104 Federal Court of Australia, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

Committee stated that 'it also appears that the amount of time to be gained from drawing out appeals to the courts may not always be extended'.[105]

18.74 While the Legal and Constitutional Affairs Committee ultimately supported the use of a privative clause,[106] it also recommended that the Government consider, as a matter of high priority, other avenues to address issues raised during hearings, including relating to the availability of assistance, and abuse of process.[107] It also concluded that case management measures were the solution to dealing with abuse of process issues.[108]

18.75 The ARC, in its consideration of the 'separate statutory scheme' for review of migration decisions, concluded that case management measures and assistance to applicants are more appropriate measure—than excluding judicial review— to reduce the volume and cost of litigation in the context of migration proceedings.[109]

Other issues

18.76 Stakeholders submitted that narrow standing provisions are not justified, noting that it may be difficult for representative organisations to demonstrate that they have standing to bring a claim.[110]

18.77 Standing does not constitute a restriction on access to the courts. It determines whether a person or organisation can commence or participate in legal proceedings. However, standing was considered by the ARC in its 2012 report on judicial review, and it recommended that a standing test be adopted, modelled on s 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*),[111] to provide greater clarity on when representative organisations have standing to bring an application for review.[112] It rejected adopting an open standing test, a test supported by a number of submissions to this ALRC inquiry.[113]

18.78 By contrast, the ALRC in its 1996 report into standing in public interest litigation, recommended the adoption of open standing, allowing any person to commence and maintain public law proceedings, unless:

- the relevant legislation clearly excludes the class of persons of which the applicant is one; or

---

105 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.70].
106 Ibid rec 4.
107 Ibid rec 1.
108 Ibid [3.40].
109 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [6.16]; Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999) rec 2, [3.40].
110 Public Interest Advocacy Centre, *Submission 55*; Law Council of Australia, *Submission 75*.
111 An organization or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association: *Administrative Appeals Tribunal Act 1975* (Cth) s 37(2).
112 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [8.21].
113 Environmental Justice Australia, *Submission 65*; Australian Network of Environmental Defender's Offices, *Submission 60*; Public Interest Advocacy Centre, *Submission 55*.

- it would not be in the public interest in all the circumstances, because it unreasonably interferes with a person with a private interest's ability to act differently.[114]

18.79 The ARC noted the ALRC's recommendations that open standing be adopted,[115] but it concluded that some restrictions on standing provide a means for 'managing unmeritorious applications', and that reviews under the *ADJR Act* relate to decisions made in a particular case.[116] Further, the ARC noted that the Government has not taken up the ALRC's recommendation to adopt an open standing test.[117]

18.80 Since the ARC's review, the rules of standing have been significantly relaxed in the United Kingdom. The Supreme Court of the United Kingdom noted that the traditional standing rules did not always serve the rule of law, because government officials and their agencies could make unlawful decisions without necessarily affecting a particular person (which is traditionally required for a person to have standing to commence an application for judicial review). The Court reasoned that the need to maintain the rule of law meant that what should be regarded as a sufficient interest to support standing could vary.[118] This more relaxed approach to standing was confirmed by the United Kingdom in 2012, when it held there could be cases where 'any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court'.[119]

18.81 PIAC submitted that the threat of an adverse costs order is a practical restriction on access to the courts.[120] The ALRC has previously stated:

> liberalising the laws of standing and intervention will be of limited value if commencing or participating in litigation is too expensive. On the other hand, increasing the range of potential litigants may lead to extra demands for legal aid and other forms of assistance. Accordingly, any changes to the laws of standing and intervention must be developed as part of the package of reforms for improving the accessibility and effectiveness of the legal system.[121]

---

114 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report 78 (1996) Rec 2.

115 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [8.10].

116 Ibid [8.21].

117 Ibid [8.19].

118 *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [170]. This decision was handed down on 12 October 2011

119 *Walton v Scottish Ministers* [2012] UKSC 44, [94]. This decision was handed down on 17 October 2012. These cases suggest that the law on standing in Australia relies on principles that have been reformed in the jurisdiction from which they were drawn: Matthew Groves, 'Standing in Administrative Law—Money Talks and Public Interest Takes a Walk' (paper Presented to the Victorian Chapter of the Australian Institute of Administrative Law, Melbourne, March 2015).

120 Public Interest Advocacy Centre, *Submission 55*.

121 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report 78 (1996) [2.21].

Justifications for limits on judicial review

18.82 Stakeholders expressed concerns about current restrictions on access to the courts. They emphasised that restrictions should only be imposed in exceptional circumstances.

18.83 Limits on judicial review have been justified on a number of grounds, including the need for certainty and efficiency. Professor Simon Young has written that privative clauses

> have been employed by parliaments over many years for many reasons—a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context.[122]

18.84 The ARC stated that limits on judicial review are justified where judicial review:

- would pose a risk to personal safety, such as interim orders designed to protect against security threats, or programs designed to protect witnesses;
- relates to decisions about representatives of the diplomatic or consular community;
- relates to decisions about the management of the national economy, which do not directly affect individual interests, and are most appropriately resolved in the High Court (for example, decisions of the Treasurer to make payments from consolidated revenue);
- is strongly connected with constitutional considerations;
- relates to the deployment or discipline of defence force members;
- relates to national security decisions, particularly where sensitive information is involved, which may be exposed as a result of increased litigation.[123]

18.85 The Refugee Advice and Casework Service submitted that restrictions on access to judicial review should require 'a heavy burden of proof to justify encroachment upon a principle so central to the rule of law'.[124] PIAC submitted that any limits on judicial review should be 'strict, limited and exceptional, closely tied to legitimate purpose and justifiable on public interest grounds'.[125] The Human Rights Law Centre submitted that where 'powers are invasive or infringe upon rights and freedoms, there should be a proportionate availability of judicial review'.[126]

---

122 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Groves, above n 84, 277.
123 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [5.110], [5.118].
124 Refugee Advice and Casework Service, *Submission 30*.
125 Public Interest Advocacy Centre, *Submission 55*.
126 Human Rights Law Centre, *Submission 39*.

Conclusions

18.86 There is a strong presumption that the Parliament does not intend to restrict access to the courts, unless it does so by explicit statement or necessary implication. This presumption applies in relation to attempts to restrict or exclude judicial review of administrative action. Additionally, s 75(v) of the *Constitution* guarantees an 'entrenched minimum provision of judicial review'.[127] However, the *ADJR Act*, and other legislation provide for judicial review that is more accessible and broader in ambit than review available under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*. Thus, while access to the courts cannot be excluded, limits can be, and are, placed on access to the courts.

18.87 In 2012, the ARC completed a major review of federal judicial review. It recommended that the following limits on judicial review under sch 1 of the *ADJR Act* should be removed:

- decisions under div 1, pt 7.4 of the *Corporations Act*, and decisions giving effect to the government's foreign investment policy under the *Banking (Foreign Exchange) Regulations 1959* (Cth) on the basis that it is not a sufficient justification to exclude review because the decision considers the national interest;
- decisions of the Fair Work Ombudsman and Fair Work Building Industry Inspectorate, on the basis that the decisions of these bodies are similar to decisions made by a number of other regulatory bodies, whose decisions are subject to review under the *ADJR Act*;
- the findings of the Inspector-General of Intelligence and Security, on the basis that the findings of an accountability body ought to be subject to review; and
- decisions under div 105 of the *Criminal Code*, on the basis that there is no court involvement in the making of preventative detention orders.

18.88 Further, the ARC recommended that the blanket exemption for all ASIO decisions be reviewed.

18.89 The ALRC considers that the Government should further consider these recommendations.

18.90 In relation to the ARC's recommendations relating to reviews of counter-terrorism and national security laws, such a task would fall within the role of the INSLM, who reviews the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis.

18.91 An area of particular concern—as evidenced by parliamentary committee materials, submissions and other commentary—relates to limits on access to the courts in migration legislation. The key justification advanced for these limits is that they seek to reduce the volume and cost of litigation, and prevent abuse of process by applicants.

---

127 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].

The ARC and the Legal and Constitutional Affairs Committee both stated that case management measures and assistance for applicants were a more appropriate measure to achieve these goals.

18.92 Schedule 1 para (pa) of the *ADJR Act* excludes judicial review of the exercise of a number of ministerial powers of direction and determination under the *Maritime Powers Act*. This has been justified on the basis that highly complex and sensitive operational issues should not be subject to judicial review. The Government may consider reviewing this restriction on access to the courts, particularly in light of criticism by both rights scrutiny committees of the Parliament—the Scrutiny of Bills Committee and the Human Rights Committee.

18.93 Finally, the Government should give further consideration to the ALRC's recommendation to introduce open standing in public law proceedings, included in its 1996 report on standing in public law proceedings. In the alternative, the Government should give further consideration to the ARC's recommendation that a provision modelled on s 27(2) of the *AAT Act* be introduced to clearly give representative organisations standing to make an application for judicial review under the *ADJR Act*.

Appendix 1. Table of Legislation

Primary Commonwealth legislation cited, by chapter

Legislation	**Chapter**
A New Tax System (Goods and Services Tax) Act 1999 (Cth)	Ch 16
ss 13-20	Ch 16
Aboriginal and Torres Strait Islander Act 2005 (Cth)	Ch 3
s 191	Ch 3
s 193S	Ch 3
s 200A	Ch 3
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)	Chs 8, 10
div 1	Ch 8
s 27	Ch 10
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	Chs 6, 7, 12
s 12AD	Ch 7
s 44A	Ch 7
s 54	Ch 12
s 69	Ch 6
s 70	Ch 6
Administrative Appeals Tribunal Act 1975 (Cth)	Chs 3, 10, 18
s 27	18
s 63	Ch 3
35	Ch 10
35AA	Ch 10
Administrative Decisions (Judicial Review) Act 1977 (Cth)	Chs 7, 15, 16, 18
sch 1	Ch 18
sch 1 para (a)	Ch 18
sch 1 paras (d)–(dac)	Ch 18
sch 1 paras (db)–(dd)	Ch 18
sch 1 para (h)	Ch 18
sch 1 para (hb)	Ch 18
sch 1 para (pa)	Ch 18
Aged Care Act 1997 (Cth)	Ch 3
s 86-2	Ch 3
s 86-5	Ch 3
s 86-6	Ch 3
s 86-7	Ch 3
Age Discrimination Act 2004 (Cth)	Chs 3, 11, 17

s 15	Ch 11
s 50	Ch 3
s 51	Ch 3
s 58	Ch 17
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)	Ch 3
s 121	Ch 3
s 122	Ch 3
s 123	Ch 3
s 127	Ch 3
s 128	Ch 3
s 130	Ch 3
s 131	Ch 3
Atomic Energy Act 1953 (Cth)	Ch 16
s 65	Ch 16
Australian Border Force Act 2015 (Cth)	Ch 3, 12
pt 6	Ch 3
s 4	Ch 3
s 5	Ch 3
s 24	Ch 3
s 26	Ch 12
s 48	Ch 3
ss 42–49	Ch 3
Australian Capital Territory (Self-Government) Act 1988 (Cth)	Ch 8
s 23(1)(a)	Ch 8
Australian Charities and Not-for-profits Commission Act 2012 (Cth)	Ch 5
s 100–25	Ch 5
Australian Citizenship Act 2007 (Cth)	Ch 6
s 34	Ch 6
s 35	Ch 6
Australian Capital Territory (Self-Government) Act 1988 (Cth)	Ch 7
s 1(a)	Ch 7
s 23	Ch 7
Australian Crime Commission Act 2002 (Cth)	Chs 10, 12
s 25A	Ch 10
s 29B	Ch 10
s 30	Ch 12
Australian Education Amendment Act 2014 (Cth)	Ch 9
Australian Federal Police Act 1979 (Cth)	Chs 9, 17
s 14A	Ch 17
s 14B	Ch 17

s 14D	Ch 17
s 40A	Ch 12
s 40VE	Ch 12
s 40VG	Ch 12
s 40L	Ch 12
Australian Human Rights Commission Act 1986 (Cth)	Chs 2, 3
s 11	Ch 2
s 29	Ch 2
s 46	Ch 2
s 46P	Ch 3
s 46PO	Ch 3
Australian Information Commissioner Act 2010 (Cth)	Ch 17
s 35	Ch 17
Australian Law Reform Commission Act 1996 (Cth)	Chs 1, 2
s 21	Chs 1, 2
ss 23–24	Ch 2
Australian Passports Act 2005 (Cth)	Chs 6, 15, 18
div 2	Ch 6
ss 11–14	Ch 6
s 16	Ch 6
s 22	Ch 6
s 22A	Chs 6, 18
s 24A	Ch 18
s 48A	Ch 15
Australian Postal Corporation Act 1989 (Cth)	Ch 17
s 34	Ch 17
Australian Prudential Regulation Authority Act 1998 (Cth)	Ch 3
s 56	Ch 3
Australian Securities and Investments Commission Act 2001 (Cth)	Chs 3, 12, 14, 17
s 12GN	Ch 14
ss 30, 31, 33	Ch 12
s 66	Ch 14
ss 72–73	Ch 14
s 91	Ch 14
s 127	Ch 3
s 200	Ch 14
s 220	Ch 14
s 246	Ch 17
Australian Security Intelligence Organisation Act 1979 (Cth)	Chs 2, 3, 6, 7, 10, 12, 13, 14, 15, 17, 18
pt III div 3	Chs 2, 13, 15
pt IV	Ch 6

s 4	Ch 3
s 18	Ch 3
s 30E	Ch 12
s 34AA	Ch 10
s 34	Ch 12
s 34D	Ch 6, 14
s 34E	Ch 6
s 34G	Ch 6
s 34K	Chs 6, 7
s 34J	Ch 12
s 34L	Ch 12
s 34M	Ch 12
s 34N	Ch 12
ss 34R, 34T	Ch 12
s 34ZO	Ch 10
s 34ZP	Ch 10
s 34ZQ	Chs 10, 13, 15
s 34ZS	Ch 3, 14
s 35	Ch 15
s 35K	Ch 17
s 35P	Ch 3
s 36	Ch 15
s 38(2)	Ch 15
s 54	Ch 15
s 81	Ch 3
s 92	Ch 3
Australian Sports Anti-Doping Authority Act 2006 (Cth)	Chs 12, 17
s 13D	Ch 12
s 78	Ch 17
Australian Sports Commission Act 1989 (Cth)	Ch 17
s 57	Ch 17
Aviation Transport Security Act 2004 (Cth)	Ch 12
s 112	Ch 12
Banking Act 1959 (Cth)	Chs 3, 7, 12, 14
ss 7–8	Ch 14
s 52F	Ch 12
s 66	Ch 3
s 66A	Ch 3
s 69	Ch 7
Bankruptcy Act 1966 (Cth)	Chs 3, 6, 10, 12
s 77	Ch 6
s 81	Ch 12
s 154	Ch 10
s 231A	Ch 10

s 264E	Ch 3
Building Energy Efficiency Disclosure Act 2010 (Cth)	Ch 8
s 11	Ch 8
Business Names Registration Act 2011 (Cth)	Ch 3
s 27	Ch 3
s 28	Ch 3
Broadcasting Services Act 1992 (Cth)	Chs 3, 17
sch 2 cl 3	Ch 3
sch 2 cl 3A	Ch 3
sch 5	Ch 3
sch 7	Ch 3
s 203	Ch 17
Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)	Chs 8, 9, 16
s 189	Ch 12
Charities Act 2014 (Cth)	Ch 3
s 5	Ch 3
s 11	Ch 3
Charter of the United Nations Act 1945 (Cth)	Ch 14
ss 20–21	Ch 14
Child Support (Assessment) Act 1989 (Cth)	Ch 14
Child Support (Registration and Collection) Act 1988 (Cth)	Chs 6, 10, 14
s 72D	Ch 6
s 110X	Ch 10
Classification (Publications, Films and Computer Games) Act 1995 (Cth)	Chs 3, 17
s 9A	Ch 3
s 75P	Ch 17
s 86	Ch 17
s 235	Ch 17
Commonwealth Bank Act 1911 (Cth) (rep)	Ch 7
s 51	Ch 7
Commonwealth Conciliation and Arbitration Act 1904 (Cth) (rep)	Ch 11
ss 9(1), (3)	Ch 11
Commonwealth Electoral Act 1918 (Cth)	Ch 3
pt XXI	Ch 3
s 129	Ch 3
Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2001 (Cth)	Ch 14
Communist Party Dissolution Act 1950 (Cth)	Ch 5
Competition and Consumer Act 2010 (Cth)	Chs 3, 10, 12, 17
s 2A	Ch 17
s 45D	Ch 3
sch 2 s 18	Ch 3

s 133E	Ch 12
s 135C	Ch 12
s 151BUF	Ch 12
s 154R	Ch 12
s 155(7)	Ch 12
s 155B	Ch 12
s 159	Ch 12
s 163	Ch 10
Comprehensive Nuclear-Test-Ban Treaty Act 1988 (Cth)	Ch 8
Consular Privileges and Immunities Act 1972 (Cth)	Ch 17
Copyright Act 1968 (Cth)	Chs 3, 7, 11, 14
pt III divs 3–4	Ch 14
pt V div 5	Ch 11
s 116AAA	Ch 7
s 132AA	Ch 14
s 132AO	Ch 14
s 132A	Ch 11
s 132AAA	Ch 11
s 132B	Ch 11
s 132C	Ch 11
s 173	Ch 3
Copyright Amendment (Online Infringement) Act 2015 (Cth)	Chs 3, 7
Corporations Act 2001 (Cth)	Chs 3, 7, 12, 14, 15, 18
pt 7.4 div 1	Ch 18
pt 7.5	Ch 18
s 113	Ch 14
s 115	Ch 14
s 123	Ch 14
s 136	Ch 14
s 139	Ch 14
ss 142–4	Ch 14
s 146	Ch 14
s 148	Ch 14
s 153	Ch 14
s 157	Ch 14
s 158	Ch 14
s 162	Ch 14
s 178A	Ch 14
s 178C	Ch 14
s 191	Ch 14
s 195	Ch 14
s 199B	Ch 14
s 200B	Ch 14

s 201D	Ch 14
s 202B	Ch 14
s 203D	Ch 14
s 205B	Ch 14
s 205G	Ch 14
ss 206J–K	Ch 14
s 206M	Ch 14
s 235	Ch 14
s 246B	Ch 14
s 246D	Ch 14
ss 246F–G	Ch 14
s 249K	Ch 14
s 249Z	Ch 14
s 250BB	Ch 14
s 250P	Ch 14
s 250PA	Ch 14
s 250S	Ch 14
s 250W	Ch 14
s 294	Ch 14
ss 307A–C	Ch 14
ss 308–9	Ch 14
s 312	Ch 14
s 314	Ch 14
s 316	Ch 14
s 316A	Ch 14
s 317	Ch 14
s 324B	Ch 14
s 348D	Ch 14
s 349A	Ch 14
s 428	Ch 14
s 585G	Ch 14
s 588G	Ch 14
s 597(12)	Ch 12
s 601BJ	Ch 14
s 601CW	Ch 14
s 601DD	Ch 14
s 601DE	Ch 14
s 501DH	Ch 14
s 601HG	Ch 14
s 601JA	Ch 14
s 624	Ch 14
s 630	Ch 14
s 633	Ch 14
s 640	Ch 14

ss 643–4	Ch 14
s 648G	Ch 14
s 650B	Ch 14
ss 650E–F	Ch 14
s 651A	Ch 14
s 652C	Ch 14
s 657F	Ch 14
s 659B	Ch 18
s 661B	Ch 14
s 662A	Ch 14
s 664D	Ch 14
s 665A	Ch 14
ss 666A–B	Ch 14
s 667A	Ch 14
s 670C	Ch 14
s 672B	Ch 14
ss 722–5	Ch 14
s 734	Ch 14
s 736	Ch 14
s 739	Ch 15
s 791A	Ch 14
s 820A	Ch 14
s 888H	Ch 18
s 912F	Ch 14
ss 915B–915C	Ch 15
s 923A	Ch 3
s 923B	Ch 3
s 952C	Ch 14
s 952E	Ch 14
s 952G	Ch 14
s 952J	Ch 14
s 985J	Ch 14
s 989CA	Ch 14
ss 993B–D	Ch 14
s 1020AI	Ch 14
s 1021C	Ch 14
s 1021E	Ch 14
ss 1021FA–FB	Ch 14
s 1021H	Ch 14
s 1021M	Ch 14
ss 1021NA–NC	Ch 14
s 1021O	Ch 14
S 1041A	Ch 9
s 1041E	Chs 3, 14

s 1232	Ch 14
s 1274	Chs 14, 18
s 1299G	Ch 14
s 1300	Ch 14
s 1308	Ch 14
s 1309	Ch 3
s 1350	Ch 7
Crimes Act 1914 (Cth)	Chs 2, 3, 6, 7, 8, 10, 11, 12, 13, 17
pt 1AA div 3A	Chs 2, 3, 7
pt 1AAA	Ch 7
pt 1AB	Ch 17
s 3F	Ch 7
s 3J	Ch 7
s 3K	Ch 7
s 3M	Ch 7
s 3UK	Ch 7
s 3ZB	Ch 8
s 3ZQR	Ch 13
s 3ZZCI	Ch 7
s 3ZZGE(1)(c)	Ch 12
s 3ZZGE(1)(d)(ii)	Ch 13
s 3ZZGE(3)	Ch 12
s 3ZZHA	Ch 6
s 3W	Ch 17
s 3WA	Ch 17
s 3X	Ch 17
s 3Y	Ch 17
s 3Z	Ch 17
s 15AA	Ch 11
s 15HK	Ch 3
s 15HL	Ch 3
s 15HV	Ch 13
s 15Y	Ch 10
s 15YAB	Ch 10
ss 23DB–23DF	Ch 6
s 23L	Ch 10
s 24AA	Ch 3
s 70	Ch 3
s 79	Ch 3
s 85B	Ch 10
s 89	Ch 3
Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2014 (Cth)	Ch 7

Crimes (Superannuation Benefits) Act 1989 (Cth)	Ch 9
Crimes (Taxation Offences) Act 1980 (Cth)	Ch 9
Criminal Code (Cth)	Chs 2, 3, 4, 5, 6, 8, 10, 11, 13, 14
ch 2	Ch 14
pt 2.3	Ch 11
pt 5.3	Chs 6, 10
div 102	Ch 3
div 104	Chs 2, 5, 6
div 105	Chs 2, 5, 6, 10, 18
div 306	Ch 11
div 390	Ch 5
s 5.6	Ch 14
s 11.4	Ch 3
s 11.5	Ch 3
s 13.1(3)	Ch 11
s 13.2	Ch 11
s 13.3(3)	Ch 11
s 13.3(6)	Ch 11
s 13.4(c)	Ch 11
s 13.5	Ch 11
s 72.12	Ch 11
s 72.13	Ch 11
s 72.14	Ch 11
s 72.15	Ch 11
s 72.16(1)	Ch 11
s 72.33(2)	Ch 11
s 72.35	Ch 11
s 80.1AA	Ch 3
s 80.2	Ch 3
s 80.2A	Ch 3
s 80.2B	Ch 3
s 80.2C	Chs 3, 4
s 80.3(1)(d)	Ch 3
s 93.2	Ch 10
s 101.2	Ch 3
s 101.5	Ch 3
s 102.1	Chs 3, 4, 5, 6
s 102.2	Ch 3
s 102.3	Ch 3
s 102.3(2)	Ch 11
s 102.4	Ch 3
s 102.5	Ch 3, 14
s 102.6	Ch 11

s 102.7	Ch 3
s 102.8	Chs 4, 5, 16
s 104.1	Ch 6
s 104.2	Ch 18
s 104.5	Chs 5, 6
s 105.1	Ch 6
s 105.4	Ch 6
s 105.22	Ch 8
s 105.38(1)	Ch 13
s 105.41	Ch 3
s 105.47	Ch 2
s 105.53	Ch 2
ss 115.1–115.4	Ch 9
s 119.2	Chs 2, 5, 6, 11, 14
s 119.3	Chs 2, 6, 14
s 119.5	Ch 5
s 119.7	Ch 3
s 136	Ch 3
s 137.1	Ch 3
s 137.2	Ch 3
s 272.9(5)	Ch 11
ss 272.9–272.10	Ch 11
s 272.13	Ch 11
ss 272.16–272.17	Ch 11
s 302.5	Ch 11
s 303.7	Ch 11
s 305.6	Ch 11
ss 360.3–360.4	Ch 14
s 390.3	Ch 5
s 390.3(6)(d)	Ch 13
s 390.4	Ch 5
ss 400.3–400.7	Ch 14
s 471.10	Ch 9
s 471.12	Ch 3
s 473.4	Ch 3
Customs Act 1901 (Cth)	Chs 6, 7, 10, 14, 17
pt XII div 1	Ch 6
ss 64–64ABA	Ch 14
s 64ACD	Ch 14
s 64AE	Ch 14
s 64A	Ch 14
s 65	Ch 14
s 67EI	Ch 14
s 71AAAQ	Ch 14

s 71G	Ch 14
s 74	Ch 14
s 90	Ch 14
s 101	Ch 14
ss 102–102A	Ch 14
s 102DG	Ch 14
s 105C	Ch 14
s 113	Ch 14
s 114F	Ch 14
s 116	Ch 14
ss 117AA–117A	Ch 14
s 118	Ch 14
s 119	Ch 14
ss 123–4	Ch 14
s 210	Ch 17
s 213A	Ch 14
s 214AI	Ch 14
s 219ZJB	Ch 6
s 219ZJCA	Ch 6
s 232A	Ch 10
ss 233BABAB–BABAC	Ch 14
ss 243SA–SB	Ch 14
ss 243T–V	Ch 14
Customs Tariff Act 1995 (Cth)	Ch 9
Defence Act 1903 (Cth)	Ch 3, 4, 6
s 51R	Ch 6
s 61A	Ch 4
s 83	Ch 3
s 89	Ch 3
Defence Trade Controls Act 2012 (Cth)	Ch 12
s 44	Ch 12
s 57	Ch 12
Defence (Special Undertakings) Act (Cth)	Ch 10
s 31	Ch 10
Dental Benefits Act 2008 (Cth)	Ch 12
s 32E	Ch 12
Designs Act 2003 (Cth)	Chs 3, 7
s 106	Ch 7
Disability Discrimination Act 1992 (Cth)	Chs 3, 11
s 4	Ch 5
s 6(4)	Ch 11
s 27	Ch 5
s 30	Ch 11
s 42	Ch 3

s 44	Ch 3
Diplomatic Privileges and Immunities Act 1967 (Cth)	Ch 17
Do Not Call Register Act 2006 (Cth)	Ch 3
Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Act 2001 (Cth)	Ch 14
Enhancing Online Safety for Children Act 2015 (Cth)	Chs 3, 17
s 89	Ch 17
Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2000 (Cth)	Ch 14
Environment Protection and Biodiversity Conservation Act 1999 (Cth)	Chs 3, 6, 8, 12, 14
s 3(1)(b)	Ch 8
s 12	Chs 8, 14
ss 15A–C	Chs 8, 14
s 16	Chs 8, 14
s 17B	Chs 8, 14
ss 18–18A	Chs 8, 14
ss 20–20A	Chs 8, 14
s 23	Ch 14
s 24A	Ch 14
ss 24D–E	Ch 14
s 61AEA	Ch 6
s 119	Ch 3
s 139	Ch 9
s 189B	Ch 3
s 251	Ch 3
s 324R	Ch 3
s 341R	Ch 3
s 354A	Ch 14
s 355A	Ch 14
s 390E	Ch 6
s 390R	Ch 3
s 486J	Ch 12
s 519	Ch 8
s 522A	Ch 8
s 523	Ch 8
Evidence Act 1995 (Cth)	Chs 3, 10, 12, 13
s 59	Ch 10
s 118	Ch 13
s 119	Chs 10, 13
s 120	Ch 10
s 123	Chs 10, 13
s 126H	Ch 10

s 127	Ch 10
s 128	Chs 10, 12
s 129	Ch 10
s 130	Ch 10
s 131	Ch 10
s 132	Ch 12
s 187	Ch 12
s 195	Ch 3
Excise Tariff Act 1921 (Cth)	Ch 9
s 6CA	Ch 9
Export Finance and Insurance Corporation Act 1991 (Cth)	Ch 3
s 87	Ch 3
*Extradition Act 1988 (*Cth)	Chs 11, 14
s 15	Ch 14
s 15(6)	Ch 11
s 45	Ch 14
Fair Work Act 2009 (Cth)	Chs 3, 4, 11, 12, 15, 16, 17, 18
pt 2–4	Ch 5
pt 3–1	Ch 5
pt 3–3	Ch 5
pt 3–4	Ch 5
s 3	Ch 5
s 35A	Ch 16
s 153	Ch 4
s 186	Ch 5
s 195	Ch 4
s 229	Ch 5
s 237	Ch 5
ss 337, 337A	Ch 12
s 340	Ch 11
s 342(1)	Ch 11
ss 348–350	Ch 3
s 346	Chs 5, 11
s 351	Ch 3, 4, 11
s 352	Ch 11
s 361	Ch 11
ss 408–414	Ch 5
s 415	Ch 17
s 459	Ch 5
s 480	Ch 5
s 481	Ch 5
s 484	Ch 5
s 487	Ch 5

s 494	Ch 5
ss 512–513	Ch 5
s 596	Ch 15
s 674	Ch 3
s 676	Ch 3
s 713	Ch 9
s 772	Ch 4
Fair Work (Building Industry) Act 2012 (Cth)	Chs 12, 13, 18
s 53	Ch 12, 13
Fair Work (Registered Organisations) Act 2009 (Cth)	Chs 5, 18
s 5	Ch 5
Family Law Act 1975 (Cth)	Ch 10
s 121	Ch 10
Federal Court of Australia Act 1976 (Cth)	Ch 10
s 17	Ch 10
s 23HC	Ch 10
s 37AE–37AL	Ch 10
First Home Saver Accounts Act 2008 (Cth)	Ch 7
Fisheries Management Act 1991 (Cth)	Ch 14
s 95	Ch 14
ss 99–100	Ch 14
s 100B	Ch 14
ss 101–104	Ch 14
s 105AA	Ch 14
Food Standards Australia New Zealand Act 1991 (Cth)	Ch 3
s 114	Ch 3
Foreign Acquisitions and Takeovers Act 1975 (Cth)	Ch 18
Foreign Evidence Act 1994 (Cth)	Ch 10
s 27D	Ch 10
Foreign Passports (Law Enforcement and Security Act) 2005 (Cth)	Chs 6, 18
s 15A	Chs 6, 18
s 16A	Chs 6, 18
Freedom of Information Act 1982 (Cth)	Chs 1, 3, 17
s 24AA	Ch 3
s 55Z	Ch 17
s 84	Ch 17
Geneva Conventions Act 1957 (Cth)	Ch 3
General Insurance Reform Act 2001 (Cth)	Ch 14
s 7A	Ch 14
ss 9–10	Ch 14
s 14	Ch 14
s 20	Ch 14
Great Barrier Reef Marine Park Act 1975 (Cth)	Chs 8, 11, 12, 14

s 38AA	Ch 14
s 38BA	Ch 14
s 38BC	Ch 14
s 38BD	Ch 14
s 38CA	Ch 14
s 38DA	Ch 14
s 38DD	Chs 8, 14
s 38GA	Ch 14
s 39P(4)	
s 59H(1)	Ch 11
Greenhouse and Energy Minimum Standards Act 2012 (Cth)	Ch 8
s 174	Ch 8
Historic Shipwrecks Act 1976 (Cth)	Ch 7
s 21	Ch 7
Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)	Ch 2
s 5	Ch 2
ss 7–9	Ch 2
Imported Food Control Act 1992 (Cth)	Ch 17
s 38	Ch 17
Income Tax Assessment Act 1997 (Cth)	Chs 9, 12, 16, 18
s 161	Ch 16
s 175	Ch 18
s 177	Ch 18
ss 263–264	Ch 12
s 376-25	Ch 9
s 293-115	Ch 9
div 13	Ch 9
pt IVA	Ch 9
Independent National Security Legislation Monitor Act 2010 (Cth)	Ch 2
s 6	Ch 2
s 29	Ch 2
Industrial Chemicals (Notification and Assessment) Act 1989 (Cth)	Ch 14
Industrial Relations Reform Act 1993 (Cth)	Ch 17
s 4	Ch 17
Inspector-General of Intelligence and Security Act 1986 (Cth)	Chs 17, 18
s 33	Ch 17
Inspector-General of Taxation Act 2003 (Cth)	Ch 13
s 16	Ch 13
Insurance Act 1973 (Cth)	Ch 14
s 7A	Ch 14
ss 9–10	Ch 14

s 14	Ch 14
s 17	Ch 14
s 20	Ch 14
s 24	Ch 14
s 27	Ch 14
s 43A	Ch 14
ss 49–49A	Ch 14
s 49F	Ch 14
s 49L	Ch 14
s 62ZD	Ch 14
s62ZQ	Ch 14
s 108	Ch 14
Intelligence Services Act 2001 (Cth)	Chs 2, 18
ss 28–29	Ch 2
sch 1 cl 6–7	Ch 2
Interactive Gambling Act 2007 (Cth)	Ch 17
s 23	Ch 17
James Hardie (Investigations and Procedures) Act 2004 (Cth)	Ch 13
s 4	Ch 13
s 6	Ch 13
Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (Cth)	Ch 3
s 61	Ch 3
Judiciary Act 1903 (Cth)	Chs 7, 10, 13, 17, 18
s 39B	Chs 7, 18
s 55ZH	Ch 13
s 56	Ch 17
s 64	Ch 17
s 68	Ch 10
Lands Acquisition Act 1989 (Cth)	Chs 7, 8
s 6	Ch 8
s 21	Ch 8
s 97	Ch 7
Law Enforcement Integrity Commissioner Act 2006 (Cth)	Chs 3, 10, 12, 13
s 80	Ch 12
s 90	Ch 10
s 92	Ch 10
s 94	Ch 3
s 96	Ch 12
s 96(5)	Ch 13
Legislative Instruments Act 2003 (Cth)	Ch 16
pt 4	Ch 16
Life Insurance Act 1995 (Cth)	Chs 7, 14

s 88B	Ch 14
s 98B	Ch 14
s 125A	Ch 14
s 230F	Ch 14
s 251	Ch 7
Liquid Fuel Emergency Act 1984 (Cth)	Ch 9
ss 9–14A	
s 17	
s 20–24	
Major Sporting Events (Indicia and Images) Protection Act 2014 (Cth)	Ch 3
Maritime Powers Act 2013 (Cth)	Chs 15, 18
pt 8A	Ch 18
s 22B	Ch 15
s 69	Ch 15
s 69A	Ch 15
ss 71-72	Ch 15
s 72A	Ch 15
s 74	Ch 15
s 75B	Ch 15
s 75D	Chs 15, 18
s 75F	Ch 15
s 75G	Ch 15
s 75H	Chs 15, 18
Marriage Act 1961 (Cth)	Ch 4
s 29	Ch 4
s 101	Ch 4
s 113	Ch 4
Migration Act 1958 (Cth)	Chs 5, 6, 9, 10, 11, 12, 15, 17, 18
pt 7AA	Ch 15
pt 8	Ch 18
s 4	Ch 6
s 24	Ch 12
s 45AA	Ch 9
s 91X	Ch 10
s 109	Ch 15
s 116	Ch 15
s 133A(4)	Ch 15
s 133C(3)	Ch 15
s 134A	Ch 15
s 134B	Ch 15
s 140XG	Ch 12
s 198AB	Ch 9

s 198AD	Ch 15
s 198AE	Ch 15
s 198B	Chs 17, 18
s 219	Ch 11
s 228B	Ch 9
s 240(3)	Ch 11
ss 229(5)–(6)	Ch 11
s 232(2)–(3)	Ch 11
s 268BK	Ch 12
s 305C(6)	Ch 12
s 306J	Ch 12
s 308(3)	Ch 12
s 311EA(6)	Ch 12
s 487C(1)	Ch 12
s 473DA	Ch 15
s 474	Ch 18
s 494AA	Chs 17, 18
s 494AB	Chs 17, 18
s 500A(3)(d)	Ch 9
s 501	Chs 5, 9, 15
s 501A	Ch 15
Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)	Chs 5, 15
sch 1	Ch 5
Mutual Assistance in Business Regulation Act 1992 (Cth)	Ch 12
s 14	Ch 12
National Consumer Credit Protection Act 2009 (Cth)	Chs 12, 16
s 30B	Ch 16
s 295	Ch 12
National Health Act 1953 (Cth)	Ch 17
s 99ZR	Ch 17
National Rental Affordability Scheme Act 2008 (Cth)	Ch 9
s 5	Ch 9
National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)	Chs 10, 15
pt 3A	Ch 10
s 3	Ch 10
s 29	Chs 10, 15
s 31	Chs 10, 15
s 38L	Ch 15
s 38I(3)	Ch 15
s 39	Ch 10
s 46	Ch 10
National Radioactive Waste Management Act 2012 (Cth)	Ch 8

s 11	Ch 8
Native Title Act 1993 (Cth)	Chs 7, 8, 9
div 2A	Ch 9
s 20	Chs 7, 8
s 23J	Ch 7
s 223(2)	Ch 8
*Native Title Amendment Act 1998 (*Cth)	Ch 6
Natural Heritage Trust of Australia Act 1997 (Cth)	Ch 8
s 10(a)	Ch 8
Natural Resources Management (Financial Assistance) Act 1992 (Cth)	Ch 8
s 5(1)	Ch 8
Navigation Act 2012 (Cth)	Ch 17
s 324	Ch 17
Northern Territory National Emergency Response Act 2007 (Cth)	Ch 7
s 31	Ch 7
s 60	Ch 7
Northern Territory (Self-Government) Act 1978 (Cth)	Chs 7, 8
s 50	Chs 7, 8
Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth)	Ch 10
s 40	Ch 10
Occupational Health and Safety (Maritime Industry) Act 1993 (Cth)	Ch 14
Offshore Minerals Act 1994 (Cth)	Chs 6, 11
s 404	Ch 6
s 404(4)	Ch 11
Offshore Petroleum and Greenhouse Storage Act 2006 (Cth)	Ch 11
s 619(9)	Ch 11
sch 2A cl 18	Ch 11
Olympic Insignia Protection Act 1987 (Cth)	Ch 3
Ombudsman Act 1976 (Cth)	Chs 12, 13, 17, 18
s 9	Ch 12
s 9(4)(ab)(ii)	Ch 13
s 7A(1B)	Ch 13
s 8(2B)	Ch 13
s 33	Ch 17
s 37	Ch 17

Parliamentary Joint Committee on Law Enforcement Act 2010 (Cth)	Ch 2
s 5	Ch 2
Parliamentary Precincts Act 1988 (Cth)	Chs 5, 6
s 6	Ch 6
s 11	Ch 5
Parliamentary Service Act 1999 (Cth)	Ch 12
s 65AC	Ch 12
s 65AD	Ch 12
Patents Act 1990 (Cth)	Ch 7
s 171	Ch 7
Personal Property Securities Act 2009 (Cth)	Chs 2, 7
s 10(e)	Ch 7
s 343	Ch 2
Petroleum Excise (Prices) Act 1987 (Cth)	Ch 9
s 4(1C)	
Privacy Act 1988 (Cth)	Ch 3
Private Health Insurance Act 2007 (Cth)	Ch 12
s 214.15	Ch 12
Proceeds of Crime Act 1987 (Cth)	Ch 7
*Proceeds of Crime Act 2002 (*Cth)	Chs 2, 7, 11, 12
pt 2–6	Ch 2
s 6	Ch 11
s 20A	Chs 2, 7
s 39A	Ch 12
s 179A	Ch 11
s 179B	Chs 7, 11
s 179E	Chs 7, 11
s 179G	Ch 9
s 179U	Ch 2
s 179U(1)–(3)	Ch 11
s 206	Ch 12
s 271	Ch 12
s 327	Ch 7
Product Stewardship (Oil) Act 2000 (Cth)	Ch 17
s 31	Ch 17
Protection of the Sea (Oil Pollution Compensation Funds) Act 1993 (Cth)	Ch 12
s 44(4)	Ch 12
s 46S(4)	Ch 12
Public Interest Disclosure Act 2013 (Cth)	Chs 3, 17
pt 2 div 1	Ch 17

Public Order (Protection of Persons and Property) Act 1971 (Cth)	Ch 5
s 6	Ch 5
s 15	Ch 5
Public Service Act 1999 (Cth)	Ch 12
s 72C	Ch 12
s 72D	Ch 12
Quarantine Act 1908 (Cth)	Chs 6, 12
pt IV	Ch 6
s 4	Ch 6
s 79A	Ch 12
Racial Discrimination Act 1975 (Cth)	Chs 3, 7, 11
s 8	Ch 7
s 10	Ch 7
s 27	Ch 3
s 18C	Ch 3
s 18D	Ch 3
Renewable Energy (Electricity) Act 2000 (Cth)	Ch 8
Retirement Savings Accounts Act 1997 (Cth)	Ch 12
s 120	Ch 12
Royal Commissions Act 1902 (Cth)	Chs 3, 13
s 3(2B)	Ch 13
s 3(5)	Ch 13
s 6AA(1)	Ch 13
s 6AB(5)	Ch 13
s 6O	Ch 3
Sea Installations Act 1987 (Cth)	Ch 6
s 57	Ch 6
Seafarers Rehabilitation and Compensation Act 1992 (Cth)	Chs 13, 14
s 70	Ch 13
s 85	Ch 13
Service and Execution of Process Act 1992 (Cth)	Ch 10
s 127	Ch 10
Sex Discrimination Act 1984 (Cth)	Chs 3, 4, 11
pt II div 3	Ch 3
ss 5–7	Ch 4
s 7C	Ch 11
s 23	Ch 4
s 30	Ch 4
ss 34–43	Ch 4
s 94	Ch 3
Social Security Act 1991 (Cth)	Ch 6
s 553B	Ch 6

s 634,	Ch 6
s 745N	Ch 6
Social Security (Administration) Act 1999 (Cth)	Ch 6
s 66A	
pt 3B	Ch 6
Space Activities Act 1998 (Cth)	Ch 6
s 103	Ch 6
Spam Act 2003 (Cth)	Ch 3
Superannuation Act 1990 (Cth)	Ch 9
s 5A	Ch 9
Superannuation Industry (Supervision) Act 1993 (Cth)	Chs 12, 14
ss 11B–C	Ch 14
s 18	Ch 14
ss 29JA–JCA	Ch 14
ss 29W–WB	Ch 14
ss 34M–Q	Ch 14
s 34Z	Ch 14
ss 35A–D	Ch 14
ss 63–4	Ch 14
s 71EA	Ch 14
ss 103–5	Ch 14
ss 107–108A	Ch 14
ss 122–4	Ch 14
s 126K	Ch 14
ss 129–30	Ch 14
s 130B	Ch 12
s 130C	Ch 14
s 131AA	Ch 14
ss 131B–C	Ch 14
s 135	Ch 14
s 140	Ch 14
s 141A	Ch 14
s 154	Ch 14
ss 159–60	Ch 14
s 201	Ch 14
s 242P	Ch 14
s 252A	Ch 14
s 254	Ch 14
s 260	Ch 14
s 262	Ch 14
s 265	Ch 14
s 287	Ch 12
s 290	Ch 12
s 299C	Ch 14

ss 299F–K	Ch 14
s 299M	Ch 14
s 299Y	Ch 14
s 303	Ch 14
s 331	Ch 14
s 336	Ch 12
Superannuation (Unclaimed Money and Lost Members) Act 1999 (Cth)	Ch 7
Taxation Administration Act 1953 (Cth)	Chs 7, 8, 9, 11, 17, 18
pt IVC	Ch 18
s 8AAZLGA	Ch 7
s 8K	Ch 11
s 8L	Ch 11
s 8Y(2)	Ch 11
s 133-130	Ch 9
s 353–10	Ch 8
s 353-15	Ch 17
Telecommunications Act 1997 (Cth)	Chs 3, 17, 18
s 58A	Ch 18
s 156	Ch 17
s 313	Ch 3
s 581	Ch 18
sch 3A cl 57A	Ch 18
sch 3A cl 72A	Ch 18
Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth)	Chs 3, 13
Therapeutic Goods Act 1989 (Cth)	Chs 3, 12, 16
s 31F	Ch 12
s 32JD	Ch 12
s 32JK	Ch 12
s 41JC	Ch 12
s 41JJ	Ch 12
s 63	Ch 16
Tobacco Advertising Prohibition Act 1992 (Cth)	Ch 3
Tobacco Plain Packaging Act 2011 (Cth)	Chs 3, 7, 12
s 83	Ch 12
Torres Strait Fisheries Act 1984 (Cth)	Ch 11
ss 49(2), 49A(3)	Ch 11
Trade Marks Act 1995 (Cth)	Chs 3, 17
s 226B	Ch 17
Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001 (Cth)	Ch 14
Treasury Legislation Amendment (Application of Criminal	Ch 14

Code) Act (No 2) 2001 (Cth)	
Treasury Legislation Amendment (Application of Criminal Code) Act (No 3) 2001 (Cth)	Ch 14
Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012 (Cth)	Ch 7
Veterans' Entitlements Act 1986 (Cth)	Ch 3, 9, 12
s 29(11)	Ch 9
s 129	Ch 12
s 170	Ch 3
War Crimes Act 1945 (Cth)	Ch 9
s 9	Ch 9
Water Act 2007 (Cth)	Ch 8
pt 2 div 1	Ch 8
pt 2 div 4	Ch 8
s 2(1) item 2	Ch 8
s 3(c)	Ch 8
s 20	Ch 8
s 22(1) item 6	Ch 8
s 33	Ch 8
s 254	Ch 8
Witness Protection Act 1994 (Cth)	Ch 10
s 28A	Ch 10
Work Health and Safety Act 2011 (Cth)	Ch 11, Ch 12
s 104	Ch 11
s 105	Ch 11
s 107	Ch 11
s 110	Ch 11